2014 IL App (2d) 130188-U
No. 2-13-0188
Order filed February 20, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PRIYANG PARIKH, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 10-CF-2172 Honorable Kathryn E. Creswell, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly refused to instruct the jury on the lesser-included offense of public indecency; there was sufficient evidence to convict defendant of attempted predatory criminal sexual assault; and his sentence was not excessive. Therefore, we affirmed.

¶ 2 Following a jury trial, defendant, Priyang Parikh, was convicted of attempted predatory criminal sexual assault (720 ILCS 5/8-4(a), 12-14.1(a)(1) (West 2010)) and sexual exploitation of a child (720 ILCS 5/11-9.1(a)(2) (West 2010)). The trial court sentenced defendant to six years' imprisonment for the attempted predatory criminal sexual conviction and three years' imprisonment for the sexual exploitation of a child conviction, to run concurrently. On appeal,

defendant argues that: (1) the trial court erred by refusing to instruct the jury on the lesser-included offense of public indecency; (2) there was insufficient evidence to find him guilty beyond a reasonable doubt of attempted predatory criminal sexual assault; and (3) his six-year sentence is excessive. We disagree with all of defendant's contentions and therefore affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 30, 2010, defendant was charged by indictment with attempted predatory criminal sexual assault. The indictment alleged that defendant performed a substantial step toward the commission of the offense in that he, a person 17 years or older, knowingly attempted to commit an act of sexual penetration with M.J., a child under 13 years of age, by attempting to place his sex organ in her mouth. Defendant was also charged with sexual exploitation of a child in that he, while in the presence of M.J., a child under the age of 13, and with the intent or knowledge that M.J. would view his acts, exposed his sex organ for the purpose of sexual arousal or gratification.

¶ 5 The charges stemmed from an incident that occurred during a September 5, 2010, wedding at the Clarion Hotel in Elmhurst. The hotel was connected to a wedding/banquet hall through a lobby, and the lobby was adjacent to a breakfast area. Defendant was not invited to the wedding. Defendant's theory in his opening statement was that M.J. was mistaken about what she saw, as shown by inconsistencies in her description of defendant. We summarize the relevant trial evidence.

¶ 6 Shruti Joshi, M.J.'s mother, testified that M.J., who was seven years old, was playing tag with her cousins and other children in the hotel lobby. After about 45 minutes of tag, M.J. ran into the banquet hall, frantic, saying that " 'there was a stranger [defendant], and he was going to give us lollipops and he pulled down his pants and he told me to close my eyes, open my mouth,

and he was going to put his private' " or " 'wee-wee' " in her mouth. Shruti followed M.J. to the area where defendant had had the children line up and then the nearby breakfast area where he took M.J. M.J. indicated that she was seated in a chair, and defendant was standing in front of her, with his penis 1 to 1½ inches from her. M.J. said that defendant would have put his penis in her mouth if she had not run away. M.J. told Shruti that her cousin, Vineet, was the next child waiting in line. M.J. told the other children waiting in line that she ran away from defendant because he was a stranger and did not have lollipops.

¶ 7 Shruti's brother, Nishad Parmar, testified that he played drums for the groom's procession. While unloading his equipment in the parking lot, defendant approached him, asking what time the festivities would begin. Nishad saw defendant participating in the groom's procession. Later, during the wedding ceremony, M.J. ran up to Shruti, saying that a stranger came up to her, pulled down his pants, and showed her his " 'wee-wee.' " Shruti told M.J. to slow down and repeat what she had said, and M.J. said that the stranger told her to close her eyes and open her mouth; then, he would give her a lollipop. M.J. said that she peeked, saw his " 'wee-wee' " and screamed, and then ran away. M.J. described the stranger as wearing a pink "jhabo" and having spiky hair and a scruffy facial look. Based on M.J.'s description, Nishad showed M.J. a picture of defendant from a camera of one of the guests, and M.J. identified defendant as the stranger.

¶ 8 M.J., nine years old at the time of trial, testified that she was playing tag with her cousins, Vineet and Milan, and other children in the hotel lobby. Defendant approached and asked who wanted a lollipop. He told them to line up, and M.J. was first in line. Defendant took M.J. into the breakfast room, put her on a chair, and said to close her eyes and open her mouth. As defendant stood in front of M.J., she closed her eyes for a very short amount of time and opened

her mouth. When she opened her eyes, she saw his "private." Defendant's pants and underwear were above his "ankle a little bit," and his underwear was white. Upon seeing his "private," M.J. ran over to Vineet, who was waiting next in line, and said that defendant was not giving out lollipops and was a bad guy. Defendant ran off.

¶ 9 On cross-examination, M.J. testified that she spoke to a policeman two weeks after the wedding. The interview was videotaped. M.J. remembered telling the policeman that defendant's pink jhabo had blue around the bottom; that defendant had hair all over his face; that defendant had two rings on his fingers and wore an earring; that defendant left in a dark blue Jeep; and that she saw guns in the car. Now, she was not sure about these things. M.J. did not remember telling the police that defendant had crooked teeth. She did remember saying that defendant was skinny and had a scar above his eye. Defendant never touched M.J.

¶ 10 Vineet Patel, M.J.'s cousin, testified that he was currently in fourth grade. He remembered playing tag with M.J. and Milan at the wedding. Defendant asked if they wanted a lollipop and told them to line up. He took M.J. into the breakfast room, and Vineet was next in line. Vineet saw defendant take off his pants so that they were down by his feet and his underwear was exposed. Vineet turned away to tell the others and did not see what happened next. M.J. then screamed and came out, saying that defendant was not going to give them a lollipop. Defendant ran out of the room.

¶ 11 Elmhurst Police Officer Alexander Kefaloukos testified that he was dispatched to the hotel to investigate. He interviewed M.J., who said that defendant approached her and the other children when they were playing tag. He asked if they wanted lollipops; the children said they did; and he had them line up. Then, defendant took M.J. into the breakfast area, had her sit down, told her to close her eyes and open her mouth, and said he had lollipops for her. M.J.

closed her eyes and then peeked. When she opened her eyes, she saw defendant's pants and underwear were down, and he had exposed his penis to her. M.J. screamed and said " 'I won't do that,' " and then ran out to tell the other children.

¶ 12 Elmhurst Police Detective John Tarpey testified that two days after the incident, on September 7, 2010, he created a press release with defendant's picture. Defendant called the next day from Virginia, where he lived. Detective Tarpey did not record the telephone conversation because he was at home when he took defendant's call. At first, defendant said he had gone to the wedding and did not know why this was going on. Detective Tarpey responded that defendant needed to tell the truth because the incident was caught on video; he had spoken with the children involved; and he already knew exactly what had happened.

¶ 13 Defendant told Detective Tarpey the following. Defendant had gone to his cousin's wedding the day before and was staying with someone in Naperville. Defendant then decided to go to this particular wedding even though he was not invited and did not know anyone; he was looking for older girls. Detective Tarpey asked if he started looking for younger girls, and defendant agreed.

¶ 14 Defendant said that he was going to get something to eat and was talking on his cell phone. When the call ended, defendant "was just holding [the phone] to his ear watching the children" play. Then, he went to give the children candy and exposed himself. According to defendant, it had been a terrible day. He had been drinking earlier and had just recently become unemployed, although that was not an excuse for his behavior. Defendant also said that he had not had sex in a long time.

¶ 15 Defendant continued that he told M.J., in particular, to open her mouth and close her eyes. Defendant was " 'not yet' " erect when he initially exposed himself. Detective Tarpey

asked if defendant "was going to put his [penis] in her mouth," and defendant responded " 'yeah, that was the plan if she didn't scream.' " Defendant said she started to scream, however, and the other children were screaming and saying he did not have any candy, so he left. Defendant said that " 'it was sexually driven, he had not had sex in a long time, and it was just a bad day.' " He had " 'just been looking for a blow job.' " When Detective Tarpey asked why defendant picked M.J., he said " 'she was just there at the time.' " Defendant thought M.J. was six or seven years old, and he picked her because she was an " 'easy target.' " Detective Tarpey asked if defendant was "excited," and defendant said " 'yes.' " Detective Tarpey asked "you were going to put your [penis] in her mouth?", and defendant said " 'yeah.' " Defendant " 'knew it was gross' " and did not know what came over him that day. He was going to get some help.

¶ 16 After talking to defendant on September 8, 2010, Detective Tarpey spoke to Pritesh Gandhi, the Clarion Hotel owner and manager, the next day (September 9). Pritesh told Detective Tarpey that on September 9, he had received a suspicious call from a "John Smith," saying he had been at a wedding and wanted to know about camera surveillance because his wife's purse had been stolen. According to Pritesh, the individual asked about video surveillance in the hotel lobby and the breakfast area.

¶ 17 Defendant told Detective Tarpey that he would fly to Chicago on September 10, but he did not come to the police station. As a result, Detective Tarpey left several messages for defendant. Then, Detective Tarpey called the person in Naperville with whom defendant had previously stayed and found out where defendant was located. Defendant was arrested and placed under arrest.

¶ 18 Following *Miranda* warnings, defendant agreed to talk to Detective Tarpey as they drove to the police station. Detective Tarney asked defendant if he had called the Clarion Inn, claiming

to be John Smith, and defendant said yes, he was " 'just curious.' " Next, Detective Tarpey asked why he did not show up at the police station. Defendant responded that he was afraid and that nothing like this had ever happened to him. Detective Tarpey told defendant that he had already confessed, and defendant admitted doing the things he had relayed during their conversation on the phone. Once they arrived at the police station, defendant wanted to see the video surveillance from the Clarion Inn, but Detective Tarpey did not show it to him at that time.

¶ 19 Defendant offered evidence of the car he had rented at the time of the incident. Defendant did not testify or present witnesses on his behalf.

¶ 20 During the jury instruction conference, defendant requested the court to instruct the jury on public indecency, and the State objected. The court rejected the instruction, reasoning that the evidence did not permit the jury to rationally find defendant guilty of public indecency and not guilty of attempted predatory criminal sexual assault.

¶ 21 The jury found defendant guilty of attempted predatory criminal sexual assault and sexual exploitation of a child.

¶ 22 At the sentencing hearing, several witnesses testified, including defendant's friends and family and Dr. Sun, who conducted a sex offender evaluation. Over 50 letters of support were submitted on defendant's behalf, and defendant made a statement to the court indicating his remorse for the incident. In addition, a victim impact statement was submitted by M.J.'s mother, Shruti. The court stated that it considered all of this evidence as well as the factors in aggravation and mitigation in making its decision. It sentenced defendant to six years' imprisonment for attempted predatory criminal sexual assault and three years' imprisonment for sexual exploitation of child, to be served concurrently. Defendant moved to reconsider his sentence, which the court denied.

¶ 23 Defendant timely appealed.

¶ 24 II. ANALYSIS

¶ 25 A. Jury Instruction

¶ 26 Defendant first argues that the trial court erred by refusing to instruct the jury on public indecency, which he argues is a lesser-included offense of attempted predatory criminal sexual assault. Defendant makes no argument that it is a lesser-included offense of sexual exploitation of a child.

¶ 27 The State responds that defendant was found guilty of sexual exploitation of a child, an offense encompassing the precise conduct in a public indecency instruction. As the State points out, the only difference between the offense of sexual exploitation of a child and public indecency is the age of the victim, meaning that public indecency was not "an appropriate charge" given the age of the victim and the applicability of the sexual exploitation of a child charge. The State further points out that the purpose of having a lesser-included offense, which is providing the jury with a "third option," was satisfied in this case insofar as defendant was charged with sexual exploitation of a child. See *People v. Hamilton*, 179 Ill. 2d 319, 323-24 (1997) (the purpose of an instruction on a lesser offense is to provide an important third option to a jury which, believing that the defendant is guilty of something but uncertain whether the charged offense has been proved, might otherwise convict rather than acquit the defendant of the greater offense). While we appreciate the logic of the State's argument, case law is clear that we analyze defendant's argument under the "charging instrument approach."

¶ 28 "Although a defendant generally may not be convicted of an offense for which he has not been charged, in some instances a defendant may be entitled to an instruction of an uncharged lesser-included offense." *People v. Stewart*, 406 Ill. App. 3d 518, 536 (2010). A lesser-included

offense is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged. See 720 ILCS 5/2-9(a) (West 2010). A two-tiered process called the "charging instrument" approach is used to determine whether the offense is a lesser-included offense and whether the defendant is entitled to an instruction on that offense. *Stewart*, 406 Ill. App. 3d at 536. First, courts look at the allegations in the charging instrument to determine whether the description of the greater offense contains a "broad foundation" or "main outline" of the lesser offense. *People v. Kolton*, 219 Ill. 2d 353, 361 (2006). If it is determined that a particular offense is a lesser-included offense of a charged crime, this does not automatically give rise to a correlative right to have the jury instructed on the lesser offense. *People v. Blan*, 392 Ill. App. 3d 453, 458 (2009). Instead, a defendant is entitled to a lesser-included offense instruction only if the evidence would permit a jury rationally to find the defendant guilty of the lesser included offense and acquit him of the greater offense. *Id*.

¶ 29 Defendant argues that under the first prong of the charging instrument approach, the broad foundation of public indecency is contained in the indictment charging attempted predatory criminal sexual assault. According to defendant, the trial court also agreed that it was a lesser-included offense, in that it proceeded immediately to the second prong of the charging instrument approach, which is examining the evidence adduced at trial, as its basis for denying the public indecency instruction. The State disagrees that public indecency is a lesser-included offense of attempted predatory criminal sexual assault and notes that this court can affirm on any basis in the record.

¶ 30 As stated, the first step under the charging instrument approach is looking to the allegations in the charging instrument to see whether the description of the greater offense

contains a "broad foundation" or "main outline" of the lesser offense. *Kolton*, 219 Ill. 2d at 361. The absence of a statutory element will not prevent the court from finding that a charging instrument's description contains a "broad foundation" or "main outline" of the lesser offense. *Id*. at 364. This is because an offense may be deemed a lesser-included offense even though every element of the lesser offense is not explicitly contained in the indictment, as long as the missing element can be reasonably inferred. *Id*. Whether a charged offense encompasses another as a lesser-included offense is a question of law that this court reviews *de novo*. *Id*. at 361.

¶ 31 In charging defendant with attempted predatory criminal sexual assault, the indictment alleged that he performed a substantial step toward the commission of the offense in that being 17 years or older, he knowingly attempted to commit an act of sexual penetration with M.J., a child under 13 years of age, by attempting to place his sex organ in her mouth. The offense of public indecency states that any person of the age of 17 years and upwards who performs the following act in a public place commits a public indecency: a lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person. 720 ILCS 5/11-30 (West 2010).

¶ 32 The State argues that public indecency is not a lesser-included offense of attempted predatory criminal sexual assault because the indictment made no explicit reference to "the purpose of sexual arousal or gratification," as required for the offense of public indecency. The State also argues that that missing element may not be inferred.

¶ 33 On this issue, the supreme court's decision in *People v. Jones*, 175 Ill. 2d 126, 134-35 (1997), is instructive. In *Jones*, the court determined that public indecency based on lewd exposure was a lesser-included offense of attempted aggravated criminal sexual abuse, which is

similar to attempted predatory criminal sexual assault, except that it requires an act of "sexual conduct" as opposed to an act of "sexual penetration."

¶ 34 The State acknowledges *Jones* but argues that it is distinguishable. The indictment in *Jones* alleged that the defendant "performed a substantial step toward the commission of [aggravated criminal sexual abuse], in that he disrobed in the presence of [the victim], who was at least 13 years of age but under 17 years of age at the time, stimulated his [own] penis to erection and requested [the victim] to masturbate him to orgasm, *for the purpose of the sexual gratification of the defendant*; and that said defendant was at least 5 years older than [the victim]." (Emphasis added.) *Id*. at 130. The State argues that unlike the indictment in *Jones*, which explicitly referred to the element of acting "for the purpose of the sexual gratification of the defendant," the indictment in this case alleging attempted predatory criminal sexual assault contains no reference to the act being accompanied by the purpose of sexual arousal or gratification. Though the indictment in *Jones* contains the language that the State argues is missing here, the supreme court's decision in *Kolton* shows why the State's argument misses the mark.

¶ 35 In *Kolton*, the supreme court discussed its decision in *Jones*, stating that "we found that the charging instrument" alleging attempted aggravated criminal sexual abuse "set forth the offense of public indecency based on lewd exposure, although the indictment did not allege that the purpose of *the exposure* was [the] defendant's gratification." (Emphasis in original.) *Kolton*, 219 Ill. 2d at 365. In other words, the language in the indictment relied on by the State, "for the purpose of the sexual gratification of the defendant," did not describe the defendant's act of exposure; rather, it was part of the statutory definition of *sexual conduct*.[1] Therefore, the

[1] See 720 ILCS 5/12-12(e) (West 2010) (emphasis added) ("Sexual conduct" means "any

indictment in *Jones* did not explicitly allege that *the exposure* was for the defendant's sexual gratification; rather, that element could be inferred.

¶ 36 The issue in this case is whether it can be inferred from the indictment that defendant exposed himself for the purpose of sexual arousal or gratification. Again, *Kolton* is instructive. In *Kolton*, the defendant was charged with predatory criminal sexual assault (*id*. at 368), which is similar to defendant here, who was charged with *attempted* predatory criminal sexual assault. The defendant in *Kolton* argued that aggravated criminal sexual abuse (requiring an act of sexual conduct) was a lesser-included offense of predatory criminal sexual assault (requiring an act of sexual penetration). *Id*. at 357. In determining that it was a lesser-included offense of predatory criminal sexual assault, the court stated that even though the indictment, in alleging "sexual penetration," did not explicitly allege that the defendant acted "for the purpose of sexual gratification or arousal," that statutory element could reasonably be inferred because the definition of "sexual penetration" was inherently sexual in nature. *Id*. at 369. The court stated that "[w]hen 'sexual penetration' is alleged, it is possible to infer that the acts were done with the purpose of sexual gratification or arousal." *Id*. at 370.

¶ 37 Both *Kolton* and *Jones* lead to the conclusion that public indecency based on lewd exposure is a lesser-included offense of attempted predatory criminal sexual assault in this case. By alleging in the indictment that defendant attempted an act of sexual penetration by attempting to place his penis in M.J.'s mouth, it may be inferred that defendant's exposure of his penis was done with the intent to arouse or satisfy his sexual desire.

¶ 38 Having determined that public indecency based on lewd exposure is a lesser-included offense of attempted predatory criminal sexual assault, we turn to the second step of the charging

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intentional or knowing touching *** *for the purpose of sexual gratification or arousal* *** ").

instrument approach. Under the second step, a defendant is entitled to a lesser-included offense instruction only if the evidence would permit a jury rationally to find the defendant guilty of the lesser-included offense and acquit him of the greater offense. *Blan*, 392 Ill. App. 3d at 458. The question is whether the evidence would permit the jury rationally to find defendant guilty of public indecency and acquit him of attempted predatory criminal sexual assault. The trial court answered that question in the negative, stating that the evidence did not permit the jury to rationally find defendant guilty of public indecency and not guilty of attempted predatory criminal sexual assault. We review the trial court's decision in this regard for an abuse of discretion. See *People v. Cardamone*, 381 Ill. App. 3d 426, 507-08 (2008) (reviewing the trial court's refusal to submit a lesser-included offense instruction for an abuse of discretion).

¶ 39 Defendant argues that the trial court abused its discretion in denying the public indecency instruction because there was evidence that he exposed himself with the intent to arouse or satisfy his sexual desire. According to defendant, the jury's verdict on count II of the indictment proves as much. In count II, defendant was charged with sexual exploitation of a child, which requires that he exposed his sex organ for the purpose of sexual arousal or gratification. Because he was found guilty of that charge, defendant argues that he was entitled to an instruction on public indecency. See *Blan*, 392 Ill. App. 3d at 458 (the amount of evidence necessary to meet this factual requirement, *i.e.*, that tends to prove the lesser offense rather than the greater, has been described as any, some, slight, or very slight).

¶ 40 Although we agree with defendant that there was evidence of public indecency in this case, that is not the only requirement he must satisfy. In order to be entitled to the instruction, the evidence must permit the jury rationally to find defendant guilty of public indecency *and acquit* him of attempted predatory criminal sexual assault. In other words, the issue is whether

the jury could have found defendant guilty of *only* the lesser offense. See *Blan*, 392 Ill. App. 3d at 460. Given Detective Tarpey's, M.J.'s, and Vineet's testimony, the jury could not rationally find defendant guilty of public indecency and acquit him of attempted predatory criminal sexual assault.

¶ 41 Detective Tarpey testified that defendant confessed his plan to him over the phone, which was to put his penis in M.J.'s mouth. Defendant said that that was the plan if she did not scream, and he was looking for a "blow job." Defendant's confession to Detective Tarpey was corroborated by M.J.'s testimony that defendant had her sit in a chair and then close her eyes and open her mouth. M.J. told Shruti that defendant was standing in front of her, with his penis 1 to 1½ inches from her. Vineet also saw defendant pull down his pants. Based on this evidence, the jury could rationally find defendant guilty of both public indecency and attempted predatory criminal sexual assault, but not simply public indecency. In fact, this is exactly what occurred in this case when the jury found defendant guilty of both sexual exploitation of a child and attempted predatory criminal sexual assault. Because the jury could not rationally find defendant guilty of public indecency alone, the trial court did not abuse its discretion by refusing to instruct the jury on this lesser-included offense.

¶ 42 B. Sufficiency of the Evidence

¶ 43 Defendant next argues that there was insufficient evidence to convict him of attempted predatory criminal sexual assault. When reviewing a challenge to the sufficiency of the evidence, we consider whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). This standard of review applies regardless of whether the evidence is direct or

circumstantial. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). We will not retry a defendant when considering a sufficiency of the evidence challenge; the trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses. *Id.* at 114-15. A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Id.* at 115. In *People v. Lipscomb-Bey*, 2012 IL App (2d) 110187, this court noted that the case law on the subject of attempt crimes is not uniform when the facts are uncontested. *Id.* ¶ 22. For example, we noted that in *People v. Hawkins*, 311 Ill. App. 3d 418, 423 (2000), the court stated that whether uncontested facts constituted a "substantial step" towards commission of sexual assault was reviewed *de novo*. Nevertheless, we stated in *Lipscomb-Bey* that "[w]e believe that *Collins* is the appropriate standard but note that under either standard our result would be the same." *Lipscomb-Bey*, 2012 IL App (2d) 110187, ¶ 22. We reiterate here that *Collins* is the appropriate standard, although our result would be the same applying *de novo* review.

¶ 44 For an attempt crime, the elements are the intent to commit a specific offense, which here is predatory criminal sexual assault, and "any act that constitutes a substantial step toward the commission of the offense." 720 ILCS 5/8-4(a) (West 2010). A person commits the offense of predatory criminal sexual assault of a child if the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed. 720 ILCS 5/12-14.1(a)(1) (West 2010).

¶ 45 Defendant argues that the State failed to present evidence that he took a substantial step toward the sexual penetration of M.J., *i.e.*, placing his penis in her mouth. Defendant argues that at most, he exposed himself to M.J. He argues that beyond that, however, he did not direct M.J.

to do anything; he did not say anything to her; he did not ask her to touch his penis; he did not move toward her or touch her; and he did not do anything that could be interpreted as the commencement of a sexual crime against her.

¶ 46 It is not possible to assemble a definitive list of acts for every criminal offense which, if performed, would constitute a substantial step toward the commission of that offense. *People v. Oduwole*, 2013 IL App (5th) 120039, ¶ 44. What constitutes a substantial step depends on the unique facts and circumstances of each case. *Lipscomb-Bey*, 2012 IL App (2d) 110187, ¶ 24. "There must be an act or acts toward the commission of the principal offense, and the act or acts must not be too far removed in time and space from the conduct that constitutes the principal offense." *Oduwole*, 2013 IL App (5th) 120039, ¶ 44. The defendant need not complete the last proximate act to the actual commission of the principal offense; a substantial step occurs when the acts taken in furtherance of the offense place the defendant in a dangerous proximity to success. *Id*. The facts are to be placed on a "continuum between preparation and perpetration." *Id*. (quoting *People v. Terrell*, 99 Ill. 2d 427, 434 (1984)).

¶ 47 The Model Penal Code provides additional guidance for determining whether a defendant took a substantial step toward the commission of the offense. *Lipscomb-Bey*, 2012 IL App (2d) 110187, ¶ 25. It lists conduct that is to be considered sufficient as a matter of law to support an attempt conviction, as long as the conduct is strongly corroborative of the actor's criminal purpose, including "(a) lying in wait, searching for or following the contemplated victim of the crime" and "(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission." Model Penal Code § 5.01(2) (1985); *id*.

¶ 48 In this case, there was sufficient evidence that defendant took a substantial step toward committing predatory criminal sexual assault. Defendant showed up at a wedding that he was

not invited to in order to look for "older girls." He had been drinking that day and had not had sex in a long time. He admitted to Detective Tarpey that he began looking for younger girls. In the hotel lobby, defendant pretended to be on his cell phone so that he could watch the children play. Defendant lured the children with the prospect of candy and told them to line up. Consistent with the Model Penal Code, defendant "searched for the victim" and chose M.J., an "easy target." Again, consistent with the Model Penal Code, defendant "enticed" M.J. to the breakfast room, the "place contemplated" for him to receive a "blow job." The breakfast room had no security cameras and was separated from the lobby by a doorway and a half wall.

¶ 49 M.J. testified that defendant put her on a chair and told her to close her eyes and open her mouth. When M.J. opened her eyes, she saw defendant's penis 1 to 1½ inches from her. Defendant's pants and underwear were down by his ankles. Vineet corroborated M.J.'s testimony, stating that defendant took M.J. into the breakfast room and then pulled down his pants so that they were down by his feet. Vineet turned to tell the other children and did not see what happened next. The next thing he remembered was that M.J. screamed and ran out of the breakfast room.

¶ 50 Defendant admitted to Detective Tarpey that his plan was to put his penis in M.J.'s mouth. By selecting and secluding M.J., telling her to close her eyes and open her mouth, and exposing his penis at close range, defendant was in a dangerous proximity to success. While defendant concentrates his argument on his lack of action towards M.J. after exposing himself, M.J. prevented him from further action by opening her eyes, screaming, and running away. Defendant told Detective Tarpey that his plan was to put his penis in her mouth if she did not scream, which is exactly what she did. As the State points out, physical contact would have been

the last step for defendant, making him guilty of predatory criminal sexual assault as opposed to attempted predatory criminal sexual assault.

¶ 51 Defendant cites several cases in support of his argument, all of which are distinguishable. Though the cases cited by defendant differ from the case at bar in several respects, the main difference is that none of the defendants disrobed or exposed themselves. See *People v. Decaluwe*, 405 Ill. App. 3d 256, 266 (2010) (where the defendant did not disrobe or commit an act which would have indicated that he intended to have sex with the victim, there was insufficient evidence of attempted aggravated criminal sexual assault); *People v. Walter*, 349 Ill. App. 3d 142, 147-48 (2004) (where the 24-year-old defendant and the 15-year-old victim exchanged emails, some of which were sexual, the defendant's appearance for a meeting with the victim and her best friend at McDonald's, without more, fell short of a substantial step toward the commission of the offense of aggravated criminal sexual abuse); *People v. Montefolka*, 287 Ill. App. 3d 199, 209-211 (1997) (where the defendant broke into the victim's home, overpowered her, and made two requests that she remove her underwear but never exposed himself, his conduct did not constitute a substantial step toward the commission of the offense); *People v. Rayfield*, 171 Ill. App. 3d 297, 299-300 (1988) (where the defendant threatened harm if the victim continued to scream but never ordered her to disrobe and never exposed himself, he was not guilty of attempted criminal sexual assault); *People v. Pitts*, 89 Ill. App. 3d 145, 147 (1980) (where the defendant never disrobed and sought sexual satisfaction in a manner other than engaging in sexual intercourse, he was not guilty of attempted rape).

¶ 52 Last, in *People v. Brewer*, 118 Ill. App. 3d 189, 191-92 (1983), the defendant was convicted of attempted indecent liberties with a child and indecent solicitation for unzipping his pants, exposing his penis, and asking a six-year-old boy if he would " 'suck his pecker.' "

Though no sentence was imposed on the indecent solicitation conviction, the defendant argued that that conviction must be vacated as either a lesser-included offense or because it was based upon the same physical act as his conviction for attempted indecent liberties with a child. *Id*. at 198. The court held that the act of exposure alone without the request for fellatio would not have established the offense of attempted indecent liberties as a matter of law and thus vacated the defendant's conviction for indecent solicitation. *Id*.

¶ 53 As the State points out, although the *Brewer* court held that a request for a fellatio was a substantial step toward the commission of the offense of indecent liberties (*id*), it did not hold that such a verbal request was required. As stated previously, each case is to be decided based on its unique facts, and defendant was not required to make such a request here to be guilty of attempted predatory criminal sexual assault. More important, the defendant's argument in *Brewer* concerned a violation under *People v. King*, 66 Ill. 2d 551 (1977), not a sufficiency-of-the-evidence argument. Based on the facts of this case, there was sufficient evidence to find defendant guilty beyond a reasonable doubt of attempted predatory criminal sexual assault.

¶ 54 C. Excessive Sentence

¶ 55 Defendant's final argument is that his sentence is excessive. Defendant argues that the trial court abused its discretion by sentencing him to six years' imprisonment because it failed to adequately consider various mitigating factors.

¶ 56 A sentence imposed by the trial court is presumed to be proper (*People v. Butler*, 2013 IL App (1st) 120923, ¶ 31), and where a sentence falls within the statutory guidelines, it will not be disturbed on review absent an abuse of discretion (*People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 41). We must afford great deference to the trial court's judgment regarding a sentence because the court, having observed the defendant and the proceedings, is in a far better position

to consider such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, and habits than a reviewing court, which must rely on a cold record. *Halerewicz*, 2013 IL App (4th) 120388, ¶ 41. A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id.* "The spirit and purpose of the law are promoted when a sentence reflects the seriousness of the offense and gives adequate consideration to the rehabilitative potential of the defendant." *Butler*, 2013 IL App (1st) 120923, ¶ 31.

¶ 57 Here, the sentencing range for attempted predatory criminal sexual assault is 4 to 15 years (730 ILCS 5/5-4.5-30(a) (West 2010)), and the sentencing range for sexual exploitation of a child is 1 to 3 years (730 ILCS 5/5-4.5-45(a) (West 2010)). During the sentencing hearing, the State argued for a 12-year sentence, and defense counsel requested probation (see 730 ILCS 5/5-4.5-15(a)(1) (West 2010)). For the attempted predatory criminal sexual assault conviction, the trial court sentenced defendant to six years' imprisonment, which is on the lower end of the range. For the sexual exploitation of a child, the trial court sentenced defendant to three years' imprisonment, to run currently, for a total sentence of six years.

¶ 58 Defendant argues that the six-year sentence is excessive given the mitigating factors in this case, which include no prior criminal record; his supportive family and friends, as evidenced by the many letters submitted on his behalf; his strong employment history and educational credentials; and the lack of physical, emotional, or mental harm to M.J. Defendant argues that all of these factors demonstrate his rehabilitative potential and favor a probationary sentence.

¶ 59 There is a strong presumption that the trial court considered any mitigating evidence that was presented to it. *Butler*, 2013 IL App (1st) 120923, ¶ 31. "In order to rebut this presumption,

the defendant must present some indication, other than the sentence imposed, that the trial court did not consider the mitigating evidence." *Id.*

¶ 60 In this case, it is clear from the record that the trial court considered the mitigating factors identified by defendant. The court commented specifically on defendant's lack of criminal record, his supportive family and friends, and his work history and education. The court stated:

> "The mitigation is that the defendant is 31 years old. He has never been arrested before. Never married. He has an older sister, raised by both of his parents. He described a good relationship with his parents, with his family. He graduated high school, attended two good schools, George Mason and Carnegie Mellon. He has a work history, a substantial period of time, approximately 11 years. The main mitigation, though, is that he has never been arrested prior to this offense. To the [sex offender] evaluator, he described having a stable and relatively stress free environment with an extensive social support system. And [the evaluator] described those factors as being quite favorable, prognostic signs for future adjustment. The defendant has never received mental health treatment.
>
> And then there are the letters that were tendered. And I read through each of those letters. It's almost like the Who's Who. I don't think I've ever seen letters written from such a large group of people that are so well educated and apparently outstanding citizens. They come from the business community. Many of these individuals are in the hotel or hospitality business or they're doctors; and many describe strong friendship with the defendant's father and with his family. The letters describe the defendant as being obedient, kind, hardworking, lifelong [*sic*] friend. And the letters throughout request the Court to exercise mercy, to show leniency to the defendant; and they frequently opine

> that he is no threat to society. There is certainly no question but that the defendant comes from a good family. They're very supportive. It's obviously a difficult situation for them. Clearly they love him and are willing to do anything to support him, including his father saying he would go to jail with the defendant if he were to violate probation. He has had a good upbringing and he has a lot of support."

¶ 61 The only mitigating factor the court did not mention was the lack of physical harm to M.J. However, the court was not required to assign particular weight to each mitigating factor. See *Halerewicz*, 2013 IL App (4th) 120388, ¶ 43 (the trial court is not required to expressly indicate its consideration of all mitigating factors and the particular weight each factor should be assigned). Moreover, defendant's claim that M.J. suffered no emotional or mental harm is contradicted by the victim impact report submitted by Shruti, in which she stated that her daughter now complained of "strangers and the dark," "strangers entering the house," and nightmares. Shuti stated that since the incident, M.J. had been "very clingy and overly emotional in public places," and had lost her "trusting, carefree childlike behavior." Based on the victim impact statement, the incident left an emotional and mental impact on M.J., for which she was receiving therapy. In sum, the trial court's detailed ruling reveals that defendant cannot overcome the presumption that it gave proper consideration to the mitigating factors.

¶ 62 In addition, we note that the trial court's sentence was on the lower end of the range despite "aggravation," which was the "the nature and circumstances" of the offense. The court stated that defendant's "intention was clear that he was going to perform a vile act on this little girl and he would have succeeded." The court found it significant that defendant "did not stop on his own"; rather, "the only reason that the offense was not completed was because she opened her eyes, she screamed and she ran." The court concluded that "under the circumstances

presented here, *even giving weight to the mitigation*, I find that sentence [*sic*] of probation would deprecate the seriousness of the defendant's conduct, it would be inconsistent with the ends of justice and a penitentiary sentence [was] necessary to deter others." (Emphasis added.) For all of these reasons, the trial court did not abuse its discretion in sentencing defendant to six years' imprisonment.

¶ 63 III. CONCLUSION

¶ 64 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 65 Affirmed.