2017 IL App (1st) 141743-U

FIRST DIVISION
April 24, 2017

No. 1-14-1743

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court of
	) Cook County, Criminal Division
Plaintiff-Appellee,	)
	)
v.	) No. 11 CR 879
	)
NICOLAS VILLANUEVAS-ARENAS,	) Honorable Evelyn B. Clay,
	) Judge Presiding
Defendant-Appellant.	)

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva conurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's error in excluding impeachment evidence was harmless in the light of the substantial evidence of defendant's guilt. The court's admission into evidence of the victim's out of court statement was proper. Defendant is not entitled to a new trial where the prosecutor's comments during rebuttal were invited by defense counsel's closing argument.

¶ 2 Following a jury trial, defendant Nicolas Villenuevas-Arenas was found guilty of one count of predatory criminal sexual assault and sentenced to 10 years in prison. On appeal, defendant claims that: (1) the trial court abused its discretion when it did not allow defendant to introduce several letters to impeach the testimony of two witnesses; (2) the trial court abused its

discretion when it allowed into evidence the victim's out-of-court statement; (3) he was denied his right to a fair trial when the State made improper and prejudicial comments during closing arguments; and (4) the cumulative effect of the errors in the case denied his right to a fair trial.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with multiple counts of predatory criminal sexual assault stemming from an incident with his daughter, N.S., on August 1, 2010. Defendant's first jury trial ended in a hung jury. Following a second trial, defendant was convicted of predatory criminal sexual assault and sentenced to 10 years in prison.

¶ 5 Prior to trial, defendant filed a motion *in limine* to introduce 13 letters that N.S. and her mother, Maria Anaya, wrote to defendant while defendant was in custody awaiting trial. Defendant argued that the letters which indicated that N.S. and Anaya loved and missed defendant were inconsistent with their anticipated testimony that defendant sexually assaulted N.S. The State objected to the letters as being irrelevant. The trial court ruled that the letters written by Maria Anaya were not admissible stating that "I don't think that the victim should be taxed by the mother's conduct and I don't think that the letters were relevant." As for letters written by N.S., the court found them irrelevant. The court mentioned that N.S. had not referenced the charge in the letters and thus, there was no "tie-in" to the case. The court denied defendant's motion to admit the letters.

¶ 6 The State filed a motion pursuant to 725 ILCS 5/115-10 (West 2012) regarding the admission into evidence of the victim's statements made to Lynn Aladeen, a forensic investigator with the Child Advocacy Center ("CAC"). At the hearing, Lynn Aladeen testified that, on August 2, 2010, she interviewed N.S. who was eleven years old at that time.

¶ 7 Aladeen stated that N.S. told her the following: when she walked into the bedroom that she shared with both her parents, defendant had his "thing" out, it was "standing up," and was putting cream on it; he unzipped her pants, threw her on the bed and told her not to say anything while raising his fist; N.S. tried to turn over and defendant turned her back on her back, he threatened her, and put her feet on his shoulders; defendant tried to put his "thing" in her "pussy." N.S. said that his thing touched the outside part and the "hole." N.S. described his "thing" as his "private thing," the part of his body that "he pees with" and "his penis." N.S. told Aladeen that it hurt her "in the middle" when defendant did this to her, but N.S. did not know why it hurt.

¶ 8 Aladeen testified that N.S. also told her that, approximately six weeks earlier, when N.S. was in bed with her mom and defendant, defendant put his hand inside her pajama pants and placed his fingers in her "front part." N.S. gestured her vaginal areas as she told Aladeen that defendant put his finger inside the hole in the "front part." Aladeen stated that N.S. understood the difference between the truth and a lie and told Aladeen that she would tell the truth. Aladeen did not use anatomical dolls and the interview was not recorded as CAC did not have recording equipment available at that time.

¶ 9 The trial court granted the State's motion to admit N.S.'s statements under section 115-10 of the Code of Criminal Procedure as an exception to the hearsay rule finding that there were sufficient safeguards in their reliability. At defendant's second trial, the State filed a motion to use proof of other-crimes evidence for intent and propensity purposes pursuant to 725 ILCS 5/115-7.3 (West 2012). The State indicated that six weeks before the incident in the instant case occurred, N.S. was sleeping in her parents' bed when defendant inserted his finger into N.S.'s vagina. The State argued that this prior incident demonstrated defendant's propensity to commit sexual assaults. Defense counsel objected and argued that the evidence was very prejudicial. The

court granted the State's motion finding that the probative value of the prior crime outweighed the prejudicial effect.

¶ 10 At trial, N.S. testified to the following. Her date of birth was December 13, 1998, and she was eleven years old on August 1, 2010. Back in 2010, she lived with defendant who was her father, her mother and her two brothers. The family lived in a two-bedroom apartment in which she shared one bedroom with her mother and defendant while her brothers shared the second bedroom. On the date of the incident, N.S. went to a barbeque with her mother and defendant. Defendant drank beer at the barbeque.

¶ 11 When they returned home, they all went to the bedroom and Anaya left the bedroom to take a shower in the bathroom in the hallway. One of her brothers was in the other bedroom. Defendant told N.S. to go check on her mother, and N.S. opened the door and saw that her mother was still in the shower. When N.S. returned to the bedroom, defendant had his pants down and was putting lotion on his penis. He told her to come close to him, and when she did, he forced N.S.'s shorts and underwear down. He told her not to say anything and he threatened to hit her if she did. Defendant pushed N.S. onto the bed. N.S.'s back was on the bed and defendant stood in front of her. He then placed N.S.'s legs on his shoulders. N.S. tried to move but defendant told her not to, and again raised his hand in a fist. Defendant then touched his penis to N.S.'s vagina. N.S. tried to get away and defendant threatened to hit her. Defendant attempted to put his penis inside N.S.'s vagina. Anaya then walked in the bedroom.

¶ 12 Anaya hugged N.S. while she cried. Anaya told N.S. to take a shower. N.S. could hear her parents arguing while she was in the shower. When N.S. came back to the bedroom, Anaya was on the bed and defendant had a hammer in his hand near Anaya's head. He threatened to kill

N.S. and her mother. N.S. returned to the bedroom and took the hammer away from defendant and hid it in the closet. N.S. heard Anaya tell defendant to get his clothes and go outside.

¶ 13 Defendant left the apartment and Anaya called the police. N.S spoke with the officers and then went to Resurrection Hospital where a doctor collected a vaginal swab for a criminal sexual assault kit. The following day, N.S. went to the Children's Advocacy Center, where she spoke to a forensic interviewer. N.S. testified that, about a month and a half prior to the incident in August, N.S. slept in her parents' bed after watching a scary movie. N.S. was awoken when defendant put his finger in her vagina. Defendant told N.S. it was a "mistake' and that "he was not going to do it anymore," so N.S. did not tell anyone. N.S. stated that she trusted defendant.

¶ 14 On cross-examination, N.S. explained that she believed Emeliano Sandoval was her father, and had lived with him until she was seven or eight years old. She later learned that defendant was her father and moved in with defendant, Anaya and her brothers. N.S. also stated that she did not want to call defendant "father." After several years, N.S. moved back to Sandoval's home and then back with defendant. N.S. stated that she knew it was wrong for an adult to touch her privates, however, she did not tell her mother about the incident after the scary movie. She also indicated that there were times when she was alone with defendant in the house and he did not sexually assault her.

¶ 15 Maria Anaya testified that she was N.S.'s mother. She lived with N.S., defendant and her two sons in August of 2010. Defendant and Anaya were in a relationship and had N.S. together. They shared a bedroom; Anaya and defendant kept their laundry in one hamper and N.S.'s laundry was kept in a separate hamper. Anaya washed defendant's laundry separate from N.S.'s.

¶ 16 Anaya indicated that on August 1, 2010, she, defendant and N.S. attended a barbeque. Once they got home at around 9 p.m., she took a shower. While showering, N.S. came into the

bathroom and called her. Anaya immediately got out of the shower. Anaya walked into the bedroom that she shared with defendant and N.S. She saw defendant standing against the bed, his back was facing the door and his buttock was exposed. N.S. was lying in bed on her back and her underwear was below her knees. Her daughter's feet were on defendant's shoulders. Anaya asked, "What are you doing to my daughter?" Defendant walked away to put on his pants and Anaya saw that his penis was erect. N.S. picked up her shorts and ran to Anaya who told her to take a shower. Defendant told Anaya that he had not done anything to N.S. and began packing his clothes. Defendant also told her that N.S. was the "one tossing herself to him." Defendant then threatened to kill Anaya and raised a hammer to her head. Defendant left and Anaya called the police. After this incident, Anaya, N.S. and her other children left the house.

¶ 17 Next, Lynn Aladeen testified at trial consistent with her testimony at the hearing on State's motion *in limine*. Before Aladeen related whet N.S. told her, defense counsel objected to "preserve his objection to all of the testimony based on hearsay and the lack of compliance with section 115-10." The court overruled the objection.

¶ 18 The police found and arrested defendant at a motel in Villa Park. Defendant gave permission to search his motel room. Deputy Cotton contacted Sergeant Price of the Forensic Investigation Unit, who recovered two t-shirts, a pair of underwear, and a blanket from the floor of defendant's motel room. These items were packaged and tested for the presence of semen, hair and fibers. Forensic biologist Bill Cheng from the Illinois State Police Crime Lab testified that defendant's underwear tested positive for semen, which was located on the inside front of the underwear. Cheng cut out the semen stain and preserved it for DNA analysis. Cheng also examined N.S.'s sexual assault kit. He specifically tested the vaginal swab for presence of semen and saliva. No semen or saliva was identified.

¶ 19 Forensic scientist Ryan Paulsen conducted the DNA analysis of the semen stain cut from defendant's underwear as well as buccal swabs from defendant and N.S. Paulsen explained that the semen stain contained a mixture of a male and female component. The male component matched defendant's DNA profile. The female component contained a match of 11 of the 13 locations. When compared the female profile to N.S., Paulsen explained that "N.S. could not be excluded for contributing to this DNA profile." Paulsen testified that the DNA profile was consistent with having originated from N.S. Statistically, the female component could not be excluded from being found in approximately 1 in 26 trillion black individuals, 1 in 220 billion white individuals, or 1 in 17 billion unrelated Hispanic individuals.

¶ 20 Paulsen explained that if a male's penis touched a female vagina, it would be reasonable to find a female's DNA on the man's penis. If the male immediately put underwear on, it would be possible to transfer some of the female DNA to the underwear. Causal touching an item of clothing against another piece of clothing would leave a limited amount of DNA.

¶ 21 Defendant testified on his behalf. He stated that he worked as a machine operator at the American Metal Factory in Roselle, from 5 p.m. to 5.a.m., Monday through Friday. He testified that Anaya told him that he was N.S.'s father when N.S. was seven years old. At that time, N.S. and Anaya were living with Emeliano Sandoval. They moved in with him, but then returned to live with Sandoval. Later, N.S. and Anaya moved back in with defendant again. According to defendant, N.S. never accepted him as a father.

¶ 22 On August 1, 2010, defendant went to a barbeque with N.S. and Anaya at his cousin's house. While at the barbeque, he heard that Emeliano Sandoval's car had been at his house one night while defendant was at work. When the family returned home, Anaya went to take a shower and N.S. stayed in the bedroom that she shared with her parents. Defendant was watching

TV and N.S. took Anaya's clothes to her, because she had forgotten to take them to the bathroom. When N.S. returned, she sat down on the bed next to defendant. He asked her about Sandoval coming over to the house and N.S. got very nervous.

¶ 23 Defendant stated that he told N.S. to "cover herself" because he was going to change his clothes and she covered herself completely with the blanket. Defendant took off his pants. He testified that Anaya walked into the bedroom while defendant was putting his boxer shorts and said, "what are you doing gorda [?]" Defendant testified that he told Anaya that he found out about who she was bringing home at night. Defendant did not tell Anaya who had told him, but Anaya was looking at N.S., called her a liar and told her to take a shower.

¶ 24 Defendant stated that he put his clothes back on and began to pack his things while Anaya tried to convince him to stay. Defendant brought his clothes and a blanket out to the truck, then came back inside and told Anaya to give him the phones. Anaya refused to give him her phone so he tried to smash N.S.'s phone, and then smashed his own phone so that Anaya would not bother him anymore. On his last trip inside the house to gather his belongings, he threatened to send N.S. to Mexico, and Anaya replied that "if you take her, you are going to be sorry for the rest of your life."

¶ 25 Defendant testified that he drove to the Briar Rabbit Hotel in Villa Park and checked in. He took his undergarments, t-shirt and towel from the truck and brought them to his hotel room. Defendant stated that he did not separate his clean clothes from his dirty ones before packing and did not know if he grabbed clean or dirty clothes form the truck. Defendant indicated that the entire family's laundry was washed together at the laundromat. He also stated that he did not take a shower before going to sleep. Defendant denied that he attempted to have sex with N.S. or that he had ever touched her private area.

¶ 26 On cross-examination, defendant denied that he told Detectives Bellamy (now Rodriguez) and DeLatorre that the reason for the fight with Anaya was because he had changed clothes in front of N.S. and that N.S. was on her back on the bed. He denied telling the detectives that Anaya was mad at him because she saw defendant without pants on. Defendant further denied saying that "I didn't do anything, I believe it's all a lie." Defendant denied telling detectives that he was not drunk, but "maybe I had 10 beers." Defendant denied telling detectives that N.S.'s clothes were off because she was changing too, and that he had turned around so he would not see N.S. Defendant agreed that he had told detectives that his fight with Anaya was about her boyfriend. Defense then rested.

¶ 27 In rebuttal, the State called Detective Bellamy, who testified that she and Detective LaTorre interviewed defendant. After receiving his *Miranda* rights in Spanish and English, defendant acknowledged his rights and agreed to speak to the detectives. He indicated that he preferred Spanish and the interview was held in Spanish. Initially, he said the argument with Anaya was about N.S., that he didn't do anything, and that it was all a lie. Defendant told the detectives that Anaya walked into the room and defendant was in a t-shirt and underwear, and N.S. was on the bed on her back. Defendant stated that, when Anaya saw him without his pants on, she got mad and left. Defendant told the detective that he had about ten beers that day but was not drunk.

¶ 28 Defendant then told the detectives that the argument with Anaya was about Anaya's ex-boyfriend. Detective DeLatorre reminded defendant that he had said that the argument was about changing his clothes in front of N.S. Defendant responded, "that came later on, then I left." He was asked the third time to explain what happened, and he said that Anaya came and saw him with his pants off and that N.S. had her clothes off too. Defendant said that he turned around so

he would not see N.S. with her clothes off. When asked how often N.S. would change in his presence, defendant did not answer the question. Instead he said that he was not fully dressed at that time. Detective LaTorre asked defendant for a second time how many times N.S. had changed in front of him. Defendant said that this incident was the first time that N.S. had taken her clothes off in front of him. The State rested its case.

¶ 29 The jury found defendant guilty of predatory criminal sexual assault. The court sentenced defendant to 10 years in prison. This appeal follows.

¶ 30 ANALYSIS

¶ 31 I. Letters as Impeachment Evidence

¶ 32 Defendant argues that he was denied his right to present a defense and his right to confrontation when the trial court excluded the letters that N.S. and Maria Anaya wrote to defendant while he was in jail awaiting trial. Defendant contends that the letters were relevant for purposes of impeachment because they showed that the conduct of Anaya and N.S. after the incident was inconsistent with their anticipated testimony against defendant at trial.

¶ 33 It is within the trial court's discretion to decide whether evidence is relevant and admissible. *People v. Morgan*, 197 Ill. 2d 404, 455-56 (2001) citing *People v. Hayes*, 139 Ill. 2d 89, 130 (1990). A trial court's decision concerning whether evidence is relevant and admissible will not be reversed absent a clear abuse of discretion. *Id.*

¶ 34 A criminal defendant's constitutional right to confrontation includes the right to cross-examine. *People v. Blue*, 205 Ill. 2d 1, 12 (2001) citing *Douglas v. Alabama,* 380 U.S. 415, 418 (1965). To satisfy the confrontation clause, the court should afford a defendant the widest latitude to establish the witness's bias and hostile motivation. *Id.* at 14. "It is proper to cross-examine as to acts or conduct on the part of a witness which are inconsistent with what would be

the natural or probable course of conduct if the witness is testifying truthfully about the occurrence in dispute." *People v. Rainford*, 58 Ill. App. 2d 312, 319 (1965). Evidence of the inconsistent conduct should be especially considered in sexual assault cases where the charges are difficult to disprove. *Id.*

¶ 35 Here, prior to trial, defendant sought to introduce 13 letters as impeachment evidence. The letters were initially written in Spanish but were translated in English. In sum, the letters indicated that N.S. and Anaya loved and missed their father and lover respectively. At the hearing on defendant's motion *in limine* defendant argued that Anaya's conduct in writing love letters to defendant who allegedly abused her daughter was inconsistent with her anticipated testimony that she witnessed defendant abusing their daughter. Defendant also contended that the N.S.'s letters to defendant expressing her affection toward defendant were inconsistent with her claim against defendant. Defense counsel informed the court about the content of Anaya's letters. The State responded that the letters were irrelevant and not indicative of inconsistent behavior. The court held that the letters were not relevant and that N.S. should not be "taxed" with letters from her mother.

¶ 36 Regarding the letters written by N.S. to defendant, the court noted that N.S. did not reference the pending charges and that there was no "tie-in" to the instant case. The court noted "I don't think [defendant] should benefit from whatever this person is saying in response to him being in jail. Someone she's lived with a number of years." The court read N.S. translated letters and ultimately ruled that they would not be admissible.

¶ 37 Defendant relies primarily on *People v. Rainford*, 58 Ill. App. 2d 312 (1965) for the argument that in a sexual assault case, the defendant should be allowed to question the victim about "such conduct [that] was incompatible with the charge she was making against him." In

Rainford, the defendants, the 13-year old mother and step-father were convicted of assault with intent to commit rape. *Id*. at 315. On appeal, the defendant argued that the trial court abused its discretion when it limited the cross-examination of the victim and her step-brother on matters affecting their credibility. *Id*. at 316. The appellate court held, in relevant part, that the trial court erred when it did not allow three questions asked by the defendant which attempted to demonstrate that the victim continued to live with the defendants. *Id*. at 318. The court held that it was proper for defendant to cross-examine the witnesses as to acts or conduct which were "inconsistent with what would be the natural or probable course of conduct if the witness is testifying truthfully about the occurrence in dispute." *Id*. The court noted that it was natural and probable that a girl of her age would continue to stay with her family, but found that the question went to the weight and not admissibility of the evidence. *Id*.

¶ 38 Here, similarly, the trial court erred when excluding the letters written by both Anaya and N.S. The letters written after defendant was charged in the instant case contained declarations of love expressing their affection for defendant and how much they missed him. The court held that the letters were not relevant and "not probative on any issue whatsoever," and found them inadmissible because "they would tax [N.S.] for having the kind of mom she has." The court also stated that it would not allow defendant to present the letters because they did not contain and did not reference the charge against him.

¶ 39 But, defendant did not attempt to introduce the letters as substantive evidence for their truth. Instead, the letters were relevant impeachment evidence. *People v. Bradford*, 106 Ill. 2d 492, 499 (1985) ("[t]he purpose of impeaching evidence is to destroy the credibility of a witness and not to establish the truth of the impeaching."). Just as in *Rainford*, the letters professing

Anaya's and N.S.'s love and support for defendant were inconsistent with how they would probably act if their testimony about defendant sexually assaulting N.S. were true.

¶ 40 The letters were also relevant as prior inconsistent statements for purposes of impeachment. A witness may be cross-examined as to prior statements which are inconsistent with his testimony at trial, but the inconsistency must relate to relevant, not to collateral matters. *People v. Castro*, 109 Ill. App. 3d 561, 65 (1982). The test of propriety is whether the prior statement has a reasonable tendency to discredit the direct testimony on a material matter. *Id.* Clearly, the love letters from N.S. and Anaya, written after the offense occurred, tended to discredit their trial testimony that defendant sexually assaulted N.S. We find that the trial court erred in excluding the letters.

¶ 41 We turn now to the question of whether the error in the case at bar was harmless beyond a reasonable doubt. In determining whether a constitutional error is harmless, the test to be applied is whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). When deciding whether error is harmless, a reviewing court may: (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *People v. Becker*, 239 Ill. 2d 215, 240 (2010).

¶ 42 Here, we find that the evidence presented at trial overwhelmingly supported defendant's conviction. At trial, N.S. testified that defendant had his penis erect out when he threw her onto the bed, pulled down her shorts and placed her feet on his shoulders. N.S. tried to get away but defendant threatened her with his raised fist and then stuck his penis into her vagina. N.S. also

testified that a few weeks prior to the abuse in the instant case, defendant put his finger in her vagina. Anaya corroborated N.S.'s testimony. Anaya testified that she walked into the bedroom saw defendant naked from the waist down, leaning over 11-year old N.S. and she lay on the bed with her underwear below her knees. Anaya stated that she saw N.S.'s "little feet" on defendant's shoulder and that defendant's penis was erect.

¶ 43 Lynn Aladeen from CAC testified that she met with N.S. the day after the assault, and N.S. related the exact same details she provided at trial. N.S. told her that defendant's penis touched her vagina on the outside and "in the hole" a little bit. N.S. indicated to Aladeen that it hurt when defendant did this to her but she did not know why it hurt.

¶ 44 Furthermore, the DNA evidence corroborated N.S. account of the assault. Forensic scientist Ryan Paulsen testified that the female DNA found on the semen stain in front of defendant's underwear was consistent with having originated from N.S. While the female component contained a match of 11 of the 13 locations, Paulsen belied that the association between N.S.'s profile and the DNA profile found on the semen stain was "a strong association."

¶ 45 Meanwhile, defendant's evidence at trial consisted of his own self-serving testimony that the entire event was made up by Anaya when defendant confronted her with an allegation that she was cheating on him and because he threatened to send N.S. to Mexico. Based on this record, we find that the evidence presented at trial overwhelmingly established defendant's guilt.

¶ 46 In addition, defendant extensively cross-examined both N.S. and Anaya about their "inconsistent" conduct with their testimony at trial. Defendant elicited that N.S. did not tell her mother about the incident that occurred six weeks prior when defendant put his fingers in her vagina, despite the fact that N.S. shared a room and a bed with her mother when it occurred. Defendant also cross-examined Anaya and elicited that Anaya did not move out of the home she

shared with defendant, despite the fact that she was aware that defendant previously hit their daughter. Therefore, the jury heard evidence that N.S. and Anaya acted in a manner inconsistent with what would be "the natural or probable" way to act under the circumstances and the letters would have been cumulative of the type of evidence indicating inconsistent behavior. Accordingly, we find that the trial court's error was harmless.

¶ 47 II. The Victim's out of Court Statement

¶ 48 Defendant claims next that the trial court improperly allowed into the evidence part of Lynn Aladeen's testimony concerning statements made by N.S. about an uncharged other-crime evidence committed by defendant. Aladeen testified that N.S. told her that, approximately six weeks prior to the sexual abuse charged in the instant case, defendant put his finger in her vagina. Defendant contends that this part of Aladeen's testimony did not fall under the hearsay exception of section 115-10 of the Code of Criminal Procedure and was not admissible under section 115-7-3, allowing for the admission of other sex-crime evidence.

¶ 49 We review a trial court's decision to admit or deny other-crimes evidence under an abuse of discretion standard. *People v. Donoho*, 204 Ill. 2d 159, 182-183 (2003). A trial court abuses its discretion only when its ruling is arbitrary, fanciful, or where no reasonable person would take the view adopted by the trial court. *Id*. at 183.

¶ 50 Although defense counsel generally objected to Aladeen's testimony "based on hearsay and lack of compliance with 115-10," counsel did not object to the portion of Aladeen's testimony describing the other-crimes evidence. When a party objects to the admissibility of evidence at trial, but raises a different ground for inadmissibility on appeal, the trial objection is insufficient to preserve the error for review. *People v. Scott*, 2015 IL App (4th) 130222, ¶ 30. A specific objection made at trial forfeits all grounds not specified, and a ground of objection not

presented at trial will not be considered on appeal. *People v. Gales*, 248 Ill. App. 3d 204, 229 (1993).

¶ 51 Defendant asks us to review the forfeited error under the plain error doctrine. Defendant also asks us to review the forfeited error on the basis that he was denied effective assistance of counsel as a result of his counsel's failure to object based on the proper grounds and for counsel's failure to preserve the error for review. Under plain error review, we will grant relief to a defendant in either of two circumstances: (1) if the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) if 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. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant asserts only the closely-balanced evidence prong of plain error. Under the closely-balanced prong of plain error review, the defendant must show prejudicial error. *People v. Herron*, 215 Ill. 2d at 187. The defendant bears the burden of persuasion with respect to prejudice. *People v. Lewis*, 2015 IL App (1st) 130171, ¶ 31.

¶ 52 First, and foremost we need to determine whether an error occurred. Other-crimes evidence is admissible to prove certain facts, such as "intent, *modus operandi*, identity, motive, [and] absence of mistake." *Id*. at 173 (citing *People v. Illgen*, 145 Ill. 2d 353, 364-65 (1991)). The Illinois Rules of Evidence provide that other-crimes evidence can be used for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." Ill. R. Evid. 404(b) (eff. Jan.1, 2011). Meanwhile, evidence concerning other crimes is inadmissible when its purpose is to demonstrate a propensity to commit a crime with the exception of the situations when a defendant is accused of various sexual assault offenses, including the charge in the instant case, predatory criminal sexual assault, listed in section 115-7.3 of the Code of

Criminal Procedure. *Donoho*, 204 Ill. 2d at 170. One of the requirements is that the evidence must be "otherwise admissible under the rules of evidence." 725 ILCS 5/115-7.3 (West 2012).

¶ 53 Section 725 ILCS 5/115-10 (a) (West 2012) provides that, in a prosecution of a sexual act against a child under the age of 13, the following evidence shall be admitted as an exception to the hearsay rule:

> 1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and
>
> (2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.

725ILCS 5/115-10 (a) (West 2012).

Section 115-10 permits admission of such details of the child's complaint, including identification, even if not on an element of the crime charged. *People v. Schmitt*, 204 Ill. App. 3d 820, 829 (1990).

¶ 54 Here, the court held a proper section 115-10 hearing outside the presence of the jury in order to determine that the content and circumstances of N.S.'s statements to Aladeen provided sufficient safeguards of reliability to permit admission of the evidence as an exception to the hearsay rule; the court made the requisite statutory determination. The trial court properly exercised its discretion when it did not *sua sponte* exclude that portion of Aladeen's testimony that pertained to N.S.'s report about the prior incident. Although the court admitted the evidence to show proof of intent and propensity, because the other-crime evidence pertained to the identification of the defendant, we find no error. *People v. Gumila,* 2012 IL App (2d) 110761, ¶ 56 ("we may affirm the admission of evidence of any basis appearing in the record, regardless of

whether it was relied on by the trial court.").

¶ 55 Furthermore, the erroneous admission of a hearsay statement is harmless error when the child victim in a sexual abuse case, testifies to the uncharged events and was available for cross-examination. *People v. Johnson*, 296 Ill. App. 3d 53, 65 (1998); *People v. Jahn*, 246 Ill. App. 3d at 706; *People v. Anderson*, 225 Ill. App. 3d 636, 648 (1992). Here, the victim testified to the same incident and was available for cross-examination. Therefore, assuming *arguendo* that there was an error, the error was harmless.

¶ 56 Defendant argues that the evidence was closely balanced because it was a credibility contest between defendant and N.S. and her mother. But, as established in the previous section, defendant's uncorroborated testimony did not closely balance the substantial and corroborated evidence presented by the State and defendant's claim of first-prong plain error fails.

¶ 57 Defendant also contends that counsel performed deficiently by not objecting to the evidence on the proper grounds which, according to defendant, would have led to the evidence not being admitted at trial. To be entitled to relief for ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and that he suffered prejudice as a result. *People v. Scott*, 2015 IL App (1st) 131503, ¶ 27. To satisfy the prejudice prong of an ineffective assistance of counsel claim, the defendant must show that, but for counsel's deficient performance, a reasonable probability exists that the result of the proceeding would have been different. *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 45.

¶ 58 Here, in the light of the overwhelming evidence against him, defendant cannot establish that had the portion of Aladeen's testimony regarding the other-crimes evidence not been allowed into the evidence, the outcome of his trial would have been different especially when evidence of

the previous incident was presented to the jury through N.S.'s testimony. Defendant failed to show that he was prejudiced by counsel's alleged failure to object and he is not entitled to relief for ineffective assistance of counsel. See *People v. White*, 2011 IL 109689, ¶¶ 132-34. Therefore, since the evidence presented to the jury that defendant sexually assaulted N.S. was overwhelming, not closely balanced, defendant suffered no prejudice from counsel's failure to preserve the error for review. Accordingly, defendant is not entitled to relief under the plain error doctrine or under his claim of ineffective assistance of counsel.

¶ 59 III. Closing Arguments

¶ 60 Defendant argues next that the prosecutor made improper comments during rebuttal when arguing to the jury that defendant's theory of defense was that there was a "big conspiracy" against him involving all the State's witnesses. According to defendant, aside from being a mischaracterization of defendant's defense, the prosecutor's argument distorted the burden of proof and violated his right to a fair trial. Defendant urges this court to reverse his conviction and remand for a new trial.

¶ 61 In presenting a closing argument, the prosecutor is allowed a great deal of latitude and is entitled to argue all reasonable inferences from the evidence. *People v. Jones*, 2014 IL App (3d) 121016, ¶ 37. The prosecutor is allowed to comment on the evidence and reasonable inferences from the evidence, including a defendant's credibility or the credibility of the defense's theory of the case. *Id*. The standard of review applied to arguments by counsel is similar to the standard used in deciding whether a plain error was made: comments constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments. *People v. Henderson*, 142 Ill. 2d 258, 323 (1990). During rebuttal, prosecutors are entitled to respond to comments made by the defendant.

People v. Ramos, 396 Ill. App. 3d 869, 875 (2009) (quoting *People v. Kliner*, 185 Ill. 2d 81, 154 (1998)). As with other aspects of argument, rebuttal must be considered in context with the other portions, including defendant's argument. *Id*.

¶ 62 Here, after reviewing defendant's closing argument and the State's response, we find that the State's remarks regarding the conspiracy theory were in response to defendant's remarks in the closing argument. Defendant's closing argument began by inferring that the entire evidence at trial was distorted: "the State talked about trust and the trust between a father and daughter. Well you will also trust that governmental officials, police officers would actually do the job. They would test the proper evidence. *** They would take all of these basic, very basis precautions to give you credible evidence, but they didn't. They failed miserably in their job. You cannot trust their evidence."

¶ 63 From there the argument addressed and questioned the believability of every State's witness. Defense counsel characterized Anaya as "Maria the puppet master." Counsel told the jury that "Maria is an admitted without a doubt [sic] manipulator, "and "an admitted perjurer and liar." Counsel then stated that Anaya fed specific details to N.S. before N.S.'s interview with Lynn Aladeed from CAC and that N.S. "was manipulated to testify falsely, but not only her." Counsel also questioned N.S.'s motives for crying: "[i]s it her having testify falsely to something that she know didn't happened? Is it testifying because Maria wants her to testify?"

¶ 64 Defense counsel's argument then supposed that the police officers and crime lab scientists failed to collect and even test the correct evidence. Counsel argued that the evidence technician collected defendant's dirty clothes that, albeit being dirty, were clothes that defendant was planning to put on after taking a shower. Counsel argued that the clothes that were tested were assumed to be those that defendant wore on the night of the incident and qualified the officers'

actions as"[t]otal incompetence *** hard to imagine." Next counsel attacked the testimony of Lynn Aladeen stating that it was "[c]ompletely meaningless, garbage testimony." Then counsel questioned the DNA evidence in the case stating: "[t]he State can actually say with a straight face that the DNA corroborates her story. It's shocking. It's really shocking. Not only did they test the wrong underwear and they didn't test the victim's underwear, but their entire scenario didn't happen."

¶ 65 In short, defendant questioned the veracity and believability of every single piece of evidence in the State's case-in-chief. The prosecutor was not required to leave defense counsel's arguments unanswered, and given the nature and the extent of defendant's accusation, the prosecutor's response was in the realm of invited comment. Defendant claimed that the entire incident was false, that N.S., Anaya, and Aladeen all testified falsely or were being manipulated to persist in false accusations against him. Defendant also claimed that all the evidence at trial was wrongfully handled and tested by incompetent police officers and crime lab employees. For defendant's argument to hold true, it would mean that the all the State's witnesses including the police officers and crime lab employees colluded to falsely accuse defendant.

¶ 66 Based on the defense's theory, the State was entitled to respond and point out the illogical and improbable aspect this theory. The prosecutor properly responded that, for the defense argument to be true, each witness must be a part of a "big conspiracy against defendant." The comments were invited by defense's closing argument that the State's witnesses could not and should not be believed. See *People v. Temple*, 2014 IL App (1st) 111653, ¶ 74 ("the State's comments about a conspiracy were a direct response to the defense's attack on the credibility of the state witnesses and therefore was not a misstatement of the law or an attempt to distort the burden of proof" (internal quotation marks omitted)).

¶ 67 Furthermore, the State's rebuttal argument never approached the position that defendant had to prove the State's witnesses were lying or had fabricated evidence in order for defendant to be acquitted. In *People v. Banks*, 237 Ill. 2d 154, 184-85 (2010) our supreme court distinguished situations where a prosecutor permissibly argued that a jury would have to believe the State's witnesses were lying in order to believe the defendant's version of events versus improperly arguing that the jury would have to believe the State's witnesses were lying in order to acquit defendant. *People v. Banks*, 237 Ill. 2d 154, 184-85 (2010) (citing *People v. Coleman*, 158 Ill. 2d 319, 346 (1994)). Here, the prosecutor's comments merely argued that the jury would have to believe that the State's witnesses were not credible in order to believe the defense's theory. But the prosecutor did not argue that the jury would have to believe the State's witnesses were lying in order to *acquit* defendant. The prosecutor's comments were therefore permissible under *Banks*.

¶ 68 Defendant also claims that the prosecutor improperly shifted the burden of proof to defendant when he pointed out defense counsel's choice not to ask certain questions during the cross-examination of Detective Bellamy who witnessed Aladeen's interview with N.S and during his cross-examination of Maria Anaya. Specifically, defendant claims that the following comments were improper:

> "Detective Bellamy was on the stand. Did [defense counsel] ever once ask her, hey by the way, you were present when that interview took place, right? Did Lynn Aladeen ask leading questions? No. Not once Detective Ballamy asked questions. Why? Oh, because probably she would say no, they were open-ended questions that were asked."
>
> ***
>
> "When Maria was on the stand, was she ever once asked by defendant, hey, did the defendant threaten to take [N.S.] to Mexico? How come she was never asked those

> questions? Oh that's right, because that never happened. That is just conveniently what the defendant comes up to explain to you what his whole reason is, right, behind his massive conspiracy. Why she was never asked that question? How come she was never confronted with that question? Because it never happened."

¶ 69 Defendant acknowledges that he did not object to this error at trial and asks us to review the forfeited error under the plain error doctrine. But, defendant cannot satisfy the first prong of plain error because the evidence at trial was not closely balanced. Likewise, defendant cannot establish plain error under the second prong of the plain error analysis. Under the second prong, the defendant must prove there was plain error and that the error was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187. Error in closing argument does not fall into the type of error recognized as structural. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78. Defendant is therefore, not entitled to relief under the plain error review and his claim regarding these two comments is forfeited. See *Ramos*, 396 Ill. App. 3d at 873.

¶ 70 Defendant also argues that the cumulative effect of the alleged errors denied him a fair trial. The resolution of the general argument that the cumulative effect of the errors warrants a reversal will depend upon the reviewing court's evaluation of the individual errors. *People v. Falconer*, 282 Ill. App. 3d 785, 793 (1996). Where the alleged errors do not amount to reversible error on any individual issue, there is no cumulative error. *Id.* Here, given our disposition of each of defendant's arguments, we conclude that there was no individual error that warrants reversal of defendant's conviction and, therefore, no resulting cumulative errors.

¶ 71 Finally, defendant argues, and the State agrees, that defendant's mittimus should be corrected to reflect 1,386 of presentencing detention rather than 1,305 days stated on the

mittimus. Defendant was sentenced on May 19, 2014, and was originally incarcerated on August 2, 2010. Thus, pursuant to 730 ILCS 5/5-8-7(b) (West 2012), defendant's mittimus should be corrected to indicate 1,386 days of presentencing incarceration. The mittimus must also be modified to reflect a custody date of August 2, 2010, for purposes of awarding presentence credit against defendant's sentence.

¶ 72 CONCLUSION

¶ 73 Based on the foregoing, we affirm.

¶ 74 Affirmed as modified.