2017 IL App (2d) 150027-U
No. 2-15-0027
Order filed May 19, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County.
Plaintiff-Appellee,	)	
v.	)	Nos. 12-CF-15 12-CF-16
JOSE JUAREZ HERNANDEZ,	)	Honorable Timothy J. McCann,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant received ineffective assistance of counsel where his trial counsel failed to object to inadmissible hearsay evidence, despite the court having previously granted a motion *in limine* barring the use of such evidence.

¶ 2 The State charged defendant, Jose Juarez Hernandez, with aggravated criminal sexual abuse in two separate indictments. Following a bench trial on one indictment, defendant was convicted of one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(b) (West 2014)). After a stipulated bench trial on another indictment, defendant was convicted of one

count of aggravated criminal sexual abuse.[1] On appeal, defendant argues that he received ineffective assistance of counsel when his trial counsel failed to object to hearsay evidence that was previously ruled inadmissible by the trial court. For the reasons that follow, we reverse defendant's convictions and remand for new trials.

¶ 3 I. BACKGROUND

¶ 4 Both indictments contained two counts of aggravated criminal sexual abuse. The first indictment, 12-CF-15, alleged that, on or about December 2, 2010, defendant committed an act of sexual conduct with A.G., a family member who was under 18 years of age, in that defendant knowingly fondled the breasts of A.G. for the purpose of the sexual arousal of defendant. A second count of that indictment alleged the same conduct and added that A.G. was at least 13 years of age but under 17 years of age, and that defendant was at least 5 years older than A.G. The second indictment, 12-CF-16, alleged that, on or about October 24, 2011, defendant committed an act of sexual conduct with A.G., a family member who was under 18 years of age, in that defendant knowingly touched A.G.'s vagina for the purpose of the sexual arousal of defendant. A second count alleged the same conduct and included defendant and A.G.'s age difference.

¶ 5 Before trial on either matter, defendant filed a motion *in limine* to bar certain hearsay statements that A.G. made to her friend, Grant Burris. At the hearing on the motion, the State explained that A.G.'s statements to Burris were two text messages sent on December 1 and 2,

[1] In the indictment returned on February 29, 2012, the State charged defendant with committing the offense of aggravated criminal sexual abuse in violation of 720 ILCS 5/12-16(b) (West 2012). That statutory provision, however, was renumbered as 720 ILCS 5/11-1.60 by Public Act 96-1551 (eff. July 1, 2011).

2010. The first message stated: "Grant knows about Junior and Jose touching my boobs today. I had no one to talk to, he's really understanding and helped me." The second message stated: "I slept in Betin's room last night after the Jose incident. Today is December 2nd. I am officially depressed. I just want to roll up in a ball and sleep." The State also explained at the hearing that the messages were recordings that A.G. made which were "in conformity with what she had said to us about what had happened." The State told the court that it could not think of an evidentiary basis to introduce the text messages, and it advised the court that it did not intend to introduce the text messages in its case-in-chief. The court then granted defendant's motion *in limine* with respect to A.G.'s hearsay statements made to Burris.[2]

¶ 6 Also before trial, the State filed a motion *in limine* seeking to elicit other-crimes evidence during the two anticipated trials. Specifically, the State sought to elicit evidence about the December 2, 2010 (12-CF-15) incident in the trial concerning the October 24, 2011 (12-CF-16) incident, and *vice versa*. In addition to using other-crimes evidence to establish defendant's knowledge, intent, and *modus operandi*, the State sought to use the evidence, under section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2012)), to establish defendant's propensity to commit the crimes of aggravated criminal sexual abuse. The trial court granted the State's motion *in limine*.

[2] In its oral ruling, the court found that A.G.'s statements to Burris "would not be admissible." In its written order, however, the court merely found that A.G.'s statements to Burris were "not sought to be admitted." To the extent that these rulings are inconsistent, the oral pronouncement controls. See *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 87 ("When the oral pronouncement of the court and the written order are in conflict, the oral pronouncement controls.").

¶ 7 The State elected to try 12-CF-16 first. Defendant waived a jury trial in open court, with an interpreter present. The bench trial commenced on May 19, 2014.

¶ 8 The State's first witness was A.G, who testified that she was 17 years old at the time of trial. Prior to 2012, A.G. lived in Plano, Illinois, with her mother, maternal grandmother, two brothers, an uncle, and defendant. She testified that she had an older brother, Alberto, and a younger brother, Edward. A.G. also testified that, prior to the end of 2011, defendant was her mother's boyfriend, but she considered him to be a stepfather because he lived with them in Plano for three years and he cared for her family.

¶ 9 A.G. testified that she was 14 years old in 2011. On October 24, 2011, her boyfriend came to her house, but A.G.'s grandmother told him to leave. After her boyfriend left, A.G. went to her mother and defendant's room where she talked to defendant. A.G.'s mother was at work. While she was talking to defendant, A.G.'s best friend called her cell phone. Both A.G. and defendant were seated on defendant's bed while A.G. talked on the cell phone. A.G. testified that defendant then leaned over and placed his head on her chest, with his upper body placed on top of her stomach. She further testified that defendant began to rub her legs before he started "focusing his attention onto [*sic*] my vaginal area" by "rub[bing] back and forth with his fingers" over her vagina. Both defendant and A.G. were fully clothed. A.G. also testified that, once defendant started to touch her, she froze because she was terrified; she did not know how her phone conversation with her best friend ended. She remained frozen until someone ran up the stairs. A.G. then "shrugged and pushed" defendant off her and ran into the basement where she called her boyfriend, who told her that he would come over. A.G. testified that she then went into her older brother's room and told him "that it happened again." Her older brother, Alberto, hugged her and encouraged her to tell her biological dad. The following morning at school, she

was pulled out of class by a guidance counselor. Her boyfriend then convinced her to tell the guidance counselor what happened the night before.

¶ 10 A.G. further testified that the October 24, 2011, incident was not the first time that defendant had "touched" her. In December 2010, A.G. was in her bedroom wearing a bathrobe when defendant entered the bedroom. A.G. testified that defendant, without saying anything, hugged her from behind and pulled her close to him, and then placed his hands on her breasts. A.G. testified that, right when defendant's hands touched her breasts, she "ducked" underneath his arms and got away. She did not say anything to him later that night or the next morning when he drove her to school, because she was scared.

¶ 11 A.G. also testified, without objection, that on the same night in December 2010 that defendant touched her breasts, she made "notes" on her cell phone explaining what had happened. Also without objection, A.G. reviewed and testified about the State's Exhibit 1, which was a series of six pictures taken of the two notes that A.G. made in her cell phone on December 1 and 2, 2010. A.G. testified that the notes she made in her cell phone were part of her diary. She also testified that she was feeling "really depressed" and helpless when she made the notes in her diary. The first cell phone note, dated December 1, 2010, stated: "Grant knows about jr [*sic*] & jose [*sic*] touching my boobs today. I had no one to talk to, he's really understanding & he helped me." The second cell phone note, dated December 2, 2010, stated: "I slept in betins [*sic*] room last night after the jose [*sic*] incident. Today is Dec, 2nd. I am officially depressed. I just wanna rolll [*sic*] up in a ball & sleep." The State's Exhibit 1 was admitted into evidence without objection.

¶ 12 On cross-examination, A.G. testified that she called defendant her stepdad because they had a close relationship. She denied telling either her boyfriend or the forensic interviewer that

she was in her bedroom taking off makeup when defendant touched her on October 24, 2011. A.G. also denied telling her best friend that she was sitting "on the couch" when defendant touched her on October 24. Additionally, she testified that her younger brother, Edward, was in her bedroom during the December 2010 incident. A.G. also confirmed that she later told the forensic interviewer that she wrote "the note" about the December 2010 incident in her "diary."

¶ 13 Pedro Acosta testified that he was A.G.'s best friend. Acosta testified that he had a telephone conversation with A.G. on the night of October 24, 2011. Defendant was a part of the conversation, although Acosta did not actually speak to him. Instead, A.G. told Acosta that she was "sitting on the couch" and defendant sat next to her; A.G. then stated that defendant was "squishing her." Acosta testified that the phone then went silent and the call ended. Acosta did not talk to A.G. again that night. On cross-examination, Acosta testified that he could "hear rustling" on the phone. He also testified that he dated A.G. "off and on" around October 24, 2011.

¶ 14 Alberto G. testified that he was A.G.'s older brother. On October 24, 2011, A.G. came to his bedroom crying. A.G. told him that defendant "tried to do something to her." Alberto hugged her and "made sure she was okay." Alberto also testified that he "believe[d]" A.G. had previously told him about having "contact" with defendant before October 24, because he remembered "watching" defendant, although he did not remember A.G. telling him "about a specific other incident." On cross-examination, Alberto testified that, on October 24, 2011, A.G. "probably" told him what defendant tried to do to her, but he did not remember because he had "a bad memory." Alberto also testified that he did not remember what he told A.G. in response to the incident.

¶ 15 Adrian Herrera testified that he was A.G.'s boyfriend in October 2011. On October 24, 2011, he went to A.G.'s house for an hour and a half before he left and went to his stepmother's house. When he got to his stepmother's house, he received a phone call from A.G. in which she was "freaking out." Herrera testified that A.G. told him that "something was wrong and like something about her stepdad." Herrera then went back to A.G.'s house, where he climbed through her bedroom window. He testified that, as soon as he entered A.G.'s bedroom, he saw blood on her wrist and a broken light bulb on the floor; A.G. told him that she used the light bulb to cut her wrist. Herrera hugged A.G. and wiped the blood off her wrist. He testified that he spent the night in A.G.'s room, but A.G. slept in her mother's room. At school the next morning, Herrera asked a guidance counselor to remove A.G. from class, and Herrera convinced A.G. to tell the counselor "what happened." Herrera testified that A.G. spoke to the guidance counselor in his presence, and she told the guidance counselor "how her stepfather touched her."

¶ 16 On cross-examination, Herrera testified that, from what he remembered, he initiated contact with the guidance counselor first instead of the guidance counselor seeking him. He also testified that police officers were looking for him at school on the morning of October 25, 2011, because he stayed at A.G.'s house the night before and did not tell his foster parents where he was. Herrera also testified that A.G. had told him that, on October 24, 2011, she was in her room taking off makeup when defendant entered her room, pulled her onto her bed, and then "grabbed her and wrestled with her." A.G. further told him that her younger brother Edward came into her room "while they were in the middle of an act" and then defendant stopped. On redirect examination, Herrera testified that he sought out the guidance counselor at school because he was "freaking out" about his foster parents calling the police, but he was "more concerned" about A.G.

¶ 17 Following the close of the State's evidence, defendant's motion for a directed verdict was denied. Defendant then called Edward A. to testify. Edward, A.G.'s younger brother, testified that he was ten years old at the time of trial. Edward testified that he did not remember defendant entering A.G.'s room and putting his arms around A.G. on December 2, 2010. He also testified that, on October 24, 2011, he went into his mother's room and saw defendant and A.G. sitting "separate" on the bed. On cross-examination, Edward described his mother's room in detail and testified that he saw defendant sitting on the left edge of the bed and A.G. sitting on the right side of the bed. Edward testified that he did not see what happened before he entered the room.

¶ 18 Defendant also played a videotaped portion of A.G.'s interview with a forensic child interviewer at the Child Advocacy Center on October 27, 2011. The State objected to the video's introduction into evidence, arguing that it was a prior consistent statement. Defense counsel argued that the video impeached A.G. based on her testimony concerning the October 24, 2011, incident. Specifically, defense counsel argued: "[A.G.] testified on the stand that [defendant] came and leaned in on her to the right of her, not to the left and touching her to the right, not – right and left of her body. Not to the right as she's indicating on this video and indicating that he leaned over her right side." The court admitted the video into evidence. Defendant, with the aid of an interpreter, waived his right to testify.

¶ 19 Following the close of evidence, the court found defendant guilty of count one, aggravated criminal sexual abuse. It found defendant not guilty of count two, noting that the State did not introduce evidence of defendant's age.

¶ 20 After the court ruled in case number 12-CF-16, defendant, with the aid of an interpreter, waived a jury trial in case number 12-CF-15 (the indictment concerning the December 2, 2010,

incident). Defendant also waived his right to testify. The parties stipulated that the testimony and argument in the second trial would be identical to the testimony and argument that was introduced and heard during the first trial. Following the stipulation, the court found defendant guilty of count one, aggravated criminal sexual abuse. The court found defendant not guilty of count two.

¶ 21 Following trial, defendant retained new counsel and filed a motion for a new trial. In his posttrial motion, defendant argued that the State failed to prove him guilty beyond a reasonable doubt. Defendant also argued that he received ineffective assistance of counsel when his retained counsel failed to inform him that he had been suspended from the practice of law during the pendency of the case, and a second attorney filed an appearance on behalf of defendant even though defendant never hired her (this second attorney was defendant's trial counsel). Defendant also argued that his attorneys were ineffective when they failed to file certain pretrial motions, failed to provide meaningful advocacy at trial, and failed to call witnesses at trial who would have testified to A.G.'s motives in accusing defendant. Defendant also argued that both attorneys who filed appearances were ineffective when they were habitually late or missed court, they never advised defendant about legal strategies, they failed to inform defendant that he had to register as a sex offender if convicted, and they did not discuss stipulating to the trial on 12-CF-15 until after defendant was found guilty of count one of 12-CF-16.

¶ 22 The court denied the motion. Following a sentencing hearing, the court sentenced defendant to 36 months of sex offender probation. Defendant timely appealed.

¶ 23 II. ANALYSIS

¶ 24 Defendant first argues that he received ineffective assistance of counsel when his trial counsel, after successfully moving *in limine* to bar such evidence, failed to object to A.G.'s

testimony concerning the notes that she made on her cell phone in December 2010. He contends that the cell phone notes were inadmissible hearsay statements that were not subject to any exception and were also inadmissible prior consistent statements.

¶ 25 To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to satisfy either the deficiency prong or the prejudice prong precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

¶ 26 To establish counsel's deficient performance, a defendant must overcome the strong presumption that counsel's action or inaction was sound trial strategy. *People v. Dupree*, 2014 IL App (1st) 111872, ¶ 41. Reviewing courts are highly deferential to trial counsel on matters of trial strategy and must evaluate counsel's performance from his or her perspective at the time of trial, rather than in hindsight. *Dupree*, 2014 IL App (1st) 11872, ¶ 41.

¶ 27 Before trial, defendant filed a motion *in limine* seeking to bar the notes that A.G. recorded in her cell phone on December 1 and 2, 2010 as inadmissible hearsay.[3] At the hearing on the motion, the State conceded that it had no basis to introduce the hearsay notes from A.G.'s cell phone. Instead, the State explained that the statements were recordings that A.G. made that were "in conformity with what she had said to us about what had happened." The State then

[3] At the time defendant filed the motion *in limine*, both defendant and the State apparently believed that A.G. sent the December 1 and 2 notes in her cell phone to her friend, Grant Burris. At trial, however, it became clear that the notes were kept as part of A.G.'s "diary" on her cell phone. The State does not dispute that the focus of defendant's motion *in limine* concerned the content of the notes that were admitted as evidence at trial.

informed the court that it did not intend to introduce the cell phone notes during its case-in-chief. Accordingly, the court granted defendant's motion *in limine* with respect to those cell phone notes. At trial, A.G. testified about the December 2010 incident during the State's case-in-chief. The State also explicitly asked A.G., without objection, whether she made any notes in her cell phone concerning the December 2010 incident. Also without objection, the State then moved to admit Exhibit 1 into evidence, which included six pictures of the actual text of the notes that A.G. made on December 1 and 2, 2010. The motion was granted.

¶ 28 The State contends that trial counsel's failure to object to the evidence was a "sound strategic decision" because evidence concerning the December 2010 incident was admissible as other-crimes evidence in case number 12-CF-16. The State also argues that, because defense counsel cross-examined A.G., the rationale behind precluding hearsay evidence was eliminated.

¶ 29 Generally, evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crimes. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). Under section 115-7.3 of the Code, however, evidence of other crimes may be admissible to show a defendant's propensity to commit sex offenses if that evidence is otherwise admissible under the rules of evidence. *People v. Donoho*, 204 Ill. 2d 159, 176 (2003); see also 725 ILCS 5/115-7.3 (West 2014). Other crimes evidence may also be admissible to show *modus operandi*, intent, identity, motive or absence of mistake. *Wilson*, 214 Ill. 2d at 135-36. Additionally, evidence of other crimes can be admissible to show, by similar acts or incidents, that the act in question was not performed inadvertently, accidently, involuntarily, or without guilty knowledge. *Wilson*, 214 Ill. 2d at 136. "Even if other-crimes evidence is otherwise admissible, however, it may still be excluded because it is offered in the form of a hearsay

statement that does not meet a recognized exception to the hearsay rule." *People v. Littleton*, 2014 IL App (1st) 121950, ¶ 53.

¶ 30 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and is generally inadmissible unless it falls within an exception. *People v. Yancy*, 368 Ill. App. 3d 381, 385. "Hearsay evidence is generally inadmissible because of the lack of an opportunity to cross-examine the declarant." *Yancy*, 368 Ill. App. 3d at 385.

¶ 31 Here, the court granted the State's motion *in limine* seeking to introduce evidence of the December 2010 incident in the trial on 12-CF-16 (the October 24, 2011, incident) and *vice versa*. As defendant notes, however, the cell phone notes were hearsay, and thus inadmissible as other-crimes evidence. The admissible evidence concerning the December 2010 incident should have been limited to A.G.'s testimony concerning the incident itself. Additionally, even though defendant had the opportunity to cross-examine A.G. about the cell phone notes, the rationale undermining the rule against hearsay was not eliminated. The cell phone notes were not only inadmissible hearsay not subject to any recognized exception, as the State acknowledged before trial, but they also constituted inadmissible prior consistent statements.

¶ 32 As a general rule, prior consistent statements of a witness are inadmissible for the purpose of corroborating the witness's trial testimony. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 52. Prior consistent statements are prohibited because they are likely to unfairly enhance the witness's credibility with the trier of fact solely because the statement has been repeated. *Dupree*, 2014 IL App (1st) 111872, ¶ 52. There are, however, two exceptions to the rule: (1) where the prior consistent statement rebuts a charge that a witness is motivated to testify falsely, and (2) where the prior consistent statement rebuts an allegation of recent fabrication. *Donegan*, 2012 IL App (1st) 102325, ¶ 52. Under the first exception, the statement is admissible

if it was made before the motive to testify falsely came into existence; under the second exception, the statement is admissible if it was made before the alleged fabrication. *Donegan*, 2012 IL App (1st) 102325, ¶ 52.

¶ 33 Here, neither exception to the rule against prior consistent statements applies, nor does the State suggest that one does. The record is clear that defendant did not suggest that A.G. was motivated to testify falsely or that he otherwise accused A.G. of recently fabricating the December 2010 incident. Additionally, the content of the cell phone notes was consistent with A.G.'s testimony at trial in every respect. Indeed, the State acknowledged at the pretrial hearing that the notes were "in conformity" with what A.G. told the State about the December 2010 incident. At trial, no witnesses corroborated A.G.'s testimony concerning that incident. Instead, the only other evidence concerning the incident was Edward's testimony that he did not remember seeing defendant hug A.G. Thus, the content of the cell phone notes served the almost singular purpose of corroborating A.G.'s testimony concerning the December 2010 incident.

¶ 34 The State's reliance on *People v. Holmes*, 2016 IL App (1st) 132357, is misplaced. There, defense counsel elicited the prior consistent statement during cross-examination of a witness. *Holmes*, 2016 IL App (1st) 132357, ¶ 91. The court also rejected defendant's alternative argument that counsel was ineffective for eliciting the prior consistent statement, because counsel used that prior consistent statement to undermine evidence concerning the defendant's mental disorder, which was a necessary element to prove that defendant was a sexually dangerous person. *Holmes*, 2016 IL App (1st) 132357, ¶ 95. Here, on the other hand, defense counsel did not elicit the prior consistent statements, and there was no strategic reason for failing to object, as the evidence had been barred by the motion *in limine*, was inadmissible

other-crimes evidence, and bolstered A.G.'s credibility concerning the acts with which defendant was charged.

¶ 35 We also reject the State's reliance on *People v. Williams*, 139 Ill. 2d 1, 16 (1990), in which our supreme court held that the admission of a hearsay letter was not reversible error because it was merely cumulative and the declarant was subject to cross-examination. Hence, counsel in that case was not ineffective for failing to object to the hearsay evidence. *Williams*, 139 Ill. 2d at 18. Here, unlike in *Williams*, the cell phone notes were not only inadmissible hearsay, but were also inadmissible other-crimes evidence, as well as inadmissible prior consistent statements used to bolster A.G.'s credibility. As the court in *Williams* neither addressed nor analyzed other-crimes evidence or prior consistent statements, that case is inapposite.

¶ 36 The State further contends that defendant "invited any potential error" regarding the cell phone notes when defense counsel referred to them during her opening statement. We note that the State's argument concerning invited error is misplaced in the context of an ineffective assistance of counsel claim. To the extent that the State so argues, the doctrine of invited error does not preclude a claim of ineffective assistance of counsel. See, *e.g.*, *State v. McNeil*, 302 P.3d 844, 852 (Utah Ct. App. 2013) ("While invited error precludes a plain error claim, it does not preclude a claim for ineffective assistance of counsel."); *State v. Studd*, 973 P.2d 1049, 1057 (Wash. 1999) ("[T]he invited error doctrine generally forecloses review of an instructional error. But invited error does not bar review of a claim of ineffective assistance of counsel based on such an instruction.")(Internal quotations omitted); *People v. Cooper*, 809 P.2d 865, 900 (Cal. 1991) (even if error was invited, "this does not leave defendant without a remedy if counsel acted incompetently. As in any other situation, defendant can always claim he received

ineffective assistance of counsel."). Accordingly, under these circumstances, to the extent that the State suggests that the admission of the cell phone notes was error invited by defense counsel's brief remarks in her opening, it effectively concedes that counsel was ineffective in not objecting to the admission of the content of the notes.

¶ 37 Moreover, the State's argument that defendant "invited" the error finds little support in the record. In its opening statement, the State first noted that the evidence at trial would show that defendant grabbed A.G.'s breasts in December 2010, explaining: "the events from 2010 go to the defendant's absence of mistake, go to his intent, and go to specifically his propensity to do this type of touching with this victim." Then, in her opening statement, defense counsel claimed that the evidence at trial would show that A.G. told "different stories to everyone." As one example of A.G.'s inconsistent stories, defense counsel stated: "[A.G.] also mentions a December 2, 2010 incident and she tells the child advocacy person that she put it in her diary. We find out later she has no diary, she put it in the notes in her cell phone." Defense counsel did not refer to the contents of the cell phone notes, but was merely explaining that the trial evidence would show that A.G. lacked credibility, as demonstrated by, among other things, her allegedly false statement that she did not have a diary.

¶ 38 To the extent that it can be argued that counsel's "trial strategy" was to show that A.G. was untruthful about whether she had a diary or not, counsel was also certainly deficient in failing to ask for a limiting instruction as to the use of the exhibit for that limited purpose. If counsel's strategy was merely to impeach A.G. based on where she wrote her notes, either in a diary or cell phone, such strategy was clearly worthless. By even suggesting that A.G. recorded the incident at all, defense counsel signaled the trier of fact that the December 2010 incident was serious enough to record in *any* medium, thereby bolstering A.G.'s credibility before the

substantive evidence was even presented. By failing to object *at all* to the admission of the evidence, counsel allowed (1) inadmissible hearsay evidence not subject to any exception, (2) inadmissible other-crimes evidence, and (3) inadmissible prior consistent statements to be used as both propensity and substantive evidence. The use of that evidence went well beyond any plausible attempt at impeachment. See *People v. Bradford*, 106 Ill. 2d 492, 499 (1985) ("The purpose of impeaching evidence is to destroy the credibility of a witness and not to establish the truth of the impeaching evidence."); see also *Dupree*, 2014 IL App (1st) 111872, ¶ 39 ("Even where admissible, prior consistent statements may only be used for rehabilitative purposes; they are not admissible as substantive evidence.").

¶ 39 *Dupree* is instructive. In *Dupree*, the appellate court held that the defendant received ineffective assistance of counsel where trial counsel opened the door to an otherwise inadmissible prior consistent statement made by one of the witnesses. *Dupree*, 2014 IL App (1st) 111872, ¶ 56. Specifically, defense counsel's trial strategy was to demonstrate that the witness gave inconsistent statements to the police at the outset. *Dupree*, 2014 IL App (1st) 111872, ¶ 46. Nevertheless, defense counsel "opened the door" to the admission of a subsequent statement that the witness gave to the police, which was consistent with his trial testimony, by suggesting that the witness's trial testimony was a recent fabrication. *Dupree*, 2014 IL App (1st) 111872, ¶ 46. The appellate court determined that counsel's performance was deficient, because counsel knew that the witness's trial testimony was not a recent fabrication but was instead consistent with the subsequent statement he gave to the police. *Dupree*, 2014 IL App (1st) 111872, ¶ 51. Counsel then "compounded" the error by not objecting to the State's introduction of the prior consistent statement as substantive evidence and by not requesting a limiting instruction. *Dupree*, 2014 IL App (1st) 111872, ¶ 51. The appellate court further determined

that the defendant was prejudiced, because the prior consistent statement was directly related to the defendant's guilt. *Dupree*, 2014 IL App (1st) 111872, ¶ 56.

¶ 40 As in *Dupree*, defense counsel here knew or at least should have known that A.G. made prior consistent statements, as evidenced by defendant's motion *in limine* that successfully barred the content of the cell phone notes. Unlike in *Dupree*, however, defense counsel did not "open the door" to the content of the cell phone notes, as counsel never referred to the content during opening statements. Nevertheless, and similar to *Dupree*, defense counsel failed to object to the admission of these cell phone notes as substantive evidence. Defense counsel also failed to ask for a limiting instruction as to the use of the cell phone notes. Finally, and even more egregious than in *Dupree*, defense counsel's failure to object to the evidence not only allowed it to be considered for the truth of the matter asserted, but to be used to prove defendant's propensity to commit the October 24, 2011, crime of aggravated criminal sexual abuse.

¶ 41 Accordingly, we hold that counsel's representation fell below an objective standard of reasonableness when counsel failed to object to the admission of the cell phone notes, despite obtaining a motion *in limine* barring such evidence. We recognize that we must be highly deferential to trial counsel with respect to strategic choices, but we will find counsel's performance to be deficient where a strategic decision appears "so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances would pursue such a strategy. *** [A]n attorney is expected to use established rules of evidence and procedure to avoid, when possible, the admission of incriminating statements, harmful opinions, and prejudicial facts." (internal quotations omitted) *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 31-32. Here, there was no rational or reasonable strategic reason for allowing the content of the cell phone notes to come in at trial, as those notes were (1) previously barred by the trial court;

(2) inadmissible hearsay evidence; (3) inadmissible other-crimes evidence, and (4) inadmissible prior consistent statements. We conclude that no reasonably effective defense attorney, under these circumstances, would pursue a similar strategy, as such a strategy required counsel to blatantly disregard the rules of evidence, as well as favorable rulings on motions *in limine*, to allow the admission of incriminating and harmful evidence.

¶ 42 Turning to the second prong of *Strickland*, we must next determine whether counsel's deficient performance prejudiced defendant. To establish prejudice, the defendant must show that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Makiel*, 358 Ill. App. 3d 102, 108 (2005). This prong is satisfied if the defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Makiel*, 358 Ill. App. 3d at 108-09.

¶ 43 Due to counsel's failure to object to the evidence concerning the cell phone notes, the contents of those notes were admitted into evidence. As explained, those cell phone notes were inadmissible hearsay, inadmissible other-crimes evidence, and, most importantly, inadmissible prior consistent statements. No evidence corroborated A.G.'s testimony regarding the December 2010 incident, and no witnesses saw either of the alleged sexual acts. Instead, Edward, the only occurrence witness to either incident, testified that he did not see defendant hug A.G. in December 2010, and that he saw A.G. and defendant seated separately on defendant's bed on October 24, 2011. Also, Herrera and Acosta both testified that A.G. told them different versions of the October 24 incident. The cell phone notes thus improperly bolstered A.G.'s credibility, which was crucial to establishing defendant's guilt. See *Dupree*, 2014 IL App (1st) 111872, ¶ 53 ("The improper bolstering of a witness's credibility is reversible error when the trial testimony of that witness is crucial."). Also, the cell phone notes served as substantive evidence of

defendant's guilt, which was particularly prejudicial in the stipulated bench trial on 12-CF-15. See *People v. Ramsey*, 205 Ill. 2d 287, 293 (2002) ("The failure to object to hearsay not only waives the issue on appeal, but allows the evidence to be considered by the trier of fact and to be given its natural probative effect.").

¶ 44 Moreover, counsel's deficient representation in failing to object to the evidence further prejudiced defendant, as evidenced by the State's use of evidence concerning the December 2010 incident to show defendant's propensity to commit the October 24, 2011, crime of aggravated criminal sexual abuse. As explained, under section 115-7.3 of the Code, evidence of other crimes may be admissible to show a defendant's propensity to commit sex offenses if that evidence is otherwise admissible under the rules of evidence. *Donoho*, 204 Ill. 2d at 176. Here, the State's use of inadmissible evidence to establish defendant's propensity to commit the crimes of aggravated criminal sexual abuse rendered the results of both trials unreliable and the proceedings fundamentally unfair.

¶ 45 Based on the above, we hold that defendant was prejudiced by counsel's deficient performance. Accordingly, defendant received ineffective assistance of counsel. Therefore, we reverse defendant's convictions and remand the matters to the trial court for new trials. Additionally, after a careful review of the record, we conclude that the evidence was sufficient to convict defendant of aggravated criminal sexual abuse in both case numbers. Thus, no double jeopardy impediment to retrial is present. See *Dupree*, 2014 IL App (1st) 111872, ¶ 61 (citing *People v. Ward*, 2011 IL 108690, ¶ 50).

¶ 46 Finally, because we have reversed defendant's convictions, we need not address his other argument on appeal that the Sex Offender Registration Act (730 ILCS 150/1 *et seq.* (West 2014)) is unconstitutional.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we reverse defendant's convictions in case numbers 12-CF-15 and 12-CF-16 and remand for new trials on both indictments.

¶ 49 Reversed and remanded for new trials.