2016 IL App (4th) 140603-U

NO. 4-14-0603

FILED
August 17, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Vermilion County |
| TIMOTHY DAVIS, | ) | No. 13CF185 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Mark S. Goodwin, |
| | ) | Judge Presiding. |

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Appleton and Turner concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed in part, vacated in part, and remanded for further proceedings, concluding (1) defendant's ineffective-assistance-of-counsel claim should be brought in a collateral proceeding, (2) the admission of other-crimes evidence was not plain error, (3) the State's witnesses did not offer expert testimony bolstering the alleged victims' credibility, (4) no cumulative errors required reversal, and (5) defendant failed to demonstrate he was deprived of his right to counsel for purposes of filing a motion to reconsider his sentence. However, the appellate court (1) vacated the period of mandatory supervised release ordered on count II and directed the court to reduce the term to two years, and (2) remanded the case for a preliminary inquiry into defendant's ineffective-assistance-of-counsel claims.

¶ 2 In April 2013, the State charged defendant, Timothy Davis, with aggravated sexual abuse of his two stepdaughters, S.T. (born February 13, 2002) and D.B. (born January 28, 1998). 720 ILCS 5/11-1.60(b) (West 2012). Later that month, the State charged defendant with predatory criminal sexual assault of a child, alleging commission by defendant of an act of

sexual penetration with S.T., who was under the age of 13 at the time. 720 ILCS 5/11-1.40(a)(1) (West 2012).

¶ 3 Following a May 2014 trial, a jury found defendant guilty of all three charges. The trial court thereafter sentenced defendant to an aggregate term of 17 years' imprisonment.

¶ 4 Defendant appeals, asserting (1) defense counsel was ineffective for failing to object to other-crimes evidence with respect to the charges related to S.T., (2) the trial court improperly allowed other-crimes evidence regarding the charge related to D.B. and then failed to provide a limiting jury instruction, (3) the State improperly elicited expert testimony that bolstered the credibility of the alleged victims, (4) the cumulative errors required reversal, (5) the court denied defendant his right to counsel for purposes of a motion to reconsider his sentence and also failed to provide defendant with a preliminary inquiry into his ineffective-assistance-of-counsel claims, and (6) the court improperly imposed a four-year period of mandatory supervised release (MSR) on count II. For the following reasons, we affirm in part, vacate in part, and remand for a preliminary inquiry into defendant's allegations of ineffective assistance of counsel.

¶ 5 I. BACKGROUND

¶ 6 A. Charges

¶ 7 In April 2013, the State charged defendant by information with aggravated sexual abuse of two family members—S.T. (count I) and D.B. (count II)—who were under 18 at the time (720 ILCS 5/11-1.60(b) (West 2012)). Later that month, the State filed an amended information adding count III, alleging defendant, between March 1, 2012, and January 15, 2013, committed predatory criminal sexual assault of a child by committing an act of sexual penetration with S.T., who was under the age of 13. 720 ILCS 5/11-1.40(a)(1) (West 2012). Defendant was married to Tabitha Davis, the mother of. S.T. and D.B., thus making him their

stepfather. S.T. and D.B. have a younger sister, but she raised no allegations against defendant. The family resided in a home in Georgetown, Illinois, into which they moved approximately one year prior to the State filing charges.

¶ 8 In May 2013, defendant filed a motion to suppress his statements made to police at the time of his arrest, which the trial court subsequently denied. In March 2014, defendant filed a motion *in limine*, seeking to prohibit the State from using his misdemeanor domestic-battery conviction (Vermilion County case No. 13-CM-26) to impeach his credibility. The State did not object, and the court granted the motion. However, defense counsel did not specifically object to the admission of the underlying incident as other-crimes evidence. This particular domestic-battery conviction stemmed from an incident during which defendant shot S.T. with a BB gun, causing authorities to remove the children from the family home.

¶ 9 B. The Jury Trial

¶ 10 During defendant's May 2014 jury trial, the parties presented the following evidence.

¶ 11 1. *S.T.*

¶ 12 S.T., age 12, testified defendant began inappropriately touching her after the family moved into their Georgetown home. The inappropriate touching would occur in the bathroom, living room, and, on multiple occasions, in defendant's bedroom. According to S.T., defendant would touch her breasts and vagina. Defendant also had S.T. massage his penis while he was naked. On one occasion, defendant made S.T. place her mouth on his penis until he ejaculated. S.T. testified, on other occasions, defendant "kissed" her vagina.

¶ 13 S.T. could not recall the exact dates when the alleged abuse occurred and, in fact, testified she tried to forget it ever happened. It took her over a year to tell anyone what had

occurred. Despite his actions, S.T. testified she loved defendant because he bought her toys and clothes. She also made a large snowman card for defendant in January 2013, writing on it that she loved and missed him. In the summer of 2012, she and D.B. signed a Father's Day card for defendant.

¶ 14 2. *S.T.'s Recorded Interview*

¶ 15 In a recorded interview played for the jury, S.T. stated she often saw D.B. going into defendant's room when Tabitha was at work. Defendant would also take S.T. into his bedroom, where she gave him full body massages, which included massaging his penis. Defendant would touch and kiss her private areas, specifically, her vagina. While S.T. was in the bath, defendant would often get into the bathtub with her and kiss her. On one occasion, S.T. said defendant put strawberry-flavored gel on his penis and made her lick it off. According to S.T., defendant kept several flavored gels on a shelf in his bedroom. During the incident where defendant directed her to lick his penis, he "kissed" her vagina.

¶ 16 In January 2013, S.T. said defendant shot her with a BB gun as punishment, which left a scar on her leg. As a result, the sisters were removed from the home. S.T. had mixed feelings about defendant. On one hand, she wanted him punished because his sexual actions toward her were wrong. On the other hand, S.T. did not want him to go to jail because he would buy her clothes and toys.

¶ 17 3. *D.B.*

¶ 18 D.B., age 16, testified she had her first sexual encounter with defendant in 2011 or 2012. The incidents began within months of defendant moving in with her mother, which occurred when D.B. was 13. According to D.B., defendant began by hugging her, with both of them fully clothed. Defendant also convinced her to sleep in his bed with him so she could

watch over the newborn kittens living in his room. They would sometimes sleep fully clothed but, on other occasions, they would sleep only in their underwear.

¶ 19 D.B. then testified defendant forced her to take nude photographs for him. If she wanted something or was being punished for wrongdoing, defendant would make her pose nude in front of a mirror or take nude photographs of herself using his cellular phone. He also made her lie naked on his bed while he photographed her. According to D.B., these incidents occurred 20 to 30 times. Defendant threatened to tell her mother about the photographs if she was not compliant.

¶ 20 D.B. stated, in 2013, defendant progressed to kissing her body. The number of times he kissed her on each occasion depended on what she wanted in return, such as getting permission to visit her boyfriend. At times, when in trouble, D.B. could accept his kisses in lieu of being whipped with a belt or being forced to do strenuous exercise. One of her previous punishments from defendant had been to lie naked on the cold bathroom floor.

¶ 21 According to D.B., over the course of 10 to 15 encounters, defendant kissed her vagina, breasts, stomach, and legs. These encounters would occur after her mother left for her night-shift position. As a result, she would get only three hours of sleep per night, which led to her grades declining at school.

¶ 22 D.B. testified, in April 2013, she told a family friend what defendant had allegedly done to her. However, shortly after defendant's arrest, she told that same friend defendant never touched her. She said she was afraid to call police when the alleged abuse began. D.B. acknowledged, at one point, Tabitha discovered nude photographs of D.B. on D.B.'s iPod. D.B. did not tell her mother she took the photographs at defendant's request; rather, she

told her mother she was sending them to someone else. She also admitted signing a Father's Day card for defendant in June 2012, but she explained she did so to make her mother happy.

¶ 23 4. *Anna Foote*

¶ 24 Anna Foote, a child-protection investigator with the Department of Children and Family Services, testified she received a hotline call in April 2013 about suspected abuse within S.T. and D.B.'s household. As a result of the hotline call, Foote, along with police officer Ephraim Bolin, conducted a forensic interview of the complaining witnesses. Foote explained a forensic interview is conducted by asking nonleading questions. When asked why she used such an approach, Foote explained, "generally kids are pretty truthful and if you ask them questions in such a way where you're not looking for an answer they'll tell you the answer." When asked about S.T.'s mixed feelings toward the prosecution of defendant, Foote described those feelings as normal for a young victim of sexual abuse.

¶ 25 5. *Ephraim Bolin*

¶ 26 Officer Ephraim Bolin, a juvenile officer with the Georgetown police department, testified he interviewed S.T. and D.B. with Foote. Officer Bolin agreed with Foote that S.T.'s mixed feelings about prosecuting defendant were unsurprising because defendant often bought her things she wanted.

¶ 27 6. *Defendant's Recorded Interview*

¶ 28 After interviewing D.B. and S.T., Officer Bolin and the chief of police, Whitney Renaker, interviewed defendant. Defendant participated in three interviews within a couple of hours. During the first interview, defendant was read his *Miranda* rights (Miranda v. Arizona, 384 U.S. 436 (1966)) and thereafter denied any sexual activity with D.B. or S.T. and refused to

speak to police further. Within two to three minutes of police escorting defendant from the room, defendant reconsidered and indicated his desire to continue to speak with the officers.

¶ 29 Prior to his second interview, police again provided defendant with his *Miranda* rights. Defendant continued to deny any sexual activity between him and D.B. and S.T., but he admitted he had seen all three sisters naked during routine interactions, such as taking D.B. a towel when she was in the shower. Officer Bolin asked defendant about any pictures on his cellular phone, explaining any deleted images could be recovered. He also told defendant he believed the girls' statements that he touched their breasts, gave them oral sex, and gave them "body kisses." Defendant thereafter stated he no longer wished to continue the second interview.

¶ 30 Defendant and the officers left the interrogation room but returned six minutes later. According to Officer Bolin, during this six-minute time period, defendant decided he wanted to speak further with police. Officer Bolin denied threatening defendant's family in an attempt to coerce defendant into confessing. According to Chief Renaker, defendant began to cry when police stated they could not tell him what would happen with Tabitha. Chief Renaker stated defendant then called himself a "monster" and asked if he could speak with police again. Accordingly, the officers escorted defendant back into the room.

¶ 31 The recorded interview shows police again read defendant his *Miranda* warnings and provided him a written copy to initial, which included a portion where defendant initialed he had not been threatened, coerced, or promised anything in exchange for his statement. Officer Bolin and Chief Renaker discussed this portion of the *Miranda* waiver at length with defendant before he initialed the form.

¶ 32 After signing a waiver of his *Miranda* rights, defendant stated, "It's true, all of it." He explained the family moved into the house in Georgetown approximately a year before.

Thereafter, he discovered nude pictures of D.B. on her iPod. He reacted by breaking her iPod. D.B. also told defendant she had fantasies involving incest, which intrigued and aroused him. As a result, he began doing Internet pornography searches for incest. According to defendant, D.B. asked him to take nude photographs of her, and he agreed to take them with the intention of deleting them before she could send them to anyone.

¶ 33 Defendant admitted he began taking nude photographs of D.B. in lieu of other punishments, such as whipping her with a belt. During the photo sessions, which took place in defendant's bedroom, he progressed to kissing D.B. on two occasions. At this point of the interview, defendant began crying as he admitted kissing D.B.'s chest and vagina. He explained she initiated their sexual contact the first time, and he initiated it the second time. He was aroused on both occasions.

¶ 34 As to S.T., defendant explained he was wrestling with her when his penis inadvertently pushed through the gap in his pajama pants. According to defendant, S.T. brushed against his penis, and he convinced her to continue touching him. He also rubbed his penis with strawberry gel and had S.T. lick it off. Defendant denied ejaculating but admitted a small amount of pre-ejaculate seeped out. Afterward, he told S.T. not to tell anyone what happened. He apologized to police for his behavior and said it all happened because he was "stupid." During the third interview, defendant was sweating profusely.

¶ 35 Following the State's presentation of evidence, defendant moved for a directed verdict, which the trial court denied.

¶ 36 7. *Tabitha Davis*

¶ 37 Tabitha Davis, the mother of S.T. and D.B., and defendant's wife, testified she worked three jobs and was often away from her daughters. She was unaware the girls had any issues with defendant.

¶ 38 Tabitha testified D.B. had caused her several problems over the past year, including shoplifting and receiving failing grades. Tabitha also caught D.B. with nude photographs on her iPod, which D.B. told her were sent to D.B.'s boyfriend. Defendant told Tabitha about D.B.'s incest dream approximately two months before the children were removed from the home, but D.B. denied having such a dream when confronted by Tabitha.

¶ 39 Tabitha also testified, prior to S.T.'s interview with police, S.T. told Tabitha she could not remember what she was supposed to say to the police.

¶ 40 8. *Defendant*

¶ 41 Defendant testified he began dating Tabitha in February 2009, and they married in June 2010. While Tabitha worked, D.B. usually watched over her sisters. However, D.B. started getting into trouble for shoplifting and stealing fundraiser money about six months before charges were filed against defendant. Defendant stated he was the person who discovered D.B.'s nude photographs on her iPod. He denied D.B.'s statement that he made her lie on the bathroom floor naked as a form of punishment.

¶ 42 Defendant explained he confessed to sexual acts with S.T. and D.B. because Officer Bolin threatened to go after his family if he refused to confess. According to defendant, while he was in the hallway with Officer Bolin after his second interview, the officer gave him the details he was to use in his confession. During the six minutes between the interviews, defendant said Chief Renaker left defendant alone with Officer Bolin, and defendant did not tell Chief Renaker about Officer Bolin's threats. He was afraid to say anything about the coercion

during his video interview. He admitted signing the *Miranda* form indicating his statement was freely and voluntarily given without coercion, threats, or promises. Defendant acknowledged the officers appeared kind during the recorded interview and admitted he said he was sorry for his actions. However, defendant said his confession was not true; he never had sexual encounters with S.T. or D.B.

¶ 43 According to defendant, while he was in the hallway before his third interview, Officer Bolin told him to say he (1) was wearing pajama pants when S.T. touched him, (2) rubbed flavored gel on his penis, and (3) gave S.T. "body kisses." Conversely, defendant noted Officer Bolin did not tell him what to say regarding the incest pornography or full body massages, nor did Officer Bolin tell him to admit he was a monster or a bad parent. Defendant denied having any flavored gel in the house. Defendant testified, in January 2013, after being removed from the home, S.T. drew him a picture of a snowman and wrote that she loved and missed him. S.T. and D.B. also signed a Father's Day card for him in June 2012.

¶ 44 Following the presentation of evidence, the jury returned guilty verdicts on all counts.

¶ 45 C. Posttrial Proceedings

¶ 46 In June 2014, defendant filed a motion for a new trial or, in the alternative, for a judgment of acquittal. Therein, he alleged (1) he was not proved guilty beyond a reasonable doubt, (2) the trial court erred by denying his motion to suppress his confession, and (3) the court erred in allowing the jury to hear the recorded statement of S.T.

¶ 47 In June 2014, the trial court denied defendant's posttrial motion. Following a sentencing hearing, the court sentenced defendant to (1) 5 years' imprisonment on count I with a 2-year period of MSR, (2) 5 years' imprisonment on count II with a 4-year period of MSR, and

(3) 12 years' imprisonment on count III with an MSR period of 3 years to life. The court ordered the sentence on count III to run consecutively to the sentence on count I, which gave defendant an aggregate sentence of 17 years.

¶ 48 Later that month, defendant sent a letter to the trial court, stating he was no longer represented by his attorney and he was unhappy with the representation he received. He also asked for a reduction in his sentence. A few days later, defendant sent a second letter, again complaining about defense counsel's representation. Defendant asserted defense counsel failed to (1) explain the proceedings, (2) prepare for trial, (3) communicate, and (4) present certain evidence. The letter also indicated defendant wished to appeal, and, on July 2, 2014, a notice of appeal was filed on his behalf. The trial court took no further action with respect to defendant's letters.

¶ 49 This appeal followed.

¶ 50 II. ANALYSIS

¶ 51 On appeal, defendant asserts (1) defense counsel was ineffective for failing to object to other-crimes evidence with respect to the charges related to S.T., (2) the trial court improperly allowed other-crimes evidence regarding the charge related to D.B. and then failed to provide a limiting jury instruction, (3) the State improperly elicited expert testimony that bolstered the credibility of the alleged victims, (4) the cumulative errors required reversal, (5) the court denied defendant his right to counsel for purposes of a motion to reconsider his sentence and also failed to provide defendant with a preliminary inquiry into his ineffective-assistance-of-counsel claims, and (6) the court improperly imposed a four-year period of MSR on count II. We address these arguments in turn.

¶ 52 A. Ineffective Assistance of Counsel

¶ 53 Defendant first asserts defense counsel provided ineffective assistance of counsel by failing to challenge, as improper other-crimes evidence, the admission of S.T.'s statement that defendant shot her in the leg with a BB gun.

¶ 54 Defendant concedes defense counsel challenged the admission of the BB gun incident as improper impeachment based on a misdemeanor conviction not involving dishonesty. However, defendant asserts counsel's failure to recognize and raise the other-crimes-evidence issue before the trial court constituted ineffective assistance.

¶ 55 We begin by noting defense counsel filed written motions and made oral motions to exclude any reference to defendant's use of a BB gun against S.T. However, defense counsel failed to preserve this issue in a posttrial motion, which would render the argument forfeited. *People v. Thompson*, 238 Ill. 2d 598, 611, 939 N.E.2d 403, 412 (2010). Ordinarily, we would then engage in a plain-error analysis to determine whether reversal is necessary, notwithstanding forfeiture of the issue. See *Id.* at 613, 939 N.E.2d at 413.

¶ 56 In this case, however, defendant does not request our review under the plain-error doctrine but, rather, raises an ineffective-assistance-of-counsel claim. To demonstrate defense counsel has provided ineffective assistance of counsel, defendant must show (1) his counsel's actions fell below an objective standard of reasonableness; and (2) but for counsel's errors, the results of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

¶ 57 Defense counsel's conduct during trial is generally attributed to trial strategy. See *People v. Mitchell*, 105 Ill. 2d 1, 12, 473 N.E.2d 1270, 1275 (1984). Trial strategy usually includes counsel's decisions with respect to objecting to the admission of certain evidence. *People v. Perry*, 224 Ill. 2d 312, 345, 864 N.E.2d 196, 216 (2007). The record on appeal

contains no explanation from defense counsel as to why he chose to frame his objection as improper impeachment evidence rather than improper other-crimes evidence. Thus, "[w]ithout any explanation from defendant's trial counsel on the record before us, it is extraordinarily difficult to conclude, as defendant now asks us to do, that defendant's trial counsel's trial level omissions do not constitute areas 'involving the exercise of judgment, discretion or trial tactics.' " *People v. Flores*, 231 Ill. App. 3d 813, 828, 596 N.E.2d 1204, 1214 (1992). Such an issue would be more appropriately addressed through a collateral proceeding. In the alternative, because we are remanding this case for a *Krankel* hearing (See *People v. Krankel*, 102 Ill. 2d 189, 464 N.E.2d 1045 (1984)) to allow the trial court to address defendant's claims of defense counsel's neglect, defendant may be able to develop a sufficient record for our review during that proceeding.

¶ 58 B. Other-Crimes Evidence Regarding D.B.

¶ 59 Defendant next argues it was plain error for the jury to hear evidence that he punished D.B. by having her lie naked on the bathroom floor. In other words, defendant contends this evidence constituted improper other-crimes evidence.

¶ 60 Defendant did not raise this issue before the trial court, which would ordinarily result in forfeiture of the issue on appeal. *Thompson*, 238 Ill. 2d at 611, 939 N.E.2d at 412. However, we may consider a forfeited claim where the defendant demonstrates plain error. *Id.* To prove plain error, a defendant must first demonstrate a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007). In this situation, an error occurs if the court abused its discretion by admitting the other-crimes evidence. *People v. Harper*, 251 Ill. App. 3d 801, 804, 623 N.E.2d 775, 777 (1993). If the defendant proves a clear or obvious error occurred, we will reverse only where (1) "the evidence is so closely balanced

that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error;" or (2) the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11.

¶ 61 Under Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided by sections 115-7.3, 115-7.4, and 115-20 of the Code of Criminal Procedure (725 ILCS 5/115-7.3, 725 ILCS 5/115-7.4, and 725 ILCS 5/115-20 [West 2012])." While the evidence of other crimes is certainly relevant, it is objectionable because it carries too much probative value. *People v. Donoho*, 204 Ill. 2d 159, 170, 788 N.E.2d 707, 714 (2003).

¶ 62 However, "evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crimes." *People v. Wilson*, 214 Ill. 2d 127, 135, 824 N.E.2d 191, 196 (2005). This includes evidence that provides proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011).

¶ 63 Defendant asserts the bathroom incident provided no evidence of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; rather, the incident only provided improper propensity evidence. Defendant argues the bathroom incident could not demonstrate intent, as defendant was not claiming a mistake or a lack of intent, but, instead, he was denying any sexual conduct with D.B. See *People v. Knight*, 309 Ill. App. 3d 224, 227, 722 N.E.2d 331, 334 (1999) (the defendant's state of mind was not in controversy where he denied committing the crime). Moreover, according to defendant, the

bathroom incident does not provide evidence of motive to commit the acts for which he was on trial. See *People v. Lenley*, 345 Ill. App. 3d 399, 407, 802 N.E.2d 315, 322 (2003) ("The motive exception to the general ban on other-crimes evidence arises in the context of other crimes that serve as the motive behind the crime charged."). Defendant also argues the bathroom incident does not show a common scheme or design, as the bathroom incident does not share common or distinctive features with the alleged incidents of sexual abuse for which he was charged. See *id.* at 410, 802 N.E.2d at 324-25.

¶ 64 The State, on the other hand, contends " '[e]vidence of other crimes is admissible if such evidence is intertwined with the offense charged.' " *Harper*, 251 Ill. App. 3d at 804, 623 N.E.2d at 777 (quoting *People v. Garrison*, 146 Ill. App. 3d 592, 593, 496 N.E.2d 535, 536 (1986)). The State asserts the evidence of the bathroom incident demonstrated the progression of "punishments" inflicted on D.B. in the form of various sexual behaviors that makes it intertwined with the charged offense, ranging from defendant forcing D.B. to lie naked on the bathroom floor, to taking nude photographs, and, finally, to the commission of sexual acts as a form of punishment. We agree this evidence demonstrates ongoing preparation, or a plan, to groom D.B. for future sexual abuse.

¶ 65 We also conclude the prejudice resulting from testimony regarding the bathroom incident did not outweigh its probative value. D.B. testified to a number of inappropriate encounters with defendant, including her sleeping in his bed wearing only her underwear and defendant making D.B. take nude photographs of herself in the mirror. The bathroom incident was far less significant than these other encounters. Moreover, the parties did not spend a great deal of time discussing the bathroom incident and focused a majority of their time on the nude

photographs and alleged sexual acts. Accordingly, we conclude it was not an abuse of discretion for the trial court to allow evidence of the bathroom incident.

¶ 66 Defendant also points out, although other-crimes evidence can be admitted for propensity purposes under section 115-7.3 of the Criminal Code, the bathroom incident does not fall within the enumerated admissible offenses within that section, nor did the State properly notify him it sought introduction of evidence under that section.

¶ 67 Section 115-7.3 of the Criminal Code provides that when a defendant is charged with one of the enumerated offenses—which includes both aggravated criminal sexual abuse and predatory criminal sexual assault of a child—evidence that the defendant has committed another of those enumerated crimes may be admitted for purposes of demonstrating propensity. See 725 ILCS 5/115-7.3 (West 2012)). However, both parties agree the bathroom incident does not fall within any of those enumerated offenses. Because the bathroom incident does not fall within any of the enumerated offenses set forth in section 115-7.3(a) and the State did not seek admission of any evidence under that provision, we cannot see how section 115-7.3 procedurally applies to the instant case. Thus, we conclude no plain error occurred in violation of section 115-7.3, as it was procedurally inapplicable to the present case.

¶ 68 Defendant next contends, even if the admission of the bathroom incident was not plain error, the trial court's failure to offer a limiting instruction constituted plain error. Specifically, defendant asserts the court should have used Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.14), which instructs the jury to consider other-crimes evidence for the limited purpose for which it was received. See *People v. Jackson*, 357 Ill. App. 3d 313, 321, 828 N.E.2d 1222, 1231 (2005) (The best way to

address the admission of other-crimes evidence is to use the limiting instruction contained in IPI Criminal 4th No. 3.14.).

¶ 69 IPI Criminal 4th No. 3.14 provides, where the State presents evidence a defendant has been involved in conduct other than that charged in the information, that evidence may only be considered for the limited purpose for which it was admitted—to prove identification, presence, intent, motive, design, knowledge, or other purpose. The jury then determines whether the conduct occurred and what weight should be given to that evidence in deciding whether the defendant committed the charged offense. IPI Criminal 4th No. 3.14. Even if the trial court commits error by failing to provide the limiting instruction to the jury, such an error is harmless if the result of the trial would have been the same, even if the proper instruction had been given. *Jackson*, 357 Ill. App. 3d at 321, 828 N.E.2d at 1231.

¶ 70 Defendant asserts the trial court's error is reversible under both prongs of the plain-error doctrine. Under the first prong, reversal is necessary where "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error." *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11. Defendant asserts this case was based on the credibility of the witnesses and, therefore, the failure of the trial court to include a limiting instruction regarding the bathroom incident tipped the scales of justice against him. We disagree.

¶ 71 Where credibility is the only basis upon which a case is decided, the admission of erroneous evidence may tip the scales of justice against the defendant under the first prong of the plain-error doctrine. *People v. Naylor*, 229 Ill. 2d 584, 609, 893 N.E.2d 653, 669 (2008). At the same time, "[i]n determining whether the closely balanced prong has been met, we must make a

'commonsense assessment' of the evidence [citation] within the context of the circumstances of the individual case." *People v. Adams*, 2012 IL 111168, ¶ 22, 962 N.E.2d 410.

¶ 72 In this case, S.T.'s testimony was largely consistent with her statement given to police regarding defendant's sexual abuse. She provided specific details about the abuse, such as defendant's use of flavored gel to convince her to engage in oral sex, which defendant corroborated in his confession to police. Similarly, defendant confessed to engaging in oral sex with D.B. and forcing her to take nude photographs, which was consistent with D.B.'s testimony. The consistency and specificity about the events, as provided by D.B., S.T., and defendant, demonstrate overwhelming guilt. Though defendant claims much of his incriminating statement to police consisted of information provided to him by Officer Bolin, he also admitted to browsing incest pornography and engaging in full-body massages with the girls without any prompting from Officer Bolin. Additionally, the level of specificity from his testimony exceeded the amount of information Officer Bolin could have provided to him in the six minutes he stood in the hallway between interviews. Defendant's explanation of events, "though not logically impossible, was highly improbable." See *id.*

¶ 73 Moreover, the snowman drawing and Father's Day card, S.T.'s statement to her mother that she could not remember what to say to police, and D.B.'s alleged statement to a family friend fail to overcome the overwhelming evidence of defendant's guilt in light of the consistency between defendant's confession and the testimony of S.T. and D.B. Accordingly, we conclude defendant failed to prove the evidence was so closely balanced that the trial court's failure to provide a limiting instruction required reversal.

¶ 74 Under the second prong, defendant argues the error "is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11.

¶ 75 "Generally, the only instructions necessary to ensure a fair trial include the elements of the crime charged, the presumption of innocence, and the question of burden of proof. [Citations.]." (Internal quotation marks omitted.). *Jackson*, 357 Ill. App. 3d at 321, 828 N.E.2d at 1231. Where the omitted instruction did not concern any of these areas, structural error has not occurred. *Id.* As the omitted jury instruction in this case was not related to the elements of the charged offenses, the presumption of innocence, or the burden of proof, we find no structural error requiring reversal.

¶ 76 Accordingly, the trial court's failure to include the limiting jury instruction did not constitute plain error.

¶ 77 C. Bolstering Credibility

¶ 78 Defendant next asserts plain error occurred where the State improperly bolstered the credibility of the complaining witnesses through Foote's testimony and the recorded interview between defendant and Officer Bolin. Specifically, defendant challenges as error (1) Foote's testimony that children generally tell the truth and (2) Officer Bolin's statement to defendant that he believed S.T. and D.B. were telling the truth.

¶ 79 Because defendant also failed to preserve this issue before the trial court, we review this issue for plain error. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."). Our first step is to determine whether a clear or obvious error occurred. *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 411.

¶ 80 Defendant compares the statements of Foote and Officer Bolin to improper expert testimony. The State disagrees, asserting neither statement was provided by means of expert testimony. We agree with the State.

¶ 81 Where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education" may provide an expert opinion as to the subject. Ill. R. Evid. 702 (eff. Jan. 1, 2011). Foote testified she conducted a forensic interview with S.T. and D.B. When asked why she and Officer Bolin asked open-ended questions rather than leading questions, she responded, "Because generally kids are—generally kids are pretty truthful and if you ask them questions in such a way where you're not looking for an answer they'll tell you the answer." Foote did not testify S.T. or D.B. provided truthful statements, nor was she asked to provide an expert opinion based on scientific, technical, or other specialized knowledge that would help the jury understand the evidence; rather, her testimony served solely to explain why she and Officer Bolin did not ask leading questions.

¶ 82 On the other hand, a lay opinion is permissible where it is "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge." Ill. R. Evid. 701 (eff. Jan. 1, 2011). Foote's testimony served to explain the method of interrogation and her generalized statement explaining why she used that method of interrogation did not serve to bolster the credibility of S.T. or D.B. Thus, her testimony constituted permissible lay opinion.

¶ 83 Further, Officer Bolin did not provide expert testimony with respect to his interview with defendant. First, Officer Bolin's remark that he believed the victims' statements

was not offered through testimony. Rather, it came in solely through the video interview of defendant. Thus, defendant's attempt to classify Officer Bolin's statement as expert testimony is unpersuasive. Officer Bolin's statement to defendant was clearly an interrogation tactic to convince defendant to confess. See *People v. Bowman*, 335 Ill. App. 3d 1142, 1153, 782 N.E.2d 333, 342 (2002) (during an interrogation, police may play on a suspect's fears, anxieties, and ignorance).

¶ 84 Accordingly, we conclude no clear or obvious error occurred with respect to Officer Bolin's or Foote's statements regarding the victims' credibility.

¶ 85 D. Cumulative Errors

¶ 86 Defendant argues this case should be reversed due to the cumulative errors previously discussed. However, because we have concluded the only potential error resulted from the trial court's failure to give a limiting jury instruction with respect to the other-crimes evidence, we need not address whether any cumulative errors required reversal.

¶ 87 E. Posttrial Proceedings

¶ 88 Defendant contends the trial court erred by failing to (1) appoint counsel to represent him on a motion to reconsider his sentence, and (2) hold a *Krankel* hearing to address defendant's complaints against defense counsel.

¶ 89 1. *Failure To Appoint Counsel*

¶ 90 Defendant asserts he was denied his right to counsel on his motion to reconsider his sentence. Whether a defendant's constitutional rights have been violated is subject to *de novo* review. *People v. Burns*, 209 Ill. 2d 551, 560, 809 N.E.2d 107, 114 (2004).

¶ 91 Under the sixth amendment, a defendant has the right to counsel at all critical stages of criminal proceedings. *United States v. Wade*, 388 U.S. 218, 224 (1967). A motion to

reconsider a sentence has been found to be one of those critical stages wherein a defendant is entitled to counsel. *People v. Williams*, 358 Ill. App. 3d 1098, 1105, 833 N.E.2d 10, 16 (2005).

¶ 92 Defendant argues when he told the trial court defense counsel no longer represented him and he did not know how to proceed, the court was required to appoint counsel to represent him. Defendant contends he had a meritorious issue—the court considered an inappropriate factor in aggravation—that should have been raised in a motion to reconsider his sentence. We note defendant did not request a review of the merits of his sentencing claim under the plain-error doctrine.

¶ 93 The State disagrees defendant was entitled to new counsel, asserting defense counsel was still defendant's counsel of record, as he had not filed a motion for leave to withdraw from the case. Ill. S. Ct. R. 13(c)(3) (eff. July 1, 2013). Given the record before us, we agree with the State.

¶ 94 The record before us fails to demonstrate defense counsel was aware defendant sought a motion to reconsider his sentence. Rather, we have only defendant's statement that defense counsel no longer represented him, without further explanation of the circumstances. Absent more information to indicate defense counsel had withdrawn from the case or otherwise refused to file a meritorious postsentencing motion, we are not inclined to find defendant was deprived of his constitutional right to counsel at a critical stage of the proceedings.

¶ 95 2. Krankel *Hearing*

¶ 96 Defendant next argues the trial court failed to provide him with a *Krankel* hearing (*Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045), despite his *pro se* allegations of ineffective assistance of counsel. The State concedes defendant was entitled to an inquiry into his claims, and we accept the State's concession. Whether the trial court fails to exercise its discretion by

considering an inquiry into a defendant's ineffective-assistance-of-counsel claims is an issue we review *de novo*. *People v. Moore*, 207 Ill. 2d 68, 75, 797 N.E.2d 631, 636 (2003).

¶ 97 Where a defendant, posttrial, raises *pro se* allegations regarding his counsel's performance, the trial court has a duty to examine the factual basis of those allegations. *Id.* at 77, 797 N.E.2d at 637. "If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *Id.* at 78, 797 N.E.2d at 637.

¶ 98 Here, defendant mailed two letters to the trial court complaining about defense counsel's performance. At that point, pursuant to *Moore*, the court was obligated to conduct a preliminary inquiry into defendant's allegations to determine whether the appointment of counsel was necessary for purposes of conducting a full *Krankel* hearing. Accordingly, this case must be remanded for the court to conduct a preliminary inquiry into defendant's allegations of ineffective assistance of counsel.

¶ 99 F. MSR Period

¶ 100 Finally, defendant asserts the MSR period imposed by the trial court on count II was erroneous. The State concedes this issue and we accept the State's concession. Because the court's imposition of a four-year MSR period was based on statutory interpretation, our review is *de novo*. See *People v. Rinehart*, 2012 IL 111719, ¶ 23, 962 N.E.2d 444.

¶ 101 Defendant was convicted of two counts of aggravated criminal sexual abuse, which constitute Class 2 felonies. 720 ILCS 5/11-1.60(g) (West 2012). Normally, a Class 2 felony carries with it a two-year MSR period. 730 ILCS 5/5-8-1(d)(2) (West 2012). However, where a defendant commits a second of subsequent offense of aggravated criminal sexual abuse

or felony criminal sexual abuse to a victim under the age of 18, the defendant must receive an MSR period of four years, with at least the first two of those years served under electronic detention. 730 ILCS 5/5-8-1(d)(5) (West 2012).

¶ 102 Here, the trial court properly imposed a two-year MSR period on count I but then imposed a four-year period of MSR on count II, presumably because the court considered count II to be defendant's second conviction for aggravated criminal sexual abuse. As the State concedes, the enhancement provision does not apply in this situation, where count II arose prior to defendant's conviction on count I. See *People v. Anderson*, 402 Ill. App. 3d 186, 192-93, 931 N.E.2d 773, 778 (2010) (analyzing section 5-8-1(d)(5) and stating an offense does not qualify as a "second or subsequent offense," triggering an enhanced term of MSR, unless the defendant committed that offense sometime after conviction was entered on the first offense).

¶ 103 Accordingly, we vacate the trial court's imposition of a four-year MSR period on count II. Under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), this court may correct the sentencing judgment without remanding the cause to the trial court. See also *People v. Smith*, 2016 IL App (1st) 140039, ¶ 20, 53 N.E.3d 1123. However, we direct the trial court to amend the sentencing judgment to reflect a two-year MSR period on count II.

¶ 104 III. CONCLUSION

¶ 105 For the foregoing reasons, we (1) affirm the trial court's judgment in part, (2) vacate the imposition of the four-year MSR period on count II and direct the court to amend the written sentencing judgment to reflect a two-year period of MSR, and (3) remand for a preliminary *Krankel* inquiry. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 106 Affirmed in part and vacated in part; cause remanded with directions.