2019 IL App (1st) 151244-U

No. 1-15-1244

Order filed February 13, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	10 CR 12153
	)	
IVAN GARCIA,	)	The Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The use of other-crimes evidence was not unduly prejudicial to defendant. While the trial court erred in failing to issue a particular jury instruction, it did not rise to the level of plain error because the evidence was not closely balanced, and trial counsel was not ineffective relating to the jury instruction because there was no resulting prejudice. Trial counsel was also not ineffective for failing to impeach the main witness with prior inconsistent statements, and the State's closing arguments were not improper. This court therefore affirmed the judgment of the circuit court.

¶ 2 Following a jury trial, defendant Ivan Garcia was found guilty of predatory criminal sexual assault of a child and aggravated criminal sexual abuse, then sentenced to a total of 52

years' imprisonment, to be served consecutively with his 20-year sentence on a separate sexual assault conviction. Defendant raises a number of arguments on appeal relating to improper use of other-crimes evidence, improper jury instructions, ineffective assistance of counsel, and improper closing arguments. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant Ivan Garcia was charged with multiple counts of sex crimes against his minor nieces, K.M. and D.M., then tried separately as to each of the victims. At K.M.'s trial (case number 09 CR 18887), evidence showed that while executing a search warrant for drugs on September 26, 2009, police discovered video and other evidence that defendant, then age 29, had sexually abused K.M., then age 15. She testified at length about the nine-month period during which he digitally penetrated her, performed oral sex, and groomed her until she "just gave up," and had sex with him almost daily while he acted as her boyfriend/father-figure. D.M., who was age 11 at K.M.'s trial, testified as an other-crimes witness that defendant had also performed oral sex on her and digitally penetrated her when she was age 7. The children's mother and the sister of defendant, Virginia, was largely absent during this time even though her four children, plus defendant's own two children, lived with him at their apartment in Chicago. A jury found defendant guilty of aggravated criminal sexual abuse, and defendant was sentenced to 20 years in prison. Defendant appealed, and this court affirmed his conviction, which was entered on July 17, 2013. *People v. Garcia*, 2017 IL App (1st) 133398.

¶ 5 The State then proceeded in a separate jury trial, commencing on December 3, 2014, on the charges against defendant as to D.M. (case number 10 CR 12153). On its own motion, the State offered other-crimes evidence relating to defendant's sexual abuse against K.M.[1], and the

[1]In its other-crimes motion, the State sought to introduce evidence of defendant's guilty plea in case number 01 CR 24551, for predatory criminal sexual assault of B.N., defendant's 8-year-old female cousin. The State

State offered as an exhibit defendant's certified statement of conviction in that case (09 CR 18887).[2] In D.M.'s case, as a means of explaining how defendant initially came to be arrested, the State was allowed to offer limited testimony from Officer David Salgado that he executed a search warrant at defendant's apartment on September 26, 2009, where police discovered a black safe box containing the video evidence of defendant and K.M. engaged "in sex acts." On arriving, police saw defendant and K.M. emerging from one room and Virginia and the other children emerging from another. Virginia also testified that police searched their home and that the video showed defendant having sex with K.M.

¶ 6 Prior to the testimony of Virginia and Officer Salgado, the trial court provided the jury with an other-crimes instruction. In particular, the court stated the jury would hear evidence that defendant had been involved in an offense other than that charged in the indictment, and "[t]his evidence is being received on the issues of the defendant's intent, motive, [and] propensity to commit *** sexual assault," and to demonstrate how the investigation unfolded. The court stated the jury could consider such evidence only for that limited purpose and to determine whether defendant was involved in the offense and if so what weight to give it on the issues of intent, motive, and propensity to commit sexual assault.

¶ 7 K.M.'s testimony, although truncated, largely reflected that set forth in *People v. Garcia*, 2017 IL App (1st) 133398, showing defendant groomed her and eventually had sex with her daily. K.M. confirmed that defendant was arrested and then charged for having sex with her. She identified a photo of defendant's bed, the safe where the video evidence was found, and two still photos from the video. In one, Exhibit 6, defendant's mouth was positioned by K.M.'s butt and

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asserted defendant inserted his finger into B.N.'s vagina and butt in the summer of 2001. Although the trial court granted the State's motion as to B.N., the State declined to present this evidence, choosing to rely on that involving only K.M.

[2]When the jury retired to deliberate in D.M.'s case, this certified copy of conviction was not sent back with the jury.

probably touching her vagina. The second still photo, Exhibit 7, showed his penis touching her vagina. Notably, the photos are part of this record and appear dark, blurry, and grainy. They will be discussed in more depth in the analysis section. Prior to K.M.'s testimony, the court repeated the other-crimes jury instruction.[3]

¶ 8 For the State's case-in-chief, D.M., who was age 13 at trial, then testified that between October 2008 and September 2009, defendant sexually abused her. The first time, she fell asleep in defendant's bed but awoke to him removing her pajama pants. Defendant was on his knees, removed her underwear, and "spread [her] legs" with his hands before groping her vagina, also placing his hand inside, and putting his mouth on it and tongue inside. D.M. did not tell anyone because she thought she would get into trouble, that defendant was K.M.'s boyfriend, and the abuse "was like something bad." Several weeks later, D.M. fell asleep in defendant's bed again, and she awoke to him undressing her and, while on his knees, spreading her legs with his hands, and performing oral sex. Again, she did not tell anyone because she thought she would get into trouble. Defendant repeated this behavior more than five times.

¶ 9 Several days after defendant's fall 2009 arrest for the sexual abuse of K.M., D.M. was examined and evaluated by a Children's Advocacy Center (Advocacy Center) doctor. D.M. testified that she did not tell the doctor about defendant's sexual abuse because she "didn't know who [the doctor] was." On cross-examination, D.M. elaborated that when questioned, she told the doctor "nothing bad" had happened, "nobody hurt" her, and "nobody touched" her in a way she didn't like, including on her butt or vagina.

¶ 10 After the arrest, all four of Virginia's children were placed in shelter care under the control of the Department of Children and Family Services (DCFS) and later were placed with

[3]The second jury instruction on other-crimes evidence omitted mention that the evidence would show how the investigation unfolded.

another family member. Virginia maintained supervised visitation once a week initially. Around December 2009 or March 2010 and during one such visit, Virginia testified that she inquired "if something happened" to D.M. At Virginia's suggestion, D.M. opted to write a letter, as she was unable to otherwise express herself. D.M.'s December 2009 or March 2010 letter, originally written in Spanish after she had turned 8 years old, stated the following:

> "Okay, Mom. Sorry that he - - that they touched me in my body and Ivan touched me in my mouth and in my private part. And in my body and he sucked my thing and he was telling me that when he sucked my thing to open my legs like the other time in the police when they were checking and he gave me a kiss in my mouth and he told me all the time I love you and I didn't tell him that, mom, and when you were in Mexico I wouldn't let him touch me in my body. Never again, mom, am I going to let someone touch me, okay? I promise. Oh, and he put his tongue in my mouth when he gave me a kiss, my Uncle Ivan. Bye. I love you, mom."

¶ 11 D.M. also identified the letter wherein she revealed the abuse to her mother and read it while simultaneously translating it to the jury.[4] D.M. testified that she wrote it because defendant "was in jail" and she knew "he wasn't going to be able to get out." On cross, D.M. stated that Virginia only asked her once about whether anything happened between her and defendant, and this was at the time D.M. wrote the letter. Defense counsel then questioned D.M. about when she gave the letter to her mother, and D.M. responded that it was about two weeks "after [Virginia] told me what was going on." Defense counsel, however, did not further clarify what D.M. meant by this statement.

[4]This letter, originally written in Spanish, was read into the record three different times, once pretrial and two times at trial, and varies slightly in each of its translations. The first two times, Virginia read the letter into the record but with different translators. The third time, D.M. read the letter into the record while translating it from Spanish to English for the jury. Because D.M. authored the letter and was fluent in both English and Spanish, we have chosen to present her own translation.

¶ 12 After D.M. revealed the letter to her mother, D.M. again returned to the Advocacy Center. Detective Jose Castaneda testified that he was assigned to conduct investigations involving alleged sexual abuse of children and testified about D.M.'s subsequent interview at the Advocacy Center on March 16, 2010, with forensic interviewer, Maria Ramirez. Detective Castaneda observed the interview from an adjacent area, on the other side of a one-way mirror, while Virginia, K.M., and their aunt remained outside in the waiting room.[5] Although D.M. initially stated she did not remember "if anything happened to her," she went on to reveal the sexual abuse. At the interview, D.M. told Ramirez that she was eight years old, in second grade, and understood the difference between a truth and a lie. When she was age seven, and on more than one occasion in his bedroom, defendant kissed her mouth and neck, touched her tongue with his tongue, took off her pants, and touched her vagina with his mouth, tongue, and fingers. On cross-examination, according to Detective Castaneda, D.M. relayed something to the effect that her mother "told her to make a note because she was going to take this to court." D.M. also testified that she was honest in the interview.

¶ 13 Detective Castaneda then interviewed Virginia, K.M., and D.M.'s aunt, and Virginia turned over to police D.M.'s letter describing the abuse. Although defendant was already incarcerated, he was arrested for the sexual abuse against D.M. on June 16, 2010. Following this evidence, the court again instructed the jury that they had heard evidence of other crimes and should consider it only for that limited purpose. The State then rested its case.

¶ 14 The defense presented as its sole witness defendant's other sister, Raquel Garcia, who testified that she lived with Virginia the summer of 2013, and overheard Virginia tell D.M. to "remember what you have to say." Raquel assumed they were getting ready to go to court,

[5]Apparently, page III-159 is missing the bottom portion of a question and also a page number due to a printing glitch.

although D.M. never responded to the comment. Raquel did not remember what day or month she heard the statement, and did not understand what Virginia meant. The defense rested.

¶ 15 The jury found defendant guilty of predatory criminal sexual assault of a child and aggravated criminal sexual abuse. Defendant filed a motion for a new trial, which was denied. Defendant also requested a hearing under *People v. Krankel*, 102 Ill. 2d 181 (1984). The court listened at length to defendant's complaints about the trial and his counsel, and the court inquired of defense counsel, and ultimately rejected defendant's request after finding defense counsel was not neglectful or ineffective. The court found there was a "pattern of dangerous criminal sexual crimes by [defendant] against youthful victims" and the public needed "protection." The court then sentenced defendant to consecutive terms of 45 years' imprisonment for predatory criminal sexual assault of a child and 7 years for aggravated criminal sexual abuse, both of which were to run consecutive to his 20-year conviction in 09 CR 18887. This appeal followed.

¶ 16 ANALYSIS

¶ 17 *Other-Crimes Evidence*

¶ 18 Defendant first contends[6] the trial court improperly allowed the State to introduce other-crimes evidence relating to the sexual abuse of K.M. See 725 ILCS 5/115-7.3 (West 2008). While other-crimes evidence is generally inadmissible to show propensity, section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) is an exception permitting the State, in sex offense prosecutions, to introduce evidence of other sex offenses by defendant provided the evidence

[6]Initially, in this appeal, defendant argued that he did not validly waive his right to counsel when he represented himself on a pretrial motion because the trial court failed to admonish him as required by our Supreme Court Rules. Defendant next argued the trial court erred in denying his motion for a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), which gives a defendant a limited right to attack the veracity of search warrant affidavits. Defendant further argued the trial court erred in denying his motion to suppress evidence. The State responded that all of these arguments were barred by collateral estoppel since this court addressed these pretrial issues stemming from similar charges in *People v. Garcia*, 2017 IL App (1st) 133398. In his reply brief, defendant concedes these issues are collaterally estopped by our previous decision. Accordingly, we need not consider them further.

meets certain criteria identified below. See 725 ILCS 5/115-7.3 (West 2008). Defendant now argues that in this case the prejudicial effect of the other-crimes evidence substantially outweighed its probative value because three witnesses, including Virginia, Officer Salgado, and K.M., testified about the video evidence of defendant having sex with K.M., and K.M. identified two still photographs from the video that actually showed the sex acts. Defendant asserts the State conducted a "mini-trial" against him relating to K.M., thereby denying him a fair trial on the charges actually lodged in this case, which related only to D.M.

¶ 19 The State responds that the principal focus at trial remained on D.M., as a mini-trial can be avoided by carefully limiting the details of the other crime to what is necessary to illuminate the issue for which the other crime was introduced. *People v. Boyd*, 366 Ill. App. 3d 84, 94 (2006). We agree with the State that the other-crimes evidence in this case was sufficiently tailored to fulfill its purpose and the trial court did not abuse its discretion in finding the prejudicial impact of the evidence regarding defendant's abuse against K.M. was outweighed by its probative value. See *id*.; *People v. Perez*, 2012 IL App (2d) 100865, ¶ 54.

¶ 20 Indeed, when weighing probative value against undue prejudice to a defendant, the trial court must consider the proximity in time to the charged offense, degree of factual similarity between the offenses, and other relevant facts and circumstances. 725 ILCS 5/115-7.3 (West 2008); *People v. Donoho*, 204 Ill. 2d 159, 182-83 (2003); *Boyd*, 366 Ill. App. 3d at 93. Here, the court did just that. Like her sister, K.M., was also a minor female family member whom defendant lured to his bed, where he secretly and repeatedly committed sex crimes against her. As with D.M., after defendant took K.M. to his bed, he took off her clothing, digitally penetrated her, and performed oral sex on her. Defendant's relationship with K.M. was more involved, as he eventually had sex with her daily, often recording it, and acted as her boyfriend. However, in

both cases, defendant also served as one of the only parental figures to the girls, presumably making the reporting of the abuse that much more difficult. That he took his relationship with K.M., a teenager, further does not detract from the similarity of the crimes. See *Donoho*, 204 Ill. 2d at 185 (the existence of some differences does not defeat admissibility). These similarities supplied the probative value of K.M.'s sexual abuse evidence and, thus, its relevance to D.M.'s case. See *Donoho*, 204 Ill. 2d at 184 (as factual similarities increase, so does relevance, or probative value, of the other-crime evidence); *Boyd*, 366 Ill. App. 3d at 93, 95 (same).

¶ 21 In addition, the crimes against the two girls were coextensive in time, occurring in 2008 and 2009, which also weighs in favor of the probative value. As such, the fact that defendant sexually abused K.M. tended to make his sexual abuse against D.M. more probable. See *People v. Boand*, 362 Ill. App. 3d 106, 125 (2005) (evidence is relevant if it tends to make the existence of any fact of consequence more or less probable than without the evidence). Because there were no other witnesses to the sexual abuse against D.M., and no physical evidence corroborating the crime, K.M.'s testimony and the physical evidence of abuse showing defendant's sex acts with her was critical and the very reason the legislature made such sex crimes admissible under section 115-7.3. See *Donoho*, 204 Ill. 2d at 176. In fact, as one bill sponsor stated in reference to the statute, "[t]his legislation, which is unique to sex offenders recognizes the propensity of sex offenders to repeat their crimes, and it allows the court to use this evidence in order to help protect society." *Id*. at 173.

¶ 22 Contrary to defendant's claim otherwise, testimony by Virginia, Officer Salgado, and K.M. regarding the search warrant, safe, video evidence, and defendant's initial September 2009 arrest, was appropriately limited, it provided context for K.M.'s testimony about the abuse, and it demonstrated the course of the investigation against defendant. Indeed, the record shows that it

was only when defendant was incarcerated for K.M.'s crime that D.M. felt comfortable enough to reveal to her mother and authorities defendant's sexual abuse against her. In that sense, facts about defendant's incarceration and conviction relating to K.M. were immediately relevant to D.M.'s case.

¶ 23 While defendant complains about the still video photo shots taken from videos as unduly prejudicial, this issue was directly addressed by the court when the parties discussed what exhibits to send with the jury during deliberations. The court noted that Exhibit 6 was "a pretty blurry photograph of a face which I believe was identified as defendant" and what appeared to be the genital area of K.M. (it actually showed his face by her butt but did not specifically show the genital area, although it can be presumed). The State confirmed this. As to the other photo, Exhibit 7, the court noted, "I don't know what it is. It's so difficult to see because it's dark," and further that "it's almost unrecognizable." The court observed, however, that there was testimony from K.M. that the photo depicted defendant's penis near her vagina. Over the defense's objections, the court determined the photos were not unduly inflammatory or prejudicial, but rather that they corroborated K.M.'s testimony, were relevant, and would therefore be sent back with the jury during deliberations. See *People v. Brown*, 172 Ill. 2d 1, 41 (1996) (if photographs are relevant to prove facts at issue, they are admissible and can be shown to the jury unless their nature is so prejudicial and so likely to inflame the jurors' passions that their probative value is outweighed). We cannot say this determination was unreasonable given the court's prior other-crimes findings and also the photos, which are not at all clear in their depictions. We reach the same conclusion regarding submission of the photo of the safe, as it was relevant and not unduly prejudicial.

¶ 24 In addition, before K.M. testified, the court issued an other-crimes limiting instruction to the jury stating this evidence was not charged but was limited to show defendant's intent, motive, and propensity to commit sexual abuse. The judge then instructed the jury that it was for them to determine whether the offense against K.M. occurred and the weight of the evidence. The court issued the same instruction in relation to the testimony of Virginia and Officer Salgado, both of whom offered evidence of the crime against K.M. as propensity and background to show the course of the investigation. The court repeated this instruction at the close of the case, just before the jury deliberated. The State appropriately focused on D.M. in opening and closing arguments. In closing, the State argued K.M.'s testimony was only to prove propensity and again read aloud the other-crimes jury instruction when discussing K.M.'s case. See *People v. Heller*, 2017 IL App (4th) 140658, ¶ 57 (noting, a competent State's Attorney would of course discuss all the relevant evidence, including other crimes, with the jury during argument). In rebuttal, the State reiterated to the jury that if they believed K.M., they could believe D.M., because K.M.'s testimony resulted in a guilty finding. The State noted that it wasn't a coincidence that defendant committed the same sex acts against two minor female members of his family at home in his own bed.

¶ 25 In short, we defer to the trial court's conclusion that evidence about defendant's sexual abuse against K.M. did not lure the jury into finding defendant guilty on a ground different from that charged and thus was not unfairly prejudicial. See *Boyd*, 366 Ill. App. 3d at 94; see also *People v. Ward*, 2011 IL 108690, ¶ 41 (prejudice is an undue tendency to suggest decision on an improper basis, such as sympathy, hatred, contempt, or horror). In fact, this evidence demonstrated defendant's propensity to prey on young females and was appropriately utilized. The court's determination was not arbitrary, fanciful, or unreasonable such that no person would

take the view adopted by the court. See . See *Donoho*, 204 Ill. 2d at 186; *People v. Taylor*, 383 Ill. App. 3d 591, 594 (2008) (defining abuse of discretion). Accordingly, the court did not abuse its discretion.

¶ 26 *Jury Instructions and Ineffective Assistance of Counsel*

¶ 27 Defendant next contends that he was denied his right to a fair trial where the trial court failed to instruct the jury about how to weigh two of D.M.'s prior hearsay statements regarding the abuse. Following a pretrial hearing, with supporting testimony from Virginia and Detective Castaneda, the court admitted D.M.'s statements under section 115-10 of the Code, which provides an exception to the hearsay rule in a prosecution for sex acts perpetrated upon a child under age 13. See 725 ILCS 5/115-10 (West 2008). The court found the time, content, and circumstances of D.M.'s statements provided sufficient safeguards as to reliability.

¶ 28 Defendant now argues that the trial court, having found the hearsay statements admissible, was required to present the jury with Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. 2000) (IPI Criminal 4th No. 11.66), which reflects the following statutory language from section 115-10(c):

> "If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child ***, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." 725 ILCS 5/115-10(c) (West 2008).

Defendant rightly notes that where a child-victim's statements have been admitted under section 115-10, this instruction must be given to the jury. *People v. Sargent*, 239 Ill. 2d 166, 190, 192 (2010); IPI Criminal 4th No. 11.66, Committee Note.

¶ 29 Defendant, however, did *not* raise this matter before the trial court. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (a defendant forfeits review of jury instruction error if he does not object to the instruction, offer an alternative instruction, or raise the instruction issue in a posttrial motion). Defendant acknowledges he forfeited this issue but nonetheless contends plain error review applies because the evidence was so closely balanced that this claimed error threatened to tip the scales of justice against him. See *Sargent*, 239 Ill. 2d 166, at 189.

¶ 30 In support of his contention that the evidence was closely balanced, defendant notes that D.M. was the only occurrence witness to the abuse, as "[n]o other witnesses observed Garcia sexually abusing D.M.," and thus the case hinged on D.M.'s credibility. Defendant points out that D.M. initially denied the abuse when questioned by the doctor at the Advocacy Center and asserts with little basis in the record that D.M.'s letter about the abuse was a result of "repeated questioning and suggestions from her mother." Defendant suggests the letter's content was not credible given the witnesses' confusion as to when it was written and/or presented to Virginia. Defendant further points out inconsistencies, including D.M.'s statement during the forensic interview that her underwear were not removed during the abuse, while testifying at trial that defendant took it off.

¶ 31 Contrary to defendant's claim, we find the evidence in this case was substantial. See *Sargent*, 239 Ill. 2d 166, at 191. Here, D.M. testified consistently and competently that defendant repeatedly sexually abused her between October 2008 and September 2009 when she was 7 years old. He would undress D.M., spread her legs, grope her vagina with digital penetration, and have oral sex with her. Although she initially denied the abuse to an evaluating doctor, several months later, D.M. eventually disclosed the abuse to her mother when D.M. realized defendant was incarcerated and would not be returning. Unable to speak of the abuse at that time, D.M. had to

write it in a letter. D.M. identified the letter at trial. D.M. also disclosed the details of the abuse during an interview at the Advocacy Center, revealing that defendant had performed oral and digital penetration of her vagina. D.M.'s statements in the letter were largely consistent with those at the Advocacy Center. Although 5 years elapsed between her initial statements and trial, D.M.'s testimony also remained consistent. Virginia and Detective Castaneda further corroborated D.M.'s prior statements alleging sexual abuse.

¶ 32 D.M.'s trial testimony was buttressed by K.M.'s testimony that defendant had sexually abused her during the same period when she was age 15. The State offered physical proof of K.M.'s abuse, and a certified copy of his conviction for aggravated criminal sexual abuse in that case, all of which made D.M.'s testimony more believable. Evidence of sexual abuse against D.M. was thus quite substantial. The "inconsistencies" defendant identifies relate more to the nature of a child reporting sexual abuse than casting any doubt on her testimony. The logical inference from D.M.'s testimony and statements is that, consistent with other sexual abuse victims, she was embarrassed by the sexual abuse at the hands of a family member and essentially the only adult in her life and also fearful to report a crime against her uncle and sister's "boyfriend." If anything, D.M.'s failure to report the abuse initially should have strengthened the credibility of her allegations in the eyes of the jury. Regardless, the claimed evidentiary inconsistencies related to credibility and the weight of the evidence, two matters within the exclusive province of the jury, and did not render the evidence closely balanced. See *People v. Rodriguez*, 2012 IL App (1st) 072758-B, ¶ 45.

¶ 33 In addition, the jury had direction about how to approach D.M.'s statements. As the State notes, the jury in this case was instructed with IPI 1.02, generally addressing the believability of witnesses:

> "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, [his age,] his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case."

This instruction conveys very similar principles as to the jury's role in assessing witness credibility and the criteria jurors may consider when making that assessment, although we note that no age was inserted in the instruction here. *Sargent*, 239 Ill. 2d 166, at 192-93; see also *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 68 (the question is "whether the instructions, taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant legal principles."). Given this instruction and the fact that the evidence was not closely balanced, the jury was able to adequately assess D.M. as a witness notwithstanding the absence of IPI Criminal 4th No. 11.66. Thus, there was no plain error warranting reversal.

¶ 34 In reaching this conclusion, we also reject defendant's contention that his trial counsel was constitutionally ineffective for failing to request IPI Criminal 4th No. 11.66. A claim alleging ineffective assistance of counsel is governed by the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29. In order to succeed on such a claim, a defendant must demonstrate that counsel's performance was deficient and that this deficiency prejudiced the defendant. *Id*. ¶ 30. Defendant must specifically show that counsel's performance was objectively unreasonable and there is a reasonable probability (*i.e.*, a probability sufficient to undermine confidence in the outcome) that but for the unprofessional errors, the result of the proceeding would have been different. *Id*. Defendant's failure to satisfy one of the prongs of the test precludes a finding of ineffectiveness. *Id*.

¶ 35 Given that the jury was adequately instructed and the evidence against defendant substantial, we cannot conclude there is a reasonable probability that the outcome of defendant's trial would have been different had the jury received IPI Criminal 4th No. 11.66. See *People v. Burt*, 205 Ill. 2d 28, 39 (2001); see also *People v. Washington*, 2012 IL 110283, ¶ 60. Defense counsel postulated numerous reasons why D.M.'s allegations should be disbelieved, thus placing her credibility, age, and maturity squarely at issue. Defendant thus was not prejudiced by the use of the standard instruction over IPI Criminal 4th No. 11.66. See *Marcos*, 2013 IL App (1st) 111040, ¶¶ 78-79; *People v. Booker*, 224 Ill. App. 3d 542, 556 (1992).

¶ 36 The cases relied upon by defendant are distinguishable because there was never any section 115-10 hearing in the first place, calling into question the reliability of the child-victim's statements, and the evidence was also closely balanced. See, *e.g.*, *People v. Mitchell*, 155 Ill. 2d 344, 354 (1993). As set forth, that is decidedly not the case here.

¶ 37 *Improper Impeachment and Ineffective Assistance of Counsel*

¶ 38 Defendant again claims ineffective assistance of counsel, contending his defense counsel failed to impeach D.M. with prior inconsistent statements. Defendant maintains that his counsel should have impeached D.M. with her testimony from case number 09 CR 18887, relating to defendant's sexual abuse against K.M. (again, where D.M. served as an other-crime's witness).

¶ 39 Defendant notes, for example, that in case number 09 CR 18887, D.M. testified that she fell asleep and defendant removed her clothing, whereas in this case she testified that she awoke to him removing her clothing; in 09 CR 18887, D.M. referenced the abuse occurring in only one apartment, whereas in this case she testified that it occurred in two different apartments (as the family had moved in August 2009). Finally, he notes discrepancies in her testimony about statements to the evaluating physician. In particular, at K.M.'s trial, D.M. testified that she did

not at first reveal the abuse to the physician because "before that I talked to another lady and I thought it was like too much," and "I kind of like got tired of saying the same thing over and over."

¶ 40 Defendant argues throughout his brief about the prejudicial nature of other-crimes evidence relating to K.M., while also thinking it appropriate to argue that his attorney should have *highlighted* additional points from K.M.'s trial where defendant was convicted. Defendant argues that his defense counsel's failure to impeach D.M. in these respects was objectively unreasonable and prejudicial to his case, and thus constitutionally ineffective.

¶ 41 We apply the same legal principles relating to ineffectiveness as set forth immediately above, while also noting the strong presumption that trial counsel's actions were the result of trial strategy rather than incompetence; as a court of review, therefore, we will not second-guess decisions which involve counsel's discretion or strategy, such as the extent to which a witness is cross-examined. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 36. *People v. Hermosillo*, 256 Ill. App. 3d 1020, 1034 (1993). In addition, we evaluate counsel's performance on the basis of the entire record, and not upon isolated instances of alleged incompetence called into question by the defendant. *People v. Flores*, 128 Ill. 2d 66, 107 (1989).

¶ 42 From our review of the record in this case, it is clear defendant received effective assistance of counsel throughout the trial. See *id*. at 108. Defense counsel presented appropriate pretrial motions, including a motion to suppress, written opposition to other-crimes evidence, and a motion *in limine* to bar evidence of prior convictions. Counsel's theory of defense was that D.M.'s allegations arose as a result of pressure from authorities as well as Virginia, a rather unlikable witness in her own right, given her remoteness from her children's lives. Counsel effectively cross-examined the witnesses, emphasized points of impeachment, presented a

defense witness, and presented opening and closing arguments on defendant's behalf, in addition to posttrial motions.

¶ 43 Defense counsel was clearly aware of case number 09 CR 18887 because she briefly cross-examined D.M. on the discrepancy as to the number of times D.M. was abused (discussed in the next section). The record supports the conclusion that counsel chose not to use the testimony from defendant's prior criminal case for purported impeachment on additional minor discrepancies because it would not have helped defendant's case. This is because defense counsel already revealed on cross that D.M. had denied abuse to the evaluating physician, had changed the number of times she was abused, and could not remember the exact day, season, or month the abuse occurred (a point the State later rehabilitated D.M. on), and attacked minor discrepancies in D.M.'s interview with the Advocacy Center.

¶ 44 If anything, highlighting the prior case in too much depth could have exposed defendant to the very prejudice he now claims occurred. It could have distracted the jury from the case-in-chief and potentially offered the State the opportunity to rehabilitate D.M. with prior consistent statements, as D.M. provided unwavering testimony in both cases that defendant sexually abused her on some five or so occasions via oral sex and digital penetration. See *People v. Smith*, 2012 IL App (1st) 102354, ¶ 67 (counsel's decision declining to impeach with civil deposition avoided risk of rehabilitation with information of prior consistent statements). Likewise, at K.M.'s trial, D.M. went on to testify that the first person she told about the abuse was her mother via a letter and she essentially did not reveal the abuse until that moment, thus contradicting D.M.'s confusing statements in reference to the evaluating physician. We see no reason to question defense counsel's decision on this matter of trial strategy. See *McGhee*, 2012 IL App (1st) 093404, ¶ 38. Moreover, defendant cannot demonstrate he was prejudiced or that the outcome of

his trial was influenced by the absence of the cross-examination.[7] See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (absent prejudice, there is no basis to find ineffective assistance). As stated, this was not a close case.

¶ 45 In so concluding, we note that the cases relied upon by defendant are inapposite since they involve instances where the defense counsel made several errors only one of which was failing to impeach a witness or where the evidence was also closely balanced. See, *e.g.*, *People v. Vera*, 277 Ill. App. 3d 130, 140-41 (1995). It was the cumulative effect of the errors that led the reviewing court to find counsel ineffective in each case. See *id*. That was not the situation here.

¶ 46 *Improper Closing Argument*

¶ 47 Defendant finally contends the State made improper comments during closing arguments, thus violating his right to a fair trial. It is well settled that a prosecutor is allowed a great deal of latitude in closing argument and has the right to comment upon the evidence presented and upon reasonable inferences arising therefrom, even if such inferences are unfavorable to the defendant. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). The prosecutor may also respond to comments by defense counsel that clearly invite a response. *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 26. However, a prosecutor must refrain from making improper, prejudicial comments and arguments. *Hudson*, 157 Ill. 2d at 441. Even if a prosecutor's closing remarks are improper, they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different. *Id*. While it is not clear whether the appropriate standard of review for this issue is *de novo* or abuse of discretion, we need not resolve the matter, because our holding in this case would be the same under either standard.

[7]Notably, defense counsel highlighted during closing arguments that D.M. had testified the abuse happened in only one apartment during her forensic interview, which was at odds with her trial testimony. Thus, one of the points of discrepancy defendant now relies on was emphasized at trial and still did not dissuade the jury from finding defendant guilty.

Alvidrez, 2014 IL App (1st) 121740, ¶ 26. That is, viewing the remarks in the context of the entire closing argument, as we must, we conclude there was no reversible error committed here. *Id*.

¶ 48 In arguing improper remarks during closing, defendant first notes that during rebuttal the State told the jury that under section 115-7.3, "If you believe [K.M.] you should believe [D.M.] Don't take my word for it, it's the law. It's more likely than not, which is what propensity means, that if he did it to [K.M.], he did it to [D.M.]." Defendant argues that this was "an egregious misstatement" of the law and "the burden of proof," as it conflated propensity with the preponderance of the evidence standard.

¶ 49 Here, the State was clearly referencing the probabilities that propensity evidence, admitted under section 115-7.3, carries with it. That is, the fact that defendant sexually abused K.M. tended to make his sexual abuse against D.M. more probable and hence more likely than not. See *Boand*, 362 Ill. App. 3d at 125 (evidence is relevant if it tends to make the existence of any fact of consequence more or less probable than without the evidence). While it would have been better for the prosecutor to state that if the jury believed K.M., it *could* believe D.M. (as opposed to *should*), and articulate the actual definition of propensity (*i.e.*, a natural inclination or tendency), this was argument. Regardless, given the State's overall argument, we do not think this rebuttal comment rose to the level of error. See *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 72 (in reviewing closing arguments, we consider the whole argument as opposed to selected remarks and phrases). In its closing, the State explicitly noted the offense involving K.M. was other than that charged in the indictment and then read the jury the other-crimes limiting instruction, while noting that the "law recognizes that predators continue to prey, especially sexual predators," an implicit definition of propensity. It expressly confined its

discussion of propensity to other-crimes evidence. In rebuttal, the prosecutor honed in on the fact that the jury should not view the abuse of the two girls as mere coincidence in response to defense counsel's impugning of D.M.'s credibility. See *People v. Walston*, 386 Ill. App. 3d 598, 610-18 (2008) (thoroughly discussing section 115-7.3 exception allowing propensity evidence in sex crimes cases and noting, section 115-7.3 implicitly condones evidence of bad character).

¶ 50 Moreover, at least one Illinois court has noted that other-crimes evidence is admissible when *the jury could reasonably find by a preponderance of the evidence* that the defendant committed the other offense. See *People v. Bedoya*, 325 Ill. App. 3d 926, 938 (2001); *but see People v. Thingvold*, 145 Ill. 2d 441, 456 (1991) (noting, under a non-sex-crime analysis, proof that defendant committed or participated in an other crime is more than mere suspicion but less than reasonable doubt). Proof by a preponderance of the evidence means that the fact at issue, here, abuse at the hands of defendant, was rendered more likely than not. *People v. Houar*, 365 Ill. App. 3d 682, 686 (2006). Notably, defendant does not cite to any cases defining the standard for admitting or weighing other-crimes evidence under section 115-7.3 in either his opening or reply brief, thus forfeiting the matter. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018).

¶ 51 The State also did not diminish its burden of proof, as it explicitly set forth the crimes it was required to prove, while identifying each of the individual elements as related to the facts established in this case. Obviously, the trial court instructed the jury that the State had to prove defendant guilty beyond a reasonable doubt. Because the State did not misstate the law or improperly respond to defense counsel's arguments, we find no error.

¶ 52 Defendant next complains about the prosecutor's comment that, in D.M.'s letter and interview at the Advocacy Center, she "was consistent when she testified [about the sexual abuse] in July of 2013," a reference to case number 09 CR 18887, relating to K.M. Defendant

argues the State failed to introduce evidence of D.M.'s 2013 testimony, and regardless it would have been improper as a prior consistent statement. We disagree for the following reasons.

¶ 53 At trial, D.M. testified that the sexual abuse occurred more than five times. On cross-examination, as a means of impeachment, defense counsel highlighted that D.M. had testified in court in July 2013. Defense counsel in fact read from the court transcript in 09 CR 18887, noting that D.M. had previously testified that defendant had sexually abused her "five times" (she thought), as opposed to more than five times, which was her testimony at the present trial. Later during cross, defense counsel again referenced D.M.'s 2013 court appearance. Thus, D.M.'s 2013 testimony was placed into evidence in the present case by defendant. Moreover, the State's reference to case number 09 CR 18887 was squarely in response to defense counsel's closing argument that the jury could consider D.M.'s testimony "in court yesterday versus what she said on earlier days," and her testimony "in a previous proceeding" that "it happened five times." Thus, even assuming any error occurred regarding these comments, it was invited by defendant.

¶ 54 Defendant next contends the State improperly argued that there was not an undue delay in D.M.'s reporting the crime several months after it occurred, where "adult rape victims take longer to report a rape than two months." Defendant also complains about the State's comments that D.M. was unaware of defendant's whereabouts after his initial arrest in September 2009. Defendant again asserts the comments had no basis in the record and improperly bolstered D.M.'s credibility, and again, we disagree. With respect to the latter comment, the State appropriately argued an inference from the evidence showing that D.M. was taken into a shelter following defendant's September 2009 arrest, having minimal contact with her siblings and only revealed the abuse to her mother after learning that defendant was incarcerated. With respect to the prosecutor's comment about adult sexual abuse victims, this argument was in direct response

to defense counsel's repeated closing comments that D.M. took too long to report the crime, and at one point denied it. The State's comment clearly referred to an inferential fact commonly known about sexual abuse victims, whether young or old – that due to the shame and embarrassment associated with abuse, victims can sometimes take years to report the abuse, if they report it at all.

¶ 55 Whether defendant preserved or forfeited his claims about closing arguments is of no moment because we find no error occurred. And, even if certain remarks were improper, they were not so prejudicial as to sway the verdict in favor of defendant's innocence given the compelling evidence of his guilt. See *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 38. As such, even assuming any error, it did not rise to the level of plain error or was harmless. Moreover, the trial court properly instructed the jury on the burden of proof, other-crimes evidence, and that the lawyers closing arguments were not evidence, thus curing any claimed error. See *id.*, ¶ 36 (counsel's argument carries less weight than do jury instructions); *People v. Willis*, 409 Ill. App. 3d 804, 814 (2011) (improper arguments can be corrected by proper jury instructions). Defendant's claim as to closing arguments fails.

¶ 56 CONCLUSION

¶ 57 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 58 Affirmed.