



The defendant filed a timely notice of appeal. We affirm.

¶ 3

### BACKGROUND

¶ 4

On July 22, 2005, the defendant was charged with two counts of predatory criminal sexual assault of a child, R.Y. On June 20, 2007, the information was amended to add a charge of predatory criminal sexual assault of a child, M.Y., and two counts of aggravated criminal sexual abuse of a child, M.Y.

¶ 5

On January 9, 2007, the State filed a motion *in limine* and notice of intent to offer the child victim's out-of-court statement. The court heard the motion on February 5, 2007. The State requested that the court admit statements of the victim, R.Y., made on June 29, 2005, to a Department of Children and Family Services (DCFS) investigator and on July 1, 2005, to the Illinois State Police, describing the offenses for which the defendant was being prosecuted. The State requested admission of the statements as hearsay exceptions pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-10 (West 2006)). The defendant argued that the statute was being used "for the purpose of piling on and adding to the alleged victim's testimony, testimony which might be more acceptable and believable to a jury, who might otherwise cast a certain amount of doubt on the testimony of the child." The court found that nonleading questions were used when interviewing R.Y. and that the statements bore a sufficient indicia of reliability regarding content, the time of the making of the statement, and the place where the statements were made. The trial court ruled that if R.Y. testified under section 115-10(b)(2)(A) of the Code (725 ILCS 5/115-10(b)(2)(A) (West 2006)), Sergeant Burton and Investigator McElroy would be able to testify about the statements they took.

¶ 6

On November 17, 2008, the State filed an additional charge of predatory

criminal sexual assault of a child, R.Y., against the defendant. At the pretrial conference on November 20, 2008, the defendant waived his right to a jury trial. The State dismissed counts III, IV, and V the charges alleging sexual assault against M.Y.

¶ 7 At trial, Jeff McElroy testified that he is an investigator for DCFS. He stated that at the end of June or the beginning of July 2005, a report of possible sexual assault was made to their hotline. He phoned the Hamilton County sheriff's department and informed them of the allegations. They requested that he contact the state police. He called the state police and asked for assistance with the investigation. He then went to speak to Dawn Farley, R.Y.'s mother, and her children. He met them at an aunt's house and spoke with R.Y. on the back porch. He stated that the defendant was not present during the interview and that the interview was not recorded. Investigator McElroy testified that R.Y. told him that, on one occasion, the defendant had her take off her pants and spread her legs, and he blew on her vagina and licked it. He stated that R.Y. told him that the defendant "made her kiss his pee-pee. He also licked her butt, which she said was gross." When asked if the defendant ever had her do anything to him she stated that he would have her put her mouth on his "pee-pee." When shown a body chart she used the word "pee-pee" for penis. Investigator McElroy testified that R.Y. was subdued when he interviewed her, that her head was down, and that she spoke softly. He believed she was telling him the truth because the information she gave was not something a child her age would say and her allegations were very specific and clear. He said it did not appear to be a coached statement. Based on his education, training, and experience, Investigator McElroy did not believe that R.Y. was lying.

¶ 8 Investigator McElroy testified that he spoke to the defendant the day after he interviewed R.Y. He went to the defendant's house where he was living with his

mother and two of his children. He made a safety plan whereby the defendant could not stay in the home due to the allegations against him. The defendant denied any contact with M.Y., but "from [Investigator McElroy's] recollections, had made no denial of any statements referring to [R.Y.]"

¶ 9 Dawn Farley, R.Y.'s mother, testified that she married the defendant in 2000. Dawn stated that she first learned that the defendant sexually assaulted R.Y. when she moved out of the defendant's house and moved in with her sister. Her niece, Kristie French, approached Dawn and told her that M.Y. and R.Y. had something to tell her. R.Y. then told Dawn that the defendant "did something to us." Dawn asked her sister what to do, and she recommended that Dawn call DCFS and the police.

¶ 10 Dawn testified that when she started her relationship with the defendant, the children were "okay with" him. After she married the defendant, his attitude changed and he became mean. He began yelling and cussing at the children on a daily basis. Dawn testified that the defendant disciplined R.Y. and M.Y. by making them stand on their heads with their feet against the wall until their faces swelled shut and that he whipped R.Y. with a switch. She stated that when the defendant came into a room, R.Y. would go to the other side of the room or exit the room. Dawn testified that R.Y. is much happier now that she is away from the defendant. R.Y. started counseling at the end of 2005. Dawn stated that now R.Y. smiles and talks more, and she sleeps better.

¶ 11 Dawn testified that the defendant treated her in a hateful manner. She said he raped her while she was sleeping. She stated that she told the defendant's mother, who said there was nothing she could do about it because they were married. The defendant told her approximately three times per week that he hated her. Dawn stated that she and the children were afraid of the defendant.

¶ 12 Dawn testified that in the summer of 2004, R.Y. had chapped lips. When she asked R.Y. why her lips were chapped, R.Y. told her it was because the defendant was making her suck his toes. Dawn testified that she did not ask R.Y. why she was sucking the defendant's toes, but told her to stop. Dawn stated that she moved out of the defendant's house at the end of June or beginning of July 2005. She was unaware of the sexual abuse at that time and moved out because she "got tired of the fighting and arguing all the time." She was also tired of being controlled by the defendant, who she said monitored her every move. Dawn stated that she believed R.Y. because R.Y. had always been truthful and would not make up such accusations.

¶ 13 R.Y. testified that she was 13 years old and that, in 2004, she was 8 years old. R.Y. testified that on her birthday, June 1, 2004, she and the defendant were in a field behind their house working on a car he was fixing up to sell. She was tired and hot and went to sit under a tree to cool off. After a short while, the defendant approached R.Y., pulled his penis out, placed his hands on the back of R.Y.'s head, and forced her to suck on his penis. R.Y. testified that she struggled, but the defendant would not let go so she bit his penis. He released her, and she ran home and went into her bedroom. After some time, the defendant came into her bedroom and told her not to tell anybody. At the time of the incident no other adults were home.

¶ 14 R.Y. testified that on June 25, 2005, she was in the garage with the defendant helping him work on a vehicle. When she finished helping him she wanted to go outside to play. Before she went outside, the defendant grabbed her hand. She unsuccessfully tried to pull away. He pulled down her pants and underwear to her ankles. R.Y. stated that the defendant then set her on the vehicle, spread her legs apart, and blew on and licked the inside of her vagina. She then shoved him away and went outside. The defendant told R.Y. not to tell anybody.

¶ 15 R.Y. testified that the defendant "made [her] touch his private parts" and "suck his feet." She said that sucking on his feet caused red marks around her lips. Her mother asked why she had such chapped lips and R.Y. told her. R.Y. stated that she did not tell her mother about any other incidents involving the defendant.

¶ 16 R.Y. testified that she was afraid of the defendant because he made her stand on her head, he beat her with a switch, and he yelled and cursed at her. R.Y. stated that she never reported her abuse until after she moved out of the defendant's house because he threatened to beat her bloody or kill her if she told anybody.

¶ 17 R.Y. testified that after she moved out of the defendant's house, she felt safe. She stated that the first person she told about the defendant's actions was her cousin Kristie. Kristie urged her to tell someone else. R.Y. testified that she then told her aunt. She testified that she also spoke to Investigator McElroy and Sergeant Brenda Burton. R.Y. stated that she reviewed her videotaped interview with Sergeant Burton prior to her court testimony.

¶ 18 Kristie French testified that R.Y. told her that she and the defendant "were doing things together." Kristie testified, "Apparently, he was taking her out back to—I think she said, like, out back on their property, where there was some abandoned vehicles." Kristie stated that she advised R.Y. to tell her mother.

¶ 19 Brenda Burton testified that she is a sergeant in investigations with the Illinois State Police. She stated that at the time of the trial she had been handling criminal sexual abuse investigations for approximately 17 years. She said that she was initially contacted by DCFS to assist them in their investigation of the defendant because his two stepdaughters had made allegations of sexual misconduct against him. Sergeant Burton said that she contacted the defendant and he agreed to meet her. On July 6, 2005, she and her partner Rick White interviewed the defendant at the Franklin

County sheriff's office. The interview lasted approximately three hours. The defendant was told that he was not under arrest and that he was not going to be arrested that day. Sergeant Burton testified that she read the defendant his *Miranda* rights and gave him a copy to read. She stated that he did not indicate to her that he wanted to speak to an attorney. Sergeant Burton explained to the defendant that she had interviewed R.Y. and M.Y. She explained "what they had alleged against him and [he stated] that he understood he was there to talk to [her] about those allegations and what had been said."

¶ 20 Sergeant Burton testified that she started the interview by asking the defendant to tell her "a little bit about the background of the family." After that he asked to take a break. She said he asked to go out to his van because he wanted to play them a tape he had of a religious song. They accompanied him to the van and listened to the song. The defendant smoked a cigarette. On the way back to the interview room, he asked if he could speak to his mother. They lent him one of their personal cell phones and the defendant was allowed to call his mother. He spoke to her for about 10 minutes before they resumed the interview.

¶ 21 Sergeant Burton testified that she told the defendant that she found the girls to be very credible. She stated that she told the defendant that the girls were able to provide very detailed accounts of the sexual contact they had experienced. She explained to him that it was not easy for them to come in and tell the truth about what happened and that it would be unfair of him not to tell the truth and to make them out as liars. Sergeant Burton stated that she told the defendant that if he told the truth about what happened, she would approach the State's Attorney and tell him that the defendant had been very cooperative with the investigation and "would recommend a minimum on each charge." She stated that she did not promise him that he would

get his family back as soon as he told her everything.

¶ 22 Sergeant Burton testified that the defendant denied that he touched M.Y. in a sexual way. She then asked him to tell her what happened with R.Y. She stated that right before the defendant began to describe the sexual contact he had with R.Y., his eyes filled with tears and he was visibly upset. He told her that in what he thought was the spring of 2004, he and R.Y. were in the living room of their house, Dawn was asleep on the couch, and his two younger children were sleeping on the floor. R.Y. was sitting on his lap and French kissed him. The defendant told the officers that he dismissed it as not a big deal because she had French kissed him in the past. He then said that R.Y. put her hand on his upper thigh, moved it to his penis, and began rubbing it. While that was going on, she began kissing down his chest and looking up at him, as if for permission to continue. The defendant told the officers that R.Y. then put his penis in her mouth. The defendant told Sergeant Burton that during the incident he was very curious to know how much R.Y. knew about sex and sexual activity. The defendant told Sergeant Burton that "after she was sucking on his penis, he ejaculated." He also stated that he did not want it to happen and that he knew he should have stopped it.

¶ 23 Sergeant Burton testified that the defendant told her about two other incidents of sexual contact with R.Y. One occurred around R.Y.'s birthday while the two of them were out in a field next to their house. The defendant told Sergeant Burton that he was urinating in the field when R.Y. came up to him and began rubbing his penis. He stated that she put his penis in her mouth and sucked on it until he ejaculated. He told Sergeant Burton that he knew he should have stopped it, but he did not. The defendant then described an incident that occurred in the garage. He told Sergeant Burton that he keeps a bucket in the garage to urinate in so that he does not have to



go into the house to use the bathroom. He said that R.Y. urinated in the bucket and when she finished, he lifted her onto the engine block of a car he was working on, spread her legs and vagina, and blew on it to dry it off because he did not have any toilet paper. Sergeant Burton testified that the defendant denied doing anything else to R.Y. Sergeant Burton testified that she told the defendant that she would be contacting him at a later date and that an arrest warrant would be issued.

¶ 24 Sergeant Burton testified that it is common for people accused of sexual abuse to minimize their behavior. She stated that in the defendant's case, he was accused of having sexual contact with two girls, but he only admitted to having sexual contact with one, cutting the damage in half. Additionally, she said that the defendant was transferring the blame of the incidents to R.Y. Sergeant Burton stated that she felt the defendant was truthful about the parts that he wanted her to know, but he was not forthright with all the information he provided.

¶ 25 Sergeant Burton stated that she interviewed R.Y. at a child advocacy center. The interview was videotaped. At the time of the interview R.Y. was 10 years old. She stated that while R.Y. was 10 when she interviewed her, she seemed a bit delayed and acted more like an 8-year-old. Sergeant Burton stated that R.Y. was quiet and a little reluctant to discuss the subject matter at times but that she was compliant and willing to answer questions. Sergeant Burton stated that she had interviewed children who were not telling the truth. She stated that their stories are inconsistent and that they may seem confused at times. Sergeant Burton testified that she did not get the feeling that R.Y. was making up stories.

¶ 26 Sergeant Burton testified that R.Y. told her of several incidents involving the defendant. R.Y. started by telling about a time he French kissed her. She then told Sergeant Burton about an incident that occurred in the garage where the defendant

pulled her pants and underwear down, lifted her onto the engine block, spread her legs open, and blew on and licked her "pee-pee." When given anatomical dolls to demonstrate, R.Y. stated that the defendant licked inside her vagina. R.Y. also described an incident to Sergeant Burton where the defendant took her onto a couch in the middle of the night and was "humping her" and "having sex with" her. Sergeant Burton asked R.Y. to use the anatomical dolls to demonstrate what having sex meant to her. Penis penetration was not alleged. Sergeant Burton testified that because there was no penetration alleged other than with a tongue, no medical examination was set up for R.Y. because there would be no scarring or damage that could be found. R.Y. told Sergeant Burton of another incident when she was in a field next to her house with the defendant. He pulled his pants down and was not wearing any underwear. Sergeant Burton stated that R.Y. told her that the defendant told her, "I want you to suck on this, pointing to his penis." He then took her head and forced his penis into her mouth and made her suck on it until he ejaculated in her mouth. R.Y. said she then spit it onto his shirt. Sergeant Burton stated that R.Y. described another incident that occurred when she was younger. R.Y. told Sergeant Burton she was in the bathroom with the defendant and he bent her over the toilet and began licking her buttocks and in between her legs.

¶ 27 The State moved to admit a videotape of Sergeant Burton's interview with R.Y. The videotape was allowed and was viewed during the trial. Sergeant Burton testified that the videotape was a fair and accurate depiction of the interview.

¶ 28 The videotape of Sergeant Burton's interview of R.Y. is dated July 1, 2005. In the videotape, R.Y. told Sergeant Burton that the first time something occurred between her and the defendant, she was three or four years old. The first thing she remembered was him kissing her on the lips. The last event she remembered occurred

on June 25, 2005. R.Y. stated she was certain of the date. She told Sergeant Burton that she was wearing pajama pants and that after lunch she and the defendant were in the garage working on a vehicle. The defendant pulled down her pants and underwear, set her on the front of the vehicle, spread her "pee-pee" apart, and blew in and licked it. She stated that she hit him on the head and he stopped. R.Y. described another incident that occurred in the summer where the defendant carried her to the couch while she was sleeping. She stated that he took off her clothes, laid on top of her, and humped her. He was wearing his clothes. She demonstrated with the anatomical dolls. R.Y. described an incident when she was in a field with the defendant working on a white car. She stated that the defendant made her suck on his "pee-pee." She bit his penis and he sent her to her room. R.Y. told Sergeant Burton of another incident that occurred in the field. She said the defendant was working on the white car and he pulled down his pants and pushed her head toward his penis and made her suck on it. She said white stuff came out and she spit it on his shirt. R.Y. told Sergeant Burton that the defendant made her watch a sex movie. R.Y. also told Sergeant Burton that the defendant touched her all over, that he kissed her on the mouth and put his tongue in her mouth, and that he sucked on her "boobs." She also described an incident in the bathroom where the defendant put his hands on her buttocks, spread them apart, and licked them. She said she was leaning over the toilet and the defendant touched her everywhere. When asked how frequently things happened with the defendant, R.Y. said every week, every month, every day. Sergeant Burton then asked R.Y. if it happened every day or if the defendant skipped some days. R.Y. replied that the defendant skipped some days. When Sergeant Burton asked R.Y. what the defendant said about telling, R.Y. replied that he told her not to tell. Sergeant Burton asked what would happen if she told and R.Y. said the

defendant would whip her bloody.

¶ 29 Rick White testified that he is a special agent with the Illinois State Police and that he predominantly deals with child sex abuse cases. He stated that on July 6, 2005, he and Sergeant Burton interviewed the defendant. Agent White stated that the defendant initially denied that he had any kind of sexual contact with R.Y. Agent White stated that when the defendant was told about the allegations against him, he was not surprised. The defendant told them that the allegations were made because Dawn was mad at him. At some point during the interview, the defendant asked for a break stating he would confess, but he needed to go to his van first. Agent White testified that he and Sergeant Burton accompanied the defendant to his van. The defendant took out a Bible and played a cassette. Agent White testified that the defendant told them that it was a certain song that he had been listening to and God, speaking through the song, prompted him to tell the truth and turn his life around. The defendant then telephoned his mother, but Agent White did not hear the conversation. After the break they returned to the interview room. Agent White stated that he became frustrated because the defendant kept talking about religion, but he kept lying about what he had done. Agent White stated he told the defendant, "Here you're claiming to be a Christian and all this stuff, and then you're lying and all you're worried about is yourself and nobody else." Agent White said he walked out of the interview room and when he returned, the defendant apologized and described a few incidents involving R.Y.

¶ 30 Agent White testified that the defendant told them that, on one occasion, R.Y. started French kissing him, which was not a big deal because she had done it before. She then started kissing down his chest and feeling his crotch. Agent White stated that the defendant told them that R.Y. had just been at her biological father's house

and he thought she may have learned something there so he wanted to do a little investigating to see what she learned. Agent White testified that the defendant said he let it go too far and that R.Y. took his penis out and performed oral sex on him. The defendant ejaculated in her mouth, and he realized he should have stopped it. Agent White testified that the defendant also told them about an incident in a field. The defendant told them he was standing by a white car urinating when R.Y. came up to him smiling and being sexy. Agent White stated that the defendant told them that R.Y. performed oral sex on him and that he ejaculated in her mouth. Again he said he should have stopped it because he was an adult. Agent White testified that the defendant told them about one additional incident. The defendant and R.Y. were in the garage working on a vehicle. R.Y. needed to use the bathroom, and she urinated in a bucket they keep in the garage for that purpose. There was no toilet paper so the defendant said he lifted her up and "blow-dried her, I guess, with his mouth."

¶ 31 Agent White testified that it is usual for the accused to shift blame to the victim because it is easier "to admit you did something terrible if you don't take 100-percent responsibility for it." Agent White stated that they told the defendant that if he cooperated, they would inform the State's Attorney. Agent White testified that he had the impression that everything the defendant told him had happened. He testified, "I just figured there was more than—there was probably more that he wasn't telling me, but he—I believed that he was telling me the truth about those incidents."

¶ 32 The defendant testified that on July 6, 2005, he was called by Sergeant Burton and asked to go to the Franklin County sheriff's office to take a lie detector test. He stated that when he arrived there was no lie detector and that he was taken into a room and questioned. He asked for an attorney. The defendant testified that about one hour into the interview, Sergeant Burton gave him a piece of paper and asked if he knew

what the *Miranda* rights were. He looked at it and told her yes. She did not review the rights with him, but told him to sign the paper. He stated that he signed the paper because Sergeant Burton promised she would talk to the State's Attorney and that he would be allowed to see his biological children. He stated that Sergeant Burton told him that if he did not give them some kind of testimony that he would be sentenced to 30 years in prison. The defendant said that Sergeant Burton conducted most of the interview and that Agent White was present, but he went in and out of the room. The defendant testified that he told them repeatedly that he was not guilty. Sergeant Burton went over what the girls had said and told him to make up a story from that. He testified, "I had to make up a story from it, what—the details that she had given me, and, you know, to make a confession so that they would work with me." The defendant stated that he lied so he could see his kids and avoid going to prison. He said that if he cooperated Sergeant Burton told him she would give him two weeks before arresting him and he thought that would give him enough time to find an attorney. He said he had already asked for an attorney and had been refused. The defendant testified that Sergeant Burton and Agent White lied when they testified. He stated that nothing happened between him and R.Y.

¶ 33           The defendant testified that during the interview, he asked to go outside to smoke, and he was going to try to leave. Sergeant Burton and Agent White walked out with him. He stated that there was a tape he listened to and, when he turned on his van, it just started playing. The defendant testified that he made a call to his mother using his own telephone. The defendant stated that he told his mother that the police were not allowing him to leave and were trying to make him confess. He said Sergeant Burton took the phone from him and told his mother that the defendant was doing fine, but that he could no longer talk to her. Sergeant Burton then hung up the

phone and would not return it to the defendant until the end of the interview.

¶ 34 The defendant testified that he was asked to sign a statement that Sergeant Burton had written. He refused. The officers then left the room and drove off. The defendant stated he drove after them to ask where his biological children were so that he could see them. He did not get to see the children. The defendant testified that he was arrested a couple of weeks after the interview.

¶ 35 The trial court found the defendant guilty beyond a reasonable doubt of all three counts. On December 24, 2008, the defendant filed a motion for posttrial relief. On March 13, 2009, he filed amended motion for posttrial relief alleging that the State failed to prove him guilty beyond a reasonable doubt and various due process violations. The trial court denied the defendant's motion. The defendant was sentenced to 20 years' imprisonment in the Department of Corrections for each count, with his sentences to run consecutively. The defendant filed a motion to reconsider, which was denied. The defendant filed a timely notice of appeal.

¶ 36

#### ANALYSIS

¶ 37 The defendant argues that he was denied a fair trial because Dawn testified to a history of rape and abuse by him when those acts were not the subject of any charge. He asserts that to make up for the weaknesses in its case, the State resorted to character assassination by presenting evidence that painted the defendant as a verbal abuser who hated his wife and regularly raped her.

¶ 38 To preserve an issue for review, a defendant must both contemporaneously object and raise the issue in a posttrial motion. *People v. Nielson*, 187 Ill. 2d 271, 296 (1999). There was no ruling on the admissibility of Dawn's statements. The defendant did not object at trial to Dawn's testimony, and did not raise the issue in his posttrial motion. Accordingly, any error is waived. The defendant asks this court to

review Dawn's statements for plain error.

¶ 39 The plain-error doctrine allows a reviewing court to reach a forfeited error affecting a substantial right in two circumstances. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). First, in order to preclude an argument that an innocent person was wrongly convicted, the reviewing court may consider a forfeited error where the evidence is so closely balanced that the guilty verdict may have resulted from the error and not the evidence. *Id.* Second, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process where the error is so serious that the defendant was denied a substantial right and thus a fair trial. *Id.* at 179. In the first instance, the defendant must prove that there was plain error and that the evidence was so closely balanced that the error alone threatened to tip the scales of justice against him. *Id.* at 187. In the second instance, the defendant must prove that there was plain error that was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *Id.* Because of the importance of the right involved, prejudice to the defendant is presumed regardless of the strength of the evidence. *Id.* Plain error is a narrow and limited exception to the general waiver rule, not a general savings clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court. *Id.* at 177.

¶ 40 The defendant objects to Dawn's testimony that, after she married the defendant, his attitude changed and he became mean, that he raped her when she slept, that he told her he hated her, and that she moved out because they fought all the time. He argues that these statements do not relate to whether he engaged in sexual conduct with R.Y. He states that Dawn's testimony was an overreaching attempt to secure an emotional reaction against him so he would be convicted regardless of the weak case



brought against him on the charges.

¶ 41 Evidence of other crimes is generally inadmissible if relevant only to show the defendant's propensity to commit crime. *People v. Hall*, 194 Ill. 2d 305, 339 (2000). "Such other-crimes evidence is objectionable because it carries the risk that a jury will convict a defendant merely because it believes the defendant is a bad person who deserves punishment." *Id.* The erroneous admission of other-crimes evidence requires reversal if the evidence was a material factor in the defendant's conviction. *Id.* If it is unlikely that the error influenced the court, reversal is not warranted. *Id.*

¶ 42 "Evidence that suggests that the defendant has engaged in prior criminal activity or is intending to engage in criminal activity should not be admitted unless it is relevant to the crime for which he is being tried." *People v. Ingram*, 389 Ill. App. 3d 897, 901 (2009). The State argues that Dawn's testimony was offered for a limited purpose and was relevant because it provides an explanation about why she delayed in reporting her suspicions that the defendant was sexually assaulting her daughter, namely that she was afraid of the defendant. The State did not offer the evidence for a limited purpose. Furthermore, Dawn's testimony about when she first learned about the abuse is contradictory. She specifically stated that she never expected the defendant to do what he was charged with because she did not think he would betray her. She also said that she first learned about the abuse in the summer of 2004 when R.Y. had chapped lips from sucking on the defendant's toes. She testified that she told R.Y. to stop, but never followed up on it. She later stated that she first learned of the defendant's actions when she moved out of his house. Because it is not clear from her testimony that she was suspicious that the defendant was sexually assaulting her daughter prior to her moving out of his house, it not clear that she delayed reporting

her suspicions due to her fear of the defendant.

¶ 43           However, Dawn's testimony of other crimes and bad acts does not rise to the level of plain error. The evidence was not so closely balanced that the guilty verdict may have resulted from the error and not the evidence. R.Y. testified that, on June 25, 2005, while helping the defendant work on a vehicle in the garage, the defendant pulled her pants down, placed her on the vehicle, spread her legs apart, and blew on and licked her vagina. She also testified that on June 1, 2004, while outside in a field with the defendant working on a vehicle, he tried to force her to suck on his penis. She bit his penis and he released her. R.Y. remembered the date because it was her birthday. R.Y. testified that the defendant made her touch his "private parts" and "suck on his feet." Dawn testified that R.Y. had extremely chapped lips and that R.Y. told her it was because the defendant made her suck on his toes.

¶ 44           Sergeant Burton testified that the defendant told her that in the spring of 2004, he was in the living room with R.Y. and she began to French kiss him. R.Y. then performed oral sex on him. He stated that he knew he should have stopped it, but he did not. He also told her that around R.Y.'s birthday, he and R.Y. were in a field next to their house and she came up to him and began rubbing his penis. She performed oral sex on him. He again stated that he should have stopped it, but did not. He described a third incident to Sergeant Burton in which he and R.Y. were working in the garage. According to the defendant, R.Y. urinated in a bucket and, because there was no toilet paper, he lifted her onto the engine block of a car he was working on and blew on her vagina to dry it off.

¶ 45           Sergeant Burton testified that she interviewed R.Y. on July 1, 2005, and videotaped the interview. The videotape was admitted into evidence. In the videotape, R.Y. describes the June 25, 2005, event, the incident in the field, and

several other incidents.

¶ 46 Investigator McElroy testified that he interviewed R.Y. after the abuse was hotlined to DCFS. He said R.Y. told him that the defendant made her put her mouth on his penis. He also stated that she told him about the incident in the garage when the defendant blew and licked R.Y.'s vagina.

¶ 47 The evidence against the defendant was not so closely balanced that the alleged error alone threatened to tip the scales of justice against him. The defendant's confession and the statements made by R.Y., when taken together, overwhelmingly established the defendant's guilt.

¶ 48 The second prong of the plain-error doctrine also offers no relief to the defendant. "The purpose of this prong of the 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. Sargent*, 239 Ill. 2d 166, 190-91 (2010). Prejudice need not be established, but is presumed because of the importance of the right. *Id.* at 191. "Relief under the second prong of the plain error rule is proper only if the error is so fundamental to the integrity of the judicial process that the trial court could not have cured the error by sustaining an objection or instructing the jury to disregard the error." *Nielson*, 187 Ill. 2d at 297. The burden of persuasion rests with the defendant. *Sargent*, 239 Ill. 2d at 190.

¶ 49 The defendant argues that the admission of Dawn's testimony about other crimes and bad acts was unfair because it prejudiced the fact finder against him and violated his right to a fair trial on the relevant evidence. A trial judge in a bench trial is presumed to know the law and to follow it, and this presumption is rebutted only when the record affirmatively shows the contrary. *People v. Thorne*, 352 Ill. App. 3d 1062, 1078 (2004). There is nothing in the record that suggests that the trial court

considered Dawn's statements about the defendant's other crimes and bad acts. The defendant failed to show that the admission of Dawn's bad acts testimony prejudiced the trial court against him and that he was denied a fair trial.

¶ 50 The defendant next argues that it was error to allow witnesses to testify to the truthful character of R.Y. or the indications of truthfulness in her hearsay testimony. At the time of the trial, opinion testimony was not permitted when a trait of character, such as truthfulness, was at issue. *People v. Williams*, 139 Ill. 2d 1, 21 (1990). Credibility could only be established through reputation evidence. *People v. Robert P.*, 354 Ill. App. 3d 1051, 1061 (2005). We agree that the admission of the opinion testimony was error. However, we do not believe that this error warrants reversal of defendant's conviction. There was no objection to this testimony at trial and it was not plain error.

¶ 51 The defendant objects to the testimony given by Investigator McElroy that, based on his education, training, and background, he believed that R.Y. was not lying and that she was forthcoming. He also objects to the testimony of Dawn that she believed R.Y. because she had always been truthful with her and that R.Y. did not have any reason to make up the allegations. The defendant objects to Dawn's testimony that R.Y. did not lie about serious matters and had only lied to her about petty stuff such as "about toys or something she did at school." The defendant objects to Sergeant Burton's testimony stating: "I didn't get the feeling that [R.Y.] was making up stories. I thought she gave a pretty credible interview." The defendant asserts that both prongs of the plain-error doctrine are met.

¶ 52 The defendant argues that the case was closely balanced because it hinged on whether the trial court believed his testimony that he did not engage in any type of sexual conduct with R.Y. or if it believed R.Y.'s testimony. As discussed earlier, the

evidence was not closely balanced. Sergeant Burton and Agent White testified that the defendant confessed to them and described two incidents that were very similar to the incidents R.Y. had described. R.Y. testified, and her videotaped interview was admitted into evidence. Investigator McElroy testified as to R.Y.'s statements when he interviewed her after the report of abuse was first made. The error did not tip the scales of justice against the defendant.

¶ 53 The defendant argues that the error was so serious that it deprived him of a fair trial. At the time of the trial, Illinois was one of the very few jurisdictions that prohibited opinion testimony on the issue of credibility. *Robert P.*, 354 Ill. App. 3d at 1061. "Most jurisdictions follow Rule 405 of the Federal Rules of Evidence, which allows opinion testimony on the issue of character." *Id.* at 1062. Opinion testimony as to truthfulness is now admissible in Illinois. Ill. R. Evid. 608 (eff. Jan. 1, 2011). The erroneous admission of the opinion testimony did not affect a fundamental right of the defendant. As this evidence would now be admissible in Illinois, and at the time of the trial was properly admissible in neighboring states and in federal court, it was not a serious injustice to admit it. See *Robert P.*, 354 Ill. App. 3d at 1062 ("As this evidence can be properly admitted down the street at the federal courthouse or across the border in a neighboring state, the defendant's argument, claiming it was a 'serious injustice' to admit it in this case, fails.") The defendant failed to prove plain error.

¶ 54 Finally, the defendant argues that he was denied the effective assistance of counsel because his counsel failed to object to the evidence of other crimes and the testimony of belief in the credibility of R.Y. Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, the defendant must demonstrate that (1)

counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Hall*, 194 Ill. 2d 305, 337 (2000). To establish ineffectiveness of counsel, both prongs of the *Strickland* test must be satisfied. *People v. Johnson*, 372 Ill. App. 3d 772, 777 (2007). "Where a defendant fails to satisfy *Strickland's* second prong by failing to show prejudice, the reviewing court need not determine whether *Strickland's* first prong of deficient performance has been met." *Johnson*, 372 Ill. App. 3d at 777.

¶ 55 In the instant case, the defendant failed to satisfy the prejudice prong of the *Strickland* test. Even excluding the testimony of Dawn, and the testimony of others about R.Y.'s truthfulness, there was still sufficient evidence to find the defendant guilty. R.Y. testified that the defendant sexually assaulted her, the defendant confessed to Sergeant Burton and Agent White that he sexually assaulted R.Y., and Investigator McElroy, Sergeant Burton, and Agent White all testified as to the details R.Y. told them about what the defendant did to her. The defendant failed to show that, but for counsel's deficient performance, the result of the trial would have been different, and thus he failed to show that he received ineffective assistance of counsel.

¶ 56 CONCLUSION

¶ 57 For the foregoing reasons, the judgment of the circuit court of Hamilton County is affirmed.

¶ 58

Affirmed.