NOTICE
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Carla Bender
4th District Appellate
Court, IL

2018 IL App (4th) 160277-U

NO. 4-16-0277

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ELROY MITCHELL, Defendant-Appellant.	))))))))	Appeal from the Circuit Court of Macon County No. 15CF669 Honorable Wm. Hugh Finson, Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant forfeited his claim that the trial court erred in finding section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2014)) permitted the admission of the recorded out-of-court statements of the child victim at his trial. Further, the plain-error doctrine does not apply to excuse defendant's forfeiture where first-prong plain error did not occur and defendant does not argue second-prong plain error.

(2) The State's participation in the trial court's *Krankel* inquiry amounted to harmless error and remand for a new preliminary *Krankel* inquiry is unwarranted. Also, the trial court's finding that defendant's *pro se* claims lacked merit was not manifestly erroneous.

¶ 2 Following a jury trial, defendant, Elroy Mitchell, was convicted of five counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)) and six counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2014)). The trial court sentenced him to 20 years in prison for each predatory-criminal-sexual-assault conviction

and 7 years in prison for each aggravated-criminal-sexual-abuse conviction. Defendant appeals, arguing the court erred in admitting a video-recorded statement of the victim into evidence under section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2014)). He further complains that the court's inquiry, pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), into his *pro se* posttrial ineffective-assistance-of-counsel claims was improper because the court (1) invited the State to participate in its inquiry and (2) failed to appoint independent counsel to represent him where the record showed "possible neglect" of his case. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 15, 2015, the State charged defendant with eight counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)) and six counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2014)). The State's theory of the case was that defendant engaged in various types of sexual conduct with A.A., his step-granddaughter (born April 11, 2002), from the time A.A. was 7 and until the age of 13.

¶ 5 Specifically, in counts I through IV, the State alleged defendant committed the offense of predatory criminal sexual assault of a child from April 11, 2009, to June 30, 2011, in that he was over the age of 17 and knowingly committed acts of sexual penetration with A.A., who was under the age of 13, by placing his penis in A.A.'s vagina, anus, and mouth and his finger in A.A.'s vagina. In counts V through VIII, the State alleged the same factual circumstances and actions by defendant but asserted they occurred from July 1, 2011, to April 10, 2015. Next, in counts IX through XI, the State alleged defendant committed the offense of aggravated criminal sexual abuse from April 11, 2009, to June 30, 2011, in that he was over age 17 and commit-

ted an act of sexual conduct with A.A., who was under age 13, by placing his hand on A.A.'s vagina and buttocks and A.A.'s hand on his penis for the purpose of sexual gratification or arousal. Finally, in counts XII through XIV, the State alleged the same facts and conduct as in counts IX through XI, but asserted the crimes occurred from July 1, 2011, to April 10, 2015.

¶ 6 On August 24, 2015, the State filed a motion to allow hearsay statements of A.A. into evidence under section 115-10 of the Code. It alleged that A.A. was abused from age 7 to age 13, asserting that "A.A. turned 13 on April 11, 2015[,] and stated the incidents [of abuse] were ongoing with the last one being around the beginning of May 2015." The State alleged A.A. made statements regarding the sex acts performed upon her by defendant to various individuals and that those statements were made either before A.A. turned 13 or within three months "after the commission of the offense."

¶ 7 On October 16 and 23, 2015, the trial court conducted a hearing on the State's motion. The State presented the testimony of four witnesses. Austin M. testified he was 13 years old and described himself as A.A.'s friend and cousin. He recalled an occasion around wintertime when he was in the sixth grade when A.A. told him that someone had done something bad to her. Austin testified that he and A.A. lived in the same apartment complex and rode the bus to the same school. While riding the bus on the way to school, A.A. told him that "something bad happened to her" and asked him not to tell anyone. When Austin questioned her, A.A. stated that "her grandpa" was "touching her private areas and stuff."

¶ 8 Stephanie A. testified she was A.A.'s mother. On May 15, 2015, A.A. reported to Stephanie that defendant had been touching her inappropriately.

¶ 9 Alison Elsea testified she was a forensic interviewer with the Macon County

Child Advocacy Center. On May 20, 2015, Elsea interviewed A.A. and the interview was recorded. The State submitted the recording into evidence at the hearing. During the interview with Elsea, A.A. described ongoing sexual conduct with defendant from age 7 to age 13.

¶ 10 Finally, Tiera J. testified she was in eighth grade and friends with A.A. The two went to the same school and were in the same grade. Tiera recalled an occasion when she was in seventh grade and A.A. spent the night at her house. At that time, A.A. stated that when she was seven, someone would "touch on her" and she "didn't like it." One or two days later, A.A. told Tiera the touching continued as she got older and that "she was being touched by her private parts." Tiera recalled another time in seventh grade that she walked to A.A.'s house and A.A. pointed out the person who had been touching her. Tiera testified defendant was the person A.A. identified.

¶ 11 The State argued that it had shown sufficient safeguards of reliability for each of A.A.'s out-of-court statements. Further, it noted that under section 115-10 of the Code, a child victim's statements had to be made before the victim turned 13 or within three months after the commission of the offense, whichever occurred later. The record reflects A.A. turned 13 on April 11, 2015. The State argued that statutory requirements had, nevertheless, been met with respect to the statements that occurred after A.A.'s thirteenth birthday—the statements to Stephanie and Elsea—because they were made "within three months of [A.A.'s] birthday and the abuse was ongoing."

¶ 12 In response, defendant argued that sufficient safeguards of reliability were lacking with respect to the statements A.A. purportedly made to Austin, Stephanie, and Tiera. Defendant further argued that admission of A.A.'s recorded statements to Elsea would violate the confron-

tation clause because the recorded statements were "taken for the purpose of testimony."

¶ 13 At the conclusion of the hearing, the trial court granted the State's motion. The court noted it had viewed the almost two-hour recording of A.A.'s statements to Elsea. It found sufficient safeguards of reliability existed as to all of A.A.'s out-of-court statements.

¶ 14 In December 2015, defendant's jury trial was conducted. A.A. testified she was born on April 11, 2002. At the time of trial, she was 13 years old and in eighth grade. A.A. described defendant as her step-grandfather, stating he was married to her grandmother, Antoinette Mitchell. She testified defendant was really nice when she was younger, stating he spent time with her and her cousins at Antoinette's house, got them pizzas, and took them places.

¶ 15 A.A. testified that, eventually, things happened with defendant that she did not like. She described instances of escalating sexual conduct that began when she was 7 and continued to the age of 13. The first incident of such conducted occurred in defendant and Antoinette's "first apartment." A.A. stated she and defendant were sitting on a couch and watching cartoons early in the morning while Antoinette was in her bedroom. Defendant told A.A. to stand up and then "lay on top of him." A.A. complied, stating she and defendant were fully clothed and positioned "stomach to stomach." She stated defendant put his hands on her back and "started moving in an up-and-down motion." Eventually, defendant stopped and went to the kitchen. When he returned, he put his hands on A.A.'s buttocks "inside of [her] pants but outside of [her] panties" and rubbed her buttocks. A.A. testified she "ended up running in [Antoinette's] room [to be] with her." She did not tell anyone what happened because she was afraid of how her family might react.

¶ 16 A.A. recalled another time when she stayed the night with defendant and Antoi-

nette at their "Wellington Way Apartment." She stated she went to sleep on their living room couch. At some point, defendant came into the room and shook A.A., who pretended to be asleep. A.A. testified defendant then "laid on top of [her]" and "started moving up and down again." She and defendant were stomach to stomach and defendant tried to "line [A.A.'s] vaginal area up with his area." A.A. testified that when she referred to defendant's "area," she meant his penis. She further stated that Antoinette came into the room and saw defendant on top of her. Defendant "hurried" to get up and Antoinette asked what was going on and started hitting defendant. A.A. pretended to be asleep. Defendant became defensive with Antoinette and denied doing anything wrong.

¶ 17 The next morning, defendant and A.A. were doing laundry and defendant "gave [A.A.] a story to tell" to Antoinette. A.A. testified defendant stated he told Antoinette that "he was just playing with [A.A.] on the side" and trying to "see if [A.A.] was awake." Defendant told A.A. to "[s]tick to that" story. A.A. stated Antoinette questioned her that morning. Antoinette's face was red and she was yelling. A.A. was worried that she was in trouble. She testified she stuck with defendant's story and told Antoinette that "nothing had happened." A.A. also stated that she was worried about Antoinette's reaction. She testified she lied and said nothing had happened "[b]ecause [she] knew that [Antoinette] probably wasn't going to handle it the right way."

¶ 18 A.A. testified that there were times defendant touched her that occurred between the two incidents she described at defendant and Antoinette's first apartment and their Wellington Way apartment. She stated that she and defendant had "kissed a lot of times before" and defendant would rub her buttocks and back.

¶ 19 A.A. stated the next time she could remember something "really major" happen-

ing was a time that she and her cousin spent the night with defendant and Antoinette. A.A. estimated she was nine years old at the time. She testified that she and her cousin slept on a pile of covers on the living room floor. While her cousin was still asleep, defendant came into the room and sat on a couch. He told A.A. to come over to him and "laid back." Again, she and defendant were positioned stomach to stomach and defendant "was moving up and down."

¶ 20 According to A.A., defendant "started to do more" as she got older. She believed "things started to change" when she was approximately 10 years old and in fifth grade. A.A. recalled an incident that occurred when her grandmother was in the hospital and defendant took A.A. to the Wellington Way apartment. She stated she and defendant went into the bedroom. Defendant took off his clothes and told A.A. to remove hers. A.A. started to slowly remove her clothing so defendant "started taking them off for [her]." She testified defendant laid her on her back, got on top of her, and "started moving again, lining up [her] vaginal area and his area." A.A. stated that when she referred to her "vaginal area" she meant vagina. She testified defendant moved up and down with his penis on the outside of her vagina.

¶ 21 Defendant then began telling A.A. about sexual positions and she stated he "tried something that he called " 'the 69.' " A.A. testified defendant "put his mouth on [her] vaginal area" and, at defendant's direction, she put defendant's penis "in [her] mouth a little bit" before moving away. A.A. stated that during this incident, defendant also touched her vagina with his tongue and put his finger "inside" of her. On that occasion, defendant did not tell her why he was doing things to her; however, he had previously told A.A. that his actions were because he loved her.

¶ 22 A.A. testified there were also times when defendant had her touch his penis with

her hand. Those incidents occurred in defendant's car and before the bedroom incident at the Wellington Way apartments. A.A. testified defendant would pick her up from the school bus stop in the morning while she waited for the bus with her cousin and take her to the Dollar Store or McDonald's. She stated the bus stop was located near her apartment at "Southern Hills," where she lived until seventh grade. While in the car, defendant would have A.A. touch his penis. He also had A.A. unzip her pants, put his hands inside A.A.'s underwear, and would "rub on [A.A.'s] vaginal area" with his hands and fingers. A.A. stated that most of those times, defendant touched inside her vagina. She estimated that defendant would pick her up from the bus stop three days a week. He would either return her to the bus stop or drop her off at school. A.A. stated she had been in "fourth or fifth to seventh" grades when the incidents in the car occurred.

¶ 23 A.A. recalled "one more major" occurrence that was similar to the bedroom incident. She testified she and defendant were alone at the Wellington Way apartment and, again, in defendant's bedroom. A.A. stated defendant took off her clothes and removed his own. He then got on top of A.A. and moved "in the up-and-down motion again." Defendant next told A.A. to bend over and "[p]ut [her] butt in the air." A.A. testified she was on the bed and, at defendant's direction, positioned herself on her knees and elbows with her forehead down. Defendant told her that was the " 'doggie style' " position and "he tried putting his area into [her] bottom." A.A. testified she could feel defendant trying to put his penis inside of her; however, it "was hurting [her] pretty bad" so defendant stopped.

¶ 24 A.A. testified defendant tried to put his penis in her anus on another occasion. She stated that when she was 12 years old and in seventh grade she stayed at her aunt's house for about six months. One morning before she took the bus to school, defendant came to the house.

A.A. testified she was the only one at home. Defendant went in A.A.'s room and stated, " 'Okay. Let's make this quick.' " He took off his pants and A.A.'s pants and asked if she remembered "[t]he doggie style kind of thing." Defendant then got behind A.A. and tried to put "[h]is area into [A.A.'s] bottom."

¶ 25 A.A. testified there was one time defendant tried to put his penis into her vagina. She recalled that they were at the Wellington Way apartment and stated she was laying on her back and defendant was on top of her. Initially they "were stomach to stomach until [defendant] kind of bent over." A.A. testified defendant "tried putting it into [her]." She testified she knew "that it was in the front because it had hurt again, but it wasn't in the same place" as her "butt."

¶ 26 A.A. testified that when these incidents would occur, defendant would ask her if she liked what he was doing or if it felt good. A.A. stated she would respond " 'yes' " because she was nervous about what would happen if she said no and because she "didn't really want to have to spend extra time talking about why [she] didn't like it." She further stated that there were times defendant would give her money. He gave her money when he would pick her up in the car. Also, if she needed money, she would ask defendant and he would give her "much more" than she asked for. A.A. did not tell anyone about the money but there were times her mom found receipts or items A.A. had bought and would ask A.A. about them. A.A. told her mom that defendant had given her money but did not tell her mom about what was going on.

¶ 27 A.A. testified she turned 13 on April 11, 2015, approximately one month "before this all came out." Around that time, A.A. was residing at her aunt's house. She testified that "something would happen" with defendant at her aunt's house about twice a week. If other people were in the home, she and defendant would keep their clothes on and defendant would "just

be touching on [A.A].” However, if no one else was home, defendant and A.A. would remove their pants and defendant “would be just moving up and down” on A.A. and “fingering” her. A.A. testified that when she stated defendant was “moving up and down” on her, she meant that her “vagina area and his area” would be touching and that the touching occurred both on the outside and the inside of her vagina.

¶ 28 A.A. testified that the last time something happened with defendant was two or three days before she told an adult what had been happening to her. A.A. stated defendant asked her what she would do for $100 and suggested they perform oral sex on one another. A.A. testified she thought that she could not do that and “ended up not doing anything” with defendant.

¶ 29 A.A. stated that the first person she told about what defendant was doing to her was her cousin Austin. She testified that one morning defendant dropped her off at her bus stop and, as she exited the car, defendant’s hand was “still in [her] seat.” Austin asked A.A. why defendant’s hand had been in her seat and A.A. “started telling [Austin] everything” while on the bus ride to school. A.A. did not remember what grade she was in when she made her disclosures to Austin. Further, she testified she indicated to Austin that she did not want him to tell anybody about what she had said.

¶ 30 A.A. testified she next told her friend Tiera about the abuse. She stated she and Tiera were on the bleachers in the school gym when Tiera told her about sexual abuse that had happened to Tiera. A.A. then told Tiera that the same thing had happened to her. A.A. stated she told Tiera more details “over [at Tiera’s] house one night.” She testified she asked Tiera not to tell because she thought her family would be mad that A.A. told someone who was not in the family. A.A. stated she told Tiera every time something happened.

¶ 31 Finally, on the morning of May 15, 2015, A.A. told "Cat," her aunt's boyfriend, about what defendant had been doing to her. The same day, A.A.'s mother came to get A.A. from school. Cat and A.A.'s aunt were also present. A.A. stated everyone went to her aunt's house, including defendant and Antoinette. A.A. testified everyone started arguing and a neighbor called the police. Once the police arrived, A.A.'s mother told them "everything." A.A. testified that a couple of days later, she went to the Child Advocacy Center to talk to someone about what had happened.

¶ 32 Molly Hofmann, an advanced practice nurse with the Pediatric Resource Center, testified as an expert in the medical examination and diagnosis of abused children. On May 28, 2015, she examined A.A. According to Hofmann, A.A. reported that someone " 'touched [her] with his areas and his hands on [her] area.' " A.A. explained that when speaking about " 'his area' " she meant " 'his private part' " and when speaking about " '[her] area' " she meant " '[her] vaginal area and [her] behind.' " She denied that she touched the person "orally." A.A. further reported that the touching "hurt" but "didn't last for very long because she would tell him to stop." Afterwards, "it felt funny" when A.A. tried to use the bathroom. A.A. told Hofmann "it felt like she had to pee but couldn't."

¶ 33 Hofmann testified an examination of A.A.'s anal and genital areas yielded "totally normal" results. However, she stated a normal examination did not rule out the history of abuse that A.A. reported. Hofmann testified that normal exams are "expected in most cases of child sexual abuse." She noted that sexual abuse could cause no injuries or injuries that healed quickly. Further, she testified that A.A.'s statements about sexual contact that "hurt" and her description of feeling like she needed urinate but being unable to do so were "concerning and *** consistent

with things that are often heard when describing labial penetration."

¶ 34 Austin testified he was 13 years old and that A.A. was his cousin. In sixth grade, he and A.A. went to the same school and rode the same school bus. While riding the school bus one morning during the winter, A.A. stated she had something to tell Austin and made him promise not to tell anyone else. Austin stated A.A. was crying and told him her grandpa was touching her inappropriately on her private areas. She also stated that sometimes he "laid behind her" and that he touched her while they were in the car. Austin testified he knew who A.A. meant when she said her "grandpa," and stated as follows: "[W]e saw this car pull up, and [A.A.] got in it. And, like, after she came back, she had McDonald's, and we asked who that was. She said that that was her grandpa." Austin testified he observed A.A. getting in and out of that car approximately twice a week but denied that he ever observed anyone "with their hand on [A.A.'s] seat." Austin also testified that he saw A.A. with money, which she stated came from her grandpa.

¶ 35 Tiera testified she was 14 years old and in eighth grade. A.A. was her best friend and they went to school together. Tiera recalled that in seventh grade they spent the night together and A.A. stated someone "was touching her places that she didn't want to be touched." During their conversation, A.A. seemed "grossed out" and "sad." Tiera testified that a couple of days later they were sitting on the bleachers at school and "talked more about the situation." A.A. stated that the person touching her would go to her house in the morning when no one was there and "touch on her and make her do things that she didn't want to do." According to Tiera, A.A. stated he would kiss her and touch her private parts. Approximately three days later, Tiera was visiting A.A.'s house when someone "pulled up in front of the house." When A.A. saw the per-

son she stated " 'Tiera, that's him.' " Tiera identified defendant as the person A.A. identified as " 'him.' "

¶ 36 Stephanie testified she was A.A.'s mother and that defendant had been married to her mother, Antoinette, since 2001. In May 2015, and for six to seven months prior to that date, Stephanie and her children resided with Stephanie's sister, Nicole A. The father of Nicole's children, Clennon Sibley, also known as "Cat," sometimes stayed at the home as well. Immediately prior to living with Nicole, Stephanie and her children lived at a friend's house for approximately nine months. Prior to that, they lived "in Southern Hills." Stephanie testified that in May 2015, defendant and Antoinette lived in Wellington Way Apartments, where they had resided since the middle of 2010.

¶ 37 On May 15, 2015, Stephanie received a telephone call at work from Sibley. After speaking with Sibley, Stephanie left work, picked Sibley up, retrieved A.A. from school, and then went to Nicole's house. While driving to Nicole's house, A.A. told Stephanie that she was being "touched inappropriately" by defendant and it had been going on "for some time." According to Stephanie, A.A. seemed nervous and scared because she thought Stephanie would be upset.

¶ 38 Stephanie testified that she, A.A., and Sibley met Nicole, Antoinette, and defendant at Nicole's house. An argument between Nicole and defendant ensued and Antoinette questioned A.A. about what had happened with defendant. A.A. reported that she did not tell what had been happening to her because she " 'was being threatened not to say anything.' " Ultimately, the police were called due to the argument between Nicole and defendant and A.A.'s abuse claims were reported.

¶ 39 Loren Sturdivant testified he was a detective with the Decatur Police Department. On June 10, 2015, he arrested defendant at his Wellington Way apartment and obtained defendant's date of birth, which he identified as September 12, 1961.

¶ 40 Antoinette testified for the State that defendant was her former husband. They met in 2001 and were married in May 2002. She stated they divorced in February 2003 but remained in a relationship and were remarried in March 2011. In November 2015, they divorced for a second time. However, Antoinette testified they continued to talk and she visited defendant in jail twice a week. Antoinette testified she lived with defendant in the Wellington Way apartment for approximately six years, beginning in November 2009. Prior to that time, she and defendant lived in an apartment at "North Haven Court" for approximately one year.

¶ 41 Antoinette testified A.A. was her granddaughter and would sometimes spend the night at her apartment. She estimated A.A. stayed the night at the Wellington Way apartment four or five times. Antoinette stated she sometimes watched A.A. when school was out and Stephanie was working. She testified that defendant would go to Nicole's house to check on the grandchildren in the mornings before school because Stephanie and Nicole went to work early. Defendant made sure the children were ready for school and that they got on the bus.

¶ 42 Antoinette testified she recalled an occasion when A.A. spent the night at her home and she found defendant and A.A. in the same room. She stated the incident occurred at the Wellington Way apartment and estimated that it occurred "two to three years ago." Antoinette testified she went to sleep with defendant in their bedroom and A.A. was sleeping on the couch. Antoinette woke up during the night to use the bathroom and saw defendant lying on the couch behind A.A. Both defendant and A.A. were positioned on their sides and facing the same

direction. Antoinette testified it looked like defendant "was tickling [A.A.] and kind of like just playing with her," while A.A. was watching television or playing a game. She stated she hit defendant, asked defendant what he was doing, and told defendant to go back to bed. Further, she testified she questioned A.A. about the incident the next morning and A.A. denied that anything happened.

¶ 43 Antoinette testified that on another occasion, she observed defendant with his hand on A.A.'s side and asked defendant what he was doing. Defendant replied that he was telling A.A. "something about Facebook."

¶ 44 Antoinette stated that sometimes defendant gave A.A. money. However, he also gave money to her other grandchildren. Although defendant did not have her permission to give them money, Antoinette denied that it made her angry.

¶ 45 Antoinette testified that in February 2012 or 2013, she was in the hospital to have her appendix removed. She stayed in the hospital two nights and recalled that defendant brought A.A. and two of her other grandchildren to the hospital to visit.

¶ 46 Elsea testified she was a forensic interviewer for the Macon County Child Advocacy Center. On May 20, 2015, she interviewed A.A. and their interview was recorded. The recorded interview was admitted into evidence and played for the jury. During the interview, A.A. described sexual conduct with defendant similar to her trial testimony and that occurred from the time A.A. was 7 until she turned 13.

¶ 47 At the close of the State's evidence, defendant moved for a directed verdict and the State moved to dismiss counts I, II, and III. The trial court denied defendant's motion and granted the State's motion to dismiss.

¶ 48 Defendant then presented the testimony of Antoinette and himself. Antoinette testified that there were times she and defendant both went to check on A.A. at the bus stop when A.A. was residing at Southern Hills. If it was cold or raining, they would let A.A. sit in the car until her bus came. Antoinette estimated that occurred four times. She further testified there were times defendant went to the bus stop to check on A.A. on his own. Antoinette acknowledged that she still wore her wedding ring and that the reasons she divorced defendant was so that she could qualify for housing.

¶ 49 Defendant testified and, initially, acknowledged having been convicted of burglary in 2009. He denied having any sexual contact with A.A. He admitted that he gave A.A. money but asserted he would "give all the kids money." Defendant denied offering to give A.A. $100 but stated they had discussed that amount of money before. He stated that A.A. once observed him paying someone he worked with $500 in $100 bills and that she asked for one of the bills. Defendant denied that he offered A.A. money in exchange for oral sex.

¶ 50 Defendant testified he performed "self-contracting" work, stating he remodeled homes and employed others to work with him. He estimated he lived in the Wellington Way apartment five to seven years. Defendant testified there were three occasions while living at the Wellington Way apartments that he went to the Southern Hills bus stop by himself. He stated he might also have gone once with Antoinette. Defendant stated he took A.A. to the Dollar Store three times to buy her snacks but not McDonalds. He denied that he touched or fondled A.A.'s vaginal area during any of those trips. Defendant agreed that after A.A. moved to Nicole's residence, he occasionally went by that house "to check and see if the kids had made the bus." He testified he went to Nicole's house in the morning several times over a two-month period be-

cause Antoinette asked him to go.

¶ 51 Defendant asserted that on the morning of May 15, 2015, he went to Nicole's house at approximately "a quarter till, five till nine." He stated he went to knock on the door and observed A.A. and Sibley through the glass in the door. According to defendant, A.A. was "laying on the couch on her back" and Sibley was "over the top of [A.A.]." He testified A.A. saw him and pushed Sibley, who got up, ran out the front door, and got in defendant's face. Defendant stated he pulled his knife and he and Sibley argued. He testified A.A. ran "toward the back room somewhere"; however, the school bus pulled up and defendant yelled at her to get on the bus. When A.A. left the house defendant "spanked her on the butt" and she "went down the street crying to get on the bus." Defendant testified he and Sibley began fighting and wrestling on the porch. Ultimately, Sibley ran in the house and slammed the door. Defendant threatened to "tell [Sibley's] girl what [Sibley] was doing" and then left in his car. Later, defendant received a call from Antoinette. Following that call, he picked Antoinette up and returned to Nicole's house.

¶ 52 Defendant further explained he and A.A. would have "pillow fights and all that different type of stuff around the house." According to defendant, that was what was occurring the night that Antoinette observed him on the couch with A.A.

¶ 53 On cross-examination, defendant testified he did not know what Sibley was doing when he observed him and A.A. on the couch together. Further, he acknowledged that he did not call the police to report the incident. Initially, he also asserted that he did not tell anyone about the incident. However, on further questioning the following colloquy occurred between the State and defendant:

"Q. But this didn't come up anytime before; is that correct?

A. No, it didn't. I told somebody, but they're not here.

Q. Oh, who is that?

A. I told my employees. I told them. I told both of them what had happened.

Q. Oh, and what are their names?

A. Pardon?

Q. What are their names?

A. Greer [(also identified as Grier in the record)] and Bonds.

Q. They just have one name?

A. John Bonds and Greer. That's Greer's last name. I don't know Greer's first name."

Defendant testified he also told Antoinette about what happened between Sibley and A.A. when he picked Antoinette up to take her to Nicole's house. He stated he did not tell that information to either Stephanie or Nicole because of the confrontation that ensued at Nicole's house. Finally, defendant asserted that, a couple days later, he also told his brother, Clifford Mitchell, what he had witnessed.

¶ 54 Defendant further denied that he was ever alone with A.A., either at her residence or at his Wellington Way apartment. He specifically denied being alone with A.A. while Antoinette was in the hospital with appendicitis.

¶ 55 The jury found defendant guilty of each of the remaining 11 counts against him (counts IV through XIV). On January 15, 2016, defendant filed a motion for a new trial or a

judgment notwithstanding the verdict. Relevant to this appeal, he argued that the trial court erred in allowing the testimony of Tiera, Austin, Stephanie, and Elsea "as to statements made to them by [A.A.]."

¶ 56 On February 16, 2016, the trial court addressed and denied defendant's posttrial motion and then conducted his sentencing hearing. During sentencing, A.A. read a victim impact statement to the court and defendant presented the testimony of two witnesses, his pastor and his brother. Defendant also made a statement on his own behalf, during which he complained that his trial counsel, Scott Reuter, had been ineffective. Upon further inquiry by the court, defendant asserted Reuter erred by not calling Sibley to testify at trial. He complained that Reuter and the State "made deals about not having [Sibley]" take the stand and argued that he "should have had some say-so" about whether Sibley testified.

¶ 57 The trial court then asked Reuter whether he had any comment about defendant's claim. Initially, Reuter responded that the State had indicated its intent to call Sibley as a witness and made statements that he would testify in connection with the State's section 115-10 motion; however, Sibley had a warrant out for his arrest and did not appear at the hearing. Reuter further stated that he made the tactical decision not to "try and get" Sibley to "put him on the stand." Reuter noted defendant's testimony that defendant observed Sibley in a compromising position with A.A. but stated he suspected that, if called to testify, Sibley would deny any wrongdoing and "continue to blame [defendant]." Reuter believed it was better for defendant's case not to call Sibley as a witness and asserted he tried to explain his chosen strategy to defendant.

¶ 58 The trial court next asked the State, represented by Assistant State's Attorney Kate Kurtz, if it had "any comment." Kurtz initially responded that there had been "no arrange-

ment" with Reuter regarding Sibley and that the she "would have liked to have called him" but "[h]e didn't show up." Kurtz further stated as follows:

> "Um—[A.A.] testified as the Court I'm sure recalls, and it's been a while, and I'm going through my notes—um—but I don't believe—she certainly was subject to cross-examination; she didn't refuse to answer any questions; and she certainly could have been asked by the defense if anything—uh—if they had tried to go that route, I'm sure I would have objected to it because there was a rape shield motion—uh—but in terms of any arrangement between myself and Mr. Reuter, that's not true, and I just think the record should reflect we had no arrangement as to *** Sibley."

The trial court found no "incompetence of counsel" regarding Reuter's failure to present Sibley as a witness. In so holding, it referenced Reuter's representations that he thought it was a better choice not to call Sibley to the stand and determined Reuter had made a tactical decision.

¶ 59 The trial court next addressed defendant's claim that his counsel was ineffective for failing to present other witnesses at trial. Regarding this claim, defendant asserted he asked Reuter whether "it [was] all right if [defendant] had some of [his] *** witnesses during [his] trial" but Reuter said "no" because there were laws that did not "permit them on the stand." Upon further inquiry into defendant's claim, the following colloquy occurred between the trial court and defendant:

> "THE COURT: *** [Defendant], you said *** something *** about Mr. Reuter not calling certain witnesses. Uh—is that one of the things you're trying to say here just a minute ago?

THE DEFENDANT: Yes.

THE COURT: Who?

THE DEFENDANT: I had—uh—uh—Grier. Uh—the guy that I was working with. I don't recall his last name, and John Bonds.

THE COURT: John. What's his name?

THE DEFENDANT: John Bonds. That was the two that was with me when—uh—[A.A.] came up to me and was talking about the money issue. Uh—John Bonds is the one that I had talked to—uh—[the Department of Children and Family Services (DCFS)] on the phone."

¶ 60 In responding to defendant's claim, Reuter reviewed his records and stated he did not "have any notes specifically" as to either Bond or Grier. He further stated as follows:

"[Defendant is] telling me now *** that I told him when we first met that something like we couldn't call witnesses which I would never have done. Uh—I sometimes tell clients that there are reasons we can't call certain witnesses for certain issues, like in an example Rape Shield Laws, but I would not have told him we can't call any witnesses, and in fact, we talked about other witnesses. We talked about his wife ***. We talked about originally when the case was preceding [*sic*], *** there was a move [*sic*] by [t]he State to admit other crimes evidence as to [R.W.] We talked about—uh—Clifford Mitchell, Patricia Morgan, Nicole [A.] being witnesses there. So, we clearly talked about other witnesses, and I—uh—so, I don't know what to say about that. He's saying I told him that we couldn't call witnesses, but we clearly talked to witnesses[.]"

¶ 61 Again, the trial court invited the State to comment, stating, "Okay. Miss Kurtz?" Kurtz responded, stating, "I don't have anything, Judge." The court then rejected defendant's claim of ineffective assistance. It stated it was "kind of hard to issue a subpoena for somebody you only know by the name of Grier" and it did not believe that Reuter told defendant "we can't call witnesses." Additionally, the court noted that, after jury selection and prior to trial, it had reviewed the witness list and shown the list to defendant. The court stated it then asked defendant whether there were "any persons not on that list that [he thought] should be called as a witnesses" and defendant responded " 'no.' "

¶ 62 After addressing defendant's *pro se* claims, the trial court continued with sentencing. It imposed 20-year prison sentences for each of defendant's five predatory-criminal-sexual-assault convictions, counts IV through VIII, and seven-year prison terms for each of defendant's six aggravated-criminal-sexual-abuse convictions, counts IX through XIV. The court ordered defendant's sentences for counts IV through IX to be served consecutively and his sentences for counts X through XIV to be served concurrently with count IX, resulting in an aggregate sentence of 107 years in prison. On March 16, 2016, defendant filed a motion to reconsider, asking the court to reconsider its sentencing decision on the basis that it was excessive. On April 14, 2016, the court denied defendant's motion.

¶ 63 This appeal followed.

¶ 64 II. ANALYSIS

¶ 65 A. Victim's Hearsay Statements

¶ 66 On appeal, defendant first argues the trial court erred in admitting the recording of statements A.A. made to Elsea under section 115-10 of the Code. He acknowledges that section

115-10 sets forth a hearsay exception for testimony of an out-of-court statement made by a victim under the age of 13 concerning sex acts perpetrated upon or against the victim. However, he asserts the exception cannot apply in this case to permit A.A.'s recorded statements into evidence because the State could not meet all of the statutory requirements for admission. In particular, defendant asserts the majority of A.A.'s recorded statements were not "made before [A.A.] attained 13 years of age or within 3 months after the commission of the offense." 725 ILCS 5/115-10(b)(3) (West 2014). Defendant further contends he was denied a fair trial because the improperly admitted recorded statements unfairly bolstered A.A.'s trial testimony.

¶ 67 Initially, defendant acknowledges that he did not raise this particular issue with the trial court. As a result of that failure, we find the issue has been forfeited. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988) (stating that to preserve an issue for appeal, a defendant must both make a trial objection and raise the issue in a written posttrial motion). Nevertheless, a defendant's failure to properly preserve an issue may be excused under the plain-error doctrine. On review, this court may address a forfeited claim under the plain-error doctrine when:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that 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." (Internal quotation marks omitted.) *People v. Reese*, 2017 IL 120011, ¶ 60, 102 N.E.3d 126.

When applying the plain-error doctrine, we first determine whether a clear or obvious error occurred. *Id.* Here, defendant asserts only the occurrence of first-prong plain error, maintaining that reversal is warranted because a clear and obvious error occurred in the admission of A.A.'s recorded statements and that the evidence was closely balanced.

¶ 68 Section 115-10 of the Code establishes a hearsay exception for the out-of-court statements of child victims of sexual offenses. 725 ILCS 5/115-10 (West 2014)). Specifically, it provides as follows:

> "In a prosecution for a physical or sexual act perpetrated upon or 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." *Id.*

Section 115-10(a)(2) contemplates the introduction of a child victim's recorded statements. *People v. Bowen*, 183 Ill. 2d 103, 112, 699 N.E.2d 577, 583 (1998).

¶ 69 Section 115-10 further sets forth various requirements for the admissibility of the child victim's out-of-court statements. Specifically, it provides that "[s]uch testimony shall only be admitted" under the following circumstances:

> > "(1) The court finds in a hearing conducted outside the presence of the ju-

ry that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child *** either:

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement; and

(3) 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*, but the statement may be admitted regardless of the age of the victim at the time of the proceeding." (Emphasis added.) *Id.* § 5/115-10(b).

¶ 70 As stated, defendant argues A.A.'s recorded interview with Elsea was improperly admitted into evidence under section 115-10 because the recording was made after A.A. turned 13 and the bulk of A.A.'s recorded statements concerned specific sexual acts that occurred in excess of three months prior to when the recorded statements were made. In response, the State has essentially conceded that error occurred in the admission of most of A.A.'s recorded statements. Nevertheless, it maintains defendant cannot show that plain error occurred because the evidence presented at defendant's trial was not closely balanced. We accept the State's concession that error occurred as most of A.A.'s recorded statements concerned sexual acts that occurred outside of the time frame contemplated by section 115-10. However, for the reasons that follow, we also agree with the State's assertion that the evidence presented at defendant's trial was not closely balanced.

¶ 71 Defendant argues the case against him "boiled down to a credibility contest between A.A.'s version of [the] events and [his]." However, we find defendant fails to give appropriate consideration to A.A.'s detailed testimony or the supporting and corroborating evidence.

¶ 72 At trial, A.A. testified regarding escalating sexual acts perpetrated on her by defendant for a six-year period from approximately age 7 to age 13. She provided detailed descriptions of the acts and the context in which they occurred. Further, A.A.'s testimony was substantially corroborated by other witnesses as to related details. In particular, we note Antoinette's testimony that on two occasions she observed defendant engage in conduct with A.A. that she found concerning; Austin's testimony regarding his observations of A.A. being routinely picked up at their bus stop; testimony regarding the living arrangements of relevant individuals in the case and defendant's opportunities to be alone with A.A.; and testimony from Austin and Tiera regarding A.A.'s disclosures of abuse.

¶ 73 Additionally, the defendant's theory of defense, as noted in his brief on appeal, was that "false allegations of abuse had been concocted against [him] by *** Sibley after [defendant] discovered Sibley engaged in inappropriate sexual behavior with A.A." However, defendant's alleged "discovery" of Sibley and A.A. on the morning of May 15, 2015, occurred well after A.A. had made her disclosures of abuse to Austin and Tiera and identified defendant as the perpetrator. In other words, A.A.'s disclosures to Austin and Tiera occurred at times when A.A. would have had no apparent motive to falsely accuse defendant of sexual abuse. Given the corroborative testimony of Austin and Tiera, defendant's version of events was simply implausible.

¶ 74 Having reviewed the evidence presented at defendant's trial, we do not find it was so closely balanced that the trial court's error in admitting A.A.'s recorded statements "alone

threatened to tip the scales of justice against the defendant." *Reese*, 2017 IL 120011, ¶ 60. Further, we find the cases cited by defendant on appeal are distinguishable and do not warrant a finding that the evidence was closely balanced in this particular case. Accordingly, defendant's forfeiture of this issue is not excused under the plain error doctrine.

¶ 75 Finally, we also reject defendant's claim that his counsel was ineffective for failing raise this particular challenge to A.A.'s recorded statements with the trial court.

> "To establish ineffective assistance of counsel, a defendant must satisfy the two-prong *Strickland* test [(*Strickland v. Washington*, 466 U.S. 668, 694 (1984))], demonstrating that: (1) counsel's performance was objectively unreasonable compared to prevailing professional standards; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *People v. Patterson*, 2014 IL 115102, ¶ 81, 25 N.E.3d 526.

For the reasons already expressed, defendant cannot establish that, absent the improper admission of A.A.'s recorded statements, the result of his trial would have been different.

¶ 76 B. *Krankel* Inquiry

¶ 77 On appeal, defendant next argues that the trial court erred by failing to conduct a proper *Krankel* inquiry. He contends he is entitled to a new hearing or the appointment of new counsel to address his *pro se* ineffective-assistance-of-counsel claims.

¶ 78 A *Krankel* inquiry "is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel." *People v. Ayres*, 2017 IL 120071, ¶ 11, 88 N.E.3d 732. "[T]he goal of any *Krankel* proceeding is to facilitate the trial court's full consideration of a de-

fendant's *pro se* claim and thereby potentially limit issues on appeal." *Id.* ¶ 13. When conducting a *Krankel* inquiry, the following procedure is required:

> "[T]he trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003).

Further, a trial court may conduct a preliminary *Krankel* inquiry by "(1) questioning the trial counsel, (2) questioning the defendant, and (3) relying on its own knowledge of the trial counsel's performance in the trial." *People v. Peacock*, 359 Ill. App. 3d 326, 339, 833 N.E.2d 396, 407 (2005). Whether the trial court conducted a proper *Krankel* inquiry is subject to *de novo* review. *People v. Thomas*, 2017 IL App (4th) 150815, ¶ 24, 93 N.E.3d 664.

1. State Participation

¶ 79 Initially, defendant complains that the trial court erred when addressing his *pro se* claims of ineffective assistance of counsel because it invited the State to participate in its inquiry.

¶ 80 In *People v. Jolly*, 2014 IL 117142, ¶ 38, 25 N.E.3d 1127, the supreme court held that "a preliminary *Krankel* inquiry should operate as a neutral and nonadversarial proceeding." It stated that "[b]ecause a defendant is not appointed new counsel at the preliminary *Krankel* inquiry, it is critical that the State's participation at that proceeding, if any, be *de minimis*" and that "the State should never be permitted to take an adversarial role against a *pro se* defendant" during the preliminary inquiry. *Id.* The court determined improper, one-sided adversarial testing

occurred during the *Krankel* inquiry in the case before it, stating as follows:

> "Here, the circuit court permitted the State to question [the] defendant and his trial counsel extensively in a manner contrary to [the] defendant's *pro se* allegations of ineffective assistance of counsel and to solicit testimony from his trial counsel that rebutted [the] defendant's allegations. In other words, the circuit court allowed the State to confront and challenge [the] defendant's claims directly at a proceeding when [the] defendant was not represented by counsel. The State also presented evidence and argument contrary to [the] defendant's claims and emphasized the experience of defendant's trial counsel. Thus, *** the State and [the] defendant's trial counsel effectively argued against [the] defendant at a proceeding when he appeared *pro se*." *Id.* ¶ 40.

Ultimately, the court determined that reversible error occurred. *Id.* ¶ 41.

¶ 81 Here, we agree with defendant that the trial court erred in inviting the State to participate in an adversarial manner when inquiring into his *pro se* claims of ineffective assistance of counsel. The record reflects the court did ask the State to comment on defendant's *pro se* claims and, ultimately, the State advocated against defendant as to one of his claims. However, what occurred in this case does not rise to the level of what occurred in *Jolly* and we find reversal for a new *Krankel* inquiry is unwarranted because any error was harmless. See *People v. Skillom*, 2017 IL App (2d) 150681, ¶ 28, 74 N.E.3d 117 (noting "that, although the *Jolly* court declined to find the error in that case harmless, it did not hold that errors committed during a preliminary *Krankel* hearing could never be subject to harmless-error review").

¶ 82 The record shows defendant raised two *pro se* claims of ineffective assistance of

counsel. Specifically, he asserted Reuter was ineffective because he did not call Sibley as a witness and because he did not call certain other witnesses. The State commented only on the claim involving Sibley and prior to the State's comments, defense counsel clearly and unequivocally expressed that he made a tactical decision not to call Sibley as a witness. Notably, in finding no ineffective assistance with respect to defendant's Sibley claim, the trial court relied on only Reuter's explanation that his decision was a tactical one and not on any assertion made by the State in responding to that claim. Because the record shows no merit to the only *pro se* claim on which the State commented, we find the State's participation in the underlying proceedings does not require a new *Krankel* inquiry. See *People v. Manning*, 241 Ill. 2d 319, 327, 948 N.E.2d 542, 547 (2011) ("Matters of trial strategy are generally immune from claims of ineffective assistance of counsel.") (Internal quotation marks omitted).

¶ 83 *2. Possible Neglect*

¶ 84 Finally, defendant also contends that new counsel should have been appointed to represent him because the trial court's *Krankel* inquiry demonstrated "possible neglect" of his case by Reuter.

¶ 85 In the context of a *Krankel* proceeding, "[i]f a trial court has reached a determination on the merits of a defendant's ineffective assistance of counsel claim, we will reverse only if the trial court's action was manifestly erroneous." *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25, 960 N.E.2d 27. " 'Manifest error' is error that is clearly plain, evident, and indisputable." *Id.*

¶ 86 Here, defendant raised a *pro se* posttrial claim that Reuter was ineffective for failing to present certain witnesses at trial. Initially, he complained that he asked Reuter if he could

present witnesses but Reuter responded " 'no' " because there were laws that did not "permit them on the stand." Upon inquiry by the trial court, defendant identified John Bonds and Grier as the witnesses he wanted to present, asserting they were with him when A.A. approached him "and was talking about the money issue." The trial court found these specific claims were without merit and we can find no manifest error in that decision. In particular, Reuter denied that he told defendant he could not call witnesses at trial and identified at least five potential witnesses that he and defendant discussed and had "talked to." Additionally, he indicated he did not "have any notes" regarding either Bonds or Grier, the specific witnesses identified by defendant, indicating defendant had not disclosed the witnesses to him prior to trial. Further, the court relied on its own recollection of the underlying proceedings, stating it had reviewed the witness list at the outset of the case with the parties and defendant indicated he had no other witnesses he wished to present.

¶ 87 On appeal, defendant raises a slightly different claim regarding Bonds and Grier than was addressed at the time of the trial court's *Krankel* inquiry. Specifically, he points out that, at trial, he testified to observing Sibley lying on top of A.A. and asserted that he told Bonds and Grier about what he observed. Defendant maintains that, on cross-examination, the State inferred he had recently fabricated his testimony and, as a result, Reuter should have investigated Bonds and Grier and called them as witnesses to rehabilitate his credibility.

¶ 88 Again, however, we can find no error. As stated, Reuter asserted during the trial court's *Krankel* inquiry that he did not "have any notes" on the two specific individuals named by defendant, indicating he had been unaware of their existence prior to trial. At trial, defendant reported seeing Sibley on top of A.A. After initially denying that he told anyone what he ob-

served he then testified that he relayed his observation to Bonds and Grier. Ultimately, however, the record fails to indicate that Reuter knew of the existence of either witness until the moment of defendant's testimony on cross-examination and near the end of his trial. Under these circumstances, we find no support for defendant's assertion of "possible neglect" based on Reuter's failure to investigate and present Bonds or Grier as witnesses.

¶ 89 III. CONCLUSION

¶ 90 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State $75 as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 91 Affirmed.