2011 IL App (4th) 100357-U

Filed 10/31/11

NO. 4-10-0357

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DARRELL W. SMITH,	)	No. 09CF1281
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant's trial counsel was not ineffective for failing to object to certain hearsay statements offered to corroborate T.G.'s testimony at trial because counsel's decision not to object was a matter of trial strategy.

(2) The trial court did not err at sentencing (1) by referencing the fact defendant forced himself into T.G.'s home and (2) by considering, as a factor in aggravation, the psychological and emotional trauma T.G. experienced as a result of defendant's home invasion and sexual assault because the court is allowed to consider, as factors in aggravation, the nature of the offense and the extent of the harm to the victim.

¶ 2 On March 26, 2010, following a jury trial, defendant, Darrell W. Smith, was convicted of (1) home invasion (720 ILCS 5/12-11(a)(2) (West 2008)), a Class X felony (720 ILCS 5/12-11(c) (West 2008)); (2) attempt (aggravated criminal sexual assault) (720 ILCS 5/8-4(a), 12-3(a)(1), 12-14(a)(1) (West 2008)), a Class 1 felony (720 ILCS 5/8-4(c)(2) (West 2008)); and (3) two counts of aggravated criminal sexual assault (720 ILCS 5/12-3(a)(1), 12-14(a)(1)

(West 2008)), a Class X felony (720 ILCS 12-14(c)(1) (West 2008)). During the May 2010 sentencing hearing, the trial court merged the two aggravated-criminal-sexual-assault convictions for sentencing purposes. The court then sentenced defendant to (1) 30 years' imprisonment for the two counts of aggravated criminal sexual assault, (2) 15 years' imprisonment for the attempt (aggravated criminal sexual assault) conviction to run consecutive to the aggravated-criminal-sexual-assault sentence, and (3) 30 years' imprisonment for the home-invasion conviction to run consecutive to the aggravated-criminal-sexual-assault sentence and concurrent with the attempt (aggravated criminal sexual assault) sentence. The court noted the total time spent in the Illinois Department of Corrections for all convictions was 60 years' imprisonment and ordered defendant be given credit for 279 days previously served.

¶ 3 Defendant appeals, arguing (1) he received ineffective assistance of counsel during trial because his attorney failed to object to certain hearsay statements offered to corroborate T.G.'s testimony, and (2) the trial court improperly considered his forced entry into T.G.'s home and T.G.'s psychological and emotional trauma resulting from the assault as aggravating factors in sentencing. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On July 28, 2009, the State charged defendant in a four-count information with (1) two counts of aggravated criminal sexual assault (720 ILCS 5/12-3(a)(1), 12-14(a)(1) (West 2008)), a Class X felony (720 ILCS 12-14(c)(1) (West 2008)); (2) attempt (aggravated criminal sexual assault) (720 ILCS 5/8-4(a), 5/12-3(a)(1), 12-14(a)(1) (West 2008)), a Class 1 felony (720 ILCS5/8-4(c)(2) (West 2008)); and (3) home invasion (720 ILCS 5/12-11(a)(2) (West 2008)), a Class X felony (720 ILCS 5/12-11(c) (West 2008)).

¶ 6 Testimony at the March 2010 jury trial showed, in pertinent parts, the following. In the early morning hours of July 28, 2009, 13-year old T.G. was sleeping on the couch in her home in Urbana, Illinois. She was home alone because her mother was working the night shift at McDonald's. At some point, T.G. woke up because she had to use the bathroom. As she was walking to the bathroom, she noticed someone standing on the front porch of the house directly in front of the door. After spotting the person by the door, she yelled, "whoever's outside, I'm going to call the cops." The person responded, "no, this is OG." T.G. testified O.G. was a friend of her mother's, he had previously been to their house approximately seven or eight times, and she recognized his voice. She identified defendant in court as O.G.

¶ 7 After identifying himself to T.G., defendant said he was at the house because he had money for her mother. According to T.G., she slightly opened the door to see if her mother was with him. Once she saw her mother was not on the porch, she attempted to shut the door. However, defendant began pushing the door open and was able to force himself into the home. Defendant then put his hands around the base of T.G.'s throat and started choking her. T.G. testified he was choking her so hard she almost lost consciousness. As defendant continued choking her, he forced her over to the couch until she fell. While she was laying on the couch, he continued choking her for approximately three to four minutes.

¶ 8 Defendant then picked T.G. up by her neck and forced her to move to the smaller couch. After he forced her to the smaller couch, he began removing her clothing. As he was removing her clothing, he threatened to stab her with his knife if she cried out. T.G. testified she did not see a knife, but she was too scared to make any noise. Although she was struggling, defendant managed to remove her shirt, shorts, and underwear. T.G. testified her struggling

consisted of her moving around, but it was not successful and not much of a contest. After defendant successfully removed her clothing, he climbed on top of her and attempted to fully insert himself into her vagina for approximately 30 to 40 minutes. According to T.G., his attempts were unsuccessful because she was struggling and moving around. She testified she asked him to stop, but he did not listen. He eventually gave up, but he continued to hold her arms down by her waist. Although T.G. was able to get off the couch, she was unable to move any further.

¶ 9 Defendant then pushed her chest into the arm of the couch and inserted his fingers into her vagina. T.G. testified this lasted approximately three to four minutes. She further testified she was really scared, and she attempted to move out of his reach but was unsuccessful. Defendant eventually ran out the front door, but before he left, he threatened to come back "and stick his dick" in her if she told anyone. Additionally, she testified, "He said that 'if I told anybody, he had the whole house wired and that he would kill me and my mom, if anybody figured out.' "

¶ 10 Shortly thereafter, T.G. locked the front door, dressed in the same clothes defendant had removed, and ran toward the back door in case defendant returned. Approximately 5 to 10 minutes after defendant left, she noticed a vehicle pull up to the house. Afraid defendant had returned, she stayed by the back door in case she needed to quickly leave the house. The driver of the vehicle was not defendant and was instead dropping off her mother from work. T.G.'s mother opened a window next to the front door and started yelling T.G.'s name because the door was locked. T.G. opened the door and let her mother inside.

¶ 11 T.G. testified her mother immediately asked her what was wrong because she

acted scared and was crying. T.G. did not tell her mother what had happened until her mother started begging. Her mother called the police, and the officers arrived shortly thereafter. T.G. told the officers about the assault and identified O.G. as the assailant.

¶ 12 T.G. further testified one of the officers gave her a ride to the hospital. She testified her neck was scratched from defendant's nails, and the State introduced photographs of her neck which showed the scratch.

¶ 13 Although T.G. was given a sexual-assault examination by a nurse at the hospital, she did not remember telling the nurse what had happened.

¶ 14 On cross-examination, T.G. testified she was also interviewed by an officer at the Child Advocacy Center. She testified she did not remember telling the police officers she was awakened by someone knocking at the front door. She further testified O.G. usually visited the house with her mother's boyfriend, Mississippi. However, on the afternoon prior to this incident, O.G. was at the house visiting her mother without Mississippi and was in her mother's bedroom for approximately two to three hours.

¶ 15 She testified she did not remember telling the police officers she removed her own clothing when defendant ordered her to take them off, nor did she remember telling the officers defendant removed his clothing before attempting to fully insert himself into her for approximately 10 to 15 minutes. She further testified the blankets and stuffed animals shown by the State's photographs to be on the floor by the big couch were not on the floor when the incident occurred. Instead, the blankets were in her mother's room, but after they returned home from the hospital, her mother put them on the floor, and they laid down together.

¶ 16 Lisa Nagele, a sexual-assault nurse examiner at Carle Hospital, testified as

follows. Nagele was the sexual-assault nurse examiner on duty at the Carle emergency department on the morning of July 28, 2009. At approximately 5:25 a.m., Nagele performed a sexual-assault exam on T.G. using a sexual-assault evidence collection kit from the Illinois State Police crime laboratory. During the course of the exam, Nagele collected deoxyribonucleic-acid (DNA) evidence from T.G.'s body using a vaginal swab. Nagele testified T.G. was cooperative during the exam, but she was tearful and appeared scared and anxious. Nagele took an oral history from T.G. as part of the exam, and T.G. stated a man entered her house, choked her, dragged her to a couch, forced her to undress, and attempted to penetrate her. T.G. said he was unable to penetrate her with his penis, but he was able to put his finger in her vagina. Further, T.G. said the man threatened to kill her if she screamed.

¶ 17 On cross-examination, Nagele admitted T.G. said the man ordered her to take off her clothing, and she complied. Additionally, she testified T.G. told her the man attempted to penetrate her for approximately 10 to 15 minutes before he gave up and instead used his finger. T.G. never mentioned the man had a knife.

¶ 18 Jonathon Thompson, who was working with T.G.'s mother at McDonald's on the night in question, testified as follows. While he was working the drive-through, a gentleman drove up to the second drive-through window without ordering any food and asked for Angela Jackson, T.G.'s mother. Thompson identified defendant as the man in the drive-through. Because defendant gave him "an eerie feeling," Thompson told defendant Jackson was not at work. After a brief pause, defendant drove off. Shortly after 4 a.m., Thompson gave Jackson a ride home.

¶ 19 Angela Jackson identified defendant as O.G. and testified he was a friend of her

former boyfriend, Herbert Jones. Sometime during the morning of July 27, 2009, defendant and Jones visited her at home, and they went into her bedroom because she did not feel comfortable with defendant being around her daughter. After approximately three to four hours of hanging out in her bedroom, the three left the house and went to Rantoul. After they returned from Rantoul, defendant dropped Jackson off at McDonald's to work the 8 p.m. to 4 a.m. shift.

¶ 20 When Jackson arrived home after work, she noticed the house was very dark. Because the front door was locked, she stuck her hand through a window to unlock the door. She opened the door and noticed T.G. running toward her from the back of the house. Jackson testified T.G. appeared paranoid, and she had scratches "under her neck." She repeatedly asked T.G. what was wrong, but T.G. remained silent. T.G. eventually told her the following. O.G. had forcefully entered the house and shoved her toward the couch. He started choking her and threatening to "kill her and stab her" if she said anything. He forced her to another couch and attempted to "stick his penis inside of her." However, he "couldn't get it up." He continued choking her even though she repeatedly asked him to quit. At this point, Jackson was very upset and called the police.

¶ 21 Jackson testified T.G. did not tell her about defendant penetrating her with his finger until they were at the hospital. She further testified T.G. was wearing shorts borrowed from her the night T.G. was attacked by defendant. During the course of the investigation, semen was discovered on the shorts, and Jackson explained she was wearing the shorts when she had sex with Jones.

¶ 22 On cross-examination, Jackson testified in the afternoon prior to the incident, she went with defendant and Jones to Rantoul for approximately one hour to visit a friend of

defendant's and Jones'. After they left the friend's house, they drove back to Urbana and went to a bowling alley to play pool for the rest of the afternoon. At approximately 6:30 p.m., they went back to Jackson's house, and shortly thereafter, defendant and Jones gave her a ride to work.

¶ 23 Jackson testified she normally unlocked her front door by reaching through the window and unlocking the door herself. The night in question was no exception. She further testified she did not tell T.G. to unlock the door for her, and T.G. was in the back room when she reached through the window to unlock the door. Additionally, she testified she never hung out in her bedroom for three to four hours alone with O.G. on July 27.

¶ 24 Amanda Humke, a biologist and DNA analyst with the Illinois State Police, testified she examined (1) cuttings from the borrowed shorts and (2) the vaginal swabs taken from T.G. for the presence of semen. She found semen on the shorts, but the test results from the vaginal swabs indicated no presence of semen.

¶ 25 Kelly Biggs, a forensic scientist with the Illinois State Police, testified she tested the vaginal swabs from the sexual-assault kit for the presence of male DNA. However, because the vaginal swabs had an overwhelming amount of female DNA present, she was unable to test for male DNA in the usual fashion. Accordingly, her tests could only target the "Y chromosome." She also tested a buccal standard collection kit from defendant and developed a DNA profile to be used as a comparison on any DNA found on the vaginal swabs. When she compared defendant's DNA profile with the male DNA profile obtained from the borrowed shorts, defendant was excluded as the source of the DNA identified on the shorts. However, when she compared defendant's DNA profile with the male DNA profile located on the vaginal swabs, she found defendant could not be excluded from contributing to the DNA profile on the

swabs. According to Biggs, the developed profile could be expected to occur in approximately 1 in 1,400 African-American males, 1 in 1,700 Caucasian males, and 1 in 970 Hispanic males. Unlike some DNA tests, the test for the "Y chromosome" cannot identify a person as the source of the particular DNA.

¶ 26 Biggs also tested the two swabs collected from T.G.'s neck. Because she was only able to detect a small amount of male DNA on the swabs of the neck, she was unable to exclude any males from the DNA profile.

¶ 27 Duane Smith, an investigator with the Urbana police department, testified he was involved in the sexual-assault investigation. During the course of his investigation, he had an opportunity to speak with both T.G. and her mother. His investigation also involved identifying and finding the man called O.G. During his testimony, he identified defendant as O.G.

¶ 28 Smith located defendant in the cardiac ward of Covenant Hospital the day after the incident and had a conversation with him about the sexual-assault allegations. Defendant initially indicated he had never met T.G. or her mother. Eventually, defendant admitted going to McDonald's on the night in question and asking an employee whether "Star" was working. He then admitted he referred to Jackson as "Star," but he maintained he had never been to Jackson's house. Defendant became very upset when Smith expressed his skepticism to defendant's repeated denials, and Smith left the room. Smith's conversation with defendant lasted approximately 30 minutes, but defendant was not willing to answer any questions about where he was at the time of the sexual assault. Smith arrested defendant later the same day.

¶ 29 On cross-examination, Smith testified he spoke with T.G. about the incident, and she indicated she was awakened by someone knocking on the front door. She also stated

defendant ordered her to take off her clothing, and she removed her clothing herself.

¶ 30 Tim McNaught, an investigator with the Urbana police department, testified he was present when Smith interviewed defendant at the hospital. After Smith left the hospital room, McNaught continued to question defendant regarding his whereabouts in the early morning hours of July 28. Eventually, defendant said he was "out in the country near Rantoul" installing a stereo system and had remained there until returning to Champaign around 2:30 a.m. or 2:45 a.m. After returning to Champaign, he went to a gas station to purchase cigarettes and then spent the rest of the night at Jones's residence.

¶ 31 After hearing all of the evidence, the jury found defendant guilty of (1) home invasion, (2) attempt (aggravated criminal sexual assault), and (3) two counts of aggravated criminal sexual assault. Thereafter, in May 2010, the trial court sentenced defendant to a total of 60 years in prison in the Illinois Department of Corrections for all four convictions. Specifically, the court merged the two aggravated-criminal-sexual-assault convictions for sentencing purposes and sentenced defendant to 30 years' imprisonment on those two counts. Additionally, the court sentenced defendant to 15 years' imprisonment for the attempt (aggravated criminal sexual assault) conviction to run consecutive to the aggravated-criminal-sexual-assault sentence and 30 years' imprisonment for the home-invasion conviction to run consecutive to the aggravated-criminal-sexual-assault sentence and concurrent with the attempt (aggravated criminal sexual assault) sentence. Further, the court ordered defendant be given credit for 279 days previously served.

¶ 32 On May 3, 2010, defendant filed a motion to reconsider sentence, or, in the alternative, for a new sentencing hearing, arguing his sentence was excessive because (1) the

trial court failed to give sufficient weight to the fact his prior convictions were "well over 14 years" prior to the present offense, and his most recent conviction was for a nonviolent offense, (2) the court failed to appropriately consider defendant's medical condition when determining the sentence, (3) the evidence was insufficient to show defendant could not be rehabilitated, and (4) the court failed to determine defendant's penalty according to the seriousness of his offense and with the objective of restoring him to useful citizenship (See Ill. Const. 1970, art I, §11). Thereafter, the court denied defendant's motion.

¶ 33 This appeal followed.

¶ 34 II. ANALYSIS

¶ 35 On appeal, defendant argues (1) he received ineffective assistance of counsel during trial because his attorney failed to object to certain hearsay statements offered to corroborate T.G.'s testimony, and (2) the trial court improperly considered, as aggravating factors in sentencing, his forced entry into T.G.'s home and any psychological and emotional trauma to T.G. resulting from the assault.

¶ 36 A. Hearsay and Ineffective Assistance of Counsel

Defendant argues hearsay testimony revealing the contents of defendant's statements made to T.G. and the details of the incident in question through testimony of T.G.'s mother, Nagele, and the police officers was improperly presented by the State at trial. Defendant argues trial counsel's failure to object to the hearsay testimony constituted ineffective assistance of counsel. The State argues trial counsel's failure to object to the challenged testimony was a matter of trial strategy and did not result in deficient performance by counsel. Further, the State argues defendant was not prejudiced by counsel's failure to object because the jury would have

reached the same verdict without the admission of the challenged testimony.

¶ 37 Ineffective-assistance-of-counsel claims are evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S .Ct. 2052 (1984), and adopted by the Supreme Court of Illinois in *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance was deficient in that it "fell below an objective standard of reasonableness" and (2) this "substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Graham*, 206 Ill. 2d 465, 476, 795 N.E.2d 231, 238 (2003).

¶ 38 1. *Counsel's Performance*

¶ 39 In order for a defendant to show counsel's performance was deficient, defendant must overcome a strong presumption "that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Coleman*, 183 Ill. 2d 366, 397, 701 N.E.2d 1063, 1079 (1998). Decisions regarding whether to make an objection at trial are matters of trial strategy, and reviewing courts are highly deferential to trial counsel on matters of trial strategy. *People v. Perry*, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 216 (2007).

¶ 40 In *Graham*, 206 Ill. 2d at 477-79, 795 N.E.2d at 239-240, our supreme court rejected a defendant's claim of ineffective assistance of counsel based on counsel's failure to object to the admission of a witness's prior consistent statement. According to the supreme court, defense counsel's decision not to object to the inadmissible testimony was a "strategic choice" because the testimony supported the defense's theory of the case. *Graham*, 206 Ill. 2d at 479, 795 N.E.2d at 240. Additionally, the court noted defense counsel invited or acquiesced in

the admission of the improper evidence by eliciting similar testimony from the witness on cross-examination in a successful effort to impeach him. *Graham*, 206 Ill. 2d at 479, 795 N.E.2d at 240. According to the court, a defendant who invites or acquiesces in the admission of improper evidence cannot subsequently complain about the admission of the evidence. *Graham*, 206 Ill. 2d at 479, 795 N.E.2d at 240.

¶ 41 Here, defendant argues his trial counsel was ineffective for his failure to object to the following hearsay testimony: (1) testimony from T.G.'s mother regarding statements made by T.G. revealing details of the offense and the name of the perpetrator; (2) testimony from Nagele regarding statements made by T.G. revealing details of the offense; and (3) testimony from Smith regarding T.G.'s statement to him where she identified defendant as the person who assaulted her. Defendant argues these statements are inadmissible as hearsay not falling within any applicable exception.

¶ 42 We need not consider whether these statements constituted inadmissible hearsay because we find the record reveals defense counsel's failure to object to this testimony was a "strategic choice." Throughout the proceedings, defense counsel either elicited testimony or relied on the hearsay statements to point out the inconsistencies in T.G.'s version of events. Specifically, during closing arguments, defense counsel stated as follows regarding the inconsistencies in her testimony:

> "[T.G.] and [Jackson], saying they were inconsistent in what they said is mild. Because there was a lot of things that were inconsistent.
>
> * * *

We're asking [T.G.] about when she gets up and how she knows somebody is there. [']Well, I get up to go pee and I see somebody in the window.['] Well, that's kind of a neat trick, considering, when you have the pictures of the scene that were taken that morning and later that morning, *** there are curtains covering those windows. She told you that the porch light was broken and didn't work. *** So, it's a neat trick that she can see through a curtain with her x-ray [*sic*] vision, and see this man standing out beside this window when there's no light to illuminate him. She tells the police that she woke up to somebody knocking on the door.

* * *

Then she's talking about his clothes. She tells us that he took her clothes off. She tells the police that he ordered her to take her clothes off and she did.

* * *

She says there was a knife but she never saw it. She made several claims that he threatened her with a knife. But she changed the way she said it. Because at first he just [']threatened to kill her.['] And then later, when I was talking to her, it was, [']well, he was going to shank her.['] Well, okay, well, [']shank[', what do you mean by that? Well, [']I mean stab.['] Then later it was, well,

> [']he had the whole house wired and he was going to shank me or stab me.['] *** She never tells the nurse, just maybe an hour after this all happened they take her for that exam–never tells the nurse anything about a knife. Never mentions it to her. There's absolutely no proof whatsoever that there was a knife or she ever thought there was."

In summation, defense counsel referred to T.G. as being "absolutely inconsistent in what she says happened."

¶ 43 Like *Graham*, this case involved a defense attorney who used the majority of the challenged testimony to point out the inconsistencies in T.G.'s story. Consequently, if counsel objected to this testimony as hearsay, she would have been unable to pursue her strategy of attacking the victim's credibility. Because counsel's failure to raise any hearsay objections to these statements was a matter of strategy, we cannot find counsel's performance was deficient under the first prong of the *Strickland* standard. Further, the fact counsel invited or acquiesced in the admission of this evidence prohibits any subsequent complaints about the admission of this particular evidence at trial. See *Graham*, 206 Ill. 2d at 479, 795 N.E.2d at 240 (a defendant who invites or acquiesces to the admission of improper evidence cannot later complain about the admission of the evidence).

¶ 44 Defendant argues "[t]here could be no strategy beneficial to [defendant] that involved permitting the [S]tate to introduce inadmissible hearsay to corroborate T.G.'s testimony that [defendant] forced his way into her home, sexually assaulted her, and threatened to kill her." Further, defendant argues if such a strategy was used, "it cannot be considered *** reasonable."

Defendant points to *People v. Fillyaw*, 409 Ill. App. 3d 302, 948 N.E.2d 1116 (2011), to support his argument. In *Fillyaw*, 409 Ill. App. 3d at 315, 948 N.E.2d at 1130, the Second District determined counsel's performance was deficient under the first prong of the *Strickland* standard because "counsel's apparent unfamiliarity with the law and failure to object on the proper grounds to the improper admission of [the witness's] statement was unprofessional." This conclusion was reached because counsel attempted to object to certain statements made by a witness but was unable to formulate the correct grounds for the objection. *Fillyaw*, 409 Ill. App. 3d at 314, 948 N.E.2d at 1129.

¶ 45 The present case is distinguishable from *Fillyaw* because the record shows defense counsel used the challenged statements to focus the jury on the inconsistencies in T.G.'s story. The State raised the fact the statements were hearsay prior to trial but argued each statement fell within the following hearsay exceptions: (1) T.G.'s statements to her mother fell within the excited-utterance exception to the hearsay rule; and (2) T.G.'s statements to Nagele fell within the statements-to-medical-personnel exception. Although defense counsel did not raise any objection (nor was she required to at this time), she was aware the State would attempt to admit these statements into evidence under one of the hearsay exceptions. Therefore, this supports our conclusion defense counsel made a conscious decision to raise no objection to the introduction of these hearsay statements into evidence as part of her trial strategy.

¶ 46 2. *Prejudice*

¶ 47 Next, defendant argues counsel's failure to object was prejudicial because the hearsay statements corroborated T.G.'s testimony, and T.G.'s trial testimony was significantly impeached. As support for this argument, defendant identified the following instances of

inconsistencies in T.G.'s trial testimony: (1) T.G. testified her mother was alone with defendant at the house on the day in question, but T.G.'s mother testified Jones was also present at the house, and she was never alone with defendant in her bedroom; (2) T.G. testified defendant removed her clothing, but Smith testified T.G. stated defendant ordered her to take off her clothing and she complied; (3) T.G. testified she unlocked the door for her mother, but her mother testified she stuck her hand through the window and unlocked the door herself; and (4) T.G. testified her mother placed the blankets and stuffed animals on the floor after they returned home from the hospital, but the pictures of the living room taken by the police immediately after the assault showed the blankets and stuffed animals were already on the floor.

¶ 48 According to defendant, the State relied on the challenged statements to bolster T.G.'s testimony and remark on the fact her testimony was substantially consistent with what she reported to the nurse, her mother, and the police officers. Defendant argues, absent those hearsay statements, a reasonable probability exists the jury would have acquitted defendant because of the inconsistencies in T.G.'s testimony.

¶ 49 As previously explained, to establish ineffective assistance of counsel, a defendant must demonstrate "that, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different." *Fillyaw*, 409 Ill. App. 3d at 312, 948 N.E.2d at 1127. In other words, defendant must show he was prejudiced by the deficient performance in "that it was plausible that the result of the trial would have been different absent counsel's errors." *Id.*

¶ 50 Assuming, for argument's sake, counsel's performance was deficient, we find the result of defendant's trial would not have been different. Removing the hearsay statements from

consideration, a significant amount of admissible nonhearsay evidence against defendant was presented to the jury. The nonhearsay testimony revealed the following. Defendant forced himself into T.G.'s home, choked her, and forced her to lay on the couch. While she struggled, he removed the majority of her clothing and attempted to fully insert himself in her vagina. Defendant threatened her with a knife if she made a sound. Because he was unsuccessful in his attempt to fully insert himself in her, he instead inserted his finger into her vagina. Earlier in the evening, defendant entered the drive-through at McDonald's and asked for Jackson. However, defendant was told Jackson was not working because he was acting suspicious. When questioned by police, defendant initially denied knowing Jackson and T.G. After repeated denials, he finally admitted going to McDonald's and asking for Jackson. However, he insisted he had never been to their house. The DNA evidence placed defendant in a category of 1 in 1,400 African-American males whose DNA could not be excluded from the DNA profile found on the vaginal swabs.

¶ 51 From a review of the nonhearsay evidence presented to the jury, we conclude no reasonable probability existed that defendant would have been acquitted if his counsel had objected to the introduction of the hearsay evidence at trial. Defendant has failed to show he was prejudiced by his counsel's failure to object. Because defendant has failed to demonstrate his counsel's performance was deficient, and he was prejudiced by counsel's deficient performance, we reject defendant's claim his counsel was ineffective.

¶ 52 B. Aggravating-Factors at Sentencing

¶ 53 Defendant argues the trial court erred in sentencing him by considering factors in aggravation that were elements of the charged offenses. Initially, we note defendant did not

raise this argument in his motion to reconsider sentence, or, in the alternative, for a new sentencing hearing. Instead, defendant argued his sentence was excessive because (1) the trial court failed to give sufficient weight to the fact the majority of his convictions were "well over 14 years prior" to this offense, and his most recent conviction was for a nonviolent offense; (2) the court failed to give sufficient weight to defendant's serious medical condition; (3) no evidence showed defendant could not be rehabilitated; and (4) the court failed to determine defendant's penalty according to the seriousness of his offense and with the objective of restoring him to useful citizenship (See Ill. Const. 1970, art I, §11).

¶ 54 We note neither defendant nor the State addressed the issue of forfeiture on appeal. "Nevertheless, forfeited arguments related to sentencing issues may properly be reviewed for plain error." *People v. Freeman*, 404 Ill. App. 3d 978, 994, 936 N.E.2d 1110, 1124 (2010). The plain-error doctrine permits a reviewing court to consider unpreserved error in the following instances: (1) the evidence presented at the sentencing hearing was closely balanced, or (2) the error was so serious as to deny the defendant a fair sentencing hearing. *Freeman*, 404 Ill. App. 3d at 994, 936 N.E.2d at 1124. Under both prongs, the defendant bears the burden of persuasion. *Id.* Because defendant failed to address the forfeiture issue on appeal, he has not argued the applicability of either prong of the plain-error analysis. Therefore, he has not met this burden of persuasion under the plain-error doctrine and, therefore, he has forfeited plain-error review. See *Freeman*, 404 Ill. App. 3d at 994, 936 N.E.2d at 1124-25 (the First District determined the defendant forfeited plain-error review because he failed to "recognize his forfeiture on [a particular] issue" and did not make any argument under either prong of the plain-error doctrine).

¶ 55 However, the rules of forfeiture may be relaxed and "an issue substantively reviewed where the basis for the objection is the conduct of the trial judge." (Internal quotation marks omitted.) *Freeman*, 404 Ill. App. 3d at 995, 936 N.E.2d at 1125. Forfeiture rules may be relaxed in the following "extraordinary circumstances": (1) any objection to the trial court's inappropriate comments to the jury could result in alienating the jury; (2) objection to the court's conduct outside the presence of the jury "would have fallen on deaf ears"; or (3) the court relies on social commentary, rather than evidence, in sentencing the defendant to death. (Internal quotation marks omitted.) *Freeman*, 404 Ill. App. 3d at 995, 936 N.E.2d at 1125.

¶ 56 In *Freeman*, the First District determined only the second exception arguably applied to the defendant's double-enhancement argument. *Id.* The court determined the second exception might apply because the supreme court previously concluded counsel was not required to interrupt a sentencing judge to point out the judge was considering improper factors in aggravation. *Id.* (citing *People v. Saldivar*, 113 Ill. 2d 256, 266, 497 N.E.2d 1138, 1142 (1986)). However, the court noted the supreme court, in *People v. McLaurin*, 235 Ill. 2d 478, 487 n. 1, 922 N.E.2d 344, 350 n. 1 (2009), suggested the defendant must "specifically invoke" the exception in order to take advantage of the relaxation of the forfeiture rules, an argument the defendant failed to make. *Id.* Nevertheless, the court conducted a "substantive review of the merits of [the] defendant's argument as though the error [was] properly preserved" in the interest of completeness. *Id.*

¶ 57 Like *Freeman*, we will also conduct a substantive review of the merits of defendant's sentencing argument as though the error was properly preserved. Defendant contends the trial court erred by improperly considering T.G.'s psychological and emotional

trauma resulting from the sexual assault as an aggravating factor in imposing his 60-year sentence. Defendant argues the court's repeated reference to the psychological and emotional trauma caused by the offense was improper because physical harm (which includes psychological harm) is an element of the offense of home invasion. Further, defendant argues the court erred by improperly considering the crime occurred in T.G.'s residence, which is an element in the crime of home invasion, as an aggravating factor in imposing defendant's sentence.

¶ 58 A person commits the offense of home invasion under section 12-11(a)(2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-11(a)(2) (West 2008)) when he, not being a police officer acting in the line of duty, does the following:

> "without authority, *** knowingly enters the dwelling place of another when he *** knows or has reason to know that one or more persons is present *** and intentionally causes any injury *** to any person or persons within such dwelling place."

The term "injury" includes a physical injury *and* psychological injury or harm resulting from the physical contact. *People v. Hudson*, 228 Ill. 2d 181, 195, 886 N.E.2d 964, 973 (2008).

¶ 59 Further, a person commits an aggravated criminal sexual assault under section 12-14(a)(1) of the Criminal Code (720 ILCS 5/12-14(a)(1) (West 2008)) when he commits criminal sexual assault and displays, threatens to use, or uses a dangerous weapon. Under section 12-13(a)(1) of the Criminal Code (720 ILCS 5/12-13(a)(1) (West 2008)), a person commits criminal sexual assault when he commits an act of sexual penetration by the use of force or threat of force.

¶ 60 Generally, "conduct which is an essential element of an offense cannot be used to

enhance the punishment for that offense." *People v. Gramo*, 251 Ill. App. 3d 958, 970-71, 623 N.E.2d 926, 935 (1993). However, this rule is not meant to be applied rigidly because public policy dictates a sentence be varied in accordance with the circumstances of the offense. *People v. Cain*, 221 Ill. App. 3d 574, 575, 582 N.E.2d 189, 190 (1991). Therefore, "the degree of harm to a victim may be considered as an aggravating factor, even if that factor is arguably implicit in the offense." *Id.* Additionally, the trial court may also consider the psychological harm to the victim as a factor in aggravation. *Id.* Further, the court may consider the nature and circumstances of the offense when fashioning an appropriate sentence. *Gramo*, 251 Ill. App. 3d at 971, 623 N.E.2d at 935.

¶ 61 In *Gramo*, 251 Ill. App. 3d at 971, 623 N.E.2d at 935, the defendant argued the trial court erred when it referenced the defendant's entry into the homes and bedrooms of the victims during his sentencing on his residential-burglary conviction. This court determined the trial court did not err and was "merely describing the nature of the offenses [the] defendant committed and the seriousness with which the legislature, the courts, and society view them." *Gramo*, 251 Ill. App. 3d at 971, 623 N.E.2d at 935.

¶ 62 During the May 2010 sentencing hearing in the present case, the trial court stated as follows:

> "I have considered the presentence report. I've considered all relevant statutory factors including, but not limited to, the nature and circumstances of the offense, the evidence and applicable factors in aggravation and mitigation, the character, history, and rehabilitative potential of the [d]efendant, and the arguments

and recommendations of counsel.

Mr. Smith [defendant], who also goes by Mr. Davis, is 50 years of age. He is no stranger to the criminal justice system. He launched what turned out to be a significant criminal career almost 24 years ago in May of 1986, with a vehicle theft from California. His record spans two states and includes two misdemeanors and five felony convictions, in addition to the offenses he now stands convicted of.

Now, these convictions include attempted murder, battery, carjacking, and two forms of what appears to be the equivalent of felony domestic violence in the State of California, with injury. It is a multitude of violent offenses.

He's received a community-based sentence three times. With two of those, he committed new offenses while he was serving the community-based sentence.

He's been in prison four times prior to this date.

He reports a childhood that exposed him to verbal and occasionally physical abuse and reports that he was residing with his aunt and his uncle who appeared to have been more supportive of him.

He also reports that he fathered five children with five different women, all without benefit of wedlock or child support.

He has not had much of a role in any of their lives and does not have much contact with any of his children. There's certainly no dependents nor any hardship to any of his children by his incarceration.

His last employment was in 2008. He describes by his own report that he has multiple health problems and five heart attacks that he has suffered from, with the intervention of stents.

I'm constrained to note that did not stop him from physically forcing himself on a 13 year old as she struggled or successfully wrestling with her and molesting her. So, certainly, he has not been at all impaired in his physical abilities by what he describes as his heart attacks.

There are very little factors, if any, in mitigation that would mitigate the sentence to be imposed. There's no circumstances that explain this conduct. No suggestion of any substance abuse issues that came into play. And there is certainly significant aggravation to be derived from the nature and circumstances of the offense.

Particularly troubling, given the age of the child, she was 13, and he was 37 years older, 36 or 37 years when he committed this offense. That's definitely a factor in aggravation identified by the legislature, and particularly aggravated by the span or the continuum between their ages is quite exceptional.

He did find this child home alone, forced his way into the house, and then forced himself upon her while the victim told him to leave. He choked her, strangled her until she almost blacked out, dragged her to a couch, pushed her onto the couch, removed all her clothing while he continued to strangle her and then attempted repeatedly to rape her. Due to her heroic efforts to wiggle away and struggle and prevent him from fully inserting himself, she was able to stave that off. And by her description then, he used his finger to penetrate her inside, ignoring her pleas to stop, threatening to stab her with a knife if she yelled for help, and threatening to kill her and her mother if this was reported.

What this child endured that night is absolutely beyond words. He terrified her and terrorized her in her own home, and he molested her.

The injuries he inflicted were significant. There's the potential for the physical injuries and the actual injuries from being choked to the point where she almost blacked out. He exposed her to the possibility of sexually transmitted diseases and the risk of pregnancy because of his irresponsible actions. And all of that almost pales in comparison to the terror that she endured that night of the emotional scars that she will live with, certainly exceed what's inherent in the charge itself.

Here's a child who had every right to be safe and secure in her *** own living room *** where she was sleeping up until just before this happened. Certainly, in her own home. And the [d]efendant's actions have stolen that sense of peace and security from her. Forever, her life will be altered.

What puts this in perspective is one of the photographs that the State introduced into evidence, and that was the picture of the blanket with the teddy bear on the ground in the living room that *** her mother had described as where they laid down and she comforted her daughter after this happened. That shows you that here's a child deriving comfort from a stuffed teddy bear after being molested by the [d]efendant.

His acts were further exacerbated by the fact that he lied to the police, denied that he even knew the victim or her mother, ultimately acknowledged that he knew her by a different name, and denied ever having been in her house, which was contradicted by all of the evidence introduced at trial.

The Court believes that [defendant] has absolutely no remorse for what he did. He's a violent opportunist and a predator with no remorse or caring for the fact that he has inflicted this harm on a 13 year old innocent child and forever changed her course of life and her sense of well-being.

He's accepted no responsibility for what he's done. He has not acknowledged any empathy for what he inflicted on the victim, and that certainly makes deterrence a compelling factor, both for this [d]efendant and for others. The Court has a responsibility to make clear that children have an absolute right to be kept safe in their own home, free from the perversions and violence of criminals, like [defendant], and from sexual predators.

What is also probably the most compelling factor is that this Court must consider the safety of the community and fashion a sentence that will protect our community from individuals who have no conscience, no caring, and are willing to do this to 13 year old children.

Given the lack of evidence in mitigation and the overwhelming aggravation here, a significant sentence is called for, and the Court has an intent to fashion a sentence that will protect society from this [d]efendant, insure that he has no further access to children or to innocent victims.

Accordingly, having regard to the nature and circumstances of the offense and to the history, character, and rehabilitative potential of the [d]efendant, which I find is virtually nil, I find that a significant period of imprisonment is absolutely necessary to protect the public."

Thereafter, the court sentenced defendant to a total of 60 years in prison in the Illinois Department of Corrections for all four convictions.

¶ 63 We note the trial court fashioned a sentence based on the following convictions: (1) aggravated criminal sexual assault, (2) attempt (aggravated criminal sexual assault), and (3) home invasion. During sentencing, the court referenced the fact defendant forced himself into this 13-year-old girl's home in the middle of the night and sexually assaulted her. The court then discussed the psychological and emotional trauma T.G. will experience from this assault. Like *Gramo*, we find the court was merely describing the serious nature of this offense. Further, even if the court considered, as a factor in aggravation, the psychological and emotional harm to T.G. as a result of the home invasion and sexual assault, the court may properly consider the degree of harm to the victim as an aggravating factor regardless of whether the harm is an element of the offense. Therefore, we find the court's references to defendant's forced entry into the home and the resulting psychological and emotional trauma were not improper in the least.

¶ 64 Further, we note by the nature of some acts, a defendant forfeits the right to walk among people in a civilized society. The trial court's sentence was appropriate under the evidence in this case.

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated, we affirm the trial court’s judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 67 Affirmed.