2016 IL App (2d) 150418-U
No. 2-15-0418
Order filed March 7, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-268
SANDRO GOMEZ,	)	Honorable Sharon L. Prather,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly admitted hearsay statements pursuant to section 115-10 of the Criminal Code of Procedure of 1963 (725 ILCS 5/11-10 (West 2010)) and did not err in limiting the scope of cross-examination of the victim's mother at the section 115-10 hearing. The defendant was proved guilty beyond a reasonable doubt and the trial court did not abuse its discretion in imposing sentence.

¶ 2 The defendant, Sandro Gomez, appeals his convictions for predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)). On appeal, the defendant argues: (1) that the trial court erred in allowing the victim's hearsay statements pursuant to section 115-10 of the Criminal Code of Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2010)); (2) that the trial court erred in limiting the defendant's cross-examination of the victim's mother at the

section 115-10 hearing; (3) he was not proved guilty beyond a reasonable doubt; and (4) the trial court erred in imposing his sentence. We affirm.

¶ 3 BACKGROUND

¶ 4 On March 23, 2012, the defendant was charged by complaint with two counts of predatory criminal sexual assault of a child (counts I and II) (720 ILCS 5/12-14.1(a)(1) (West 2010)) and one count of aggravated criminal sexual abuse (count III) (720 ILCS 5/12-16(c)(1)(i) (West 2010)). All counts stated that, when the alleged acts were committed, the defendant was 17 years of age or older and the victim was less than 13 years old. Count I alleged that the defendant committed an act of sexual penetration with the victim by placing his finger in her anus. Count II alleged that the defendant committed an act of sexual penetration against the victim by placing his penis in her anus. Count III alleged that the defendant committed an act of sexual conduct with the victim by intentionally fondling her anus for the purpose of his sexual arousal. The record indicates that the victim was born on May 3, 2002, making her nine years old at the time of the alleged offenses.

¶ 5 On January 8, 2015, the State filed a motion *in limine* seeking to admit at trial out of court statements of the victim pursuant to section 115-10 of the Code (725 ILCS 5/115-10 (West 2010)). In the motion, the State alleged that the victim had made statements regarding the charges against the defendant to her aunt (Jennifer McGuire) and her mother (Jasmine McGuire) in December 2011 and to a social worker (Soledad Richter) and a police officer (Detective Verle Leard) in March 2012.

¶ 6 A hearing was held on the motion on January 8 and 15, 2015. Jennifer testified that on December 30, 2012, the victim told her that "my dad put his pee-pee in my butt." Jasmine testified that on December 30, 2012, the victim told her that "Sandro had put his pee-pee in her butt," that it was an isolated incident, and that the victim's brother was in the room when it

happened. Richter testified that on March 8, 2012, the victim told her that her "dad put his wiener in my butt." Detective Leard testified that he conducted a police interview of the victim in March 2012. The interview was recorded and the recording was admitted into evidence at the hearing. Following argument, the trial court stated that it considered all the testimony and had viewed the recording of the police interview. The trial court found that the victim's statements had sufficient safeguards of reliability. The statements were generally consistent, there was no motive to fabricate, and the victim had a good relationship with the defendant. The time lapse between the statements to the police or the social worker went to the weight to be given to the statements and not to their credibility. The trial court granted the State's motion on the condition that the victim would testify at trial.

¶ 7 On January 23, 2015, the defendant executed a jury waiver. Bench trial began on January 27, 2015. At trial, Detective Leard testified that he interviewed the victim about the alleged abuse at the Child Advocacy Center in Woodstock on March 14, 2012. The interview was recorded and was admitted into evidence as People's Exhibit No. 2. During the interview, the victim stated that one of the alleged assaults happened on Christmas Eve 2011 while she was staying at the defendant's house. She stated that "my dad gave me a hug and he pulled me under his blankets and he stuck his private spot in my butt." The victim also stated that the defendant "pulled down my pants and started putting his private spot in my butt." The victim stated that she never saw the defendant's "private part" but she said "I think he pulled down his underwear." The victim also told the detective that she told the defendant to stop and "he said don't tell anybody." The victim stated that "it hurt." The victim also stated that her brother was in the room watching television at the time of the assault. The victim stated that it happened during the day and at night. When Detective Leard asked if it happened twice, the victim responded in the affirmative.

¶ 8 Richter testified that she worked as a social worker at the school where the victim was attending fourth grade. The victim had made a comment to another student about the allegations. The principal was ultimately informed of the comment and requested that Richter speak to the victim. On March 8, 2012, Richter spoke with the victim twice. The first meeting lasted about 20 minutes and the second meeting lasted about 15 minutes. At the first meeting, Richter discussed the comments that had been overheard and tried to make the victim feel safe and reassured that Richter only wanted to help. The victim was crying and stated that she had told another student that the defendant had put his wiener inside her butt. After the first interview ended, Richter called the Department of Children and Family Services (DCFS). DCFS requested that Richter interview the victim again to find out the date and time of the alleged incident. During the second interview, the victim was more comfortable with Richter. The victim told Richter that the incident took place at the defendant's house, she was lying in bed and the defendant climbed into the bed, her brother was sitting at the foot of the bed watching television, and then the defendant stuck his wiener in her butt and it hurt.

¶ 9 The victim testified that she was 12 years old at the time of trial and lived with her mother, brother, and sister. When she was growing up she spent a lot of time with the defendant. Although he was not her biological father, she considered him to be her father. On Christmas Eve 2011 she was staying at the defendant's house with her brother and sister. Her mother was not staying there during this time. They were going to open presents at midnight. At some point she went to an upstairs bedroom to take a nap. When she woke up, she went to another bed where the defendant was lying to give him a hug. The defendant then pulled her under the covers, pulled down her pajama pants, and put his private in her butt. There was no one else in the room and it was still day time. This happened twice while she stayed there. The victim acknowledged that in previous statements she referred to the defendant's private as his "dick."

The victim testified that when the defendant put his private into her butt, she was positioned with her back to the defendant. The victim stated that when the defendant put his privates in her butt she felt pain. She screamed and asked him to stop. He said not to tell anybody.

¶ 10 The victim further testified that the second time it happened was at night on a different day but in the same bed and bedroom. Her brother was sitting on a chair in the bedroom watching television when the assault occurred. The defendant took her pajama pants off and again put his private into her butt. It felt terrible and was very physically painful. She screamed but her brother did not do anything. Her mother eventually picked her up from the defendant's house. She did not tell her mother what happened because she was scared. She thought it would happen again if she told somebody. She could not remember how close in time the two incidents of abuse occurred.

¶ 11 After her mother picked her up, they went to stay with some cousins in Indiana. Her cousin Lilly was two years older than her. A couple days after the alleged incidents, she told her cousin and her aunt what had happened. She also told her grandmother. When her mother came to her grandmother's house to pick her up, she also told her mother. She believed she told her mother during the same Christmas break when the abuse occurred. A couple months later, she told a friend at school. Two days later, she talked to Richter and told her what happened.

¶ 12 On cross-examination, the victim testified that she did not remember telling Lilly or her aunt that the abuse only happened one time. She remembered that she told Detective Leard and her mother that the abuse only happened one time. The victim testified that she was sure it happened twice and not once. When questioned again about the first incident, the victim could not remember if her brother was in the room or not. The second time her brother was in the room sitting in a chair watching television. She screamed and asked for help but her brother just

ignored her. The victim acknowledged that she did not tell the police officer that it hurt, that she screamed, or that she asked her brother for help. She also did not tell her mother that it hurt.

¶ 13 Jasmine testified that she was the victim's mother. She and the defendant were in a relationship on and off for several years. He was the father of her youngest child, but was not the biological father of the victim. She and her children lived with the defendant occasionally between 2003 and 2010. The victim and the defendant had a father/daughter relationship. After Jasmine and the defendant broke up in 2010, her children would stay with the defendant at his house in Harvard about once or twice a month. During winter break of 2011, her children wanted to spend one week with the defendant and another week in Indiana with their cousins. On Christmas Eve, after the first week, she picked the children up from the defendant's house and she dropped them off with relatives in Indiana. The children stayed with her sister and then with her mother. Jasmine returned home to Illinois.

¶ 14 Jasmine further testified that when she was returning to pick the children up from Indiana, her sister called and told her that the victim had told her cousin that the defendant had touched her inappropriately the previous week. Jasmine drove straight to her mother's house, where the children were staying. When she was there, she asked the victim to tell her what happened. The victim said that the defendant "put his pee pee in her butt." The victim said it happened at the defendant's house in his bedroom. Jasmine asked why the victim had not told her sooner. The victim said that she did not think she would be believed. The victim was hurt and scared.

¶ 15 Jasmine testified that she called the defendant that night when she returned home with the children. The defendant called her back the next day. He was apologizing because he thought something had happened but he did not know what it was. The defendant said he blacked out and when he woke up his hand was on the victim's butt. On March 8, 2012, she was contacted

by the victim's school and DCFS became involved. She had not contacted the police herself because she believed that the defendant would turn himself in and the victim would not have to be involved.

¶ 16 Jasmine accompanied the victim to the police interview on March 18, 2012. The next day she agreed to an "overhear," in which she called the defendant and allowed the police to listen to the conversation. The recording of the conversation was admitted without objection as People's Exhibit No. 3. During the conversation, she asked the defendant to explain what had happened with the victim. On cross-examination, Jasmine acknowledged that she did not take her daughter to a doctor until about two months after the alleged conduct, when DCFS became involved.

¶ 17 In the audio recording of the phone conversation between Jasmine and the defendant, Jasmine threatened the defendant with various consequences if he did not admit that he had inappropriate contact with the victim. In response, the defendant described an incident when he was heavily intoxicated from alcohol and blacked out while he was cuddling with the victim. When they were cuddling, he experienced an erection. However, because he was so intoxicated, he did not remember what happened. The defendant also stated that "I think I fingered her butt, I don't know" and "I might have grabbed her down there." The defendant admitted that when he woke up, the victim was backed up to him and she was scared. He insisted that they had both remained fully clothed while they were in bed together. The defendant denied that he was a pedophile. However, he admitted that he felt a heavy weight inside every day because of what had happened, he regretted it, and wished that he could "take it back."

¶ 18 The parties stipulated that Dr. Suzanne Dakil would testify that she performed a medical examination on the victim on March 15, 2012. She did not observe any injuries or abnormalities.

However, she opined that the results of the examination could not categorically disprove the allegations in the case.

¶ 19 The defendant testified that he, Jasmine, and Jasmine's three children lived together off and on for five or six years. He was like a father to the victim. He was the youngest daughter's biological father. On Christmas Eve 2011, the victim and her siblings were staying with him at his mom's house in Harvard. Extended family came over and they were celebrating, eating, and drinking. At some point during the day, he went upstairs to take a nap. The youngest daughter also went upstairs to lay with him. The victim came up later, gave him a hug, and also lay in bed with them. The victim's brother came to the bedroom eventually. They cuddled and watched a movie together. Later in the evening, from 10:30 p.m. to 12:30 a.m., they opened presents. They all went to sleep in the same bedroom after that. Nothing unusual happened. He slept alone in his twin size bed. The victim slept on the floor with her siblings. He never put his penis or his fingers in the victim's anus.

¶ 20 On cross-examination, the defendant testified that in the audio recording of his phone conversation with Jasmine, when he referred to having regrets, he was talking about his drinking problem. When he talked about fingering the victim's butt or touching her privates, he was making it up because Jasmine told him if he did not admit to doing something inappropriate, he would never see the children again.

¶ 21 The parties stipulated that, if called to testify, the victim's brother would state that he was at the defendant's house on Christmas Eve 2011 with his siblings. After dinner, he was in the bedroom with the victim and the defendant and he was watching a Disney movie. During that time, he did not see or hear anything odd or different.

¶ 22 Following argument, the trial court rendered its ruling. The trial court found the victim's testimony to be "very credible." The trial court noted that the victim's testimony during the

recorded interview with the police and her testimony at trial were very consistent in almost all details. The court acknowledged minor inconsistencies in the victim's testimony but found that they did not detract from her credibility. The trial court found the defendant's testimony "not credible and not worthy of belief." The trial court found the defendant guilty on all counts.

¶ 23 On April 9, 2015, at the sentencing hearing, the trial court noted that it had received and read the presentence investigation report. The State offered written victim impact statements from the victim and her mother, which were entered into the record without objection. The impact statements indicated that the victim continued to experience emotional trauma, anxiety, and nightmares as a result of the abuse. The defendant offered the testimony of six character witnesses, who each described him as a loving responsible father and a warmly regarded member of their extended family. The trial court stated that it considered all the evidence, the presentence investigation report, and all the statutory factors in aggravation and mitigation. The trial court noted that although the defendant did not have an extensive criminal history, the crimes against the victim were despicable. The trial court sentenced the defendant to nine years' imprisonment on count I, nine years imprisonment on count II, and four years' imprisonment on count III. The sentences were to run consecutive for an aggregate prison sentence of 22 years.

¶ 24 On April 21, 2015, the defendant filed a motion to vacate sentencing. The defendant argued that his conviction on count III should have merged into either count I or count II based on one act, one crime principles. The State agreed. The trial court then vacated the defendant's conviction and sentence on count III. Following the denial of his motion for a new trial, the defendant filed a timely notice of appeal.

¶ 25 ANALYSIS

¶ 26 The defendant's first contention on appeal is that the trial court erred in allowing the victim's hearsay statements through the testimony of Detective Leard, Richter, and through the

victim's recorded police interview. The defendant notes that the victim's conversations with Detective Leard and Richter occurred a couple of months after the alleged abuse. The defendant argues that this time delay undermines the reliability of the conversations because the allegations could have included suggestive aspects of an ongoing conversation between the victim and her family. The defendant argues that without more information about the interactions between the victim and her family regarding the alleged abuse during the two-month delay, the trial court did not have sufficient evidence to determine whether the victim's statements were reliable.

¶ 27 The State argues that the defendant has forfeited this argument for failing to raise it in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (failure to object at trial and in a posttrial motion generally results in forfeiture of the issue for review). Additionally, the State notes that the defendant did not argue that the issue should be reviewed for plain error. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (forfeited issue can be reviewed only if the defendant has established plain error). In the absence of a plain-error argument by a defendant, we generally decline to review a forfeited issue. *Id.* at 549. Although the defendant did not argue plain error in his opening brief, he has argued plain error in his reply brief as a response to the State's claim of forfeiture. This is sufficient to allow us to review the issue for plain error. *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000).

¶ 28 Plain-error review permits us to consider a forfeited claim of clear error where the evidence is so closely balanced that the error alone might have resulted in the defendant's conviction, or where, regardless of the closeness of the evidence, the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). The first step in plain-error analysis is to determine whether a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 29 Section 115-10 of the Code allows the admission of hearsay statements by victims of sexual offenses who are under 13 years of age. 725 ILCS 5/115-10 (West 2010). Hearsay statements are admissible under section 115-10 only if "the time, content, and circumstances of the statement provide sufficient safeguards of reliability." 725 ILCS 5/115-10 (West 2010). In evaluating reliability, the trial court must consider the totality of the circumstances surrounding the statements. *People v. Stechly*, 225 Ill. 2d 246, 313 (2007). Some factors that a trial court may consider in making a reliability determination are: (1) the child's spontaneity and consistent repetition of the incident, (2) the child's mental state, (3) the use of terminology unexpected of a child of similar age, and (4) the lack of motive to fabricate. *People v. Sharp*, 391 Ill. App. 3d 947, 955 (2009). On appeal, the issue of whether a trial court erred in allowing hearsay statements into evidence pursuant to section 115-10 is reviewed for an abuse of discretion. *People v. Zwart*, 151 Ill. 2d 37, 44 (1992).

¶ 30 In the present case, the victim spontaneously reported the incident to her cousin, aunt, and grandmother. She also told a classmate, which resulted in the confessions to the social worker and the detective. We cannot say that the time delay between the alleged incidents and the victim's statements to the police and social worker undermine the reliability of those statements. The victim's earlier reports of the abuse to her family were generally consistent with the later reports to the police and social worker. Both Detective Leard and Richter testified that they were trained in questioning children about sexual abuse allegations and both gave the victim the opportunity to explain what had happened in her own words. Additionally, the victim repeatedly used terminology that would be consistent with a child her age, thus indicating a lack of adult intervention or ongoing conversations between the victim and her family. Finally, the surrounding circumstances did not reveal any motive for the victim to fabricate her statements. The evidence indicated that the victim and the defendant had a good relationship consistent with

that of a father and daughter. Considering the totality of the circumstances, the trial court did not abuse its discretion in finding that the State met its burden of proving that the time, content, and circumstances of the victim's statements provided sufficient safeguards of reliability for admission. As the admission of the victim's hearsay statements was not error, there was no plain error. *Piatkowski*, 225 Ill. 2d at 565.

¶ 31 The defendant's next contention on appeal is that the trial court improperly limited the scope of the defense counsel's cross-examination of the victim's mother at the section 115-10 hearing. The trial court had sustained objections, based on relevance, to questions concerning whether Jasmine checked the victim's rectal area, why Jasmine did not take the victim to the hospital or contact the police sooner, and whether the victim had a history of not being truthful. The defendant argues that to foreclose this line of questioning effectively prevented him from exploring the reliability of the March outcry statements, specifically, the reason for the delay and the dialogue between the victim and her family during that time.

¶ 32 Once again, the State argues that this issue is forfeited because the defendant did not raise the issue in a posttrial motion. However, he did argue in his reply brief that the issue should be reviewed for plain error. As such, we decline to find this issue forfeited (*Williams*, 193 Ill. 2d at 347-48) and will review it for plain error. As stated, the first step in plain-error analysis is to determine whether a clear or obvious error occurred. *Piatkowski*, 225 Ill. 2d at 565. We review a trial court's evidentiary rulings for an abuse of discretion. *People v. Hill*, 2014 IL App (2d) 120506, ¶ 50. It is within the trial court's discretion to reject offered evidence if it is irrelevant. *Id.*

¶ 33 In the present case, we cannot say the trial court abused its discretion in limiting the scope of defense counsel's cross-examination of the victim's mother. The reliability of the victim's statements is not determined by whether her mother contacted the police or took her to

the hospital. Moreover, the victim's mother was allowed to testify that she believed the victim's accusations and she spoke with the defendant concerning the issue and his need to come forward. Additionally, the evidence did not raise questions as to whether the victim had suggestive or coercive adult interactions concerning the alleged abuse during the time of the delay. The victim's statements to the social worker and the detective were consistent with her earlier statements to her cousin, aunt, and mother. Additionally, as noted, the statements were consistent with the language of a child her age. Accordingly, the trial court's evidentiary rulings were not improper and we find no plain error.

¶ 34 The defendant's third contention on appeal is that he was not proved guilty beyond a reasonable doubt of predatory criminal sexual assault of a child. When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Phillips*, 127 Ill. 2d 499, 510 (1989). When the determination of guilt or innocence depends upon the credibility of the witnesses and the weight to be given their testimony, it is for the trier of fact to resolve any conflicts in the evidence. *People v. Larson*, 379 Ill. App. 3d 642, 654 (2008). We will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Billups*, 384 Ill. App. 3d 844, 846 (2008).

¶ 35 A person commits the offense of predatory criminal sexual assault of a child if the accused was 17 years of age or older 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). For purposes of the predatory criminal sexual assault of a child statute, the term "sexual penetration" is defined as "any contact, however slight, between the sex organ or anus of one

person by an object, the sex organ, mouth or anus of another person, [referred to as the contact clause] or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration [referred to as the intrusion clause]." 720 ILCS 5/12-12(f) (West 2010). The State must prove "actual contact" between the defendant's sex organ and the sex organ or anus of the complainant. *People v. Finley*, 178 Ill. App. 3d 301, 307 (1988). The word "object" in the contact clause was not intended to include parts of the body such as a finger or hand. *People v. Maggette*, 195 Ill. 2d 336, 348-350 (2001).

¶ 36 In the present case, the defendant does not challenge that he and the victim were within the age limits set by the predatory criminal sexual assault of a child statute. 720 ILCS 5/12-14.1(a)(1) (West 2010). In count I, the State alleged that the defendant committed an act of sexual penetration against the victim by placing his finger in her anus. In the recording of the telephone conversation with Jasmine, the defendant stated that he "fingered" the victim's butt. The victim told Detective Leard and testified on cross-examination that she was sure that she was assaulted twice by the defendant. However, her back was to the defendant both times and she could not see his penis. On both occasions, something went into her butt and it hurt so much that she screamed. Based on the evidence, it was reasonable for the trial court to conclude that the defendant penetrated the victim twice, once with his penis and once with his finger. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004) (the trier of fact is allowed to draw reasonable inferences from the evidence).

¶ 37 Count II alleged that the act of sexual penetration was that the defendant placed his penis in the anus of the victim. As stated, the victim testified at trial that the defendant placed his penis into her anus. This testimony, alone, was sufficient to establish the sexual penetration element of the offense. *People v. Kitch*, 239 Ill. 2d 452, 464 (2011). Additionally, the victim

told her aunt, cousin, mother, a police officer, and a social worker that the defendant placed his penis in her anus. We therefore find that it was reasonable for the trial court to conclude from this evidence that the defendant was proved guilty of predatory criminal sexual assault of a child beyond a reasonable doubt.

¶ 38 The defendant argues that the evidence was not sufficient because the victim's testimony was not credible. Specifically, the defendant argues that the victim could not recall the specific timing of the assaults, made conflicting statements about whether the assault occurred once or twice, and made conflicting statements as to whether her brother was in the room. Due to these inconsistencies, the defendant also argues that the evidence does not support two convictions for predatory criminal sexual assault. The defendant relies on *People v. Karmenzind*, 220 Ill. App. 3d 167, 175-76 (1991), and *People v. Findlay*, 177 Ill. App. 3d 903, 910-11 (1988), for the proposition that when the testimony of a victim is not clear and convincing, a conviction may only be sustained if it is substantially corroborated by some other factual evidence or circumstance. However, whether the victim's testimony is clear and convincing or substantially corroborated is no longer the standard of review. *In re A.J.H.*, 210 Ill. App. 3d 65, 70-71 (1991) (noting that this is an archaic standard and that, in a sex offense case, as in any case, the standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt).

¶ 39 In the present case, the inconsistencies in the victim's testimony were minor and did not undermine the credibility of her testimony. See *id.* at 911 ("any weaknesses in the [victim's] testimony such as the inability to remember exact dates and times, as well as other minor contradictions or inconsistencies, only affect the weight to be given the testimony and do not themselves create a reasonable doubt"). It is not unreasonable that a nine-year old child would

be unable to remember the specific timing of the assaults while staying with a father figure during a vacation. Although the victim initially told her mother that the abuse only happened once, in both the recorded interview and at trial the victim testified that she was sure the abuse happened twice. As to any discrepancies about her brother being in the room, the victim clearly testified that he was in the room during one of the assaults. The trier of fact is charged with resolving conflicts in the evidence, and we cannot say that the evidence was so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt.

¶ 40 The defendant's reliance on *Karmenzind* and *Findley* is unpersuasive. In *Karmenzind*, the victim did not report the abuse for between one and three years after the occurrence; gave differing accounts of the objects with which he was abused—a hammer, a wrench, a screwdriver, a comb, a sex organ; gave differing accounts of who was present when the abuse occurred; the victim's trial testimony differed in many ways from his previous versions of the alleged abuse; and the medical testimony established that the victim had not been assaulted in the manner alleged. *Karmenzind*, 220 Ill. App. 3d at 175-76. In the present case, by contrast, the victim reported the incident to family members within days of the incident, the victim's trial testimony as to the manner in which the abuse occurred was not inconsistent with any earlier versions of the story, and there was no medical testimony which called into question the credibility of the victim's accusations of sexual abuse.

¶ 41 In *Findlay*, the victim testified as to six incidents of alleged sexual abuse by the defendant, three of which the defendant was indicted on. *Findlay*, 177 Ill. App. 3d at 912. The defendant presented evidence impeaching and discrediting the victim's testimony with respect to four of the six incidents. *Id.* The defendant was found guilty on one count of aggravated criminal sexual abuse. *Id.* at 910. On appeal, the reviewing court reversed the defendant's conviction. *Id.* at 915. The reviewing court held that the impeachment of the victim on four of

the alleged six incidents was so substantial as to completely destroy the victim's credibility. *Id.* at 912. Additionally, while there was evidence corroborating the existence of the opportunity for the sexual abuse, there was not substantial corroboration sufficient to sustain the conviction. *Id.* at 915. In the present case, unlike in *Findlay*, the minor discrepancies in the victim's versions of the abuse were not so substantial as to destroy her credibility or detract from the reasonableness of her story as a whole.

¶ 42 The defendant next argues that the victim's testimony was not sufficient to establish sexual penetration because she failed to use sufficiently precise and specific anatomical language and, as such, there was no proof of an actual intrusion into the victim's anus. In so arguing, the defendant relies on *People v. Oliver*, 38 Ill. App. 3d 166 (1976).[1]

¶ 43 In *Oliver*, the complainant, who was not a minor, did not testify that the defendant's penis touched her anus. *Id.* at 170. Rather, she characterized the defendant's conduct by a reference to "in my butt." *Id.* at 170. She also made an out-of-court statement that the defendant's penis went along her "cheeks." *Id.* at 170. In reversing the defendant's conviction, the reviewing court explained that the State was required to show an act involving the sex organ of the defendant and the anus of the complainant. *Id.* at 170. The reviewing court found that the State did not meet its burden of proof, because the complainant's lone reference at trial that the

[1] The defendant also relies on *People v. Kennebrew*, 2012 IL App (2d) 090754-U. However, unpublished orders are not precedential and may not be cited except under limited circumstances not present here. Ill. S. Ct. R. 23(e)(1) (eff. July 1, 2011). An argument that cites an unpublished order in violation of Rule 23(e)(1) should be stricken. *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1016-17 (2009). As such, on the court's own motion, the argument based on *Kennebrew* in the defendant's briefs is stricken.

defendant's penis was "in [her] butt" was insufficient to establish deviate sexual assault in light of her prior characterization that the defendant's penis had just gone along her "cheeks." *Id.* at 170.

¶ 44 *Oliver* is easily distinguished from the present case. In *Oliver*, the complainant was an adult and presumably able to express herself. Additionally, she had given conflicting testimony as to whether the defendant's penis went in her anus or just along her butt cheek. In the present case, the victim consistently stated, on numerous occasions, that the defendant's penis went either "in her butt" or "into her butt." Additionally, she stated more than once that it hurt so much that she screamed. As such, the evidentiary shortcomings in *Oliver* do not exist in this case. Rather, the victim's testimony was sufficient to prove that there was an actual physical intrusion by the defendant into the victim's anus. See *People v. Saxon*, 374 Ill. App. 3d 409, 417 (2007) (circumstantial evidence is sufficient to uphold a conviction and in determining guilt beyond a reasonable doubt a trier of fact is allowed to consider the inferences that flow normally from the evidence before it).

¶ 45 The defendant's final contention on appeal is that the trial court erred in imposing his sentence. Specifically, the defendant argues that there were significant mitigating factors that warranted the statutory minimum sentence. Additionally, the defendant argues that the trial court improperly considered conduct inherent in the offense as an aggravating factor. While the defendant did not raise these sentencing issues in a posttrial motion, he argued in his reply brief that his sentence should be reviewed for plain error. This is sufficient to avoid forfeiture and we will thus review the defendant's contention under the plain-error doctrine. *Williams*, 193 Ill. 2d at 347-48. The first step in plain-error analysis is to determine whether a clear or obvious error occurred. *Piatkowski*, 225 Ill. 2d at 565.

¶ 46 There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. The presumption is overcome only by an affirmative showing that the sentence imposed is greatly at variance with the purpose and spirit of the law or is manifestly disproportionate to the offense. *Id.* It is the trial court's responsibility "to balance relevant factors and make a reasoned decision as to the appropriate punishment in each case." *People v. Latona*, 184 Ill. 2d 260, 272 (1998). The reviewing court is not to reweigh factors considered by the trial court. *People v. Pippen*, 324 Ill. App. 3d 649, 653 (2001). It is well-settled that a reviewing court will not disturb the sentence imposed by the trial court absent an abuse of discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494 (1987). Nonetheless, the question of whether a trial court relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo*. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 47 The defendant's convictions for predatory criminal sexual assault of a child were class X felonies, carrying sentencing ranges from 6 to 60 years' imprisonment (720 ILCS 5/11-1.40(a)(1), (b)(1) (West 2010)). The defendant was sentenced to consecutive nine-year sentences of imprisonment on each count of predatory criminal sexual assault of a child. The defendant argues that there were significant mitigating factors that warranted the statutory minimum sentence, such as his lack of criminal history and that he was a loving and responsible father that provided financial support for his children. However, a minimum sentence is not necessarily warranted simply due to the presence of some mitigating factors. *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 112. In this case the defendant's sentence was well within the statutory guidelines and close to the minimum. The trial court considered all the evidence before it as well as the statutory factors in aggravation and mitigation. It is not our province to reweigh those factors.

¶ 48 The defendant also argues that the trial court improperly considered conduct inherent in the offense as an aggravating factor. Specifically, the defendant notes that, in imposing sentence, the trial court stated:

> "THE COURT: The Court finds that the Defendant does not have a great deal of past criminal activity in his life. However, the despicable crimes that he has committed on an innocent child outweigh by far any mitigating factor."

Although the trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor in sentencing. *People v. Phelps*, 211 Ill. 2d 1, 12 (2004). In other words, a single factor cannot be used both as an element of an offense and as a basis for imposing a "harsher sentence than might otherwise have been imposed." *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992). Such dual use of a single factor is often referred to as "double enhancement." *Id.* at 85. The prohibition against double enhancements is based on the rationale that "the legislature obviously has already considered such a fact when setting the range of penalties and it would be improper to consider it once again as a justification for imposing a greater penalty." (Internal quotation marks omitted.) *People v. James*, 255 Ill. App. 3d 516, 532 (1993). The defendant bears the burden of establishing that a sentence was based on improper considerations. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009).

¶ 49 At the outset, we note that the trial court's reference to the despicable crimes on an innocent child is arguably not improper. To the extent that by "innocent" the trial court was referring to the victim's first sexual experiences, while many victims of predatory criminal sexual assault of a child may be sexually inexperienced, the statute does not include this requirement. Thus, a reference to an "innocent" victim would not be a factor inherent in the offense. See 720 ILCS 5/11-1.40(a)(1) (West 2010). Assuming arguendo that the trial court's

comments were a factor inherent in the offense, we nonetheless find the defendant's argument to be without merit.

¶ 50 The defendant relies on *People v. Gonzalez*, 243 Ill. App. 3d 238 (1993) in arguing that the trial court considered an improper factor in aggravation. In *Gonzalez*, the defendant was convicted of aggravated arson. *Id.* at 239. In sentencing the defendant, the trial court stated that "[t]here were a number of people *** who had nothing to do with [defendant's] dispute *** and when [defendant] acted in the way [he] did, [he] threatened all of their lives as well. *Id.* at 244. The reviewing court held that because the trial court relied on the fact that the defendant's actions threatened the lives of others, and because this was an element of the offense of aggravated arson, the trial court had improperly considered it in aggravation. *Id.* at 245. The reviewing court thus reduced the defendant's sentence from ten years to six years' imprisonment. *Id.* at 246. *Gonzalez* is distinguishable from the present case. In *Gonzalez*, the reviewing court found that, in sentencing the defendant, the only aggravating factor the trial court considered was that the defendant's actions threatened harm to others, a factor implicit in the offense itself. *Id.* In this case, the trial court considered numerous aggravating factors.

¶ 51 We find the decision in *People v. Hunter*, 101 Ill. App. 3d 692 (1981), to be instructive. In *Hunter*, in imposing sentence for aggravated arson, the trial court noted that the defendant's conduct had threatened serious harm (which was an element of the offense itself), the defendant's conduct was serious, and the defendant had destroyed his home for insurance proceeds. *Id.* On appeal, the *Hunter* court noted that while a fact which is implicit in the charged offense cannot be considered to aggravate a sentence, a trial court may still consider the "nature and circumstances" of the offense. *Id.* at 694-95. The *Hunter* court found that there was no abuse of discretion because the trial court did not necessarily depend on the fact that the defendant's conduct threatened serious harm in imposing a sentence greater than the minimum.

Id. at 694-95. The *Hunter* court explained that the trial court considered legitimate aggravating factors, such as the seriousness of arson generally, that a small child had been endangered, and that the defendant had destroyed his home for insurance proceeds. *Id.* at 695. Under the "nature and circumstances" approach, the *Hunter* court held that the trial court merely mentioned the threat of harm posed by the defendant's conduct and that it relied on proper aggravating factors in imposing the sentence. *Id.*

¶ 52 In the present case, as in *Hunter*, the trial court merely mentioned that the defendant committed a serious crime against an innocent child and the record does not demonstrate that the trial court considered this as an aggravating factor as opposed to the "nature and circumstances" of the crime. At the defendant's sentencing hearing, the State argued, as aggravating factors, that the defendant betrayed the victim's trust because he had been a father figure and that at least one of the assaults had occurred in the presence of the victim's brother. The State did not argue in aggravation that this was a serious crime against an innocent child, which would have indicated that the trial court considered this in aggravation. See *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 12 (finding that since the trial court's recitation of the aggravating factors mirrored what the State had argued in aggravation, the trial court had actually considered those factors in aggravation). At sentencing, the trial court stated that it considered all the evidence as well as the statutory factors in aggravation and mitigation. One statutory aggravating factor, as argued by the State, was that the defendant held a position of trust. Additionally, the trial court considered that, despite the defendant's admission on the telephone call, the defendant still maintained his innocence and refused to admit the harm he had imposed on the victim. See *People v. Ward*, 113 Ill. 2d 516, 529 (1986) (it is not improper for the trial court to consider, in sentencing, a defendant's continued claim of innocence as long as it is evaluated in light of the other evidence in the case and the relevance it has to the defendant's prospect for rehabilitation and restoration

to useful citizenship). The record demonstrates that the trial court considered proper aggravating factors in imposing sentence. As such, there is no basis in the record to substitute our judgment for the trial court's consideration during sentencing and there is no plain error.

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 55 Affirmed.