

No. 1-10-3286

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IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	
v.)	06 CR 17768
)	06 CR 17767
MARK CONLEY,)	
)	Honorable
Defendant-Appellant.)	Angela Munari Petrone,
)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 HELD: (1) Where the jury could have reasonably inferred all the elements of the crime of predatory criminal sexual assault from the testimony as a whole, there was sufficient evidence to find defendant guilty; (2) Where there were sufficient factual similarities to the charged crime and the time lapse between crimes was not too remote, the trial court did not abuse its discretion in admitting evidence of defendant’s other crimes; and (3) Where the trial court only omitted a bracketed phrase from a required jury instruction, the omission could not rise to the level of plain error.

¶ 2 After a jury trial, defendant Mark Conley was convicted of three counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. The trial

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court sentenced defendant to three consecutive terms of natural life in prison for the criminal sexual assault convictions and a seven-year prison term for the criminal sexual abuse conviction, also to run consecutive. On appeal, defendant contends that: (1) the State's evidence was insufficient to convict him of one count of predatory criminal sexual assault; (2) the trial court erred in admitting other crimes evidence against him; and (3) the trial court improperly instructed the jury as to how to consider evidence of the victim's statements. We affirm.

¶ 3 Defendant was arrested in July 2006 and charged by indictment in two separate cases based on alleged conduct he engaged in with his niece, M.L., and his nephew, B.C., who were both under 13 years of age at the time of the incidents. In the first, case number 06 CR 17767, defendant was charged with three counts of predatory criminal sexual assault of a child based on allegations that between 1996 and 2001 his penis penetrated the vagina, anus, and mouth of M.L. In case number 06 CR 17768, defendant was charged with aggravated criminal sexual abuse based on allegations that in December 2000 defendant's hand made contact with B.C.'s penis. Initially, the State elected to proceed on the case against M.L. only.

¶ 4 Prior to trial, the State filed a motion to allow evidence of two other crimes at M.L.'s trial, including the alleged sexual abuse of B.C. and the 1988 sexual assault of defendant's cousin, A.M., when A.M. was seven years old. At the hearing on the motion, the State argued that the evidence was admissible to show defendant's propensity, motive, and intent, and that the probative value of the other crimes evidence outweighed the danger of unfair prejudice. After hearing arguments from both sides, the trial court stated:

"[U]nder the analysis that I'm required to conduct by statute and

pursuant to Donohoe [*sic*], I find that this evidence absolutely is admissible for the reasons that the State seeks to admit it, and the State's motion to allow proof of other crimes is granted with respect to these two other sexual assaults they seek to offer."

Defendant filed a motion in limine in regard to the 1988 assault case, asking that any evidence of defendant's oral or handwritten confession to sexually assaulting A.M. be barred at trial. The State informed the trial court that it did not intend to introduce either statement at trial and the trial court stated that the "oral and the handwritten are not coming in regarding [A.M.]"

¶ 5 Defendant subsequently filed a motion for joinder, seeking to have both cases tried together. The State had no objection and the trial court granted defendant's motion.

¶ 6 The State also filed motions pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10) (West 2000)) seeking to introduce hearsay statements made by M.L. and B.C. in February and March of 2001 to two doctors, Doctor Groll and Doctor Epstein. After hearings on each motion, the trial court held that both doctors could testify at trial to the statements made by M.L. and B.C.

¶ 7 The following evidence was presented at defendant's May 2010 trial. M.L. testified that when she was eight years old, she lived in her grandmother's apartment along with her brother, B.C., her mother, and defendant. M.L. described an occasion in 2001 where she was watching television in her grandmother's bedroom when defendant entered. He "pulled down" M.L.'s clothes and "took off his clothes." Then he "put his private part into [her] private part." M.L. described defendant's private part as being "[b]elow his waist," "[i]n the front," and said that he

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used it to "go to the bathroom." M.L. said her private part was below her waist in the front and said she used it to go to the bathroom. Defendant also put his private part in her "other private part" which was in "the back of [her] below [her] waist" and was used to "go to the bathroom." The back private part was different from the front private part. Defendant also put his private part into M.L.'s mouth and said he would "whup" her if she told. M.L. said defendant had touched her more than 10 times and would also use his hands to touch M.L.'s front and back private parts. Defendant started abusing M.L. when she was four years old. Eventually, M.L. told her older sister what was happening. M.L. remembered going to both the University of Chicago Hospital and LaRabida Hospital about a month later. M.L. did not recall who she spoke with at either hospital or what she said. M.L. testified that the male private part was called a "[p]enis," the female private part was called a "[v]agina," and the back private part was a "butt."

¶ 8 On cross-examination, M.L. affirmed that on the specific day she described, defendant "[did] private to private, private to anal, private to butt, and private to mouth."

¶ 9 B.C. testified that when he was 10 years old, he lived at his grandmother's apartment along with M.L., his mother, and defendant. "About three or four" times when B.C. was nine or ten years old, defendant would start tickling B.C. while they were in the living room of the apartment, "and then [defendant] would move down and start touching" and tickling B.C.'s penis. Defendant would touch B.C.'s penis for a "few seconds." Defendant would also "rub up against" B.C.'s butt with his penis. The touching happened over B.C.'s clothes and usually during the day. Once, B.C. woke up in bed at night and saw defendant touching B.C.'s penis with his hand. Defendant then "passed out" on the bed. Defendant would also put his hands into B.C.'s pockets

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and act like he was searching for change. B.C. told his older sister what defendant was doing.

He remembered going to the University of Chicago Hospital in February 2001 and speaking to a different doctor in March 2001.

¶ 10 On cross-examination, B.C. said he could not remember what he told the doctors.

¶ 11 Doctor Mary Elizabeth Groll testified that on February 12, 2001, she was in the first year of her medical school residency at the University of Chicago Hospital. At approximately 11 p.m., she met and interviewed M.L. in the emergency room. M.L. was eight years old and told Groll, "[my] uncle put his finger in my private, then his private in my private, and his private in my mouth." According to Groll's report, the last assault had occurred five days prior to the hospital visit. Groll did not ask what M.L. meant by "private part." Groll then performed a physical exam of M.L. M.L.'s vaginal and anal exams were both normal. Groll also interviewed B.C. on the same day. B.C. told Groll that his uncle would "rub [B.C.'s] private area, as well as his chest and buttock" and that once "his uncle turned him over and rubbed himself on the child's back and buttock."

¶ 12 Doctor Michelle Epstein, a clinical psychologist, testified that on March 19, 2001, she was employed at LaRabida Hospital and conducted a victim sensitive interview (VSI) each with M.L. and B.C. M.L. told Epstein that her Uncle Mark "put his private in her front, back and mouth" and it "hurt[ed] [*sic*] and sting[ed] [*sic*]" and tasted nasty and it tasted like throw up." M.L. said it "happened many times" from when she was four to eight years old. Epstein then interviewed B.C., who said that defendant put his knee on B.C.'s private and covered B.C.'s mouth with his hand so B.C. could not cry for help. B.C. also said, when he was 10 years old,

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defendant acted like defendant was searching for change in B.C.'s pockets and "touched [B.C.'s] private with [defendant's] hand through [B.C.'s] clothes." Epstein did not take notes during either interview, but prepared a separate report for each interview subsequently.

¶ 13 On cross-examination, Epstein said she did not recall whether M.L. elaborated on what M.L. meant by "front" or "back" and did not recall whether she asked M.L. to do so. Epstein also acknowledge that neither interview was video or audio recorded.

¶ 14 Doctor Marjorie Fujara, an expert in child abuse pediatrics, testified that when children allege sexual abuse, in only five percent cases will a vaginal exam reveal findings that indicate vaginal penetration occurred. Finding evidence of anal penetration from a physical exam is even more rare.

¶ 15 Officer Maura O'Neill testified that she arrested defendant on July 13, 2006. Sanjay Patel, a former Assistant State's Attorney, testified that during an interview with defendant on July 15, 2006, defendant said he had inappropriately touched B.C. one time, approximately five years earlier. The witness examination continued as follows:

"Q. How did your conversation ensue with regard to [M.L.]?"

A. Well, after he had told me that he had been raped by a child, he went on to say that he had raped his cousin.

THE COURT: The defendant said he had been raped by a child?

THE WITNESS: I'm sorry. I misspoke.

After he explained that he was raped when he was a child,

he went on to explain that he had raped his cousin who was seven -"

¶ 16 Defendant objected and moved for a mistrial, arguing that the statement about him admitting to raping his cousin violated his motion in limine, which the court had granted. The trial court denied defendant's request for a mistrial and instructed the State not to refer to defendant's statement about raping his cousin again.

¶ 17 Patel continued testifying and said that defendant denied touching M.L. at first. Then, defendant told Patel he "drinks a lot" and he tends to not remember things, and "because of that, he is not saying that he never touched her, but he just doesn't remember."

¶ 18 A.M. testified that on May 7, 1988, when she was seven years old, she visited her grandmother's house and defendant was there. Defendant was the son of A.M.'s grandmother's sister. Defendant asked A.M. to help him take clothes down to the laundry room in the basement, so she walked downstairs with him. A.M. was wearing a dress that day and, once in the laundry room, defendant "pulled down [her] panties and pulled down his clothes also, and he lifted [her] up and started rubbing [her] vagina with his penis." A.M. told defendant it hurt, so defendant set her on top of the washing machine and "[r]ubbed his penis against [her] vagina again." When A.M.'s aunt came downstairs, defendant stopped, put A.M. down, and told A.M.'s aunt to go back upstairs. Then he "came back and finished what he was doing. He picked [A.M.] up against and started rubbing his penis against [her] vagina." He did not stop until A.M.'s mother called her. A.M. told her mother what had happened and her mother called the police.

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¶ 19 After both sides presented closing arguments, the trial court instructed the jury as follows:

"You have before you evidence that [M.L.] made statements concerning the offenses charged in this case. It is for you to determine what weight should be given to the statement. In making that determination, you should consider the age and maturity of [M.L.], the nature of the statements, and the circumstances under which the statements were made."

An identical instruction was given in regard to B.C. Defendant did not object to either instruction.

¶ 20 The jury found defendant guilty of all three counts of predatory criminal sexual assault as to M.L. (alleging vaginal, anal, and oral penetration), and one count of aggravated criminal sexual abuse as to B.C. The trial court sentenced defendant to three mandatory consecutive terms of natural life imprisonment for the predatory criminal sexual abuse convictions, based on his criminal history. The court also imposed an additional consecutive prison term of seven years for the aggravated criminal sexual abuse charge.

¶ 21 Defendant first contends that the State's evidence was insufficient to sustain a conviction for predatory criminal sexual assault of a child as charged in the second count of the indictment, that he "knowingly committed an act of sexual penetration upon [M.L.], to wit: contact between [defendant]'s penis and [M.L.]'s anus." See 720 ILCS 5/12-14.1(a)(1) (West 2000).

¶ 22 The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

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could have found the essential elements of the crime beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). Therefore, all reasonable inferences from the record must be allowed in favor of the State. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). When considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant, it is for the trier of fact to determine the credibility of witnesses, weigh the evidence, draw reasonable inferences, and resolve any conflicts in the evidence. *Siguenza-Brito*, 235 Ill. 2d at 228. A reviewing court will reverse a conviction only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of a defendant's guilt. *Givens*, 237 Ill. 2d at 334.

¶ 23 A defendant commits an act of predatory criminal sexual assault of a child if the defendant is 17 years of age or older and commits an act of sexual penetration with a victim who is under 13 years of age. 720 ILCS 5/12-14.1(a)(1) (West 2000). " 'Sexual penetration' means any contact, however slight, between the sex organ or anus of one person by *** the sex organ, mouth, or anus of another person ***." 720 ILCS 5/12-12(f) (West 2000). The issue of whether penetration actually occurred is a question of fact to be determined by the trier of fact, and the amount of detail in a witness's testimony only goes to the weight of the evidence. *People v. Herring*, 324 Ill. App. 3d 458, 464 (2001) (citing *People v. Shum*, 117 Ill. 2d 317, 356 (1987)).

¶ 24 Here, we find M.L.'s testimony at trial was sufficient to show contact occurred between defendant's penis and M.L.'s anus. While testifying, M.L. acknowledged that defendant put his "private part" in her "back private part." M.L. explained that her back private part was below her waist, differentiated her back private part from her front private part, and stated that she used her

back private part to go to the bathroom. Furthermore, Dr. Epstein's testimony that M.L. said defendant "put his private in her front, back and mouth" and that it "hurt[ed] [sic] and it stinged [sic]" was consistent with M.L.'s testimony that defendant put his penis in her back private part. "The trier of fact is entitled to draw all reasonable inferences from both circumstantial and direct evidence, including an inference of penetration." (Internal citations omitted.) *Herring*, 324 Ill. App. 3d at 465. Although M.L. never specifically used the word "anus," the jury could have reasonably inferred from the testimony that M.L. was referring to her anus when she said the word "butt." We acknowledge that Dr. Groll testified she examined M.L.'s anus and everything appeared to be "normal." However, Dr. Fujara testified that it is rare to find physical evidence of anal penetration in children. In addition, this court has held that evidence of trauma to the victim's anus is unnecessary to sustain a conviction. *People v. Raymond*, 404 Ill. App. 3d 1028, 1040 (2010). We find the lack of such evidence in this case does not undermine defendant's conviction. Viewing the evidence in a light most favorable to the State, we find that a rational juror could have found defendant guilty beyond a reasonable doubt of predatory criminal sexual assault based on defendant's penis making contact with M.L.'s anus.

¶ 25 Defendant next contends that the trial court erred in admitting other crimes evidence, including defendant's crimes against B.C. and the 1988 assault against A.M. Specifically, defendant argues that the crimes against B.C. and A.M. were factually dissimilar from the crimes committed against M.L. and, moreover, that defendant's assault of A.M. was too remote in time to be probative.

¶ 26 We review the decision to admit other crimes evidence for an abuse of discretion.

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Raymond, 404 Ill. App. 3d at 1044. A trial court's ruling is an abuse of discretion only if it is "arbitrary, fanciful or where no reasonable person would take the view adopted by the trial court." *Raymond*, 404 Ill. App. 3d at 1044-45 (quoting *People v. Childress*, 338 Ill. App. 3d 540, 545 (2003)).

¶ 27 Generally, evidence of other crimes is not admissible to show the defendant's propensity to commit crimes. *Raymond*, 404 Ill. App. 3d at 1045. However, section 115-7.3 of the Code offers an exception to the general rule, stating that in cases where a defendant is accused of one of the specified sex crimes, evidence of the defendant's commission of a similar crime may be admitted and "considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3 (West 2000). The supreme court has held that section 115-7.3 allows courts to "admit evidence of other crimes to show defendant's propensity to commit sex offenses" as long as the requirements of the statute are met. *People v. Donoho*, 204 Ill. 2d 159, 176 (2003). The statute provides that, when considering the probative value against the prejudicial impact of other crimes evidence, the trial court may consider: (1) the proximity in time to the charged offense; (2) the degree of factual similarity to the charged offense; or (3) any other relevant facts or circumstances. 725 ILCS 5/115-7.3 (West 2000); *People v. Everhart*, 405 Ill. App. 3d 687, 699 (2010).

¶ 28 We find substantial factual similarities between defendant's abuse of M.L. and B.C. M.L. and B.C. were siblings living under the same roof as defendant, their uncle. Both were children when the abuse occurred - M.L. alleged defendant abused her from the ages of four to eight years old, while B.C. alleged defendant abused him when he was nine or ten years old. All of the

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alleged attacks occurred in the home where defendant lived with M.L. and B.C. and involved defendant touching M.L. and B.C.'s genitals with his penis or hand. In addition, the time period during which he was abusing both M.L. and B.C. overlapped. We do not believe the trial court abused its discretion in admitting evidence that defendant abused B.C.

¶ 29 Defendant argues that the differences between his sexual contact with M.L. (defendant's penis making contact with M.L.'s vagina, anus, and mouth after taking off her clothes) and his contact with B.C. (defendant's hand making contact with B.C.'s penis over B.C.'s clothes) is dissimilar enough to render evidence of B.C.'s abuse inadmissible. However, when evidence of other crimes is offered for a purpose other than showing *modus operandi*, " 'mere general areas of similarity will suffice' to support admissibility." *Donoho*, 204 Ill. 2d at 184 (quoting *People v. Illgen*, 145 Ill. 2d 353, 373 (1991)). Though the specifics of the abuses differ, we find the remaining similarities, including the victim's ages, their relation to each other and defendant, the attacks all occurring in the shared home, and the time proximity, are enough to outweigh the discrepancies. " 'The existence of some differences between the prior offense and the current charge does not defeat admissibility because no two independent crimes are identical.' " *Everhart*, 405 Ill. App. 3d at 701 (quoting *Donoho*, 204 Ill. 2d at 185).

¶ 30 We also find the trial court properly admitted evidence of defendant's assault of A.M. as other crimes evidence. First, the assault was not too remote in time to be admitted as evidence in M.L.'s case. In *Donoho*, the supreme court held that it would not "adopt a bright-line rule about when prior convictions are *per se* too old to be admitted under section 115-7.3. Instead, it is a factor to consider when evaluating its probative value." *Donoho*, 204 Ill. 2d at 183-84.

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Defendant assaulted A.M. in 1988. According to the bill of indictment, defendant was charged in the current case with acts beginning in 1996 and continuing through 2001. Therefore, the assault against A.M. occurred nine to thirteen years prior to when defendant abused M.L. However, the record shows that defendant pled guilty to the 1988 assault and was sentenced to a prison term of six years. In trial proceedings, both parties agreed that defendant was released from prison in 1991. Therefore, if we begin the time frame from when defendant was released from prison, the gap is reduced to between six and ten years. The *Donoho* court found the passage of 12 to 15 years between two crimes was by itself insufficient to support a finding that the trial court abused its discretion in admitting the evidence. *Donoho*, 204 Ill. 2d at 184. Similarly here, we do not believe the passage of six to ten years is, alone, sufficient to render the trial court's decision an abuse of discretion. See also *People v. Ross*, 395 Ill. App. 3d 660, 675-77 (2009) (finding the trial court did not abuse its discretion in admitting evidence of a crime that occurred 17 years prior to the charged crime).

¶ 31 Furthermore, there are sufficient factual similarities between defendant's crime against A.M. and M.L. A.M. was seven years old when defendant assaulted her, within the age range of when M.L. was abused by defendant. The attack occurred in a family home, the home of A.M.'s grandmother, and A.M. was related to defendant. Defendant lifted up A.M.'s dress and touched his penis to A.M.'s vagina, just as he removed M.L.'s clothes and touched his penis to M.L.'s vagina, anus, and mouth. The attack on A.M. only happened once, however A.M. told her mom about the attack immediately, and her mom called the police. M.L. did not tell her older sister about defendant's abuse until four years after it began, therefore providing defendant with the

opportunity to continue the abuse. Although minor differences exist between defendant's abuse of M.L. and A.M., there are more than enough general areas of similarity to support admissibility. *Donoho*, 204 Ill. 2d at 184. Taking all the factors into consideration, we find that the trial court did not abuse its discretion in admitting evidence of defendant's 1988 assault of A.M.

¶ 32 Defendant nonetheless argues that even if evidence of the crimes against B.C. and A.M. was otherwise admissible, the cumulative prejudicial impact of admitting the other crimes evidence outweighed the probative value of the crimes. Defendant claims that the allowed other crimes evidence, in conjunction with the testimony of Assistant State's Attorney Patel to defendant's oral admission that he raped his cousin, "ran a severe risk of over-persuading the jury that [defendant] was a bad person." In support, defendant cites to *People v. Cardamone*, 381 Ill. App. 3d 462 (2008).

¶ 33 The defendant in *Cardamone* was a gymnastics coach who was charged with multiple counts of both predatory criminal sexual assault of a child and aggravated criminal sexual abuse, involving 14 complaints. *Cardamone*, 381 Ill. App. 3d at 464. The court on appeal held that the trial court had abused its discretion in allowing the State to elicit testimony of other crimes. *Cardamone*, 381 Ill. App. 3d at 497. The court found that "a large volume may make probative other-crimes evidence overly prejudicial." *Cardamone*, 381 Ill. App. 3d at 496. However, *Cardamone* is distinguishable because the trial court there "found admissible numerous acts alleged by 15 victims." *Cardamone*, 381 Ill. App. 3d at 494. Here, in contrast, the trial court admitted evidence of, at most, six other incidents from two witnesses. B.C. testified that defendant touched him three or four times during the day and once at night, and A.M. testified to

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a single incident of abuse. Even considering the testimony of Patel, only three witnesses testified to six incidents. Furthermore, rather than adding a lengthy narrative, Patel's testimony as to A.M.'s crime consisted only of Patel twice saying that defendant told Patel that he had raped his cousin. We do not believe that these few incidents are the "large volume" that was of concern in *Cardamone* and find no abuse of discretion.

¶ 34 Finally, defendant contends that he was deprived of a fair trial by the court's failure to properly instruct the jury in regard to the victims' statements admitted pursuant to section 115-10 of the Code, specifically claiming that the trial court erred in not instructing the jury that they needed to determine whether the victims actually made the alleged statements.

¶ 35 Initially, the State claims, and defendant concedes, that defendant forfeited this issue on appeal by failing to object to or offer an alternative instruction at trial and failing to raise the issue in a posttrial motion. *People v. Sargent*, 239 Ill. 2d 166, 188-89 (2009). However, in such instances, Supreme Court Rule 451(c) provides limited relief. See Ill. S. Ct. R. 451(c) (eff. July 1, 2006) (providing that "substantial defects" as to the tendering of jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require"). The purpose of the rule is to allow for the correction of grave errors or for errors "in cases so factually close that fundamental fairness requires" proper jury instructions. *Sargent*, 239 Ill. 2d at 189. In practice, Rule 451(c) is comparable to the plain error doctrine. *Id.*; see also Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

¶ 36 To establish plain error, the defendant must show a clear or obvious error occurred and that either: (1) the evidence was so closely balanced that the error alone threatened to tip the

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scales of justice; or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Sargent*, 239 Ill. 2d at 189. Under either prong, the burden of persuasion lies with the defendant. *Sargent*, 239 Ill. 2d at 190.

¶ 37 Section 115-10 allows for the admission of hearsay statements made by an alleged victim of sexual acts who is under the age of 13 years in certain circumstances. 725 ILCS 5/115-10(a),(b) (West 2000). If statements are admitted pursuant to the section, section 115-10(c) requires the court to instruct the jury that:

"[I]t is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, *** the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." 725 ILCS 5/115-10(c) (West 2000).

¶ 38 Illinois Pattern Jury Instructions, Criminal (4th ed.2000) (hereinafter IPI Criminal) No. 11.66 was drafted to track the language of the statute, and provides:

"You have before you evidence that ____ made [(a statement)(statements)] concerning [(an)(the)] offense[s] charged in the case. It is for you to determine [whether the statement[s] [(was)(were)] made, and, if so,] what weight should be given to the statement[s]. In making that determination, you should consider the age and maturity of ____, the nature of the statement[s], [and] the circumstances under which [(a)(the)] statement[s]

[(was)(were)] made[, and ____].” Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed.2000).

¶ 39 Here, the trial court omitted the bracketed language "whether the statement[s] [(was)(were)] made." However, even assuming the trial court erred in omitting the bracketed language, defendant would still be unable to show the error rose to the level of plain error. Under either prong, the burden of persuasion lies with the defendant. *Sargent*, 239 Ill. 2d at 189-90. Defendant only argues the second prong of the plain error doctrine, that the error was so serious it affected the fairness of his trial. "The purpose of the second prong of the plain error doctrine is to guard against errors that erode the integrity of the judicial process and undermine the fairness of the defendant's trial." *People v. Giraud*, 2011 IL App (1st) 091261, ¶ 40.

¶ 40 We are unconvinced that the trial court's failure to include the bracketed language threatened the fairness of defendant's trial, and find instruction from *Sargent*. In *Sargent*, the supreme court found the trial court's error in completely omitting IPI Criminal No. 11.66 was not enough to severely threaten the fairness of the defendant's trial. *Sargent*, 239 Ill. 2d at 191. The supreme court went on to note that an instruction based on IPI Criminal No. 1.02 had been given, and noted that despite the two instructions using different language, "they convey similar principles regarding the jury's role in assessing witness credibility and the various criteria jurors may consider when making that assessment." *Sargent*, 239 Ill. 2d at 192. Ultimately, the supreme court found no plain error. *Sargent*, 239 Ill. 2d at 194.

¶ 41 The trial court in this case did not completely omit IPI Criminal No. 11.66. Rather, the court only admitted one bracketed phrase from the pattern instruction and, in addition, gave an

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instruction based on IPI Criminal No. 1.02:

"Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his demeanor, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in light of all the evidence in the case."

Moreover, similar to the trial court in *Sargent*, the trial court here held a hearing pursuant to section 115-10(b) of the Code to determine the admissibility of M.L. and B.C.'s statements, thereby providing sufficient safeguards of reliability. See *Sargent*, 239 Ill. 2d at 193 (citing *People v. Mitchell*, 155 Ill. 2d 344, 354-55 (1993)). Under these circumstances, we find the absence of the bracketed portion of IPI Criminal 11.66 does not constitute an error so serious that it affected the fairness of defendant's trial and therefore does not rise to the level of plain error. See also *People v. Booker*, 224 Ill. App. 3d 542, 556 (1992) (where the trial court gave IPI Criminal No. 1.02 but omitted IPI Criminal No. 11.67 (now IPI Criminal No. 11.66), because the given instruction advised the jury to consider witness ability and opportunity to observe, and memory, the error was harmless and not subject to plain error review).

¶ 42 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 43 Affirmed.