2018 IL App (4th) 141106-U

NO. 4-14-1106

FILED
July 10, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
RICKY BURDEN,	)	No. 14CF168
Defendant-Appellant.	)	
	)	Honorable
	)	J. Casey Costigan,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed finding (1) although it was a clear or obvious error to admit hearsay statements of one of the victims, the trial evidence, even without the inadmissible hearsay, was not so close as to avert the forfeiture under the doctrine of plain error.

(2) Defendant's failure to demonstrate prejudice defeats his ineffective assistance of counsel claim.

(3) Because the doctrine of completeness does not allow proof that defendant, elsewhere in his recorded statement, contradicted an admission he made in his statement, defense counsel cannot be faulted for failing to request that an additional, contradicting part of defendant's statement be played to the jury.

¶ 2 In October 2014, a jury found defendant, Ricky Burden, guilty of predatory criminal sexual assault (720 ILCS 5/11-1.40(a)(1) (West 2012)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)). In December 2014, the trial court denied his

posttrial motion and sentenced him to consecutive terms of imprisonment of eight years and five years.

¶ 3 Defendant appeals, arguing that (1) inadmissible hearsay statements by one of the alleged victims were used against him in the jury trial and (2) trial counsel rendered ineffective assistance (a) by failing to make the correct objection to the hearsay statements and (b) by neglecting to request that more of defendant's video-recorded statement to the police be played. We hold the first argument is procedurally forfeited and that the doctrine of plain error does not avert the forfeiture. Moreover, because the hearsay statements in question failed to tip the scales against defendant and the doctrine of completeness would not have authorized the playing of more of his recorded statement, we deny defendant's ineffective assistance of counsel claim. Therefore, we affirm the judgment.

¶ 4 I. BACKGROUND

¶ 5 A. Notice Pursuant to Section 115-10(d)

¶ 6 Pursuant to section 115-10(d) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10(d) (West 2014)), the State notified defendant that it intended to use the following hearsay statements in his jury trial: (1) the statement that K.S. made to her mother, Antoinette M., on September 28, 2013; (2) the statement that D.L. made to her mother, Danielle L, on that date; (3) the statement that K.S. made to Mary Whitaker of the McLean County Children's Advocacy Center (Center) on October 3, 2013; and (4) the statement that D.L. made to Whitaker on that date.

¶ 7 In its notice, the State acknowledged that K.S. turned 13 years old before making her statements to Antoinette and Whitaker, but the State represented that she made these statements "within three months after the commission of the offense." See 725 ILCS 5/115-

10(b)(3) (West 2014) ("In a case involving an offense perpetrated against a child under the age of 13," one of the conditions of admissibility is that "the out[-]of[-]court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offense, whichever occurs later ***.").

¶ 8 When the State filed its notice pursuant to section 115-10(d), the charges alleged that defendant committed the offense against K.S. in August 2013. Later, however, the State amended the charges to allege that defendant committed the offense against K.S. in August 2012 instead of in August 2013.

¶ 9 B. The First Hearing Pursuant to Section 115-10(b)(1)

¶ 10 On September 18, 2014, the trial court held a hearing to decide if "the time, content, and circumstances of" the statements that K.S. and D.L. had made to Whitaker "provide[d] sufficient safeguards of reliability." 725 ILCS 5/115-10(b)(1) (West 2014).

¶ 11 The State first called Whitaker. After describing her qualifications and training, she testified that on October 3, 2013, she participated in the investigation of defendant by interviewing K.S. and D.L. at the Center.

¶ 12 Over defense counsel's objection asserting unreliability, the State played video recordings of Whitaker's interviews of K.S. and D.L. The objection was simply that the statements the children made in the interviews were unreliable. Defense counsel failed to object specifically on the ground that statements failed to satisfy the conditions of admissibility in section 115-10(b)(3) of the Code. See 725 ILCS 5/115-10(b)(3) (West 2014) ("In a case involving an offense perpetrated against a child under the age of 13, the out of court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offense, whichever occurs later ***.").

¶ 13 1. *K.S.'s Statement to Whitaker*

¶ 14 K.S. told Whitaker she was born on August 25 and that she had just turned 13. She lived with her mother, Antoinette, and her 14-year-old sister, J.S. They were at the Center because K.S. recently had revealed to Antoinette that, the previous year, defendant touched her "privates."

¶ 15 The touching happened the weekend before K.S.'s twelfth birthday, while she was at D.L.'s house, watching a movie downstairs with D.L., J.S., and defendant. During the movie, D.L. went upstairs to her bedroom, to go to sleep. K.S. and J.S. remained downstairs, lying on the floor. K.S. was next to a couch, and J.S. was a few feet away, between her and the television. Defendant was on the couch.

¶ 16 K.S. fell asleep before the movie ended. In the middle of the night, she awakened because she felt as if she needed to go to the bathroom. Defendant's hand was beneath her underwear, and his fingers were moving inside her vagina. She closed her eyes and remained still. After he withdrew his hand and kissed the right side of her face, she got up and went into a bathroom, where she remained for an hour, weeping. She then went upstairs and slept the rest of the night in D.L.'s bedroom.

¶ 17 The next morning, K.S. told J.S. what happened, but J.S. never told anyone what K.S. had told her. It was not until a week before her interview with Whitaker that K.S. revealed to Antoinette that defendant had touched her sexually—and also that he had touched D.L. K.S. had explained to Antoinette that she previously told D.L. about the touching because D.L. first told her that defendant had touched her and since D.L. confided in her, she would have felt bad if she had not confided in D.L.

¶ 18 Two days later, Antoinette told Danielle what K.S. had told her—because Danielle was still with defendant and Antoinette thought it was important that she know.

¶ 19 2. *D.L.'s Statement to Whitaker*

¶ 20 D.L. told Whitaker she was 11 years old and that her birthday was July 9. She lived with her mother, Danielle, and her younger sister, Dana. D.L. was at the Center because Danielle's now-former boyfriend, defendant, had touched D.L.'s "private."

¶ 21 He touched her on a single occasion, according to D.L. It was at home, during a summer evening in 2012. After telling Dana to get into the bathtub, D.L. went downstairs, where defendant was seated on the couch, watching a movie. She sat down on the couch, beside him. She had on black pants with purple stripes, a purple shirt, and a purple tank top. While they were seated beside one another on the couch, he "messed" with her "private," by which she meant he grabbed the top of her leg and put his hand "right there," on top of her clothing. (Whitaker confirmed, in the recording, that D.L. was gesturing at her own vaginal area.) Whitaker asked D.L. what defendant's hand was doing, and she answered, "Nothing." In response to the touching, D.L. asked defendant, "What are you doing?" He did not answer. She ran upstairs to her sister, Dana.

¶ 22 About a week before the interview, K.S. confided to D.L. that defendant had touched her. D.L. then confided to K.S. that defendant likewise had touched her. K.S. told D.L. she would tell her mother so that her mother could tell D.L.'s mother.

¶ 23 Later in the interview, D.L. told Whitaker that K.S. first told her own mother about defendant's touching of her and it was not until the next day that D.L. told K.S. that defendant had touched her, too.

¶ 24 3. *The Trial Court's Findings*

¶ 25 After the parties made arguments, the trial court found that "the time, content, and circumstances" of the interviews "provide[d] sufficient safeguards of reliability." 725 ILCS 5/115-10(b)(1) (West 2014). Accordingly, the court ruled that, pursuant to the hearsay exception in section 115-10 (725 ILCS 5/115-10 (West 2014)), the interviews would be admissible in the jury trial.

¶ 26 C. The Second Hearing Pursuant to Section 115-10(b)(1)

¶ 27 On October 7, 2014, immediately before the jury trial, the trial court held a second hearing pursuant to section 115-10(b)(1), to consider the admissibility of the following additional hearsay statements: (1) statements K.S. made to Antoinette M. in September 2013, (2) statements K.S. made to J.S. in 2012, (3) statements D.L. made to Danielle L. in September 2013.

¶ 28 1. *K.S.'s Statements to Antoinette M.*

¶ 29 Antoinette testified that, near the end of September 2013, K.S. told her that, a year earlier, in Danielle L.'s house, K.S. woke up to find that defendant's hand was between her legs.

¶ 30 When Antoinette asked K.S. if she had told this to anyone else, she answered that she told J.S. the morning after it happened.

¶ 31 Antoinette spoke with Danielle the next night, after Danielle got off work. Then Antoinette went to the police station and filed a report.

¶ 32 Sometime after K.S. was interviewed at the Center, she told Antoinette that defendant's hands had been underneath her clothing.

¶ 33 2. *K.S.'s Statements to J.S.*

¶ 34 J.S. testified that, two years earlier, she and K.S. were lying on the floor of Danielle's living room and defendant was on the couch. Around 3 or 4 a.m., J.S. got up to use

the bathroom. While J.S. was still in the bathroom, K.S. entered the bathroom, told her that defendant had touched her, and began weeping. K.S. did not tell her anything further, nor did J.S. ask any questions. Instead, they went upstairs, into D.L.'s bedroom, to sleep.

¶ 35 The next morning, K.S. and J.S. had a second conversation in the bathroom. K.S. told her that defendant had put his hands in her pants and, also, that he had put his hand over her mouth. J.S. asked K.S. if she wanted her to tell Antoinette about this. K.S. answered no and said she was too scared.

¶ 36 J.S. heard nothing more about the incident until K.S. revealed it to Antoinette. The three of them were in the living room of their home when K.S. began weeping after Antoinette asked her, jokingly, if anyone had touched her. K.S. then told Antoinette what happened at Danielle's house. J.S. heard K.S. tell Antoinette that defendant's hand was in her pants, but she heard nothing further of the conversation because she left the living room and went into a bathroom, to avoid hearing any more.

¶ 37 3. *D.L.'s Statement to Danielle L.*

¶ 38 Danielle L. testified that in September 2013, after work, she went to Antoinette's house to pick up D.L. and Dana. Antoinette met her outside and told her that defendant had touched K.S. She further told Antoinette that D.L. had something to tell her. After getting sick, Danielle went inside, and D.L. told her that one day, while Danielle was at work, defendant and D.L. were sitting on the couch and he began groping her breasts and "private area." D.L. went on to explain that she told defendant to stop and then went upstairs to Dana.

¶ 39 4. *The Trial Court's Findings*

¶ 40 After arguments by the parties, the trial court found that "the time, content, and circumstances" of these additional hearsay statements "provide[d] sufficient safeguards of

reliability." 725 ILCS 5/115-10(b)(1) (West 2014). Therefore, the court ruled that these statements likewise would be admissible in the trial.

¶ 41 D. The Jury Trial

¶ 42 1. *K.S.'s Testimony*

¶ 43 In the jury trial, K.S. testified that she lived in Normal, Illinois, with her mother, Antoinette, and her sister, J.S. The L. family—Danielle and her two daughters, D.L., and Dana—were close family friends and used to live in Normal, too, but as of the time of the trial, they lived in Alabama. When Danielle and her daughters still lived in Normal, defendant, whom K.S. thought of as an uncle, often babysat the four girls in Danielle's house.

¶ 44 One weekend night in August 2012, a few days before K.S.'s twelfth birthday, all four girls were in Danielle's house, and defendant was babysitting them. K.S. and J.S. fell asleep on the living-room floor while watching a movie with defendant. He was on a couch. K.S. was on the floor, next to the couch. J.S., who had fallen asleep before K.S., was between K.S. and the television, which was at the side of the room opposite from the couch.

¶ 45 In the middle of the night, K.S. felt someone's hands in her pants. Pretending to be still asleep, she saw, through her partially opened eyelids, defendant leaning over her. She could feel two fingers in her vagina. One finger was going in and out while the other finger was roaming over other parts of her vagina. When he finished, defendant kissed her on the left elbow and lay back down on the couch. K.S. immediately got up off the floor, went into a bathroom, and cried. Then she went upstairs to sleep.

¶ 46 The next morning, K.S. told J.S. that something had happened, but she did not specify what had happened.

¶ 47 A few months later, K.S. told D.L. what defendant had done to her, after D.L. told K.S. what defendant had done to her.

¶ 48 More than a year after defendant touched her, K.S. told Antoinette about it, when Antoinette jokingly asked her if anyone had touched her while she and J.S. were in Chicago, visiting their aunt. Antoinette in turn informed Danielle.

¶ 49 Sometime later, defendant and Danielle had an argument, after which K.S. no longer saw him regularly. According to K.S., he "never came over" anymore after the argument.

¶ 50 2. *D.L.'s Testimony*

¶ 51 D.L. testified that when she was 9 and 10 years old, defendant was like a stepfather to her. One night, when she was 10, the two of them were sitting on the couch, in the living room, watching television. This was something they commonly did together. She was wearing pajamas, with loose black pants. She was seated at one end of the couch, and he was seated at the other end. After they had been there for an hour or so, he scooted over on the couch, until he was right next to her. Then he reached over and touched her vagina with his right hand, over her clothing, and rubbed "a little fast" with his fingers. She asked, "What are you doing?" He did not answer. She ran upstairs to her little sister, who was taking a bath.

¶ 52 D.L. told no one about this incident until, sometime later, when K.S. revealed to her that defendant had touched her. D.L. then told K.S. and J.S. that he had touched her, too. K.S. passed the information on to her mother, who in turn informed D.L.'s mother. By the time D.L.'s mother found out, a year had passed since the incident on the couch.

¶ 53 3. *J.S.'s Testimony*

¶ 54 J.S. was K.S.'s older sister and D.L.'s cousin. She testified that, two years before the trial, when she was 13 and K.S. was 11, K.S. told her something about defendant. The

previous night—that is, the night before K.S. told her this—J.S., K.S., D.L., Dana, and defendant were all in the living room, watching a movie. After D.L. and Dana went to bed, K.S. and J.S. were still lying on the floor. K.S. was closer to the television, and J.S. was between her and the couch, on which defendant was reclining. J.S. fell asleep while watching television.

¶ 55 In the night, J.S. woke up to go to the bathroom. Upon entering the bathroom, she turned on the light and closed the door. About 45 seconds later, as J.S. was about to wash her hands, K.S. walked into the bathroom and told her that defendant had put one hand in her pants and the other hand over her mouth.

¶ 56 Later in the morning, J.S. and K.S. had a second conversation. K.S. told her she did not want her telling their mother, because she was scared. J.S. agreed not to do so. Their mother found out about a year later.

¶ 57 4. *Antoinette M.'s Testimony*

¶ 58 Antoinette M. testified that, at the end of September 2013, she was joking around with K.S. and J.S. when K.S. burst into tears and said someone had touched her. Antoinette took her into the bathroom for privacy, and K.S. told her she was asleep in the living room in Danielle's house when she "was woken up with [defendant's] touching her in between her legs." K.S. said she had told J.S. about this the morning after it happened and, also, that D.L. had divulged to her that defendant had done the same thing to her.

¶ 59 That night, Antoinette told Danielle what she had heard from K.S. Danielle then talked with D.L. and Dana. The next day, they went to the police station. Less than a week later, they went to the Center.

¶ 60 Sometime after they went to the Center, Antoinette had a second conversation with K.S., in which K.S. said that defendant had put his hands inside her underwear and that as

soon as he stopped, she went into the bathroom and cried. K.S. did not mention to Antoinette, however, that she followed J.S. into the bathroom. Rather, K.S. said she told J.S. the next morning.

¶ 61 On cross-examination, Antoinette testified she remembered that defendant and Danielle had gotten into a disagreement. By her understanding, the disagreement had something to do with peas and carrots, and it resulted in defendant's moving out of Danielle's house.

¶ 62 On redirect examination, Antoinette testified that defendant no longer was living with Danielle when he found out about the girls' accusations. When Danielle saw him at a neighbor's house, she told him they needed to talk. Antoinette was present when they confronted him with the allegations of sexual abuse. He denied the allegations and asked, " 'Why now? Why is it coming out now?' " Antoinette and Danielle had not told him *when*, according to the girls, he had touched them.

¶ 63 5. *Danielle L.'s Testimony*

¶ 64 Danielle L. testified she lived in Normal from 2006 to 2013 and that while living there, she worked at Dollar Tree and was romantically involved with defendant. He lived with her and her two daughters, on and off, from 2007 to 2013. For several months, Danielle and defendant slept at nights in the living room, and the girls slept in the bedrooms, upstairs. He almost always slept on the couch.

¶ 65 In the fall of 2012, an argument between Danielle and defendant about peas and carrots turned into an argument between him and D.L. After this blowup, he left the premises and stayed away for some time, possibly for as long as a month but not as long as two months.

¶ 66 One night in September 2013, Antoinette informed Danielle that something had happened to D.L. Danielle had a talk with D.L., who told her that, around the time of her, D.L.'s,

previous birthday, defendant tried to grab her chest and her "areas down low" while the two of them were watching television. After telling him to stop, D.L. went upstairs to her sister. Danielle asked D.L. why she had waited so long to reveal that this had happened. D.L. explained that she was afraid that something would happen to Danielle, that Danielle and defendant would fight, or that Danielle would go to prison and D.L. would lose her family.

¶ 67 After having this conversation with D.L., Danielle talked with K.S. Then Danielle and Antoinette confronted defendant. He responded, " 'Why all of a sudden now would they say that?' " According to Danielle's testimony, however, he never actually denied touching the girls.

¶ 68 6. *Publication of the Interviews*

¶ 69 After Danielle's testimony, the State published Whitaker's video-recorded interviews of K.S. and D.L.

¶ 70 7. *Defendant's Testimony*

¶ 71 Defendant testified he met Danielle L. in 2007, when they both lived in Alabama. In the winter of 2007, she and her family moved to Normal, and he joined them. They lived together in Normal, on and off, until a Sunday in the third week of July 2012, when he and Danielle had a serious falling out.

¶ 72 The argument began when Dana told defendant she did not want any more of the peas and carrots on her plate. He told Dana to throw the peas and carrots away, and Danielle "snapped." She threw the plate onto the floor and told him he had to move out or else she would stab him with a knife. He picked up a knife and offered it to her—trying to hand it to her—and saying, " 'I knew you scared. You put the knife up and sit down.' " Danielle asked him to leave. He went downstairs, finished doing his laundry, and moved out—and he did not return until 2013.

¶ 73 In September 2013, defendant encountered Danielle when he was in the neighborhood, visiting friends. She requested that he come outside to talk. When he came outside, Antoinette was there, too. Danielle pulled out a can of Mace. He testified: "[S]he had a knife also in her—in her—in her breast or whatever, up in her breast plate area, and she was shaking it, ['Y]ou got something to tell me about my kids,['] and I'm like, ['W]hat kids[?] [W]hat you talk[?'] You know what I'm saying?" When he comprehended what Danielle was accusing him of, he denied the accusation, saying, " 'I don't know what you talking about,' " and asking, " '[W]hen did this supposed to happen[?'] " Danielle responded that the girls did not know when it had happened. He argued to Danielle and Antoinette, " 'How this supposed to happen when somebody don't know the season or the date or the time? That don't make sense.' " He further argued to them, "[A]s long as ya'll [*sic*] been knowing me and I been keeping those kids, ain't nothing like this happened like this.['] "

¶ 74 On cross-examination, defendant confirmed that, during their relationship, he sometimes lived with Danielle and sometimes lived apart from her. They had periodic breakups from 2008 until the third week of July 2012, which was the last time he kept any of his belongings in her house. He remembered he also was at Danielle's house in August 2013 and that she became angry with him for trying to help a mechanic who was changing a flat tire on her car. Nevertheless, he stayed overnight because Danielle asked him to stay. They slept in the living room—she on the couch and he on a recliner.

¶ 75 Next, the prosecutor asked defendant how he responded to Danielle when, at the end of September 2013, she confronted him with the children's allegations. He answered that "[he] didn't know." The prosecutor then asked him about something he reportedly said when being interviewed by Detective Gill Angus of the Normal Police Department in February 2014:

"Do you remember telling Detective Angus that [Danielle] came out of the house and said she needed to talk to [you], and you thought she had [M]ace, and you told the detective, [']I already knew where it was going?['] " Defendant answered, "I didn't say I knew where she was going with this[,] because I didn't know. I'm trying to figure out why she is pulling out [M]ace. [']What's going on? Wait a minute.['] "

¶ 76 In its case in rebuttal, the State called Angus, who testified that in February 2014 he recorded his interview of defendant. Then, without objection by the defense, the State published a 30-second portion of the video-recorded interview, in which defendant told Angus: "I already knew where it was going."

¶ 77 8. *Closing Arguments*

¶ 78 In the State's closing argument, the prosecutor reminded the jury that, a year before the trial, K.S. and D.L. told their mothers that defendant had touched them. The prosecutor also reminded the jury that K.S. and D.L. previously told one another about the touching—a circumstance the prosecutor urged the jury to consider in the light of common sense, taking into account the differences between children and adults.

¶ 79 In response, defense counsel challenged the credibility of K.S. and D.L., pointing out ways in which their stories had changed and highlighting the inconsistencies between the statements by K.S. and J.S. Defense counsel argued that defendant had consistently maintained his innocence and that if the prosecutor had played 20 more seconds of Angus's interview of defendant, the jury would have heard him "den[y] it."

¶ 80 In the State's rebuttal closing argument, the prosecutor referred three times to defendant's recorded statement to Angus that he already knew where Danielle was going when she asked him if he had anything to tell her about the children.

¶ 81 II. ANALYSIS

¶ 82 A. The Claim of Plain Error in the Admission of the Hearsay Statements By K.S.

¶ 83 Defendant identifies five hearsay statements by K.S. that the State used against him in the jury trial pursuant to the hearsay exception in section 115-10. However, the statements did not fit into section 115-10 because although K.S. was under 13 when defendant allegedly sexually assaulted her, she made the statements (1) *after* she turned 13 and (2) *more than* 3 months after the alleged sexual assault. See 725 ILCS 5/115-10(b)(3) (West 2014) ("Such testimony shall only be admitted if * * * [i]n a case involving an offense perpetrated against a child under the age of 13, the out of court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offense, whichever occurs later ***."). The five hearsay statements are the statements that K.S. made to Antoinette, Danielle, and J.S. on September 28, 2013; the statement she made to Whitaker on October 3, 2013; and the statement she made to Antoinette sometime in October 2013. (By the statement that K.S. made to J.S. on September 28, 2013, defendant seems to mean the statement J.S. overheard K.S. making to Antoinette before J.S. shut herself into the bathroom.) There appears to be no dispute that (1) these five statements were hearsay (see Ill. R. Evid. 801(c) (eff. Jan. 1, 2011)); (2) absent a recognized exception, hearsay is inadmissible (see Ill. R. Evid. 802 (eff. Jan. 1, 2011)); and (3) section 115-10 provided no applicable exception.

¶ 84 As defendant points out, defense counsel failed to preserve this error. Specifically, defense counsel never made a contemporaneous objection on the ground of the failure to satisfy section 115-10(b)(3), and also failed to include an objection in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *Stapleton ex rel. Clark v. Moore*, 403 Ill. App. 3d 147, 156 (2010) ("A party is required to make specific objections to evidence, based

on particular grounds, and the failure to do so results in a [forfeiture] of objections as to all other grounds not specified or relied on.").

¶ 85 Defendant argues, however, that the evidence was closely balanced and thus, the doctrine of plain error should avert the procedural forfeiture (see *People v. Boling*, 2014 IL App (4th) 120634, ¶ 131). Also, defendant claims defense counsel rendered ineffective assistance by causing the forfeiture (see *Enoch*, 122 Ill. 2d at 201-02 (considering a claim that trial counsel rendered ineffective assistance by failing to preserve a trial error for review).

¶ 86 The purpose of the plain-error doctrine is to make sure trials are fair (*People v. Herron*, 215 Ill. 2d 167, 179 (2005)). The first step of plain-error analysis is determining whether a clear or obvious error was made (*People v. Sebby*, 2017 IL 119445, ¶ 49). A clear or obvious error, for purposes of the plain-error doctrine, would not make the trial unfair if acquiescing to the error was a calculated risk—a reasonable (though, as it turned out, unsuccessful) strategy by defense counsel. See *Sebby*, 2017 IL 119445, ¶ 49; *Herron*, 215 Ill. 2d at 179.

¶ 87 According to the State, the admission of the hearsay statements by K.S. did not make the trial unfair despite their inadmissibility, because defense counsel had a strategic reason for acquiescing to their admission. The State argues that because the hearsay statements by K.S. introduced inconsistencies in the State's evidence—inconsistencies that had the potential of weakening the credibility of K.S. and other witnesses for the State—it was a reasonable strategy for defense counsel to refrain from objecting to the statements on the ground of section 115-10(b)(3). A defense attorney could, as a matter of strategy, acquiesce to the admission of legally inadmissible evidence in the belief that the evidence would be, on balance, beneficial to the defense. See *People v. Graham*, 206 Ill. 2d 465, 478-79 (2003).

¶ 88 In this case, we find a clear or obvious error in the admission of the hearsay statements by K.S.—except the statements she made to J.S. while she, K.S., was "under the stress of excitement caused by the [startling] event ***." Ill. R. Evid. 803(2) (Jan. 1, 2011) (hearsay exceptions). Defense counsel's strategy was to oppose the admission of the hearsay statements by K.S. In the section 115-10 hearing, defense counsel objected to them. Therefore, by refraining from asserting the relevant, indisputably meritorious ground for such an objection—*i.e.*, K.S. was under 13 when defendant allegedly sexually assaulted her, and she made the statements (1) after she turned 13 and (2) more than 3 months after the alleged sexual assault (see 725 ILCS 5/115-10(b)(3) (West 2014))—defense counsel was not pursuing a strategy. Overlooking the failure to satisfy section 115-10(b)(3) was simply a clear or obvious error, not a strategic decision.

¶ 89 Having identified a clear or obvious error, we next consider whether in this case "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Herron*, 215 Ill. 2d at 187. Defendant argues the evidence in the trial was closely balanced. This first prong of plain error averts a procedural forfeiture, and provides relief, if "the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence ***." *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009); see also *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) ("[T]he defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." [*Heron*, 215 Il. 2d at 186-87.]).

¶ 90 Defendant fails to persuade as to the closeness of the evidence. Although it is true that there was no physical evidence, the trial was not a credibility contest between one alleged

victim and defendant. Rather, two teenage girls accused him of touching their "privates." In addition, the evidence established the relationship between the defendant and his accusers and his frequent unsupervised access to them. Also, the description of the conduct of defendant suggests sexual behavior not likely known to the girls. Moreover, it is unclear what motive K.S. and D.L. would have had to fraudulently conspire against defendant, especially considering that, according to their testimony, they regarded him as an uncle or a stepfather. The jury obviously rejected the notion that an argument over uneaten peas and carrots served as a motive for D.L., let alone for K.S.

¶ 91 The jury also likely considered how defendant could have known what Danielle and Antoinette were going to accuse him of before they accused him. He basically incriminated himself when he told Angus he "knew" where the conversation was headed when Danielle asked him if he had anything to say about the girls. If when the mothers of two girls whom he used to babysit approached him with a knife and a can of Mace and asked him if he had anything to tell them about their girls, a man with a clear conscience might *worry* about accusations of child sex abuse, and *hope* they were not forthcoming. However, he would not *already know* such allegations were coming, unless he had already been accused—and it does not appear that defendant had already been accused. Knowing what he would be accused of before he was accused could suggest a consciousness of guilt.

¶ 92 We acknowledge that "[t]he improper bolstering of a witness's credibility through the use of prior consistent statements preys on the human failing of placing belief [i]n that which is most often repeated." (Internal quotation marks omitted.) *People v. Richardson*, 348 Ill. App. 3d 796, 802 (2004). The hearsay statements by K.S., however, were not entirely consistent with her trial testimony. For example, K.S. told J.S. that defendant put his hand over her mouth as he

was sexually assaulting her, but in her testimony K.S. never mentioned that he put his hand over her mouth. Instead, she testified she pretended to be asleep as he was sexually assaulting her. K.S. told Whitaker that defendant kissed her on the right side of the face, whereas K.S. testified that he kissed her on the left elbow. According to J.S.'s testimony, K.S. came into the bathroom and told her about the sexual assault immediately after it happened and that, later in the morning, she told J.S. specifically what defendant had done to sexually assault her. In her testimony, however, K.S. stated that she told J.S. the next morning that something had happened but she did not specify to her what had happened. The hearsay statements also reiterated the discrepancy of who told whom first: according to K.S., D.L. told her first, but according to D.L., K.S. told her first. Because the hearsay statements by K.S. planted or reinforced some considerable inconsistencies in the State's evidence, we are unconvinced that these hearsay statements tipped the scales *against* defendant.

¶ 93 B. The Claim of Ineffective Assistance of Counsel for the Failure To Preserve a Trial Error for Review

¶ 94 Defendant also asserts defense counsel rendered ineffective assistance by causing the forfeiture (see *Enoch*, 122 Ill. 2d at 201-02 (considering a claim that trial counsel rendered ineffective assistance by failing to preserve a trial error for review). We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, the defendant must show defense counsel's performance was deficient and prejudice resulted from counsel's deficient performance. *People v. Houston*, 226 Ill. 2d 135, 143 (2007). Specifically, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting

Strickland, 466 U.S. at 694). Our review of counsel's performance is highly deferential. *Strickland*, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Id.* A defendant is entitled to reasonable representation, and a mistake in strategy or judgment does not, by itself, render the representation incompetent. *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). Both prongs of the *Strickland* test must be satisfied; therefore, a finding of ineffective assistance of counsel is precluded if a defendant fails to satisfy one of the prongs. *People v. Simpson*, 2015 IL 116512, ¶ 35. "A court may resolve a claim of ineffective assistance of counsel by reaching only the prejudice prong, as a lack of prejudice renders irrelevant the issue of counsel's alleged deficient performance." *People v. Hall*, 194 Ill. 2d 305, 337-38 (2000). We turn first to the prejudice prong, as we find it dispositive.

¶ 95 The evidence in this case demonstrates that, even if K.S.'s statements were excluded, there was no reasonable probability the result of defendant's trial would have been different. We refer the parties to our prior analysis of defendant's claim under the first prong of plain error. While the inquiry is not necessarily identical, here, our review of why defendant failed to establish the closeness of the evidence makes clear that the absence of K.S.'s statements would not create a reasonably probability of a change in the outcome. As outlined in our first prong plain error discussion, properly admitted evidence, including evidence from the defendant, overwhelmingly established the guilt of defendant. Thus, we conclude defendant cannot show prejudice. In light of his failure to show prejudice, defendant's ineffective assistance of counsel claim fails.

¶ 96 C. The Claim of Ineffective Assistance in the Failure To Introduce the Surrounding Five Minutes of Defendant's Recorded Interrogation

¶ 97 Defendant claims defense counsel's performance was less than reasonable in that defense counsel failed to "introduce the surrounding [five] minutes of [defendant's] recorded interrogation to correct the misleading nature of the 30 seconds of video that the State introduced during rebuttal and then relied heavily upon during closing arguments." According to defendant, this surrounding five minutes of video would have been admissible under the doctrine of completeness and would have revealed the following:

> "[Defendant] first explains that he and D.L. no longer got along after the 2012 argument with Danielle. [Citation.] [Defendant] then tells Detective Angus, 'I think I know where this is going, because Danielle confronted me about this, I told her it was not true.' [Citation.] When Detective Angus asks [defendant] to tell him about the confrontation with Danielle, [defendant] asks, 'About the knife?' and then 'Which confrontation?' [Citation.] After Detective Angus prompts him by saying, 'Danielle confronted you?' [defendant] explains that he 'was gonna come over and see the kids, like I always do when I'm in the area.' [Citation.]
>
> [Defendant] further explains that when he arrived, he saw Danielle at his friend's house. [Citation.] [Defendant] then agreed to go outside with Danielle so that they could talk, but he tells Detective Angus that he did not 'know what's going on at the time.' [Citation.] When he got outside, Antoinette was there; [defendant] asked[,] '[W]hat was the deal?' and said that he wanted to see the kids. [Citation.] In response to Detective Angus's question, [defendant] clarifies that as far as he knows, Antoinette has two daughters[,] who 'come over every now and then.' [Citation.] [Defendant] then describes the portion of the

> confrontation that the State played at trial, which ends with hi[s] saying that D.L. and K.S. said [that] 'I tried to touch them.' [Citation.]
>
> Immediately after the point at which the State stopped the video, [defendant] says, '[T]hat ain't never happened,' that he did not 'see where that come from' and, 'I'm asking, ["W]here did this come from, man?" ' [Citation.] Next, [defendant] says, ' ["]And when did it supposed to happen?["] That's what I asked Danielle. She said[,] ["A]bout a year ago.["] ' [Citation.] He then once again denies committing the alleged offenses, saying, 'I never did anything like that to them girls!' " [Citation.]

¶ 98 The State argues that in order for the foregoing additional portions of the video recording to be admissible under the completeness doctrine, defendant's statement to Angus that he knew where Danielle was going when she confronted him about the children had to be, in itself, misleading in the absence of the context provided by the additional portions. The State reasons that just because defendant contradicts himself elsewhere in the video (for example, "he did not 'see where that come from' and, 'I'm asking, ["W]here did this come from, man?" ' "), all that means is that he was *self-contradictory*; it does not mean that his statement of "I already knew where it was going" was *misleading* in the absence of context.

¶ 99 The State is correct. Under the completeness doctrine, "the remainder of a writing, recording, or oral statement is admissible only if required to prevent the jury from being misled, to place the admitted portion in context so that a true meaning is conveyed, or to shed light on the meaning of the admitted portion." *People v. Craigen*, 2013 IL App (2d) 111300, ¶ 46. The additional portions of the video-recorded interview that defendant describes did not "shed light on" his statement that he "already knew where it was going" or "place [the statement]

in context"; insomuch as they were relevant, the additional portions "merely contradicted" his statement. *Id.* Therefore, the completeness doctrine was inapplicable. See *id* ; *People v. Pietryzk*, 153 Ill. App. 3d 428, 438-39 (1987) (statements were inadmissible under the completeness doctrine because, instead of explaining or qualifying the admitted statements, they merely contradicted them). We assume that if defense counsel had invoked the completeness doctrine, the State would have objected, pointing out the inapplicability of the doctrine, and the trial court would have sustained the objection. We assume the court would have ruled in accordance with the law. *Strickland v. Washington*, 466 U.S. 668, 695 (1984). Refraining from performing a futile act is not ineffective assistance of counsel (*People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000)), and, therefore, we disagree that defense counsel rendered ineffective assistance by refraining from introducing the surrounding five minutes of defendant's recorded interrogation. Given our resolution of defendant's ineffective assistance of counsel claims, we need not address defendant's claim alleging cumulative error.

¶ 100 III. CONCLUSION

¶ 101 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 102 Affirmed.