NOTICE
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2016 IL App (5th) 130340-U

NO. 5-13-0340

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jefferson County.
	)	
v.	)	No. 06-CF-647
	)	
ALBERT E. RAINEY,	)	Honorable
	)	David K. Overstreet,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's convictions are affirmed as the State proved both charged counts of predatory criminal sexual assault beyond a reasonable doubt, and the defendant is unable to establish that prejudice resulted from his trial attorney's alleged errors.

¶ 2 I. FACTS

¶ 3 In November 2006, a grand jury indicted the defendant, Albert E. Rainey, on two counts of predatory criminal sexual assault of a child (counts I and II) (720 ILCS 5/12-14.1(a)(1) (West 2006)). Both counts stemmed from abuse that had been reported by the defendant's nine-year-old stepdaughter, M.C., following a "good touch/bad touch" presentation at her school. Count I alleged that the defendant had penetrated M.C.'s

vagina with his penis. Count II alleged that he had penetrated it with his finger. Both acts were allegedly committed "during 2006."

¶ 4 In August 2007, the defendant entered an open plea of guilty to both counts. In November 2007, following a hearing at which numerous witnesses testified, the defendant was sentenced to serve concurrent 27-year terms of imprisonment on the convictions.

¶ 5 In December 2009, the defendant's guilty plea and sentences were vacated on direct appeal. See *People v. Rainey*, No. 5-08-0261 (2009) (unpublished order under Supreme Court Rule 23). This court held that because the defendant's convictions required mandatory consecutive sentences, the concurrent sentences that were imposed pursuant to his guilty plea were void. *Id.* This court further held that because the defendant pled guilty believing that concurrent sentences would be imposed, his plea had not been knowingly and voluntarily entered. *Id.* The cause was thus remanded for further proceedings. *Id*.

¶ 6 From February 2010 through January 2013, defense counsel filed numerous motions and pleadings on the defendant's behalf, including an amended motion to suppress statements that was denied following a hearing. In February 2013, the cause proceeded to a jury trial, where the following evidence was adduced.

¶ 7 M.C.'s grandmother, Carla Stewart, testified that in the fall of 2006, M.C., who was nine at the time, and M.C.'s mother, Kendra Bailey, had moved in with her after Kendra and her then-husband, the defendant, had separated. Carla testified that one night in early November 2006, she had received a telephone call from a neighbor who

indicated that on their bus ride home from school, M.C. had told the neighbor's daughter that "someone had touched [M.C.] in a bad way" and that she was afraid to tell anyone about it. The neighbor's daughter had also referenced a " 'good touch/bad touch' card" that M.C. had in her book bag.

¶ 8 Carla testified that early the next morning while M.C. was still asleep, she discovered the card in M.C.'s book bag and put it beside the bag to make it appear as if it had fallen out. As M.C. was subsequently getting ready for school, Carla pretended to find the card and then asked M.C. about it. M.C. explained that it was a good touch/bad touch card and that there had been a good touch/bad touch presentation at her school. When M.C. later entered the kitchen where Carla was waiting, Carla assured M.C. that M.C. could tell her "anything," including "if anyone [had] ever touched [her] wrong." In response, M.C. turned and walked away. A short time later, M.C. returned to the kitchen, and with "a terrible look on her face" that Carla had never seen before, she told Carla that she would " 'be afraid to.' " Carla testified that at that point, she knew something was wrong. Carla again assured M.C. that M.C. could tell her anything, and it would be alright.

¶ 9 Carla testified that M.C. subsequently went back and forth from her bedroom to the bathroom repeatedly stating that she had to get ready for school. Carla felt that M.C. wanted to tell her something, so she asked M.C. to come back into the kitchen. When M.C. finally returned to the kitchen, she advised that someone had touched her "bad." When Carla asked her who it was, M.C. stood silent with her head down and acted "very reluctant to tell." Without raising her head, M.C. eventually uttered the defendant's first

name. When Carla asked M.C. if M.C. could tell her what the defendant had done, M.C. pointed to her breast area and her crotch and then walked out of the room. A few minutes later, M.C. returned to the kitchen, pointed at her crotch, and advised that the defendant had "hurt" her " '[w]ith his fingers.' " She then walked off, insisting that she had to go to school. Carla testified that she had tried to convince M.C. to skip school that day, but M.C. was determined to go. Carla testified that she "hadn't slept all night" and was not sure what to do.

¶ 10 Thereafter, while M.C. was on the front porch waiting for the school bus to arrive, she opened the screen door and told Carla that the defendant had " 'hurt [her] in the bathtub, too.' " When Carla asked what the defendant had done in the bathtub, M.C. stated that he had " 'sat [her] on his lap.' " When M.C. subsequently got on the bus and went to school, Carla decided that she needed to talk to Kendra, who was at work at the time. After Carla spoke with Kendra about what M.C. had reported, Carla and Kendra picked M.C. up from school and took her to the Mt. Vernon police department, where they met with Detective Ken McElroy.

¶ 11 Carla indicated that she had not necessarily disliked the defendant prior to M.C.'s allegations of abuse but that there were things about him that she did not like, such as Kendra "having to support" him. Carla denied the possibility that she may have "suggested anything" to M.C.

¶ 12 Kendra testified that before moving in with Carla in October 2006, she and M.C. had lived with the defendant in a single-story house on Rufus Street in Mt. Vernon. Kendra indicated that after M.C.'s abuse allegations came to light, she had never been

instructed to have M.C. examined by a physician. Kendra explained that she had been "advised that from [M.C.'s] story and from [the defendant's] story," there was "no reason to have to put her through that." Kendra testified that she did not know all the details of M.C.'s claims but was aware that M.C. had reported that some kind of penetration had occurred.

¶ 13 McElroy testified that in 2006, he had been the Mt. Vernon police department's child abuse and neglect investigator and had worked hundreds of child sexual abuse cases over the course of his 13-year career as a detective. McElroy stated that he had specialized training in the area of child sexual abuse investigations and had been taught how to forensically interview children at the National Child Advocacy Center in Huntsville, Alabama. McElroy explained that he had been specifically trained to establish if a child knows the difference between the truth and a lie, to look for emotional indicators such as fear or shame, to identify whether a child's allegations seem rehearsed, and to "try to refrain from leading the child."

¶ 14 McElroy testified that on November 3, 2006, he had briefly spoken with Carla about M.C.'s allegations at the Mt. Vernon police department and had subsequently interviewed M.C. at the Amy Schultz Child Advocacy Center in Mt. Vernon. McElroy stated that he had not discussed the case with M.C. prior to the interview. McElroy testified, among other things, that using anatomically-correct diagrams, M.C. had referred to the breast, vaginal, and buttocks areas of a female as " 'bad place[s].' " McElroy stated that M.C. had ultimately reported that the defendant had touched her in a bad way in each of those places. McElroy stated that M.C. had indicated that the defendant had abused

her on numerous occasions over several months and that the abuse had occurred while Kendra was at work. M.C. was 9 at the time, and the defendant was 32. McElroy's interview with M.C. was recorded and shown to the jury. The jury also received a transcript of the interview.

¶ 15 During the interview, after discussing the difference between a good touch and a bad touch and the difference between a truth and a lie, M.C. told McElroy that the defendant had touched her in a bad way. M.C. indicated that the defendant had often made her sit on his lap on the couch in the living room when the bad touches had happened. M.C. indicated that there had been multiple instances of abuse and that the abuse had occurred while Kendra was at work. M.C. indicated that the defendant had touched all three of her "bad places" with his fingers. M.C. indicated that the defendant would put his hands down the back of her pants and firmly squeeze her buttocks. He would also kiss her mouth, breast area, and stomach and would "breathe hot air from his nose" near her vaginal area. On one occasion, the defendant had penetrated her vagina with his fingers. M.C. recalled that two of her cousins had been at the house at the time and that she had been watching television in the living room. M.C. indicated that she had been lying on the couch near the defendant when she "felt something" inside of her. M.C. stated that "it hurt" but that she had not subsequently noticed "any blood in her panties or anything." M.C. indicated that she had only seen the defendant's "private" on one occasion, *i.e.*, when he had gotten into the bathtub with her and made her sit on his lap. M.C. indicated that the defendant had put his penis inside of her vagina before she told him to get out of the tub, and "he got out."

¶ 16 M.C. indicated that the defendant had told her not to tell anyone about the things that he had done to her but that she "knew it was right to tell someone." Referencing the good touch/bad touch card that she had gotten at school, M.C. explained that it was not her fault that she had been touched and that having been touched did not make her a bad person. M.C. indicated that there might have been "more times" that the defendant had abused her that she could not remember. At the conclusion of the interview, McElroy assured M.C. that she had done nothing wrong and that what had happened to her was not her fault.

¶ 17 McElroy testified that after interviewing M.C., he had arrested the defendant and then interviewed him at the Mt. Vernon police department. McElroy testified that the defendant had ultimately admitted that his penis had entered M.C.'s vagina during the "bathtub incident" and that he had once digitally penetrated her vagina in the living room. McElroy's interview with the defendant was recorded and shown to the jury. The jury also received a transcript of the interview.

¶ 18 Early in the interview, the defendant indicated that he had no idea why he had been arrested. When advised that it was because M.C. had "disclosed some things" following a good touch/bad touch presentation at her school, the defendant indicated that that was "weird" to him because he did not remember anything like that happening. McElroy suggested that the defendant was being untruthful and that there was medical evidence and "some other things" that corroborated M.C.'s claims. McElroy further suggested that because the things that M.C. had alleged were not "that bad," the situation could possibly be resolved through counseling.

¶ 19 McElroy indicated that M.C. had described two instances of penetration. When the defendant was specifically asked about the time in the bathtub when his "private went inside of her private just for a second," the defendant stated that he did not "definitely recall that." After the defendant was advised that M.C. had also described a time when he had put his hand in her pants and "touched her in her private area with [his] finger" and after McElroy suggested that the defendant might have been sexually abused as a child, the defendant disclosed that his grandfather had molested him. When McElroy subsequently stated that he needed to know if the defendant's abuse of M.C. had occurred "any more times [other] than those two times," the defendant stated that it had not and acknowledged that "it had just happened those two times." The defendant further explained that after both incidents, he had realized what he had done and had modified his behavior accordingly. The defendant claimed that he "kept pushing [M.C.] away" and that for weeks, she and Kendra had wondered why he would not hug M.C. or put her to bed. When asked if he had ever sexually abused any other children, the defendant indicated that M.C. was "the only one." When again asked if "it [had] just happened those two times with [M.C.]," the defendant stated, "Yep."

¶ 20 McElroy testified that he had not recommended that M.C. be examined by a medical professional because he believed that an intrusive examination was not warranted under the circumstances. McElroy indicated that in his experience, such examinations are only necessary where the allegations suggest rough penetration or "real injury." McElroy noted that M.C. had indicated that there was not any blood and that she had only been penetrated briefly. McElroy acknowledged that during his interview with

the defendant, he had been "bluffing" about the existence of any medical evidence and had used techniques such as "diminishing the seriousness of the situation." McElroy was extensively cross-examined regarding the techniques that he had used during his interviews with the defendant and M.C. and the actions that he had taken and not taken during the course of his investigation.

¶ 21 M.C. testified that she was 15 years old and lived in Mt. Vernon. M.C. described the house on Rufus Street where she had lived with the defendant when she was nine. M.C. stated that while living with Carla, she had taken the bus to and from school. M.C. testified that she could recall telling Carla that the defendant had been abusing her but that her memory of the conversation was "very blurry." M.C. recalled, however, that she could "just see it in [Carla's] eyes" that Carla had been "shocked" by the allegations.

¶ 22 M.C. testified that she remembered being interviewed by Detective McElroy and that she had told him the truth during the interview. M.C. indicated that she had described an instance when she had been sitting on the defendant's lap on the couch in the living room and had tried to "do a backflip off of him." M.C. testified that "when [she] leaned back and was getting ready to flip over," the defendant had touched the "inner part of [her] legs" and her vaginal area.

¶ 23 M.C. testified that she had told McElroy what the defendant had done to her in the bathtub. M.C. stated that she had been sitting in the tub when the defendant came in and asked her if she wanted him to get in with her. She told him, "No," but he got in anyway. He then "picked [her] up and sat [her] on his lap facing him." M.C. indicated that the defendant's penis had gone "inside" her vagina, specifically testifying that his "private"

had gone into hers. M.C. did not know if his penis had gone "all the way in," but she recalled that the penetration had been "very brief." When M.C. told the defendant to get out of the bathtub, he did. M.C. testified that after that, she was scared and had blamed herself for what had happened.

¶ 24 M.C. also recalled telling McElroy about the time that the defendant had "actually put his finger inside [her] vagina." M.C. testified that her statement about that instance was true as well. M.C. testified that she had not been examined by a physician after she had reported the things that the defendant had done to her. M.C. indicated that she had since tried to put the abuse "out of [her] mind."

¶ 25 For the defense, Alyssa Neitzert, a certified sexual assault nurse examiner, opined that if M.C. had been brought in for a physical examination, the examination might have revealed injury to her hymen. As stated in her admitted report, Neitzert explained that "[p]enetration with a penis would have a high likelihood of causing injury to the posterior segment of the hymen."

¶ 26 The defendant testified that M.C.'s allegations that he had sexually abused her were false and that the various incidents that she had described during her interview and at trial had not happened. The defendant stated that he had denied McElroy's allegations of abuse and had been shocked by McElroy's claims that there was corroborative medical evidence. The defendant explained that he had also been distracted after disclosing that he had been sexually abused by his grandfather. The defendant further explained that he had taken McElroy's comments about counseling as suggestions that the defendant would receive counseling for what had happened to him as a child and that he would not go to

jail. When asked about the fact that he had admitted that he had committed the two acts of penetration that M.C. had described during her interview, the defendant stated that McElroy had "never specified which acts." The defendant further indicated that he had made the admission after deciding that he had "better take the counseling" rather than go to jail for something that he had not done.

¶ 27 The record indicates that the jury deliberated for approximately 50 minutes before finding the defendant guilty on both counts of the grand jury's indictment. The trial court subsequently sentenced the defendant to serve a 20-year term of imprisonment on each count and ordered that the terms be served consecutively. See 730 ILCS 5/5-8-4(a)(ii) (West 2006). In June 2013, the defendant filed a timely notice of appeal.

¶ 28 II. DISCUSSION

¶ 29 On appeal from his convictions, the defendant argues that the State failed to prove his guilt on count II beyond a reasonable doubt. He further contends that trial counsel was ineffective for failing to challenge the reliability of M.C.'s statements to Carla and Detective McElroy before the trial court ruled that the statements were admissible pursuant to section 115-10 of Code of Criminal Procedure of 1963 (section 115-10) (725 ILCS 5/115-10 (West 2006)), for failing to ensure that the jury was instructed in accordance with section 115-10, and for allowing the jury to hear that McElroy believed that M.C. was credible. For the reasons that follow, we reject all four of the defendant's claims.

¶ 30 A. Reasonable Doubt

¶ 31 To obtain a conviction on count II, the State was required to prove that the defendant penetrated M.C.'s vagina with his finger. See 720 ILCS 5/12-14.1(a)(1) (West 2006). The State was thus required to prove that a digital "intrusion" into her vagina had occurred, "however slight" it might have been. 720 ILCS 5/12-12(f) (West 2006); see also *People v. Maggette*, 195 Ill. 2d 336, 346-50 (2001). On appeal, the defendant argues that the State's evidence was insufficient to prove its allegation that the defendant had penetrated M.C.'s vagina with his finger and that his conviction on count II should therefore be reduced to the lesser-included offense of aggravated criminal sexual abuse. See, *e.g.*, *People v. Hurry*, 2013 IL App (3d) 100150-B, ¶ 21. The defendant argues, among other things, that although M.C. recounted an instance of digital penetration when interviewed by Detective McElroy, her trial testimony regarding the event was inconsistent with what she had previously reported.

¶ 32 It is well established that "[a] reviewing court will not set aside a criminal conviction on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *Maggette*, 195 Ill. 2d at 353. "When considering the sufficiency of the evidence, it is not the function of a reviewing court to retry the defendant." *Id.* "Rather, the relevant question is whether, after reviewing all of the evidence in the light most favorable to the prosecution, any rational fact finder could have found beyond a reasonable doubt the essential elements of the crime." *Id.* "[T]his standard of review applies in all criminal cases, whether the evidence is direct or circumstantial." *Id.*

¶ 33 The defendant argues that M.C.'s testimony at trial was inconsistent with what she had previously reported about having been digitally penetrated. Referencing M.C.'s account of the time she had attempted to do a backflip off of the defendant's lap as he sat on the couch in the living room, the defendant contends that her "description of the incident at trial [was] different than her description at the time of the interview" and that her trial testimony "showed only that [he] had touched the outside of her vagina." As the State observes on appeal, however, the defendant conflates the backflip incident that M.C. described at trial with the digital penetration incident that M.C. reported during her interview, which "were consistently expressed as two separate incidents."

¶ 34 As previously noted, M.C. testified that she had told McElroy about the backflip incident, the bathtub incident, and the time that the defendant had "actually put his finger inside [her] vagina." She had, in fact, only reported the latter two. In any event, with respect to the instance of digital penetration, M.C. advised McElroy that she had been lying on the couch near the defendant watching television in the living room when she "felt something" inside of her. M.C. further explained that two of her cousins, "Alex and Piper," had been at the house at the time. At trial, M.C. confirmed that her interview statement about the defendant having digitally penetrated her vagina while she was watching television was accurate. With respect to the backflip incident, M.C. testified that when she had once attempted to do a backflip off of the defendant's lap as he sat on the couch, the defendant had touched the "inner part of [her] legs" and her vaginal area. When cross-examined, M.C. recalled that the backflip incident and the bathtub incident had both happened on "the same day." She further recalled that the two events had taken

place on a Sunday, that the backflip incident had occurred first, and that the bathtub incident had occurred in the afternoon. M.C. denied defense counsel's suggestions that her two cousins had been at the house the day that the backflip and bathtub incidents had happened, stating, "There was no one there but [her] and [the defendant]."

¶ 35 The defendant also suggests that M.C.'s claim of digital penetration was the result of McElroy's leading questioning and should be viewed with suspicion because there was no physical evidence corroborating the claim. We disagree and note that at trial, the jury rejected these very arguments after having watched M.C.'s interview for itself. "It is the function of the jury as the trier of fact to assess the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence." *People v. Lee*, 213 Ill. 2d 218, 225 (2004). Moreover, the record does not support the intimation that M.C.'s allegations were the result of leading questioning, and the jury could have readily concluded that the lack of physical evidence was unremarkable under the circumstances. See *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 89; *People v. Moore*, 199 Ill. App. 3d 747, 773 (1990); see also *People v. Shum*, 117 Ill. 2d 317, 356 (1987) (noting that "medical evidence is not required to prove rape"). We further note that even if M.C. had testified that the act of digital penetration had never occurred, her statements to McElroy were admitted pursuant to section 115-10, so the jury could have found the defendant guilty on count II based solely on her prior claim that it had occurred. See *People v. Johnson*, 2016 IL App (4th) 150004, ¶ 32 (noting that the jury was free to conclude that the child victim's out-of-court statements that were admitted pursuant to section 115-10 were more credible than her contrary trial testimony). Additionally,

although the defendant correctly states that he never admitted "in his own words" that the acts of penetration that M.C. had reported to McElroy had occurred, the inculpatory statements the defendant made during his interview, which the jury also viewed, were essentially a series of admissions or tacit admissions that M.C.'s allegations were true. See *People v. Soto*, 342 Ill. App. 3d 1005, 1013 (2003). We lastly note that the jury could have readily determined that the defendant's testimony that he had falsely confessed was nonsensical and self-serving. See *People v. Newbolds*, 194 Ill. App. 3d 539, 542 (1990).

¶ 36 Viewing the evidence adduced at trial in the light most favorable to the State, we conclude that the defendant's reasonable-doubt argument is wholly without merit and that the evidence overwhelmingly established the defendant's guilt on both charged counts. We accordingly reject the defendant's contention that his conviction on count II should be reduced to the lesser-included offense of aggravated criminal sexual abuse.

¶ 37 B. Ineffective Assistance of Counsel

¶ 38 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). "Counsel is presumed to know the law." *People v. Perkins*, 229 Ill. 2d 34, 51 (2007). When assessing counsel's performance, a reviewing court must therefore "indulge in a strong presumption that counsel's conduct fell into a wide range of reasonable representation, and the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *People v. Cloutier*, 191 Ill. 2d 392, 402 (2000). "Neither mistakes in strategy nor the fact

that another attorney with the benefit of hindsight would have proceeded differently is sufficient to establish ineffective assistance of counsel." *People v. Dobbs*, 353 Ill. App. 3d 817, 827 (2004).

¶ 39 To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). "Because a defendant must establish both a deficiency in counsel's performance and prejudice resulting from the alleged deficiency, failure to establish either proposition will be fatal to the claim." *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996). "Further, in order for a defendant to establish that he suffered prejudice, he must show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." *People v. Burt*, 205 Ill. 2d 28, 39 (2001). "Satisfying the prejudice prong necessitates a showing of actual prejudice, not simply speculation that [the] defendant may have been prejudiced." *People v. Patterson*, 2014 IL 115102, ¶ 81.

¶ 40 As previously noted, the defendant maintains that his trial attorney was ineffective for failing to challenge the reliability of M.C.'s statements to Carla and Detective McElroy before the trial court ruled that the statements were admissible pursuant to section 115-10, for failing to ensure that the jury was instructed in accordance with section 115-10, and for allowing the jury to hear that McElroy believed that M.C. was credible. We will address each of the defendant's contentions in turn.

¶ 41 1. 115-10 Hearing

¶ 42 Prior to trial, the State gave the defendant notice that it intended to admit M.C.'s statements to Carla and McElroy as substantive evidence pursuant to section 115-10 and that the statements were "contained in discovery previously provided." See 725 ILCS 5/115-10(d) (West 2006). At the reliability hearing on the State's motion to introduce the statements pursuant to section 115-10, Carla and McElroy did not testify, but the State submitted a cursory offer of proof as to what their testimony would be. The State further advised that M.C. was nine when the statements were made and that she would be testifying at trial. After hearing the State's offer of proof, the trial court determined that the time, content, and circumstances of M.C.'s disclosures provided sufficient safeguards of reliability. The court further noted that the State anticipated that M.C., who was "under age 13 at the time of the alleged occurrence," would testify at trial. The court thus ruled that M.C.'s statements to Carla and McElroy would be admissible at trial pursuant to section 115-10. See 725 ILCS 5/115-10(b) (West 2006).

¶ 43 On appeal, the defendant argues that trial counsel was ineffective for failing to insist that Carla and McElroy testify at the reliability hearing. The defendant maintains, among other things, that he was prejudiced by "[c]ounsel's failure to object to the limited proffer by the State and to challenge the reliability of the statements by requiring testimony from the witnesses." The defendant suggests that had counsel proceeded as he allegedly should have, there is a reasonable probability that the result of the reliability hearing would have been different, *i.e.*, that M.C.'s out-of-court statements would not

have been admitted pursuant to section 115-10. We reject this claim, as it is speculative at best.

¶ 44 Section 115-10 "provides an exception to the hearsay rule in a prosecution for a sexual act perpetrated upon a child under age 13." *People v. Dugan*, 237 Ill. App. 3d 688, 694 (1992). Under section 115-10, hearsay statements made by a victim regarding the sexual acts may only be admitted if, after a hearing, the court first determines that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. *Id*. at 696-97. "When conducting a reliability determination, a trial court evaluates the totality of the circumstances surrounding the making of hearsay statements." *People v. West*, 158 Ill. 2d 155, 164 (1994). "Some factors that are important in making the determination include: the child's spontaneous and consistent repetition of the incident, the child's mental state, use of terminology unexpected of a child of similar age, and the lack of a motive to fabricate." *Id*.

¶ 45 When the State seeks to admit a victim's statement to a potential witness pursuant to section 115-10, it can establish the statement's reliability through an offer of proof. *People v. Guajardo*, 262 Ill. App. 3d 747, 757-58 (1994); *People v. Moss*, 260 Ill. App. 3d 272, 280-81 (1993). A hearing at which the witness actually testifies is not required. *Id*. "Questions regarding the admissibility of evidence pursuant to section 115-10 lie within the discretion of the trial court, and a reviewing court may overturn a trial court's determination only when the record clearly demonstrates that the court abused its discretion." *Moss*, 260 Ill. App. 3d at 280. A trial court abuses its discretion where its

ruling is arbitrary, fanciful or where no reasonable person would take the view adopted by the court. *People v. Taylor*, 383 Ill. App. 3d 591, 594 (2008).

¶ 46 Here, in August 2007, the contents of M.C.'s statements to Carla and McElroy were disclosed in discovery, and the defense was provided with a copy of McElroy's video-recorded interview with M.C. In November 2007, at the sentencing hearing on the defendant's subsequently vacated guilty plea, Carla and McElroy testified as to the time and circumstances of the statements that M.C. had made to them. At the defendant's trial in February 2013, Carla and McElroy testified as to the time, content, and circumstances of the statements. Their live testimony at both proceedings was consistent and suggested an extremely high degree of reliability. We have no reason to conclude that had they been called to testify at the reliability hearing, their testimony would not have been the same. Moreover, because their trial testimony was more detailed than the State's offer of proof, we can hardly conclude that had they testified at the reliability hearing, there is a reasonable probability that the result of the proceeding would have been different. We rather agree with the State that to the extent that defendant might have contested the adequacy of its offer of proof at the hearing, the State "could and would have readily established all the factual predicates necessary for a finding of reliability." *Cf. People v. Zwart*, 151 Ill. 2d 37, 43-44 (1992) ("After carefully reviewing the record, we hold that the State did not adequately establish that the victim's hearsay statements were reliable within the meaning of section 115-10.").

¶ 47 Counsel "is not required to raise losing arguments to avoid an ineffective-assistance claim." *People v. Cavazos*, 2015 IL App (2d) 120171, ¶ 82. Moreover, a

defendant "cannot rely on speculation or conjecture to justify his claim of incompetent representation." *People v. Holman*, 164 Ill. 2d 356, 369 (1995). We accordingly reject the defendant's argument that his trial attorney was ineffective for failing to insist that Carla and McElroy testify at the reliability hearing.

¶ 48 2. 115-10 Instruction

¶ 49 In pertinent part, section 115-10 specifically provides as follows:

> "If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child ***, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." 725 ILCS 5/115-10(c) (West 2006).

Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 11.66), was adopted in response to this statutory requirement, and where a child-victim's statements have been admitted pursuant to section 115-10, the instruction must be given to the jury. See *People v. Sargent*, 239 Ill. 2d 166, 190, 192 (2010); IPI Criminal 4th No. 11.66, Committee Note.

¶ 50 Here, during closing arguments, defense counsel maintained that M.C.'s allegations should be viewed with suspicion given "the circumstances of [her] initial complaint" and her age at the time. Counsel noted that it was common knowledge that young children are susceptible to suggestion and leading questions. Counsel further noted that young children "integrate notions of fiction and reality at the same time."

Counsel thus argued that what M.C. had alleged when she was nine "could have definitely been made up" or could have otherwise been suggested to her. Counsel also intimated that Carla might have directed M.C. to make the allegations because of "bad family blood" and that McElroy might have spoken with M.C. "off-camera" before interviewing her. Counsel further suggested that it was "certainly problematic" that M.C.'s allegations had first surfaced through information that had been obtained "third-hand through a friend's mom."

¶ 51 The State asserted that M.C. was a very credible "little girl" when she first reported the abuse at age 9 and was an equally credible trial witness at age 15. Noting that M.C. had the "courage" to appear and testify "about one of the worst days and times in her life," the State asked the jury to consider her demeanor and "the way she carried herself." The State suggested that the jury could find the defendant guilty on M.C.'s trial testimony alone.

¶ 52 For whatever reason, the jury did not subsequently receive IPI Criminal 4th No. 11.66. On appeal, the defendant maintains that trial counsel was ineffective for failing to tender it. We find that the defendant is unable to establish prejudice under the circumstances and accordingly reject this contention.

¶ 53 "Counsel's decision as to what jury instructions to tender is one of several determinations widely recognized as matters of trial strategy that are generally immune from ineffective assistance claims." *People v. Douglas*, 362 Ill. App. 3d 65, 75 (2005). Strategic considerations aside, however, to prevail on his claim that counsel was ineffective for failing to tender IPI Criminal 4th No. 11.66, the defendant must establish

that had the jury been given the instruction, there is a reasonable probability that the outcome of his trial would have been different. See *Burt*, 205 Ill. 2d at 39; see also *People v. Washington*, 2012 IL 110283, ¶ 60 (noting that "instructional errors are deemed harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed"). "[A] 'reasonable probability' is defined as a showing sufficient to undermine confidence in the outcome, rendering the result unreliable or fundamentally unfair." *Patterson*, 2014 IL 115102, ¶ 81.

¶ 54 Here, we cannot conclude that there is a reasonable probability that the jury would not have convicted the defendant had defense counsel tendered IPI Criminal 4th No. 11.66, especially considering defense counsel's arguments to the jury. Although arguments of counsel generally carry less weight with a jury than instructions from the court (*People v. Williams*, 249 Ill. App. 3d 102, 104 (1993)), defense counsel postulated numerous reasons why M.C.'s allegations should be disbelieved, and the substance of counsel's arguments went far beyond the credibility considerations that IPI Criminal 4th No. 11.66 would have conveyed.

¶ 55 As the trier of fact, the jury was tasked with determining the credibility of the witnesses and was in a superior position to do so. See *People v. Rodriguez*, 2012 IL App (1st) 072758-B, ¶ 45. As the State repeatedly notes on appeal, the jury watched the video recording of McElroy's interview with M.C. and witnessed her testimony at trial. The jury likewise watched the video recording of McElroy's interview with the defendant and witnessed the defendant's testimony at trial. The jury was also able to evaluate Carla's and McElroy's credibility. The jury obviously determined that the State's witnesses were

credible and that the defendant was not. Given the overwhelming evidence of the defendant's guilt, that the jury did not receive IPI Criminal 4th No. 11.66 in no way undermines our confidence in its verdict. We accordingly reject the defendant's claim that his trial attorney was ineffective for failing to tender the instruction.

¶ 56 We lastly note that the defendant cites *People v. Mitchell*, 155 Ill. 2d 344 (1993), in support of his claim that counsel's failure to tender IPI Criminal 4th No. 11.66 requires a reversal of his convictions. In *Mitchell*, however, the record failed to establish the reliability of the child-victim's statements and further failed to provide a basis upon which one could infer that the statements were reliable. *Id.* at 353. Moreover, the evidence of the defendant's guilt was deemed "sufficiently close that the failure to instruct the jury as required by section 115-10(c) constitute[d] plain error." *Id.* at 354. Here, the evidence of the defendant's guilt is not close, and as stated, the record fully supports a finding that M.C.'s statements to Carla and McElroy were reliable. *Mitchell* is thus inapposite.

¶ 57 3. McElroy's Beliefs

¶ 58 Prior to the parties' opening statements at trial, the trial court instructed the jury that one of its "very important tasks" would be to "judge the believability of the witnesses." In his opening statement to the jury, defense counsel maintained that McElroy had led M.C. to tell him things that he wanted her to affirm and had failed to properly investigate her allegations.

¶ 59 Prior to trial, the defendant filed several motions *in limine*, one of which requested that the trial court preclude the State from asking McElroy to comment on M.C.'s

credibility. The motion noted that in the discovery materials that had been provided to the defense, McElroy had stated that based on his experience and training, he felt that M.C. was very credible. At a subsequent hearing, the motion was granted without objection. The State advised that it had not planned on asking McElroy to comment on M.C.'s credibility and would instruct him not to do so. Nevertheless, during McElroy's direct examination testimony at trial, when the State asked him what he had done after interviewing M.C., he stated that he had arrested the defendant because he felt that M.C. "was very credible." McElroy explained that he had not perceived "any indications" that M.C.'s claims had been fabricated or "coached" and that what she had told him had given him probable cause to make the arrest. McElroy further explained that his "probable cause" was his informed belief that "a crime most likely happened." Notably, defense counsel did not object or ask that the court instruct the jury to disregard any of these remarks. Nor did defense counsel reference the comments at a subsequent recess that was taken following McElroy's direct examination testimony.

¶ 60 During cross-examination, when defense counsel asked McElroy if he allowed for the possibility that a child might lie to him during an interview, he explained that he did and that he looks for "indicators" suggesting that the child's allegations might have been rehearsed or fabricated. McElroy acknowledged, among other things, that young children can be susceptible to suggestibility and often tell stories that are "half-true." McElroy further acknowledged that children will "oftentimes answer questions in a way that they believe will please the adult asking the question" and will "often integrate fictional notions with reality." McElroy was questioned about the lack of physical evidence

supporting M.C.'s claims and about his failure to take actions such as identifying the cousins that M.C. had referenced during her interview. He was also questioned as to why he had not pressed M.C. for additional details regarding her allegations.

¶ 61 After suggesting that McElroy had improperly conducted his interview with M.C., that he should have attempted to corroborate her claims, and that his investigation had resulted in "[l]ots of unanswered questions," counsel suggested that despite his "hundreds of cases of investigative experience," McElroy had made a rush to judgment:

> "[Defense counsel]: Okay. And after [M.C.'s] interview, obviously, you had your mind made up, right?
>
> [McElroy]: I felt there was probable cause.
>
> [Defense counsel]: Well, I mean, not only did you feel there was probable cause, you felt this was such a strong case you didn't even need to investigate it any further, correct? Don't ask the tough questions. Don't send her for a medical examination. I know what I know. That was your attitude, correct?
>
> [McElroy]: No. That is not my attitude—or was not."

¶ 62 On redirect, when the State asked McElroy if he had been trained to identify the "indicators of a child being coached," he stated that he had been. When McElroy confirmed that he had not detected "any indicators of lying on the part of [M.C.]," defense counsel objected, stating, "It's for the jury to determine whether or not she was lying and whether or not she was credible." After the trial court overruled counsel's objection, McElroy testified that he had not detected "anything false about any of the things [M.C.] was saying" nor did he detect any "indicators" that she had been coached.

¶ 63 During closing arguments, counsel asserted that McElroy was an incompetent investigator who had learned how to interview children back "in the Stone Age." Counsel argued that McElroy's interview with M.C. was "terrible" and deliberately suggestive. Counsel claimed that "[i]n the interview[,] [M.C.] told Detective McElroy whatever he wanted to know, and he already knew what he wanted to prove." Counsel suggested that McElroy had not properly investigated M.C.'s allegations, "because [he] believe[d] her so much."

¶ 64 The State argued that although the jury had heard "some second-guessing" about the steps that had been taken during the course of the investigation, once the defendant had "basically" admitted that what M.C. had reported was true, "it was not necessary to corroborate it further." As previously noted, the State suggested that the jury could find the defendant guilty on M.C.'s trial testimony alone. The State did not discuss McElroy's assessment of M.C.'s credibility or the "indicators" that he had been trained to detect.

¶ 65 Before deliberating, the jurors were instructed that "[o]nly [they were] the judges of the believability of the witnesses." See IPI Criminal 4th No. 1.02. In his motion for a new trial, the defendant raised numerous contentions of error but did not claim that McElroy had improperly bolstered M.C.'s credibility.

¶ 66 On appeal, noting that because questions of credibility are to be resolved by the trier of fact, it is generally improper for a witness to comment on the credibility of another witness (*People v. Becker*, 239 Ill. 2d 215, 236 (2010)), the defendant contends that "[c]ounsel in this case was ineffective where he failed to object to the State's

improper questioning and elicited additional prejudicial testimony during his cross-examination of Detective McElroy." We disagree.

¶ 67 "Defense counsel's failure to object to testimony may be a matter of sound trial strategy, and does not necessarily establish deficient performance." *People v. Evans*, 209 Ill. 2d 194, 221 (2004). Moreover, "when a defendant fails to object to testimony and then elicits the same or similar testimony on cross-examination, any error in admitting that testimony is waived." *People v. Murphy*, 322 Ill. App. 3d 271, 277 (2001); see also *People v. Caffey*, 205 Ill. 2d 52, 113 (2001) (holding that even if "a defendant objects to certain testimony on direct examination, but then questions the witness on cross-examination concerning that allegedly inadmissible testimony, any error is waived for purposes of appeal"). The manner in which defense counsel cross-examines a witness is also "an area that falls within the ambit of trial strategy." *People v. Jacobs*, 308 Ill. App. 3d 988, 993 (1999).

¶ 68 Here, we construe counsel's failure to object to McElroy's unsolicited comment that he thought that M.C. was credible as a matter of sound trial strategy. Although counsel obviously could have objected to the comment and asked that the jury be instructed to disregard it (see, *e.g.*, *People v. Phillips*, 383 Ill. App. 3d 521, 547 (2008); *People v. Boaz*, 222 Ill. App. 3d 363, 365-66 (1991)), counsel instead used McElroy's subjective certainty to suggest that he had rushed to judgment and had thus failed to properly investigate M.C.'s allegations. During cross-examination, for instance, when McElroy seemingly tried to temper his testimony by merely stating that he "felt there was probable cause," defense counsel challenged his answer as an understatement and

subsequently argued that McElroy had not properly investigated M.C.'s allegations, "because [he] believe[d] her so much." As a matter of strategy, counsel thus emphasized that McElroy subjectively believed that M.C. was credible. We further note that on appeal, the defendant does not dispute that on redirect, when the State attempted to rehabilitate McElroy by asking him whether he had perceived any of the "indicators" that he had been trained to detect, the trial court properly overruled counsel's objection because the defense had "opened the door" on the subject. See *People v. Tolbert*, 323 Ill. App. 3d 793, 805 (2001). Additionally, even though the objection was overruled, counsel was still able to remind the jurors that it was their duty "to determine whether or not [M.C.] was lying and whether or not she was credible," which was essentially the curative instruction that the jury would have received had counsel objected in the first place. See *People v. Dodds*, 190 Ill. App. 3d 1083, 1099-1100 (1989); *People v. Townsend*, 136 Ill. App. 3d 385, 394-95 (1985).

¶ 69 Under the circumstances, the defendant's ineffective-assistance-of-counsel claim on this issue is unsustainable. As previously indicated, "[i]f the alleged incompetency of an attorney is actually a matter of trial tactics or strategy, both of which are purely matters of professional judgment, such allegations cannot support a claim of ineffective assistance." *People v. Leeper*, 317 Ill. App. 3d 475, 482 (2000). We further conclude that even if counsel's actions could be viewed as indefensible, the defendant would still be unable to establish prejudice. See, *e.g.*, *People v. Degorski*, 2013 IL App (1st) 100580, ¶¶ 87-88. We lastly note that the present case does not involve a situation where

a police officer "essentially testified" that he believed that the defendant was guilty. *People v. Theis*, 2011 IL App (2d) 091080, ¶ 37.

¶ 70 III. CONCLUSION

¶ 71 For the foregoing reasons, the defendant's convictions for predatory criminal sexual assault of a child are hereby affirmed.

¶ 72 Affirmed.