2023 IL App (5th) 220513-U

NO. 5-22-0513

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re ROBERT M., a Minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Macon County.
	)	
Petitioner-Appellee,	)	No. 20-JD-65
	)	
v.	)	
	)	
Robert M.,	)	Honorable
	)	James R. Coryell,
Respondent-Appellant).	)	Judge, presiding.

JUSTICE VAUGHAN delivered the judgment of the court.
Justices Cates and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to convict respondent of aggravated criminal sexual assault, and any error in proceeding to an evidentiary hearing immediately after appointing *Krankel* counsel was invited by *Krankel* counsel and harmless.

¶ 2 After the initial direct appeal in this case, the Illinois Supreme Court vacated the appellate court disposition and remanded for a *Krankel* hearing. Respondent, Robert M., now appeals, arguing the *Krankel* proceedings were conducted in error and the State failed to prove his guilt beyond a reasonable doubt. For the following reasons, we affirm.[1]

[1]This is an accelerated appeal under Illinois Supreme Court Rule 660A(f) (eff. July 1, 2018). Rule 660A(f) provides, "[e]xcept for good cause shown, the appellate court shall file its decision within 150 days after the filing of the notice of appeal." Ill. S. Ct. R. 660A(f) (eff. July 1, 2018). In this case, the 150-day period to issue a decision expired on January 7, 2023. However, due to separate motions by each party requesting, and receiving, extensions of time to file their briefs, the briefing was not completed until

¶ 3 I. BACKGROUND

¶ 4 On July 2, 2020, the State filed a petition to find respondent, then age 15, delinquent for committing two counts of aggravated criminal sexual assault in violation of section 11-1.30(b)(i) of the Criminal Code of 2012 (Code) (720 ILCS 5/11-1.30(b)(i) (West 2018)) (counts I and II) and two counts of aggravated criminal sexual abuse in violation of section 11-1.60(c)(2)(i) of the Code (*id.* § 11-1.60(c)(2)(i)) (counts III and IV). The petition alleged, on or about March 1, 2019, respondent placed his penis into S.W.'s anus (count I and II) and mouth (counts II and IV). Prior to trial, the trial court granted the State's motion to allow S.W.'s hearsay statements made to her mother, Octivia Frazier, on March 2, 2019, and Alison Elsea, a senior forensic interviewer at Child First, on March 13, 2019, pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2018)).

¶ 5 A bench trial began on March 19, 2021. The evidence showed that at the time of the offenses, respondent was 14 years old, and S.W. was 5 years old. On March 1, 2019, Frazier dropped off S.W. at the home of respondent's mother, Rennoria Hammock, because respondent's sister, Crishonna, was going to babysit S.W. and Frazier's other two children. Because Frazier drank that night, she stayed at Hammock's house with her children.

¶ 6 Sometime during the evening of March 2, 2019, after Frazier and her children returned home, Frazier noticed S.W. acting unusual. She asked S.W. if she was okay, to which S.W. said, "No." Frazier then asked S.W., "When you were at Rennoria Hammock's house yesterday, did anybody touch your private areas?" S.W. said, "Yes." Frazier indicated that she asks that question

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December 15, 2022. The case was then immediately set on the next available docket, which was January 12, 2023. Under these circumstances, we find good cause to issue our decision after the 150-day deadline.

whenever S.W. goes somewhere because Frazier was touched when she was little and did not trust boys in general. Frazier averred that S.W. never said yes to that question before.

¶ 7 S.W. then told Frazier that respondent touched her. S.W. further stated that when the other kids were asleep, respondent woke her up, instructed her to "come here," and took her to a dark room. S.W. stated that respondent told her to "open your mouth," put his "nuts" in her mouth, peed something white in her mouth, and asked, "did it feel good?" S.W. further told Frazier that respondent instructed her to pull her pants down and he rubbed his "nuts" between her vagina and butt. Frazier explained that S.W. uses "nuts" to refer to a "penis." Frazier also testified that she confirmed with S.W. that respondent was the one who touched her because Hammock had three sons; S.W. knew it was respondent by his hair and voice.

¶ 8 Frazier testified the police became involved on March 9, 2019. That day, Frazier provided the police with about 14 pairs of S.W.'s underwear. Frazier was not sure the exact pair S.W. wore on March 1, 2019, so she gave the police all the pairs of underwear in the dirty laundry that Frazier believed S.W. wore around March 1, 2019. Frazier stated that no one, including respondent's family, was in her home between March 1 through March 9 of 2019. After her interaction with the police, Frazier also took S.W. to complete a rape kit.

¶ 9 Svetlana Gershburg, Illinois State Police DNA forensic scientist, testified. Out of the 14 pairs of S.W.'s underwear, Gershburg observed one pair had brighter fluorescence than the others, which indicated to her that further testing should be conducted. Such testing resulted in "strong positive results" for seminal fluid. As such, Gershburg sent cuttings from the underwear for DNA testing, which revealed the DNA profiles of S.W. and another person. Gershburg testified respondent could not be excluded as the source of the other DNA profile. She further explained that the likelihood of a person matching the semen profile was 1 in 430,000 people. On cross-

examination, Gershburg disclosed that no DNA profiles were discovered from S.W.'s sexual assault kit.

¶ 10 Elsea also testified. She averred that she conducted an interview of S.W. On March 13, 2019. The court admitted the recorded interview and the diagram of a body used in the interview, without objection.

¶ 11 The video-taped interview revealed that S.W. knew she went to Elsea to talk about respondent. S.W. told Elsea she was at "Dinky's" when respondent pulled his pants down, put his nuts in her mouth, and peed in it. Hammock is sometimes referred to as "Dinky." When asked what happened after that, S.W. replied, "That's it." Initially, S.W. stated that Hammock was not in the house at the time of the assault, but later stated Hammock was sleeping. S.W. also originally stated that her brother was in the room watching TV with her and respondent was looking out of the window when the assault occurred. However, at the end of the interview, S.W. clarified that her brother was watching TV in the backroom when the assault occurred, and she and respondent were in the dining room. When Elsea indicated that she wanted to know when respondent put his nuts in S.W.'s mouth, S.W. stated, "he did it last night." Later in the interview, S.W. told Elsea that respondent peed in her mouth three times.

¶ 12 Elsea asked S.W. if respondent peed anywhere else, and S.W. responded that respondent put his nuts in her butt, and it felt like he peed on her butt. At first, S.W. indicated that respondent put his nuts in her butt at Hammock's house, but shortly after indicated that this incident occurred at "Baydu's house." According to S.W., Baydu lives by Hammock. In response to Elsea's questions, S.W. clarified that respondent put his nuts in her butt at both Hammock's and Baydu's. Later in the interview, S.W. explained how her and respondent's bodies were positioned for the separate assaults at the two houses.

¶ 13 Elsea again asked if respondent touched anywhere else, and S.W. answered in the negative and further stated "he didn't touch my vagina." When asked if anyone else ever touched her, S.W. stated only respondent touched her. S.W. specified that Latrell—respondent's brother—did not touch her.

¶ 14 During Elsea's testimony, the court also took judicial notice of the section 115-10 hearing, in which the court allowed the State to present hearsay statements made by S.W. The testimonies from Frazier and Elsea at the section 115-10 hearing were substantially the same as that at trial. However, Frazier additionally testified at the section 115-10 hearing that S.W. knew the difference between respondent and his two brothers. Elsea averred that truth and lie discussions were not part of Child First's protocol; however, sometimes she will ask the child if they could tell her the truth or things that are real before beginning. Elsea did not believe S.W. said anything to doubt the truthfulness of S.W.'s statement but admitted she was not trained in detecting a lie.

¶ 15 S.W. testified at trial. When asked "do you know what it means to tell the truth," S.W. answered affirmatively. S.W. also indicated she understood the importance of telling the truth. S.W. stated that she told Frazier that respondent raped her, and she told Frazier the truth. S.W. also testified that she told Elsea that respondent peed in her mouth. Defense counsel did not cross-examine S.W., and the State rested.

¶ 16 Hammock testified on behalf of the defense. She stated that she arrived at her house around 9 p.m. on March 1, 2019, and remained there for the rest of the night. When she woke up on March 2, 2019, she went to her sons' room and found respondent sleeping on the floor and Frazier sleeping in respondent's bed with her three children. Hammock testified that she never saw respondent have any kind of physical contact with S.W. Hammock further stated, "[respondent] never ever been around by [S.W.] by himself, and my house has always 20 kids in there."

¶ 17 Respondent's aunt, Mikelia Callaway, also testified. She arrived at Hammock's house around 5 or 6 p.m. and went to bed around 1 a.m. on March 2, 2019. Callaway testified that respondent was with her for most of the night, and she did not observe him make any kind of physical contact with S.W.

¶ 18 Respondent also testified. He stated that he went to sleep around 3 or 4 a.m. on March 2, 2019. He testified that he did not have any type of interaction with S.W. that night or the next day. He was primarily with his aunt, Mikelia Callaway, and his cousin, Katherine. When defense counsel asked, "Is there anything else that the Court hasn't been made aware of that you believe is relevant in this case?" respondent testified that shortly after the incident, Frazier and S.W. came to Hammock's house again. At that time, his aunt asked S.W. whether Frazier told her to say the accusations and S.W. said yes. On cross-examination, respondent admitted there were times that he was not with his aunt and cousin the night of March 1, 2019.

¶ 19 During closing arguments, defense counsel contended there were numerous inconsistencies regarding S.W.'s statements of when and where the acts occurred. Counsel also highlighted that there was no male DNA found in S.W.'s sexual assault kit. Defense counsel also explained:

> "[I]t's not accurate to say that [respondent's] DNA was found, that's not what the evidence was. Science can't tell us that yet. What science can say is that there was male DNA found and that in their expert opinion 1 in 430,000 people would match that DNA. I believe there's roughly 12 million people alone in Illinois so we're talking about in Illinois alone roughly 30 or so people at any given time who would likely match that DNA profile."

¶ 20 Counsel further argued that Frazier testified to sleeping in respondent's bed with S.W. He stated:

> "I shuttered [*sic*] to think how much male DNA could be in a young, teenage male's bed. And if [S.W.] was sleeping in there, we know from the fact there was male DNA found on panties that were submitted to the Illinois State Police Crime Lab that DNA can stay on those types of materials for a long period of time and that could be explaining it as well."

¶ 21 The court found the State proved respondent delinquent for both counts of aggravated criminal sexual assault (counts I and II). In doing so, it acknowledged there were "some inconsistencies in the kid's testimony about the location and who was there and *** who took whose car." However, it found those details were not relevant, and that during her interview, S.W. described the sexual assault in detail and was very specific about who did it. The court noted:

> "[Trial counsel] makes a point that there are 12 million people in Illinois, but if you say that half of those people are males, we cut it down to 6 million people in Illinois. And then we divide that by—in half and we've got maybe 12 or 13 people in the whole State that could have been the source of this and before the DNA was ever taken, she said that he was the person that did it."

¶ 22 On July 22, 2021, the court denied respondent's motion for judgment notwithstanding the verdict and new trial based on insufficient evidence. It then sentenced respondent to 24 months' probation.

¶ 23 Respondent appealed, arguing that counsel was ineffective for failing to impeach Frazier by presenting evidence of her bias from respondent ending his sexual relationship with her and the evidence was insufficient to prove his guilt. The Fourth District affirmed, holding the evidence was sufficient. *In re R.M.*, 2022 IL App (4th) 210426, ¶ 47. It also found that it could not determine respondent's ineffective assistance of counsel claim because the claim was based on evidence outside the record. *Id.* ¶ 23. The Illinois Supreme Court later used its supervisory authority to

remand the case back to the trial court to hold a *Krankel* hearing. *In re R.M.*, No. 128191 (Ill. Apr. 1, 2022) (supervisory order).

¶ 24 On May 15, 2022, Andrew Wessler was assigned to represent respondent. Wessler presented to a status hearing held on May 19, 2022, where he informed the court that he was appointed to represent respondent, but, due to a conflict, he believed Dennis Barnard would be assigned to the case. The court asked how long it would take to contact respondent. Wessler deferred to Barnard, who said two to three weeks. The court scheduled another status hearing and requested someone file something explaining what the *Krankel* hearing would cover.

¶ 25 At the next status hearing, on June 2, 2022, Barnard appeared on behalf of respondent. Barnard averred that he had the appellate papers to provide to the court. The court set the *Krankel* hearing, and again requested someone put the allegations in the court file. Barnard replied, "Yes, Judge. I'll get it over to you."

¶ 26 At the outset of the August 4, 2022, hearing, Barnard stated he was representing respondent. Immediately after, the State informed the court, "it's my understanding that we're doing an evidentiary hearing on the ineffective assistance of counsel." The court indicated its confusion because respondent did not raise any ineffective assistance of counsel claims in the trial court or file pleadings explaining such claims. It further stated, "at some point in time, I would like to know what the *Krankel* hearing is about, which [the State doesn't] get to participate in." Then, the following exchanged occurred:

> "MS. MULLISON: Well, my understanding is that we were doing an evidentiary hearing because the *Krankel* hearing is to determine if he gets counsel. He's already got counsel.

THE COURT: Well, he's already got counsel, Mr. Brown. I don't even know if we get to the point where he has counsel.

MS. MULLISON: Well, and I guess that's why I assume Mr. Barnard was here. If we're still determining whether or not he gets Mr. Barnard appointed, then I think it is a *Krankel* hearing where our involvement is dismissed, I would agree with that."

¶ 27 The court then said, "I think that's where we are ***," and asked, "What's the complaint about, Mr. Brown?" Respondent replied that Brown (trial counsel) failed to present all the evidence to the court. Respondent further explained that he and Frazier had a sexual relationship beginning a year before this incident. On the night of the alleged acts, respondent refused to "sleep" with Frazier, and she got mad. Respondent also indicated that Frazier guided S.W. to say respondent was the person who committed the sexual assault.

¶ 28 The court said, "I'm going to appoint Mr. Barnard to represent [respondent]. He's heard the allegations. Mr. Barnard, are you ready to proceed, or do you need time?" Barnard (*Krankel* counsel) said that he was ready and wished to call respondent to the stand.

¶ 29 Respondent testified that trial counsel told him that he could not raise his relationship with Frazier because it had no bearing on the case, but respondent found it relevant to prove Frazier "set it up." When *Krankel* counsel asked if there was anything else he wanted to cover as far as what trial counsel did or did not do, respondent averred that on March 1, 2019, his sister was supposed to babysit but left with his cousin. His aunt, Anelle, stayed to watch the kids, and Anelle was in his room and the kids were all in another room. He further explained Frazier tried to sleep in respondent's bed with him later that night, but he said "no" and got on the floor. *Krankel* counsel again asked if there was anything else respondent would like to tell the court about trial counsel's

representation. Respondent said trial counsel did not want to go into detail to show that respondent and S.W. were never alone that night.

¶ 30 During cross-examination, the State asked respondent who trial counsel should have called to testify at trial. Respondent averred that his sister, cousin, aunt, and his friend's mom, Barb. Respondent stated the former three were with the victim that night and the latter two had knowledge of his relationship with Frazier.

¶ 31 Trial counsel also testified. He conceded that respondent's mother informed him of respondent's relationship with Frazier but stated respondent never confirmed or denied the relationship. Trial counsel further stated that he asked respondent's mother if she had witnessed the sexual relationship herself, and she said no. So, trial counsel informed respondent's mother that she could not testify to that as she had no personal knowledge of the situation.

¶ 32 Trial counsel stated that he did not directly ask about the relationship between respondent and Frazier at trial, but asked respondent an open-ended question at the end of the trial to provide respondent an opportunity to raise this argument if he so chose. Trial counsel further averred that he would have—at least—asked respondent about the relationship and brought it up during closing arguments as bias or a motive to lie by Frazier if respondent had confirmed the relationship. Regarding other potential witnesses, trial counsel testified that he told respondent and his mother to bring any witnesses that would have evidence of the incident to court, and he would call them to testify. He did not believe there was anyone present at the trial who wanted to testify but was not called.

¶ 33 Trial counsel stated his theory at trial was to attack the inconsistency of S.W.'s statements and the DNA evidence. He explained respondent's DNA could have transferred from his bed to

S.W.'s underwear from S.W. sleeping in respondent's bed with Frazier, and that S.W. was either confused or mistaken given her young age.

¶ 34 On cross-examination, *Krankel* counsel asked, "Did you—you say at one point in trial, you did bring up that the DNA could have been transferred from [Frazier] to [S.W.] in the bed at some point, did you bring that up?" Trial counsel replied that, during closing arguments, he argued that S.W. could have gotten respondent's DNA on her underwear simply from sleeping in his bed without any contact with him. *Krankel* counsel then asked if he mentioned respondent and Frazier's relationship, and trial counsel said he did not.

¶ 35 *Krankel* counsel argued that trial counsel could have made a difference at trial by bringing out evidence that the semen could have been mixed up in the laundry. Before he could finish his thought, the court said, "that was the argument that he made." *Krankel* counsel then replied, "He did make that. I guess he didn't maybe go far enough in asking [respondent] or trying to get him to come out with that story. That's all I have."

¶ 36 The court noted "the real evidence in the case was the underwear with the DNA with his semen and DNA in it, in the child's underwear, and I think that is conclusive to me as the trier of fact. The rest of this wouldn't have affected it ***." It said that respondent may have had a relationship with Frazier, "but it really doesn't have anything to do it with it." It found the essential question was whether respondent had a sexual encounter with S.W. and the DNA evidence indicated—at some point—he did. Accordingly, the court found respondent was not denied effective assistance of counsel. Respondent immediately appealed.

¶ 37 II. ANALYSIS

¶ 38 On appeal, respondent argues that the State failed to prove him guilty beyond a reasonable doubt. He also contends that the trial court erred in proceeding to an evidentiary hearing

immediately after it appointed *Krankel* counsel and *Krankel* counsel provided ineffective assistance by failing to request a continuance so he could investigate respondent's claims.

¶ 39 A. Sufficiency of the Evidence

¶ 40 Respondent contends the State failed to prove he was guilty of aggravated criminal sexual assault. Specifically, he argues the court should not have considered the DNA evidence, or alternatively placed too much emphasis on the DNA evidence; S.W.'s identification was unreliable; and S.W.'s testimony and hearsay statements should have been disregarded as unreliable due to the inconsistencies in S.W.'s statements and S.W. being incompetent.

¶ 41 Due process requires the State to prove each element of an offense beyond a reasonable doubt. U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 2; *In re Winship*, 397 U.S. 358, 364 (1970). When reviewing the sufficiency of the evidence, it is not our function on review to retry defendant or substitute our judgment for that of the trier of fact. *People v. McLaurin*, 2020 IL 124563, ¶ 22. Rather, we must determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Rudd*, 2012 IL App (5th) 100528, ¶ 11. In doing so, we view the evidence and reasonable inferences thereof in the light most favorable to the State. *People v. Vanhoose*, 2020 IL App (5th) 170247, ¶ 24. Although not conclusive or binding on this court, we give great deference to the trier of fact's determinations regarding the weight afforded to the evidence and witness credibility. *People v. Gray*, 2017 IL 120958, ¶ 35.

¶ 42 Under this standard, circumstantial evidence can be sufficient to sustain a conviction. *People v. Jackson*, 2020 IL 124112, ¶ 64. "A criminal conviction will not be set aside on a challenge to the sufficiency of the evidence unless the evidence is so improbable or unsatisfactory

that it creates a reasonable doubt of the defendant's guilt." *Id.* We draw all reasonable inferences in the State's favor. *Vanhoose*, 2020 IL App (5th) 170247, ¶ 25.

¶ 43 Here, respondent was convicted of two counts of aggravated criminal sexual assault in violation of section 11-1.30(b)(i) of the Code (720 ILCS 5/11-1.30(b)(i) (West 2018)). To prove aggravated criminal sexual assault under that section, the State must prove respondent was under 17 years of age and committed "an act of sexual penetration with a victim who is under 9 years of age." *Id.* There is no dispute that respondent here was under the age of 17 and S.W. was under the age of 9 at the time of the offense. Respondent argues the State failed to prove he sexually penetrated S.W.

¶ 44 Respondent cites *People v. Mitchell*, 215 Ill. App. 3d 849, 860-61 (1991), to argue his conviction based on contact with S.W.'s anus cannot stand where the alleged acts were only supported by S.W.'s hearsay statements. We find *Mitchell* distinguishable.

¶ 45 *Mitchell* provided two specific reasons—not present here—to overturn a conviction based solely on the hearsay statements of the sexually abused victim: (1) the safeguards of reliability under section 115-10 were not present where the trial court found the amended version of section 115-10 was not applicable; and (2) the victim did not testify at trial. *Id.* at 860. Here, the reliability safeguards of section 115-10 were present where the court made a section 115-10 determination to admit the hearsay statements as substantive evidence. Respondent does not challenge the trial court's section 115-10 determination. S.W. also testified at trial, and there was DNA evidence corroborating S.W.'s hearsay statements. Accordingly, *Mitchell* is not instructive here.

¶ 46 Respondent next argues the court improperly considered the DNA evidence from underwear that was never verified as belonging to S.W. He asserts no one confirmed the underwear tested was the same pair S.W. wore on March 1, 2019, as Frazier's testimony conceded she did

not know which pair of underwear S.W. wore on March 1, 2019. As such, respondent argues the DNA evidence is unreliable. We disagree.

¶ 47 Foundation of evidence can be established through circumstantial evidence. See *People v. Patten*, 105 Ill. App. 3d 892, 895 (1982); *People v. McQueen*, 115 Ill. App. 3d 833, 840 (1983). While Frazier provided 14 pairs of S.W.'s underwear to police, Frazier indicated the collection of underwear included the undergarment worn by S.W. on March 1, 2019. Only one pair in the group contained a seminal DNA profile that testing could not exclude respondent as a contributor. Given this evidence, we find the court reasonably inferred the underwear tested by the police was the pair of underwear S.W. wore on March 1, 2019.

¶ 48 Respondent alternatively argues the court placed too much emphasis on the DNA evidence. He contends the DNA profile in this case did not affirmatively connect respondent to the offense—it merely failed to exclude him from a group of individuals whose DNA profile might have matched the seminal fluid. He further contends the trial court improperly calculated the number of Illinois citizens who would match the DNA profile by dividing the population of Illinois twice. He claims the population of Illinois should be divided in half only once to account for the exclusion of females. According to respondent, the correct calculation would be about 30 or so people in Illinois who would likely match the DNA profile.

¶ 49 While the DNA testing in this case could not conclusively determine respondent was the source of the DNA, respondent being a potential DNA contributor nevertheless corroborates S.W.'s identification and the State's theory. See *People v. Pike*, 2016 IL App (1st) 122626, ¶ 71. Respondent's argument that the court improperly calculated the number of male Illinois citizens that could have contributed to the DNA is not supported by the record. While the court's comments are confusing on this point and could imply it divided the population of Illinois one too many

times, it is apparent the court's ultimate calculation was correct. Defense counsel and the court acknowledge there are 12 million people in Illinois. Respondent agrees this number should be divided in half to represent only the male population of Illinois. Using the probability that 1 out of every 430,000 people would match the DNA profile and the population of 6 million people, the correct calculation concludes about 13.9 people in Illinois would match the DNA profile. Accordingly, the court's calculation of about 12 or 13 people was correct. Nevertheless, even assuming the court's calculation was wrong, we do not believe the weight placed on the DNA evidence would diminish had the court known that about 30 people in Illinois would have likely matched the DNA profile instead of 12. Therefore, the court did not err in considering the DNA evidence.

¶ 50 We also disagree that S.W.'s identification was unreliable. A single witness's identification is sufficient to support a finding of guilt if viewed under circumstances permitting a positive identification, but a vague or doubtful identification is not sufficient to support a conviction. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). In evaluating an identification, we consider: "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Id.* at 308.

¶ 51 Respondent's analysis of the factors improperly focuses on the fact that S.W. told Frazier she could not see the assailant's face. S.W., however, identified respondent by his voice. Voice recognition is a sufficient means of identification. *People v. Hicks*, 134 Ill. App. 3d 1031, 1038 (1985). Accordingly, our analysis of the factors must be made in light of the fact that S.W. identified respondent by voice.

¶ 52 The evidence here showed that the assailant spoke when coaxing S.W. out of the bedroom and several times during the sexual encounter, which provided an adequate basis for voice recognition. *People v. Camel*, 59 Ill. 2d 422, 432 (1974). Being a victim of sexual assault, S.W. was also no casual observer and had heightened awareness. See *People v. Testa*, 125 Ill. App. 3d 1039, 1045 (1984) (citing *Neil v. Biggers*, 409 U.S. 188, 200 (1972)). S.W. demonstrated her certainty by consistently and confidently identifying respondent as the perpetrator. See *Hicks*, 134 Ill. App. 3d at 1037-38; *People v. Lewis*, 165 Ill. 2d 305, 354 (1995). The first time S.W. identified respondent was on the day after the commission of the crime, which weighs in favor of finding the identification reliable. *Slim*, 127 Ill. 2d at 313 (11 days between crime and witness identification was insignificant). We also note that S.W.'s identification was not the sole proof of respondent's guilt, as the DNA evidence provided corroboration. See *People v. Bey*, 42 Ill. 2d 139, 144 (1969). Weighing all of the factors, we find no substantial likelihood of misidentification, and, therefore, S.W.'s identification was properly admitted.

¶ 53 We also reject respondent's argument that S.W.'s testimony and hearsay statements should be ignored as unreliable due to inconsistencies, as such argument overlooks that S.W.'s identification was corroborated by circumstantial DNA evidence. *Slim*, 127 Ill. 2d at 314. Although S.W. was not consistent with every detail, the inconsistencies go to the weight of the evidence and not the admissibility. *In re Montrell S.*, 2015 IL App (4th) 150205, ¶ 48. The trial court—who was the trier of fact who was in the best position to judge the credibility of all the witnesses—had the responsibility to resolve any inconsistencies in S.W.'s statements. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. It found S.W. credible. Because nothing in the record indicates the court's credibility determination was against the manifest weight of the evidence, we defer to it. See *People v. Swenson*, 2020 IL 124688, ¶ 36 ("where findings of fact must be determined from the credibility

of the witnesses, a court of review will defer to the trial court's factual findings unless they are against the manifest weight of the evidence" (internal quotation marks omitted)).

¶ 54 Respondent's argument that S.W. was not competent to testify because there was no positive showing that S.W. understood the difference between a truth and a lie is equally uncompelling. Respondent's argument overlooks that every witness—irrespective of age—is presumed to be competent to testify. 725 ILCS 5/115-14(a) (West 2018); *People v. Williams*, 383 Ill. App. 3d 596, 632 (2008). It was respondent's responsibility to show S.W. did not know the meaning of "truth." 725 ILCS 5/115-14(c) (West 2018); *Williams*, 383 Ill. App. 3d at 632. Respondent did nothing during the proceedings below and fails to point to anything in the record to call S.W.'s competency into question. Moreover, the State asked S.W. if she knew what it meant to tell the truth and its importance of telling the truth. S.W. indicated yes to both questions. As such, we find respondent failed to meet his burden.

¶ 55 In sum, the court properly considered S.W.'s identification, the DNA evidence, and S.W.'s testimony and hearsay statements. S.W. has consistently stated—in and out of court—that respondent placed his penis in her mouth and anus. DNA evidence—while not conclusive—corroborated S.W.'s allegations. Viewing this evidence in a light most favorable to the State, we find the State sufficiently proved respondent guilty of aggravated criminal sexual assault in violation of section 11-1.30(b)(i) of the Code (720 ILCS 5/11-1.30(b)(i) (West 2018)).

¶ 56 B. *Krankel* Hearing

¶ 57 The Illinois Supreme Court's decision in *People v. Krankel*, 102 Ill. 2d 181 (1984), developed a common-law procedure to address *pro se* posttrial claims of ineffective assistance of counsel. *In re Johnathan T.*, 2022 IL 127222, ¶ 23. "This procedure allows the trial court to decide whether independent counsel is necessary to argue a defendant's *pro se* posttrial ineffective

assistance claims at a full *Krankel* [evidentiary] hearing." *Id.* The *Krankel* procedure applies in cases involving delinquent juveniles and is triggered where a defendant brings such claim to the trial court's attention. *Id.* ¶¶ 24, 32.

¶ 58 Once a defendant raises a *pro se* posttrial ineffective assistance of counsel claim, the trial court must determine whether defendant's *pro se* allegations show possible neglect of his case. *Jackson*, 2020 IL 124112, ¶ 97. If the court finds the claims pertain to matters of trial strategy or lack merit, it need not appoint new counsel. *Id.* However, if the allegations show possible neglect, new counsel should be appointed to independently evaluate defendant's *pro se* claims and represent defendant at the hearing on the *pro se* claims of ineffective assistance of counsel. *Id.*

¶ 59 1. *Invited Error*

¶ 60 Respondent contends the court erred when it moved forward with an evidentiary hearing within the same hearing that it appointed *Krankel* counsel because there was no opportunity for *Krankel* counsel to fulfill his duty to investigate respondent's posttrial ineffectiveness claims. By failing to set the evidentiary hearing for another day or establish *Krankel* counsel was familiar with respondent's claims, respondent argues the court deprived respondent of his right to effective representation of *Krankel* counsel.

¶ 61 We agree with respondent that the record fails to affirmatively show that *Krankel* counsel investigated respondent's claims. *Krankel* counsel was not respondent's attorney until the court appointed him on August 4. Although—at the proceedings before *Krankel* counsel was appointed—he informed the court that he would file a motion explaining respondent's ineffectiveness claims, he never did so. There is no indication in the record that *Krankel* counsel actually met with respondent before that hearing, let alone investigated respondent's claims of ineffectiveness.

¶ 62 Equally important, however, is that the record also does not show that *Krankel* counsel failed to investigate or otherwise prepare for the evidentiary hearing. *Krankel* counsel was present in court for a few hearings before he was officially appointed. In those hearings, and before he was officially appointed, *Krankel* counsel addressed the court as the attorney who would be representing respondent and informed the court how long it would take him to contact respondent. The record also implies that *Krankel* counsel had some familiarity with respondent's claims, as *Krankel* counsel was the person who received the appellate court papers relevant to respondent's case and provided those papers to the trial court on June 2, 2022, before the preliminary *Krankel* hearing.

¶ 63 Nevertheless, we find any error was invited by *Krankel* counsel. Under the doctrine of invited error, "a party cannot complain of error which that party induced the court to make or to which that party consented." *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). To hold otherwise " 'would offend all notions of fair play.' " *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (quoting *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001)).

¶ 64 *Krankel* counsel told the court he wished to proceed to an evidentiary hearing, after the court provided the opportunity to have more time. As such, respondent cannot assert the court erred in immediately proceeding to an evidentiary hearing. See *People v. Daniel*, 2022 IL App (1st) 182604, ¶ 147 (under the invited error doctrine, the court did not err in failing to hold a *Krankel* hearing where defendant affirmatively requested to withdraw his *pro se* pleading that contained his ineffective assistance of trial counsel claims).

¶ 65 2. *Harmless error*

¶ 66 Moreover, we find any error was harmless. Citing *People v. Fields*, 2013 IL App (2d) 120945, *People v. Cabrales*, 325 Ill. App. 3d 1 (2001), and *People v. Moore*, 207 Ill. 2d 68 (2003),

respondent argues that proceeding to an evidentiary hearing immediately after appointing new counsel is not amenable to harmless error review because such violation is structural error that undermines the fundamental fairness of the evidentiary hearing. We disagree.

¶ 67 Errors are not subject to harmless error review and require automatic reversal only if they are "structural." *Jackson,* 2020 IL 124112, ¶ 120. Structural error is one that "necessarily renders a criminal trial fundamentally unfair or unreliable in determining guilt or innocence." *People v. Averett*, 237 Ill. 2d 1, 12-13 (2010). However, if an error does not rise to the level of structural error, it is amenable to harmless error review. *Jackson*, 2020 IL 124112, ¶ 120.

¶ 68 Structural errors are very limited and "include a complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of a grand jury, and a defective reasonable doubt instruction." *Averett*, 237 Ill. 2d at 13. The commonality of these errors is that they affect the framework within which the trial proceeds, rather than mere errors in the trial process itself. *People v. Moon,* 2022 IL 125959, ¶ 29. We are not limited to the class of structural errors previously identified, but we determine whether the error being considered is comparable to those already recognized as structural. *Id.* ¶ 30. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." (Internal quotation marks omitted.) *Averett*, 237 Ill. 2d at 13.

¶ 69 We do not find the alleged error here comparable to those recognized as structural. An allegation that counsel did not have time to prepare or investigate does not result in *complete* denial of counsel. See *Morris v. Slappy*, 461 U.S. 1, 11 (1983) ("Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel."); see *Chambers v. Maroney*, 399 U.S. 42, 53-

54 (1970) (representation of new counsel minutes before trial did not violate defendant's sixth amendment right where defendant's allegations of unpreparedness were harmless). None of respondent's authority indicates or holds that conducting a *Krankel* proceeding in an erroneous fashion is structural error. See *People v. Jolly*, 2014 IL 117142, ¶ 45 ("*Fields* did not find that the State's improper adversarial participation in a preliminary *Krankel* hearing was structural error."); *Moore*, 207 Ill. 2d at 81 (found error was not harmless but did not discuss structural error); *Cabrales*, 325 Ill. App. 3d at 6 (same). Rather, the binding precedent regarding similar circumstances demonstrates that harmless error applies here.

¶ 70 In *People v. Jackson*, 2020 IL 124112, ¶ 120, the Illinois Supreme Court determined the State's adversarial participation in a preliminary *Krankel* hearing is not structural error, and therefore is subject to harmless error review. Despite respondent's reliance on *Moore*, it too applied a harmless error analysis. 207 Ill. 2d at 80-81. While *Moore* ultimately found the trial court's error in failing to engage in a preliminary *Krankel* inquiry was not harmless, it did not hold that errors in the court's procedure conducting a *Krankel* proceeding are structural. *Id.* Rather, it could not find the error harmless where no record was made on defendant's ineffective assistance of counsel claims due to the trial court's failure to conduct a preliminary inquiry into defendant's allegations. *Id.* at 81. Similarly, the court applied a harmless error review in *People v. Jolly*, 2014 IL 117142, ¶¶ 40-43, and found the State's participation in the preliminary *Krankel* inquiry was not harmless where its participation biased the record. See *Jackson*, 2020 IL 124112, ¶ 113 ("[I]n *Jolly*, we could not conclude that the State's adversarial participation in that *Krankel* preliminary inquiry constituted harmless error based on the lack of an objective and neutral record.").

¶ 71 We acknowledge that all these cases applied harmless error review to errors occurring at the preliminary *Krankel* inquiry and do not involve the exact alleged error as here. However, we

find them comparable as all involved alleged errors in how the trial courts conducted the *Krankel* proceedings.

¶ 72 More analogous is the Illinois Supreme Court decision, *People v. Nitz*, 143 Ill. 2d 82 (1991). In *Nitz*, after conducting a preliminary *Krankel* hearing on defendant's posttrial *pro se* claim that counsel was ineffective for failing to call certain witnesses to testify, the circuit court ordered an evidentiary hearing without appointing new counsel. *Id.* at 134-35. At the evidentiary hearing, the State, trial counsel, and defendant were allowed to question the potential witnesses, but the court ultimately found trial counsel was not ineffective. *Id.* at 135.

¶ 73 The Illinois Supreme Court found the court erred by not appointing new counsel to represent defendant at the evidentiary hearing. *Id.* However, it determined such error was harmless where the hearing transcript revealed the potential witnesses' testimonies were inapposite to defendant's claims. *Id.*

¶ 74 We find the situation at bar less concerning than that seen in *Nitz*. Here, respondent had the benefit of representation at the evidentiary hearing. If harmless error applied in *Nitz*—where the court's error resulted in defendant having no counsel at the evidentiary hearing—we find harmless error review is equally appropriate here where the alleged error possibly hindered *Krankel* counsel's effectiveness at the evidentiary hearing.

¶ 75 To establish harmless error, "the State must prove beyond a reasonable doubt that the result would have been the same absent the error." *Jackson*, 2020 IL 124112, ¶ 127. In other words, "we determine whether the outcome would have been the same regardless of the error." *People v. Stoecker*, 2019 IL App (3d) 160781, ¶ 11; *People v. Traina*, 230 Ill. App. 3d 149, 154 (1992). We make this determination based on specific "facts of each case, considering the record as a whole."

Stoecker, 2019 IL App (3d) 160781, ¶ 11; *People v. Dunn*, 326 Ill. App. 3d 281, 287 (2001); *Traina*, 230 Ill. App. 3d at 154.

¶ 76 We find beyond a reasonable doubt that the trial court would not have rendered a different conclusion even with the purported information respondent wished to present. Respondent suffered no prejudice from the failure of having his friend's mom, Barb, and his aunt testify about his alleged relationship with Frazier because the court made its decision assuming respondent's relationship with Frazier was true. It simply found that such information would not have impacted the judgment. No further information of the existence of respondent's relationship would impact such holding.

¶ 77 There was also no prejudice regarding respondent's claim that trial counsel should have called his aunt, sister, and cousin because they were watching S.W. that night. Even on appeal, respondent does not clearly explain how their testimonies would have benefitted his case, but respondent implies that these witnesses could have testified that respondent did not touch S.W. anytime on March 1, 2019. We find the record rebuts this contention.

¶ 78 It is undisputed that respondent's sister abandoned her babysitting duties and left Hammock's home after S.W. arrived on March 1, 2019. Respondent's own testimony at the evidentiary hearing indicated his sister and cousin left and the adult in charge of babysitting, his aunt Anelle, was in a separate room away from "the kids." Respondent's sister, cousin, or Aunt Anelle cannot—individually or collectively—account for S.W. or respondent for the entire night. Consequently, even assuming they would testify that respondent did not touch S.W., such testimony would not change the outcome of the proceedings.

¶ 79 We also reject respondent's assertion that he suffered prejudice where *Krankel* counsel failed to explain the probability of having the same genetic profile—which matched the DNA

profile on S.W.'s underwear—greatly increases for relatives. According to respondent, this information was critical, where respondent had siblings who could have also matched the DNA sample.

¶ 80 We first note that while *Krankel* counsel argued that trial counsel did not go far enough in explaining how respondent's relationship with Frazier could have impacted the DNA evidence, respondent did not raise any allegations of ineffectiveness—at the preliminary or evidentiary hearing—based on the DNA evidence alone. We also note that respondent does not assert that one of his relatives also matched the DNA profile found in S.W.'s underwear; rather he contends counsel should have explained that the probability of matching the DNA profile increases for relatives as compared to a randomly selected person. Such speculation is insufficient to establish prejudice. *People v. Johnson*, 2021 IL 126291, ¶ 55. Regardless, we find the proceedings would not have been different even assuming respondent's siblings were a contributor to the DNA profile, as S.W. consistently identified respondent as the perpetrator.

¶ 81 For these reasons, we find any error in proceeding to an evidentiary hearing immediately after appointing *Krankel* counsel was harmless. The better practice is to have the evidentiary hearing on a day separate from the appointing of *Krankel* counsel to ensure *Krankel* counsel considered and investigated respondent's contentions. However, we cannot ignore the harmless nature of error merely as a means to chastise improper or poor performance in the trial court. See *People v. Reese*, 121 Ill. App. 3d 977, 986-87 (1984) (" 'the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise *** prosecutorial overreaching' " (quoting *United States v. Hasting*, 461 U.S. 499, 507 (1983))).

¶ 82 3. *Ineffective Assistance of Krankel Counsel*

¶ 83 Respondent also argues that *Krankel* counsel was ineffective in failing to request a

continuance so that he could investigate respondent's claims. A criminal defendant has a constitutional right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and counsel's errors resulted in prejudice. *People v. Bailey*, 2020 IL App (5th) 160458, ¶ 86. The failure to establish either prong precludes a finding of ineffectiveness. *People v. Easley*, 192 Ill. 2d 307, 318 (2000). We find the prejudice prong is dispositive of this issue.

¶ 84 To establish prejudice, "defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Valdez*, 2016 IL 119860, ¶ 29 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Respondent contends that under *United States v. Cronic*, 466 U.S. 648, 656-57 (1984), we presume prejudice here. He explains that counsel failed to subject the State's case to meaningful adversarial testing where there was no indication that counsel consulted with respondent and did not have sufficient time to investigate respondent's claims. We disagree.

¶ 85 Prejudice is presumed in instances where the likelihood of prejudice to the accused is high. *People v. Cherry*, 2016 IL 118728, ¶ 25. One such exception is when "counsel 'entirely fails to subject the prosecution's case to meaningful adversarial testing.' " *Id.* (quoting *Cronic*, 466 U.S. at 659). This exception, however, is narrow and infrequently applies. *Id.* ¶ 26. An attorney's representation amounting to poor representation is insufficient for the exception to apply, it must amount to no representation at all. *Id.*

¶ 86 Respondent contends this case is similar to *People v. Downs*, 2017 IL App (2d) 121156-C and *People v. Kyles*, 2020 IL App (2d) 180087. In *Downs*, the Second District presumed prejudice where *Krankel* counsel abandoned all of defendant's *pro se* claims and argued against all

allegations of ineffectiveness. 2017 IL App (2d) 121156-C, ¶ 73. The Second District again presumed prejudice in *Kyles*, where *Krankel* counsel abandoned all of defendant's *pro se* claims of ineffectiveness and the record failed to show that counsel independently investigated the viability of the claims. 2020 IL App (2d) 180087, ¶ 46.

¶ 87 We find *Downs* and *Kyles* distinguishable because in this case, counsel presented all of respondent's claims to the circuit court and did not argue against any of the claims. We acknowledge counsel's concession that trial counsel made an argument that the DNA evidence could have been innocently transferred to S.W.'s underwear—standing alone—may indicate that *Krankel* counsel was conceding this claim. However, immediately after that statement, *Krankel* counsel said, "I guess [trial counsel] didn't maybe go far enough in asking [respondent] or trying to get him to come out with that story. That's all I have." Viewing *Krankel* counsel's argument as a whole, it is clear he attempted to argue respondent's claim despite trial counsel's testimony that he made such argument at trial. Accordingly, he did not affirmatively argue against respondent's claims, as counsel did in *Downs*. We find *People v. Cherry*, 2016 IL 118728, instructive.

¶ 88 In *Cherry*, at the evidentiary hearing, *Krankel* counsel summarized the claims raised in defendant's *pro se* motion and raised a new claim concerning the review of medical records but did not present any witnesses. *Id.* ¶ 8. The trial court denied defendant's posttrial claims of ineffectiveness assistance of trial counsel based on his failure to prove prejudice. *Id.* On appeal, defendant argued that prejudice is presumed where appointed counsel provided no representation at all by failing to call witnesses and merely repeated the claims contained in defendant's *pro se* motion. *Id.* ¶ 9.

¶ 89 The *Cherry* court rejected the application of presumed prejudice, finding it could not be said that counsel provided no representation where he filed and argued a motion concerning

defendant's sentence and argued the ineffectiveness claims at the *Krankel* hearing. *Id.* ¶ 29. It explained an argument that *Krankel* counsel should have done more to develop and support a defendant's *pro se* claims at the hearing fails to rise to the level of "entirely failing to subject the prosecution's case to meaningful adversarial testing." *Id.* Such is a matter of poor representation, and not "no representation at all." *Id.*

¶ 90 Admittedly, *Krankel* counsel here provided less representation than that in *Cherry*, but we also find it can hardly be said *Krankel* counsel provided no representation at all where he questioned respondent and trial counsel to support respondent's claims and attempted to argue respondent's claim regarding the alleged relationship with Frazier. Respondent's allegation that counsel could have better developed and supported his claims of ineffectiveness had counsel requested more time to investigate is an allegation of poor representation, not no representation. Accordingly, we will not presume prejudice.

¶ 91 The showing of prejudice under *Strickland* is similar to that required by harmless error review. See *People v. Kite*, 204 Ill. App. 3d 955, 960 (1990) (cannot consistently determine defendant was prejudiced by counsel's actions where a potential error was found harmless); *People v. Smith*, 160 Ill. App. 3d 89, 98 (1987) (the error "constituted nothing more than harmless error, [and accordingly] did not rise to the level of ineffective assistance of counsel"). This is so because both analyses regard the same ultimate question: whether the outcome would be different absent the error. Compare *Stoecker*, 2019 IL App (3d) 160781, ¶ 11 with *Valdez*, 2016 IL 119860, ¶ 29 (quoting *Strickland*, 466 U.S. at 694). As such, if an error does not amount to reversible error, any action of counsel in causing the error would not prejudice defendant. See *Jackson*, 2020 IL 124112, ¶ 91; *Kite*, 204 Ill. App. 3d at 960.

¶ 92 Respondent asserts prejudice under *Strickland* based on the same reasons as that in his harmless error argument. In the context of this case, both analyses concern whether the outcome of the *Krankel* evidentiary hearing would be different if *Krankel* counsel had additional time to investigate. Because we found that any error in proceeding to an evidentiary hearing immediately after appointing *Krankel* counsel was harmless, *Krankel* counsel's agreement to proceed in such manner did not prejudice respondent for the same reasons.

¶ 93 III. CONCLUSION

¶ 94 For the foregoing reasons, the State presented sufficient evidence to find respondent delinquent for both counts of aggravated criminal sexual assault, and any error in proceeding to an evidentiary hearing immediately after appointing *Krankel* counsel was invited and did not prejudice respondent. Accordingly, we affirm.

¶ 95 Affirmed.