2016 IL App (1st) 142135-U

SIXTH DIVISION
September 30, 2016

No. 1-14-2135

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DENNIS ALLEN, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 11 CR 5536 Honorable Domenica A. Stephenson, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** The evidence was sufficient to support defendant's conviction of predatory criminal sexual assault of a child. Trial counsel was not ineffective. The State did not engage in prosecutorial misconduct. Affirmed.

¶ 2 Following a jury trial, defendant Dennis Allen was convicted of three counts of predatory criminal sexual assault of a child, namely, 12-year-old R.G. and 10-year-old A.G, and was sentenced to mandatory natural life imprisonment. 720 ILCS 5/12-14.1(a)(1), (b)(1.2) (West 2011 Supp.). On appeal, he first contends that the evidence was insufficient to support his

conviction predicated upon contact between his penis and R.G.'s mouth, or in the alternative, that he is entitled to a new trial because the evidence supporting this conviction was inadmissible. Defendant also contends that his trial counsel was ineffective for failing to object to the State's reliance upon allegedly inadmissible or nonexistent evidence of contact between his mouth and A.G.'s penis. Defendant's last claim of error alleges various instances of misconduct on the part of the State. We affirm.

¶ 3 BACKGROUND

¶ 4 The State charged defendant with 10 counts of predatory criminal sexual assault against 10-year-old R.G. and his brother, 12-year-old A.G. Counts II and VIII alleged that defendant placed his penis in the mouth of R.G. and A.G., respectively. Counts VI and X alleged contact between defendant's mouth and the penises of R.G. and A.G., respectively.

¶ 5 Before trial, the State moved to admit certain hearsay statements into evidence pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2014)). The State sought to admit the testimony of Elizabeth Cerrentano (who treated R.G. at Little Company of Mary Hospital) and Lynn Aladeen (who interviewed R.G. and A.G. at the Chicago Children's Advocacy Center). At the hearing on the State's motion, Cerrentano and Aladeen both testified as to their conversations with R.G. and A.G. After the conclusion of the hearing, defense counsel argued that the statements were unreliable and thus inadmissible because R.G.'s statements to Cerrentano were inconsistent with A.G.'s statements to Aladeen. The State countered as follows:

> "MS. ERNO [Assistant State's Attorney]: If I understand [defense] counsel's argument he is trying to use [R.G.'s] interview with one person and [A.G.'s] interview with another interviewer

> and then to compare those two to say there is [*sic*] inconsistencies. I'm asking your Honor not to consider that.
>
> Each boy talking to each witness is where you would compare consistencies or great inconsistencies if there was [*sic*]. What's admissible under the statute is only going to be each boy's explanation about sexual crimes that they suffered from.
>
> I am not going to be able to use their statements to witnesses about witnessing what happened to their brother under the 115-10 anyway, and that was the portion that counsel was just comparing is what one boy recalls seeing or not seeing happen to the other one. That's not going to be admissible under 115-10 regardless."

Following argument, the trial court found that the "content and circumstances" of Aladeen's and Cerrentano's interviews of R.G. and A.G. provided sufficient safeguards of reliability. The trial court then granted the State's motion and stated, "both those witnesses will be allowed to testify regarding the children's statements." The trial court did not limit the scope of either witness's testimony. The cause proceeded to trial, and the following evidence was adduced.

¶ 6 Jetty G. testified that she was 72 years old, had 10 biological children, and was the adoptive mother of R.G., A.G., R.G.'s biological siblings, and A.G.'s biological siblings. According to Jetty, A.G. was five years old when he came to live with her and this was A.G.'s tenth "placement" or home that he had lived in, whereas R.G. was four when he came to her home and this was R.G.'s first placement. Jetty lived in a house on the 9400 block of South

Throop Street in Chicago with R.G., A.G., their siblings, her adult daughter Cynthia, Cynthia's ex-husband, and Eugene Cornelius (whom everyone referred to as "Mr. Gene").

¶ 7 For the previous 16 years, Jetty had worked as a professional homemaker and caregiver for "Help at Home," and defendant was Cornelius's caretaker. Jetty added that, although defendant had lived in the house for about two years, he had moved out around two years before February 2011. Nonetheless, defendant would come to her house to help Cornelius get up and bathe, feed him, and clean his room. Jetty testified that, although defendant's responsibilities as a caretaker did not include interacting with the children, he said he wanted to be a "father figure" for all of the children. She noticed, however, that defendant would only buy things for A.G. and R.G. and none of the other children. In addition, defendant would also take A.G. and R.G. to the movies and play ball with them. Jetty further recalled that, over a couple of months, she spoke to defendant "[a]t least four or five times" that he should not be in the boys' room. She noted that, at times, defendant would arrive at around 7 a.m. and immediately go upstairs to the boys' room instead of going to help Cornelius.

¶ 8 Jetty then testified that, at around 1 a.m. on February 25, 2011, she abruptly woke up to the sound of Cynthia screaming at defendant. She went downstairs to the living room and saw Cynthia holding an iron threatening to hit defendant in the head. Jetty said that defendant was sleeping in the living room. In addition, R.G. had been sleeping in the living room on a "pallet" because some repairs were being made upstairs. After Cynthia explained what she had seen, Jetty said she only looked at defendant, who said he "didn't do it." Although Cynthia eventually contacted the police, neither she nor Cynthia called them immediately because defendant was supposed to take Cornelius to a morning dialysis appointment.

¶ 9 Cynthia G. testified that she was Jetty's 46-year-old daughter and lived with Jetty at the time of the incident. Cynthia recalled that, when she went to bed that evening, R.G. and his younger brother, S.G., were sleeping on an air mattress in the living room because some renovation work was being done to their upstairs bedroom, and defendant was sleeping on a "pallet" in the living room. At around 1:30 or 2 a.m. on February 25, 2011, Cynthia woke up because she wanted popcorn, so she got out of bed and went to the kitchen. She collected the ingredients and went into the dining room to use the popcorn maker. After starting the popcorn maker, she noticed out of her peripheral vision only S.G. sleeping on the air mattress. She then saw defendant take R.G. out from underneath him and "throw[]" R.G. onto the air mattress. Cynthia said she started "screaming and hollering" at defendant that she had caught him "messing around with them." Cynthia continued screaming as she went upstairs to inform her mother and then returned downstairs, where she picked up an iron. Cynthia conceded that, despite her mother's pleas not to do so, she was going to hit defendant with the iron because she caught him "messing" with her little brother. Cynthia said that defendant denied any impropriety, explaining that R.G. "sleep [*sic*] wild," but Cynthia said she responded by asking defendant how a person could "sleep wild and end up under you[,] a grown man?" At that point, Cynthia testified that defendant did not answer her and only told her mother, "Sister *** I wouldn't do nothing [*sic*] like that."

¶ 10 R.G. then testified that he was born on June 13, 2000, and was 13 years old at the time of trial. R.G. testified that in February 2011 he was living with his adoptive mother (Jetty G.), as well as his siblings, which included A.G. and S.G. R.G. said that, late on February 24, 2011, he went to sleep in the living room on an air mattress with S.G. R.G. said that defendant placed a "pallet" (which R.G. described as simply a blanket on which a person would sleep in lieu of a

mattress) about two inches from the air mattress and turned off the television that R.G. and S.G. had been watching. R.G. fell asleep but was later awoken when he felt being pulled off of the air mattress onto the pallet. He felt a "big heavy person" on top of him, making it difficult for him to breathe.

¶ 11 R.G. heard popcorn popping and then saw a light turn on. At that point, defendant threw him back onto the air mattress. R.G. then heard Cynthia "cursing out" defendant, while defendant sat on the pallet trying to explain what happened. Cynthia, however, kept yelling at defendant. She told R.G. and S.G. to go upstairs and go to bed, so they slept in Jetty's room upstairs. The next morning, R.G. went to the hospital and spoke to police officers.

¶ 12 R.G. stated that this incident had not been the first time that "anything happened" with defendant. When he was about nine years old, R.G. recalled that he and A.G. were in their bedroom sitting on the bed, and defendant entered the room and told them, "[I]t's time to play." According to R.G., defendant then removed his erect penis from his pants and "tried to make us suck his penis." R.G. said he and A.G. both resisted, but the following colloquy then took place:

> "Q. [The State] Did you see whether or not [defendant's] penis touched [A.G.'s] mouth?
>
> A. Yes.
>
> Q. For how long would you say [defendant's] penis touched [A.G.'s] mouth?
>
> A. At least about six seconds until [A.G.] moved his face.
>
> * * *
>
> Q. After [A.G.] moved his face, what did [defendant] do next?

***

Q. So [defendant] said [R.G.], come over here?

A. Yes.

* * *

Q. Okay. Then what did [defendant] do?

A. He tried to make me do the same thing.

Q. Can you describe to us how he tried to make you do that?

A. He put [his penis] to my face."

¶ 13 R.G. then described defendant's penis touching the "side" of his lip—"right here"—and added that he was "trying" to resist, as well. The State later asked R.G. whether defendant's penis touched R.G.'s "lip or insides of any part of [R.G.'s] mouth even a little bit." R.G. responded, "He just touched the side of my lip and then I just started trying to get away." The State then asked that the record reflect that, when R.G. earlier said "right here," he was "pointing to the right side of his mouth just outside his lips."

¶ 14 When the State asked R.G. whether defendant touched R.G.'s penis "one time or more than one time," R.G. said it was only once. The State then asked whether defendant made R.G. put his mouth on defendant's penis "one time or more than one time," and R.G. answered, "Twice." In response to the State's follow-up question, R.G. reiterated that defendant made him put his mouth on defendant's penis on another occasion.

¶ 15 R.G. then described another incident in which defendant performed oral sex on R.G. and A.G. R.G. said that defendant took him and A.G. to their bedroom and locked the door. While

R.G. and A.G. were both on the bed, defendant first went to A.G., pulled down A.G.'s pants and underwear, and began "sucking [A.G.'s] penis." Defendant then went to R.G.

¶ 16 R.G. was now standing up, and defendant touched R.G.'s penis with his hand and brought it to defendant's mouth. Defendant began sucking R.G.'s penis while A.G. was still in the room. R.G. said his penis was in defendant's mouth for about 10 seconds until he "peed" in defendant's mouth. According to R.G., defendant said he was going to "whoop" R.G., but Jetty had come home from work and rang the doorbell, so defendant went to answer the door.

¶ 17 R.G. explained that he never told his mother (Jetty), Cynthia, or any trusted adult what defendant had been doing because R.G. was afraid that he was going to be taken away from his adoptive mother. On cross-examination, R.G. agreed that he never told the police that he had "peed" in defendant's mouth; instead, R.G. informed his attorney about a year prior.

¶ 18 A.G., who was 15 years old at the time of trial, testified that he was born on July 18, 1998. A.G. stated that he slept in his mother's room at the foot of her bed on some covers and a pillow on February 24, 2011. A.G. testified that he wanted to sleep there because his bedroom was being remodeled, he heard that defendant was coming over, and he "didn't have time for him to be playing and feeling on me." He woke up in the middle of the night to the sound of his mother stumbling over things and rushing to put on a house coat. He heard his mother run downstairs, and at that time he heard Cynthia's voice. A.G. walked to the stairs and saw Cynthia—who was "mad and upset"—holding an iron. He could see his mother trying to calm everything down and find out what had happened. From his perspective, A.G. could see S.G. lying on the air mattress still asleep and R.G. sitting up looking confused and puzzled. After he saw that, A.G. said he turned around, returned to his mother's room, and began to cry. A.G.

explained that he began crying because he felt "like a sigh of relief because I was happy that he had got caught."

¶ 19 A.G. said that he met defendant when he was around nine years old and defendant moved into their home. A.G. added, however, that, even after defendant moved out of the house, defendant still came over every day to take care of "Mr. Gene" (a.k.a. Cornelius). A.G. further noted that defendant bought him and R.G. clothing and a bicycle, and defendant also took them out to eat and to the movies.

¶ 20 A.G. then described an incident when he was 12 in which A.G. and R.G. were in their bedroom and defendant was lying on the bed with his pants down and holding his penis. According to A.G., defendant told them, "[T]ime to eat." Defendant started wrestling with A.G. and R.G. because defendant was "trying" to make A.G. and R.G. suck his penis. A.G. saw defendant grab R.G.'s hair to force R.G.'s head down to defendant's penis, but A.G. said R.G. was able to get away after defendant's penis touched R.G.'s cheek. Defendant then tried to make A.G. "do it," but A.G. said that he was not "fitting [*sic*] to do it." At that point, defendant sat up on the bed and said, "[Y]ou all no fun."

¶ 21 On another occasion, A.G. said that, while he was in his room, defendant came in and tried to put his penis in A.G.'s mouth. A.G. testified that R.G. ran into the room, but defendant forced R.G. out of the room and locked the door. A.G., however, told defendant that A.G. did not want to do "this" anymore, after which A.G. noticed that defendant "turned all his attention from me *** to [R.G.]." When asked, A.G. initially denied ever seeing defendant put his penis in R.G.'s mouth, but then admitted that he was present for the incident in which defendant put his mouth on R.G.'s penis and R.G. "peed" into defendant's mouth. A.G. admitted that he never told an adult about defendant's behavior because A.G. was afraid that A.G. and his sister would

be removed from the home and A.G. loved staying at the home and did not want to lose that because "this incident" happened.

¶ 22 Aladeen testified that she was a forensic interviewer with the Chicago Children's Advocacy Center, and that she interviewed both R.G. and A.G. Aladeen said that she first spoke to R.G. alone for about 30 minutes, and then she spoke to A.G. alone for about an hour. Aladeen added that the boys never had an opportunity to talk to each other between the interviews.

¶ 23 Aladeen first recounted her interview with R.G. R.G. first told her that, two weeks prior to the interview, a man who worked for his mother had pulled him off of his air mattress and onto the man's pallet and got on top of him. R.G. then stated that, when his sister came in and saw them, the man pushed R.G. back onto his air mattress. Aladeen recalled R.G. describing an incident during which the man came in and sucked R.G.'s penis while R.G. was on his bed in his bedroom, another incident when the man sucked R.G.'s penis in the living room, and one incident where R.G. described seeing the man suck A.G.'s penis in the bedroom. R.G. told Aladeen that these incidents began when R.G. was about eight years old, and the last incident occurred around two weeks before the interview. In addition, Aladeen said that R.G. informed her that the man "tried" to make him and A.G. suck the man's penis.

¶ 24 During Aladeen's interview with A.G., A.G. stated that that he had been sleeping until he heard Cynthia screaming, and then he understood that the man had been on top of R.G. Aladeen testified that A.G. disclosed that his first "encounter" took place just before he turned 11 years old. During that incident, A.G. revealed that "the man made him and [R.G.] suck the man's penis ***." According to Aladeen, A.G. described "a few different incidents." A.G. spoke of two incidents involving contact between the man's penis and A.G.'s and R.G.'s mouths: In one incident, "the man made A.G. suck his penis," and in another, "the man tried to make [A.G.] and

[R.G.] suck his penis." Aladeen, however, testified that A.G. did not describe any incident in which the man put his mouth "on either one of their penises." A.G., however, admitted that there was an incident where "the man made A.G. suck his penis by grabbing his arm," during which "the man squeezed [A.G.'s] neck and pushed him down." Finally, A.G. also said that the man made R.G. watch A.G. suck the man's penis.

¶ 25 After the State rested, defendant testified on his own behalf, confirming that he was 47 years old but denying that there was any inappropriate contact with the boys. Instead, defendant testified that he woke up during the night to the smell of popcorn and noticed that he could not move his right arm because R.G.'s head was on it. Defendant said he gently lifted R.G.'s head and got onto the air mattress to place R.G. in a different area when Cynthia walked in and started yelling at him. The parties then rested and the cause proceeded to closing arguments.

¶ 26 Immediately before closing arguments, the trial court admonished the jury that closing arguments were not evidence and that the arguments should not be considered as evidence. The trial court added that the jury should disregard any statement based on neither the evidence nor a reasonable inference drawn from the evidence. During the State's initial closing argument, the State made the following comments:

> "MS. AHMAD [Assistant State's Attorney]: So, ladies and gentlemen, today when you retire to the jury room, you have the testimony that you heard. You have exhibits. You will take with you your life experience. *** you do not leave your life experience at the door. Think about [R.G.] trying to describe to you how this defendant was trying to force his penis into his mouth. Think about [R.G.'s] demeanor as he sat there minimizing,

> he tou[c]hed me here with his penis, he touched me here pointing to the corner of his mouth because he just can't bring it to himself to say that this defendant put it actually in his mouth.
>
> MR. WALSH [Defense counsel]: Objection.
>
> THE COURT: Sustained.
>
> MS. AHMAD: Think about the demeanor of A.G. as he struggled to tell you how this defendant attempted and then ultimately took off his clothes, how this defendant placed his mouth on A.G.'s penis, and how difficult it was for him to tell you that.
>
> * * *
>
> *** Ms. Aladeen told you how she met in March of 2011 with both boys. She told you specifically how she spoke with [R.G.]. She told you how [R.G.] told her about the defendant sucking *** [R.G.'s] penis. She told you how [R.G.] told her that the defendant sucked [A.G.'s] penis. ***
>
> Ms. Aladeen also told you how she spoke with [A.G.]. *** Ms. Aladeen told you how [A.G.] told her the man made him and [R.G.] suck the man's penis."

¶ 27 Defense counsel argued, *inter alia*, that R.G. and A.G. testified about "things that they never said before to any police officer, any children's advocacy center, *** anyone else ***." Defense counsel then informed the jury that they would get an instruction about "prior

inconsistent statements and how you should think about prior inconsistent statements in evaluating the credibility of these witnesses who have no other support for their testimony."

¶ 28 In its rebuttal argument, the State made the following comments:

> "MS. ERNO [Assistant State's Attorney]: This really is a simple case, ladies and gentlemen. Keep your eye on the ball. The defense is trying to tell you that *** it's complicated and confuse you by the use of terminology of prior inconsistent statements and somehow trying to lead you to believe that that's automatically—
>
> MR. WALSH: Objection, judge, to the defense trying to confuse them, the jury.
>
> THE COURT: Overruled.
>
> MS. ERNO: They are trying to confuse you by using terminology prior inconsistent statements and then by somehow trying to lead you right down the road that means you should discount things that you heard. It's not that complicated. They are trying to make it more complicated so you don't see what is right in front of your eyes."

¶ 29 At the conclusion of closing arguments, the trial court instructed the jury. Among its instructions, the trial court informed the jury that opening statements were made by the attorneys to acquaint the jury with the facts they expected to be proved. The trial court added that the attorneys' closing arguments were made to discuss the facts and circumstances in the case, and should be confined to the evidence and the reasonable inferences to be drawn from the evidence. The trial court reiterated that closing arguments were not evidence, and any statement or

argument made by the attorneys that was not based on the evidence should be disregarded. At the conclusion of jury instructions, the jury retired to deliberate.

¶ 30 The jury found defendant guilty of counts II (alleging contact between defendant's penis and R.G.'s mouth), VI (defendant's mouth and R.G.'s penis), and X (contact between defendant's mouth and A.G.'s penis), but not guilty of count VIII (contact between defendant's penis and A.G.'s mouth). The trial court subsequently imposed the statutorily mandated sentence of natural life imprisonment. See 720 ILCS 5/11-1.40(b)(1.2) (West 2011 Supp.).

¶ 31 This appeal followed.

¶ 32 ANALYSIS

¶ 33 Defendant raises three issues on appeal. Defendant first challenges the sufficiency of the evidence as to his conviction under count II (predicated upon contact between his penis and R.G.'s mouth). Defendant's second claim of error is that he is entitled to a new trial on count X (predicated upon contact between his penis and A.G.'s mouth) because his trial counsel rendered ineffective assistance in allowing the State to rely on "inadmissible and non-existent" evidence, which resulted in his conviction. Finally, defendant contends that this court should remand for a new trial due to various instances of prosecutorial misconduct. We first discuss the legal standards of ineffective assistance of counsel claims and the plain error doctrine, however, because defendant relies upon both—either principally or alternatively—in his claims of error.

¶ 34 Ineffective Assistance of Counsel and Plain Error

¶ 35 Claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). To establish ineffective assistance, a defendant must show both that (1) counsel's performance was deficient

and (2) the deficient performance prejudiced the defendant. *Id.* (citing *Strickland*, 466 U.S. at 687). Deficient performance is performance that is objectively unreasonable under prevailing professional norms, and prejudice is found where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 496-97; *Strickland*, 466 U.S. at 690, 694. The failure to establish either prong of the *Strickland* test is fatal to the claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010) (citing *Strickland*, 466 U.S. at 697).

¶ 36 The plain error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 185-87 (2005). Defendant only argues the first prong of the plain error doctrine applies, and therefore he must prove "prejudicial error." *Id.* at 187. In other words, "the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Id.* However, before considering whether the plain-error exception applies, we must first determine whether any error occurred, for if there is no error, there is no plain error. *Id.*

¶ 37 Defendant's Conviction on Count II

¶ 38 Defendant contends that this court should vacate his conviction for predatory criminal sexual assault of a child as alleged in count II because the evidence did not establish that defendant's penis made contact with R.G.'s mouth. According to defendant, R.G. and A.G. testified that defendant merely "tried" to make R.G. put his mouth on defendant's penis, and the only admissible evidence before the jury was that defendant's penis made contact with R.G.'s cheek. In the alternative, defendant claims trial counsel was ineffective for failing to object to

inadmissible evidence purportedly establishing contact with R.G.'s mouth, and further asserts that "[f]or similar reasons, the admission and use of this inadmissible evidence is reviewable under the plain error doctrine."

¶ 39 When presented with a challenge to the sufficiency of the evidence, this court must determine " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. De Filippo*, 235 Ill. 2d 377, 384-85 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007) (citing *People v. Smith*, 185 Ill. 2d 532, 541 (19w99)), *aff'd*, 236 Ill. 2d 1 (2009). In addition, we may not retry the defendant; instead, the trier of fact must assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *People v. Evans*, 209 Ill. 2d 194, 209, 211 (2004). It is axiomatic that a jury is not required to accept any possible explanation compatible with a defendant's innocence and elevate it to the status of reasonable doubt. *People v. Herrett*, 137 Ill. 2d 195, 206 (1990). In essence, this court will not reverse a conviction unless the evidence is "so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *Evans*, 209 Ill. 2d at 209.

¶ 40 Defendant challenges his conviction for predatory criminal sexual assault of a child. Section 12-14.1(a)(1) of the Criminal Code of 1961 (Criminal Code) provided that an accused commits predatory criminal sexual assault of a child if the accused is 17 years of age or older and commits an act of "sexual penetration" with a victim who was under 13 years of age at the time of the act. 720 ILCS 5/12-14.1(a)(1) (West 2011 Supp.). The Criminal Code defines sexual

penetration in part as "any contact, however slight, between the sex organ *** of one person by *** the *** mouth *** of another person ***." 720 ILCS 5/12-12(f) (West 2011 Supp.).

¶ 41 In this case, R.G. testified that, after seeing defendant place his penis on A.G.'s mouth for about six seconds (until A.G. moved his face), defendant then went to R.G. Although defendant argues that R.G. testified that defendant merely "tried" to make R.G. do the same thing and later pointed to a spot on his face that the State noted for the record was "on the right side of his mouth outside of his lips," R.G. had also testified that the area was the "side" of his lip and that he was also "trying" to resist defendant's attempt to place his penis on R.G.'s mouth. In addition, Aladeen testified that, during her interview of A.G., A.G. informed her that he witnessed defendant make R.G. "suck [defendant's] penis." All of this evidence was presented to the jury, and it was their role, not ours, to resolve inconsistencies and contradictions in the evidence. *Evans*, 209 Ill. 2d at 211. We cannot hold that the evidence was "so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *Id.* at 209. Consequently, we may not reverse the jury's verdict, and defendant's claim of error fails.

¶ 42 Defendant argues, however, that we should disregard Aladeen's testimony because A.G.'s statement did not describe "something that happened to himself," and thus does not meet the requirements under section 115-10. It is well established that such statements are admissible. See *People v. Embry*, 249 Ill. App. 3d 750, 763 (1993) (out-of-court statements of one child victim concerning the defendant's abuse of her younger sister were "properly admissible as components of the contemporaneous and ongoing series of events constituting *a matter or detail pertaining to the offense perpetrated against herself*" (Emphasis in original.)); see also *People v. Boling*, 2014 IL App (4th) 120634, ¶ 92 (one victim's hearsay statements "regarding [the]

defendant's apparent abuse of" another victim were admissible because the testifying victim's abuse occurred contemporaneously with the abuse against that other victim).

¶ 43 As noted above, Aladeen testified that A.G. told her that, during the first "encounter" shortly before A.G. turned 11, defendant "made" A.G. and R.G. suck his penis. In addition, when the State asked whether A.G. described "other *** encounters," Aladeen responded that A.G. described a "few different incidents." Aladeen began by stating that A.G. had "talked about two," but she seemed to recount more than that, namely, A.G.'s statements that: "one time," defendant "made" A.G. and R.G. suck his penis; an incident in which defendant "made" A.G. suck his penis (with no reference to whether R.G. was present or also victimized); and "another incident" when defendant "tried to make" A.G. and R.G. suck his penis. In any event, despite the admittedly imprecise nature of Aladeen's testimony, A.G. was clearly describing part of the contemporaneous abuse that defendant was inflicting upon him. The evidence was therefore properly presented to the jury.

¶ 44 Defendant, however, asserts in reply that the State has forfeited and "affirmatively waived any contention that [A.G.'s] prior statement [to Aladeen] about what he saw happen to [R.G.] was admissible." We disagree. The trial court granted the State's motion to admit Aladeen's hearsay testimony under section 115-10 of the Code without any limitation as to the scope of her testimony. Thus, irrespective of the State's misinterpretation of section 115-10, the trial court's order rendered *all* of Aladeen's hearsay testimony admissible.[1]

¶ 45 In addition, waiver or forfeiture are inapplicable here. Waiver is the intentional relinquishment of a known right, whereas forfeiture is the "failure to make the timely assertion of the right." (Internal quotation marks omitted.) *Gallagher v. Lenart*, 226 Ill. 2d 208, 229-30

[1] Defendant does not challenge this ruling on appeal.

(2007) (quoting *People v. Blair*, 215 Ill. 2d 427, 444 n.2 (2005) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993))). Here, the State was unaware that it was able to use A.G.'s testimony about what defendant was doing to R.G. because the abuse of R.G. was happening contemporaneously with A.G.'s abuse. Indeed, the State mistakenly informed the trial court that it was "not going to be able to use" either boy's statements about what they witnessed happen to the other under section 115-10. As such, we cannot hold that the State intentionally relinquished a right of which it was completely unaware. Similarly, the State cannot be described as having forfeited this argument because there was no right that it failed to timely assert: the trial court's ruling gave it *more* than it sought—the unrestricted use of Aladeen's hearsay testimony. Defendant's argument is therefore without merit.

¶ 46 Defendant's alternative claims are also meritless. First, his trial counsel was not ineffective for failing to object to Aladeen's testimony regarding A.G.'s statements that defendant's penis made contact with R.G.'s mouth. We have already held that this testimony was properly admitted, so counsel cannot be held ineffective for failing make a fruitless objection. *People v. Edwards*, 195 Ill. 2d 142, 165 (2001). In addition, plain error review is unwarranted: where there is no error, there can be no plain error. See *Herron*, 215 Ill. 2d at 187.

¶ 47 Defendant's Conviction on Count X

¶ 48 Defendant next contends that this court should vacate his conviction for predatory criminal sexual assault of a child as alleged in count X and remand for a new trial because his attorney was ineffective in two respects. Defendant notes that A.G. never testified that defendant put his mouth on A.G.'s penis, but his trial counsel failed to object to: (1) R.G.'s direct testimony and later "inadmissible hearsay statement" (to Aladeen) that he witnessed this act, and (2) the State's comment during its initial closing argument that *A.G.* testified that this act took

place. Defendant again argues that "the admission and use of this inadmissible evidence warrants review under the plain error doctrine," which we construe to be an alternative argument.

¶ 49 We have already held there was no error in admitting both R.G.'s statements on direct examination and also Aladeen's hearsay testimony that R.G. observed defendant placing his mouth on A.G.'s penis. See *Embry*, 249 Ill. App. 3d at 763; *Boling*, 2014 IL App (4th) 120634, at ¶ 92. As such, trial counsel was not ineffective for refusing to lodge an objection that was doomed to fail. See *Edwards*, 195 Ill. 2d at 165. In addition, since there was no error, plain error review is inappropriate, and we must honor defendant's forfeiture of these claims. See *Herron*, 215 Ill. 2d at 187.

¶ 50 Finally, we reject defendant's claim that he is entitled to a new trial because of the State's erroneous comment during its initial closing argument that A.G. testified that defendant had put his penis in A.G.'s mouth. To establish ineffective assistance, a defendant must show not only deficient performance, but also prejudice, which is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Petrenko*, 237 Ill. 2d at 496-97; *Strickland*, 466 U.S. at 690, 694. Here, we cannot hold that, had counsel objected to that isolated comment, there is a reasonable probability that the result of his trial would have been different. As discussed below, the comment was isolated within a somewhat lengthy closing argument, and the jury was instructed that it should disregard any argument not based upon the evidence. Moreover, although the evidence was not overwhelming, the testimony of both R.G. and Aladeen was nonetheless sufficient to support defendant's conviction on Count X and outweighed any possible prejudice resulting from the State's isolated erroneous comment. Since defendant has failed to meet the prejudice prong of the *Strickland* test, his claim fails. *Clendenin*, 238 Ill. 2d at 317-18 (citing *Strickland*, 466 U.S. at 697).

¶ 51 For similar reasons, first-prong plain error review also does not salvage this claim. Under that prong, defendant must show that the evidence was so close that the error "alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187. The evidence in this case, despite the inconsistencies and contradictions, nevertheless was not so closely balanced that the State's isolated erroneous comment resulted in the jury's verdict of guilty. We must therefore reject his final point on this issue.

¶ 52 Prosecutorial Misconduct

¶ 53 Finally, defendant contends that he is entitled to a new trial based upon prosecutorial misconduct. Specifically, defendant first argues that the State violated its own motion *in limine* when it elicited "inadmissible hearsay" in the form of the forensic interviewer's testimony that A.G. told her that A.G. saw R.G. suck defendant's penis (as alleged in count II) and that R.G. told her that he saw defendant suck A.G.'s penis (as alleged in count X). Defendant also claims the State improperly argued in its closing argument that (1) A.G. testified that defendant put his mouth on A.G.'s penis, but A.G. never testified as to this fact; and (2) defendant was attempting to confuse the jury by asking them to consider A.G.'s and R.G.'s prior inconsistent statements. Defendant again concedes that these issues were not preserved below but seeks plain error review, or in the alternative, claims ineffective assistance of counsel.

¶ 54 The State is given considerable latitude in making closing arguments, and it may respond to comments that clearly invite a response. *People v. Armstrong*, 183 Ill. 2d 130, 145-46 (1998). "A prosecutor may argue the evidence presented, or reasonable inferences therefrom, even if the inference is unfavorable to the defendant." *People v. Tolliver*, 347 Ill. App. 3d 203, 224-25 (2004) (citing *People v. Hudson*, 157 Ill. 2d 401, 441 (1993)). Furthermore, we must review the arguments of both the State and the defense in their entirety, with the challenged portions placed

in their proper context. *People v. Cisewski*, 118 Ill. 2d 163, 175-76 (1987). A significant factor in determining the impact of an improper comment on a jury verdict is whether "the comments were brief and isolated in the context of lengthy closing arguments." *People v. Runge*, 234 Ill. 2d 68, 142 (2009). In addition, we must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict. *People v. Simms*, 192 Ill. 2d 348, 373 (2000). Finally, even if a prosecutor's closing remarks are improper, "they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *Hudson*, 157 Ill. 2d at 441. While the issue of which standard of review should apply is unsettled (compare *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (*de novo*) with *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (abuse of discretion)), we need not resolve this apparent conflict because under either standard, defendant's claim fails.

¶ 55 We have already held that the State did not elicit "inadmissible hearsay" from Aladeen as to the boys' statements to her regarding what they witnessed defendant doing to each other, and that the trial court correctly allowed the testimony under section 115-10. See also *Boling*, 2014 IL App (4th) 120634, ¶ 92**;** *Embry*, 249 Ill. App. 3d at 763**.** Therefore, defendant's first claim of prosecutorial misconduct necessarily fails. We now turn to his claim regarding the State's closing arguments.

¶ 56 Defendant notes that, although the State told the jury during its initial closing argument that *A.G.* testified that defendant put his mouth on A.G.'s penis, A.G. himself never testified as to this fact. Defendant argues that this misstatement was on a "critical point," was "extremely prejudicial," and requires that we reverse. We disagree. Although the State erred when it made that remark, we cannot hold that defendant suffered such substantial prejudice that, absent the comments, the verdict would have been different. As discussed above, Aladeen's and R.G.'s

testimony sufficiently established that defendant committed the offense of predatory criminal sexual assault of A.G. In addition, the jury was both admonished (immediately before closing arguments) and instructed (immediately after) that closing arguments are not evidence, and to disregard any statement or argument made by the attorneys not based on the evidence. Defendant presents nothing to counter the presumption that the jury followed the trial judge's instructions in reaching a verdict. *Simms*, 192 Ill. 2d at 373. Finally, given that the State's initial closing argument spanned 10 pages (and without regard to its 12-page rebuttal closing argument), the fact that this was a fleeting reference within a lengthy closing argument weighs heavily against defendant. See *Runge*, 234 Ill. 2d at 142. In sum, we cannot hold that, absent the challenged remark, the verdict would have been different. Hence, the State's erroneous remark does not constitute reversible error. *Hudson*, 157 Ill. 2d at 441.

¶ 57 Finally, defendant complains that the State improperly characterized a portion of defense counsel's closing argument as an attempt to "confuse" the jury when defense counsel argued that R.G.'s and A.G.'s testimony provided details that they had never before said to anyone else, and that the jury should consider the boys' "prior inconsistent statements" in evaluating their credibility. Viewing the State's and defendant's closing arguments in their entirety and in their proper context, however, it is clear that the State was not accusing defense counsel of trickery or of deception. Rather, the State was merely arguing that defense counsel's argument, which consisted of exaggerating minor inconsistencies[2] in R.G.'s and A.G.'s testimony, was unpersuasive. Although defendant is correct that the State may not resort to accusations of deception and trickery on the part of defense counsel (see, *e.g.*, *People v. Beringer*, 156 Ill. App. 3d 309, 314 (1987)), it is not error for the State to comment in rebuttal on a defendant's attempt

[2] We need not determine whether two statements are "inconsistent" when one simply provides greater detail than the other.

to use minor discrepancies in the State's evidence (see, *e.g.*, *People v. Hudson*, 102 Ill. App. 3d 346, 351-52 (1981)).

¶ 58 In any event, even assuming, *arguendo*, that the State's arguments were improper, defendant did not suffer such substantial prejudice that, in the absence of that comment, his verdict would have been different. The evidence establishing his guilt outweighed any possible prejudice he may have suffered as a result of the State's comment. The trial court admonished the jury both immediately before and immediately after closing arguments that closing arguments were not evidence that they should disregard any argument not based on the evidence, and there is nothing to indicate that the jury did not follow these instructions. *Simms*, 192 Ill. 2d at 373. Therefore, even if this remark was improper, it would not be reversible error. *Hudson*, 157 Ill. 2d at 441. Accordingly, defendant's claim is meritless.

¶ 59 Since we have held that none of these errors resulted in prejudice, defendant's alternate claim of ineffective assistance of counsel necessarily fails. *Clendenin*, 238 Ill. 2d at 317-18. Furthermore, we must also reject his request that we undertake first-prong plain error review because he has failed to show that the evidence was so close that the error alone severely threatened to tip the scales of justice against him (*Herron*, 215 Ill. 2d at 187).

¶ 60 The Cumulative Effect of the State's Alleged Errors

¶ 61 Defendant also includes—within a single sentence—a claim that the State's purported misconduct cumulatively constitutes reversible error. Without regard to whether this argument satisfies Supreme Court Rule 341(h) (Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016)), this claim is meritless because the claimed errors individually are meritless. See *People v. Perry*, 224 Ill. 2d 312, 356 (2007).

¶ 62 CONCLUSION

¶ 63 The evidence was sufficient to support defendant's convictions of predatory criminal sexual assault of a child predicated upon contact between defendant's penis and R.G.'s mouth and predicated upon contact between defendant's penis and A.G.'s mouth. The State did not engage in prosecutorial misconduct either at trial or during its closing arguments. Accordingly, we affirm the judgement of the trial court.

¶ 64 Affirmed.