

2019 IL App (1st) 161169-U

No. 1-16-1169

Order filed on May 14, 2019

Modified order filed on June 18, 2019

Second Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 2776
	)	
BRIAN JONES,	)	Honorable
	)	Frank Zelezinski,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Justices Mason and Hyman concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's convictions for predatory criminal sexual assault of a child and aggravated criminal sexual abuse are affirmed. The trial court did not err when it allowed testimony about the victim's suicide attempt. The court erred when it admitted into evidence the victim's handwritten statement. However, defendant did not establish plain error for his unpreserved claim. Remanded as to fines and fees order.

¶ 2 Following a jury trial, defendant Brian Jones was found guilty of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2002)) and aggravated criminal sexual

abuse (720 ILCS 5/12-16(c)(1)(i) (West 2002)) and sentenced to, respectively, 12 and 5 years in prison on each count, to be served consecutively. On appeal, defendant contends that (1) the trial court erred when it allowed testimony about the victim's suicide attempt, (2) he was prejudiced when the court admitted the victim's handwritten statement into evidence and subsequently allowed it to be sent to the jury, and (3) the trial court erred when it imposed consecutive sentences. Defendant also challenges the assessed fines and fees. We affirm.

¶ 3 Defendant's convictions arose from incidents that occurred between October 31, 2002, and early December 2002, when defendant lived in the same house as the victim, E.C. Before trial, defendant filed a motion to suppress statements he made after he was arrested. The court denied defendant's motion, finding he made the statements voluntarily and never requested an attorney or to remain silent.

¶ 4 The State went to trial on two counts. It alleged that defendant was 17 years or older and E.C. was under the age of 13 and he committed predatory criminal sexual assault of a child by inserting his finger into E.C.'s vagina (Count I) and aggravated criminal sexual abuse in that he placed E.C.'s hand on his penis for the purpose of sexual gratification or arousal (Count II).

¶ 5 At trial, E.C., who was 18-years-old at the time of trial, testified she was born on May 9, 1997. E.C., along with her mother and brother, went to the same church as defendant. From October 31, 2002, to the end of December 2002, when E.C. was five years old, defendant lived with E.C. and her mother and brother. E.C. was not afraid of defendant when he lived in her home.

¶ 6 During this roughly one-month period, when E.C.'s mother was at work, defendant watched E.C. and her brother and would allow her brother to go outside but made her stay inside.

E.C. testified that defendant “always asked me to touch his third leg.” The first time defendant had her touch his “third leg,” he put lotion in her hand, put her hand on his penis, put his hand on top of her hand, and “stroked his penis up and down.” E.C. testified that she remembered that something came out of his penis. After this happened, E.C. watched television until her mother came home. Defendant asked E.C. to “rub his third leg” more than once but E.C. could not remember how many times. When E.C. refused, defendant locked her in the closet. E.C. testified that one time defendant took her to her room, laid her on her brother’s race car bed, took her clothes off, and inserted his fingers inside her vagina. E.C. remembered “squirming” and that defendant did not say anything. Defendant then took her into her mother’s room and let her watch Barney.

¶ 7 Between 2002 and 2013, E.C. did not tell anyone what defendant had done because she was afraid and “thought it was my fault and I thought it was something that I probably would have got in trouble for, and I just kept it to myself.” The following exchange then occurred between E.C. and the State:

“Q. And in 2013 did something happen where you had told at least some of what had happened?

A. Yes.

Q. What happened?

A. I tried to commit suicide at school.

Q. And on that date what was going through your mind?

A. I was just so tired of living because I beat myself up about the situation everyday, so I just said I was ready to go. And then at school it’s just I was tired.

Q. Were you taken to the hospital?

A. Yes.

Q. And during that time you told your mom what happened?

A. When I was transported to Ingalls a couple of days after, yes, I finally told my mom what happened.”

¶ 8 On December 11, 2013, defendant sent E.C. a private message on Facebook, after which defendant and E.C. exchanged messages. E.C. read the messages to the jury, which stated:

“[Defendant]: Hey Princess \*\*\*, (lol) I hope all is well with u [sic]. I need yo [sic] moms number, I had some tax stuff I need help with. I remember she used to help my dad...

[E.C.]: [Defendant], didn't you stay with us before?

[Defendant]: Yes, ma'am, that was a long time ago. Lol.

[E.C.]: Yeah I remember ! I was about 7 years old when you sexually assaulted me and locked me in my closet. You let [E.C.'s brother] go outside and made me Stay [sic] and play with your 'third leg' I remember it all I was just a young girl. You took my childhood from me, for 9 years I kept that held inside

[Defendant]: I am Sooo sorry, I was young and Very [sic] stupid. There is nothin u [sic] can do to take that back. Please forgive me

[E.C.]: You destroyed my entire life

[Defendant]: I'm sorry. I didn't mean to do that, I wasn't thinkin [sic] straight. Please forgive me... I would like to talk to u [sic] more and find out what I can do to make it up to u [sic].

[E.C.]: There's nothing you can do. I was only 7

[Defendant]: Can you call me now? Please? I really wanna talk to u [*sic*], I'm not a bad guy at all, I just made a BIG mistake"

¶ 9 E.C. testified that, when she spoke with Forest Park police detective Tom Piszczor at the police station, she was not able to tell him everything that happened so she wrote it down in a statement.<sup>1</sup> She was not able to tell him because she "very emotional," "still afraid to tell what happened," and "didn't have the strength to say it." E.C. identified the handwritten statement. The State did not ask her questions about the content of the statement. E.C.'s statement, which the court later admitted into evidence, stated:

"One day when my mom was gone he told me I was going to be rewarded for being such a good girl. He took me upstairs into me and my brother's room, and layed [*sic*] me down on my brother's race card bed . . . and then put his fingers inside of me . . . I remember crying stop but since I was little I couldn't push him away. He washed me up and put me and my room and let me watch my barney tapes."

¶ 10 On cross-examination, E.C. testified that she told Piszczor that, when defendant used her hand to stroke his penis, nothing came out of it. Asked whether she told Piszczor about the "third leg masturbation," she responded "I didn't tell him voicely [*sic*] but I did write it down in a statement." The following exchange then occurred:

"Q. You wrote it down on a statement?

A. Yes.

Q. About the masturbation, I'm saying.

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<sup>1</sup> The report of proceedings spells the detective's last name as "Piszczor." However, the felony complaint spelled his last name as "Piszczor." We will therefore refer to him as Detective Piszczor.

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A. Yes.

Q. Okay. Now, what the jury was allowed to see was a piece of paper where you wrote down about being laid on the bed somewhere?

A. Yes.

Q. Okay. Now, the things that you wrote on that statement, those things were — they were stated by you for the first time with Detective Piszczor; is that correct?

A. Yes.

Q. Okay. You hadn't told anybody else about being laid on the bed and fingered, had you?

A. No.”

E.C. acknowledged that, from 2002 to 2013, she did not tell anyone, including her mother, brother, father, counselors at school, or pastor, about what happened. The first time she told someone was during her hospitalization when she told her mother and therapist that she had been sexually assaulted 10 years earlier.

¶ 11 On re-direct, E.C. testified that, from 2002 to 2013, she did not tell her mother, father, or brother about what happened because she was afraid. Asked what was going through her mind from 2002 to 2013, E.C. testified that she “really wanted to tell because I was really tired of holding it in, but I just didn't have the courage to say it.” The State asked her, “[s]o from 2002 till 2013 until you had the episode in school, how were you dealing with it? How were you coping?” E.C. responded that she “just bit my tongue and just prayed that it all would go away, but it only got worse.”

¶ 12 Kimberly, E.C.'s mother, testified that, when defendant lived with her family, her children did not complain about him. After defendant moved out in December 2002, defendant and his father occasionally came to her house to watch movies. E.C. never told Kimberly that defendant locked her in the closet, put his fingers inside her vagina, or hurt her. At some point after defendant moved out, E.C. told Kimberly that defendant had locked her in the closet but did not tell her that it involved anything sexual.

¶ 13 In May 2013, E.C. was taken to the hospital when E.C. was at school. E.C. was not able to talk with Kimberly until the second day of her admission, at which time E.C. told Kimberly that defendant had molested her. Kimberly did not go to the police right away because the counselor advised her that E.C. was in a "very sensitive state," needed more counseling, and was not "really quite ready to talk about it more."

¶ 14 In December 2013, defendant contacted E.C. through Facebook and E.C. was "hysterical." Kimberly took E.C. to the police station because she feared for E.C.'s safety. E.C. was hospitalized in May and November 2013 and Kimberly had been trying to get E.C. stabilized so she could go to the police. After defendant contacted E.C. on Facebook, Kimberly felt she could not wait any longer to press charges.

¶ 15 On cross-examination, the following exchange occurred with Kimberly and defense counsel regarding the May 2013 hospitalization:

"Q. Okay. And this suicide attempt that we'll call it, you know what I'm talking about in May of 2013?

A. Yes.

Q. Okay. That never happened before May 2nd, 2013, did it?

A. She was never hospitalized for suicide before May 13th.

Q. All right. And she didn't have any problems in school before?

A. What type of problems are you referring to?

Q. Well, I mean, was she trying to hurt herself in school?

A. She was — when she was taken into the hospital, they did classify her as a cutter, which means that she had cuts on her wrists and arms. So even though I may not have noticed it, this was not the first incident.

Q. Okay. However, you didn't notice it, right?

A. Pardon?

Q. You did not notice any cuts —

A. No, I did not, no.”

Kimberly acknowledged that, “before this situation” on May 2, 2013, E.C. was not under a psychiatrist's care.

¶ 16 Park Forest police detective Tom Piszczor testified that, on December 14, 2013, he spoke with E.C. and her mother at the police station. E.C. was crying, uncomfortable, and it “was uneasy” for her to talk about what happened. Piszczor testified that E.C. wrote a handwritten statement and he identified it at trial.

¶ 17 Piszczor and Detective Morache spoke with defendant at the police station after he was arrested on January 25, 2014.<sup>2</sup> Piszczor read defendant his *Miranda* warnings and defendant stated he understood and agreed to speak. Defendant told Piszczor that he babysat E.C. and her brother but initially denied any sexual activity. Piszczor presented defendant with the Facebook

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<sup>2</sup> Detective Morache's first name is not included in the record.



messages and he initially “kept denying.” Defendant then said to Piszczor: “If I tell you really what happened, I’m going to go to jail for a long time. I can’t do jail. They do all kinds of things to pedophiles in jail. I can’t tell you what I really did.”

¶ 18 Defendant told Piszczor that, when E.C.’s mother left for work, he fed E.C. and her brother, whom he would send outside to play. When E.C.’s brother was outside, defendant pulled his pants down and had E.C. play with his “third leg,” or penis. Defendant admitted that a few incidents occurred in which he gave lotion to E.C. and had her massage his penis in an “up-and-down motion.” When E.C. did not comply, he locked her in the closet until her mother returned. Defendant stated he did this because he was frustrated he did not have a girlfriend and had a lot going on in his life. Defendant denied putting his fingers into E.C.’s vagina and did not want to put his statement in writing.

¶ 19 On cross-examination, Piszczor testified that, when E.C. described the “third leg situation,” she could not remember if defendant had ejaculated. Defense counsel asked Piszczor about whether E.C.’s handwritten statement indicated anything about her clothes being taken off before she was laid down on the bed and, after looking at the statement, Piszczor testified it was not in E.C.’s statement.

¶ 20 After Piszczor testified, the State requested the court admit E.C.’s handwritten statement into evidence and stated it did not believe it should be sent to the jury. Defense counsel objected, noting the statement conflicted “facially with the testimony” and it was not probative or relevant. The court admitted E.C.’s handwritten statement into evidence but noted it would not go back to the jury. In doing so, the court stated:

“The State has no reasons to, in fact, send it to the jurors. And the substance of that statement did not, in fact, come to being by the State, therefore it should not go back to the jurors because the substance of the statement did not go in. It wasn’t impeaching by them. But the fact that a statement was made by the witness which she did, in fact, acknowledge is enough evidence to allow it at least to be admitted into evidence. It doesn’t go back. Defense did not really use it to impeach the witness for that matter as well. So it’s admitted but it won’t go back to the jurors.”

The court admitted into evidence a birth certificate showing that defendant was born on August 4, 1983.

¶ 21 Defendant testified that, from October 31, 2002, to December 1, 2002, when he was 19-years-old, he lived with E.C., Kimberly, and E.C.’s brother. Defendant knew the family from church and would babysit when needed. Defendant testified that it was challenging to babysit E.C. because she was energetic and active and he was “unfamiliar” with how to deal with an energetic child. To punish E.C., defendant did not let her go outside and gave her timeout in her closet. He testified that this punishment was not the best decision and he did it because he was not “really experienced” with watching children. He testified that he knew that “rule number one is not to put my hands on them or hurt them in any way.”

¶ 22 Defendant testified that he did not ask E.C. to do anything sexual or masturbate him while he called his penis a third leg. He never laid E.C. on her brother’s bed and put his fingers into her vagina. He testified that the term “the third leg” came from a “dumb joke” he made “in passing” when he was teaching E.C. the piano. E.C. was sitting on his knee and started banging the keys. Defendant told her to stop and E.C. pinched his penis. Defendant “made a stupid joke”

and told her she was “playing with the wrong instrument.” When E.C. asked him “what?” defendant told her, “my third leg.” E.C. started playing the piano and pinched his penis again. Defendant told E.C. he was going to tell her mother about “pinching my third leg” if she did it again.

¶ 23 After defendant moved out of E.C.’s home in December 2002, he continued to attend the same church as Kimberly and E.C. until 2006 and would see them about twice a month. When defendant saw E.C. at church, E.C. brought up the punishment in the closet and defendant apologized. Defendant and his father would occasionally go to Kimberly’s house to watch movies. E.C. never mentioned the “third leg” or that he fingered her and asked her to masturbate him. In 2010 or 2012, Kimberly invited defendant and his father to a family reunion. When E.C. saw defendant, she said to him, “he’s the one who locked me in the closet.” Defendant apologized to E.C.

¶ 24 Defendant acknowledged that the Facebook messages between him and E.C. were messages he sent and responses he received from E.C. In December 2013, defendant sent E.C. a message on Facebook because he had a question regarding taxes for E.C.’s mother. In E.C.’s response to him, she stated that he locked her in the closet and “had her playing with my third leg.” Defendant responded by telling E.C. he was sorry for locking her in the closet and threatening to tell her mother about the third leg. In those messages, defendant was apologizing for putting E.C. in the closet, not for the sexual abuse accusation. Defendant testified he felt bad about locking E.C. in the closet and it was “a very stupid mistake.” He never told E.C.’s mother that she pinched his penis and did not want to get E.C. in trouble.

¶ 25 Defendant testified that, after he signed the *Miranda* warnings, Piszczor explained the allegations and he denied them because they were not true. After Piszczor showed him the Facebook messages, defendant asked for a lawyer. Piszczor continued to question him and ignored his requests for a lawyer and to remain silent. Defendant testified that he told Piszczor that he had E.C. masturbate him and called his penis a third leg after he had been interrogated for about one and one-half hours. He testified that what he said was not true and he made the statement because it was “very stressful situation being interrogated like that in the room” and “this is what they were saying she was saying and they told me that she was trying to hurt herself and that, just what really got to me,” as he still looked at her like a little sister. Defendant did not put his statement in writing because it was not true. Defendant testified that none of E.C.’s allegations against him were true.

¶ 26 During closing argument, defense counsel argued that “[t]he first time she ever said anything, anything about fingering was when she went to the police station. And she couldn’t — apparently she didn’t say it so the police officer had her write it down. And you’ve seen a copy of that little note that she wrote to the police officer. Has nothing about taking off her clothes on that. Nothing.” During jury deliberations, the jury sent the court a question about E.C.’s handwritten statement: “Can we see [E.C.’s] statement from the police station?” The court concluded that the jury should have the statement because it was admitted into evidence. Defendant objected to the ruling.

¶ 27 The jury found defendant guilty of predatory criminal sexual assault of a child and aggravated criminal sexual abuse. The court subsequently denied defendant’s motion for a new

trial and sentenced him to, respectively, 12 and 5 years in prison on each count, to be served consecutively. The court imposed \$719 in fines and fees.

¶ 28 On appeal, defendant first contends that the trial court erred when it allowed testimony about E.C.'s suicide attempt. He asserts that the testimony about E.C.'s suicide attempt was not relevant because it did not make any of the facts necessary to prove him guilty of predatory criminal sexual assault or aggravated criminal sexual abuse more or less likely, as it occurred 10 years after the incidents. He asserts that the testimony was inadmissible to explain E.C.'s delayed outcry because there was no testimony that the suicide attempt led to the outcry and it was unnecessary to establish that E.C.'s outcry occurred in 2013. Defendant claims the testimony was highly prejudicial and led the jury to believe that he caused E.C. to attempt to commit suicide, which unnecessarily inflamed the jury. Defendant requests we reverse his convictions and remand for a new trial.

¶ 29 Initially, we note that defendant acknowledges he did not properly preserve his challenge because he did not object to the testimony or raise the issue in a posttrial motion. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (To preserve a claim for review, a defendant must both object at trial and raise the issue in a posttrial motion). Defendant however argues, and the State does not dispute, that we may nevertheless review his challenge under the plain error doctrine. Under the plain error doctrine, we may review unpreserved error when a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant or (2) the error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565

(2007). Before we apply the plain error doctrine, we must first determine whether any error occurred at all. *Piatkowski*, 225 Ill. 2d at 565.

¶ 30 “Evidence is admissible if it is relevant to an issue in dispute and if its prejudicial effect does not substantially outweigh its probative value.” *People v. Patterson*, 192 Ill. 2d 93, 114-15 (2000). Under our rules of evidence, “relevant evidence” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ill. R. Evid. Rule 401 (eff. Jan. 1, 2011). “Probability is tested in the light of logic, experience, and accepted assumption as to human behavior.” *Patterson*, 192 Ill. 2d at 115. A trial court may exclude relevant evidence “if its probative value is outweighed by such dangers as unfair prejudice, jury confusion, or delay.” *People v. Cruz*, 162 Ill. 2d 314, 348 (1994).

¶ 31 The admission of evidence is a matter left to the sound discretion of the trial court. *People v. Banks*, 2016 IL App (1st) 131009, ¶ 70. We will not disturb the trial court’s decision unless its decision was an abuse of discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12. A trial court abuses its discretion when its “ruling is arbitrary, fanciful, or unreasonable or when no reasonable person would adopt the trial court’s view.” *Banks*, 2016 IL App (1st) 131009, ¶ 70. We conclude that the trial court did not abuse its discretion when it allowed testimony about E.C.’s suicide attempt.

¶ 32 Defendant takes issue with E.C.’s testimony on direct examination that she attempted to commit suicide. The record shows that E.C.’s testimony that she “tried to commit suicide” in 2013 first came out when the State asked her why she did not tell anybody about the sexual assaults from 2002 to 2013 and what happened in 2013 that led her to first tell anyone about the

assaults. E.C.'s testimony in response to these questions about her suicide attempt and subsequent hospitalization, during which she first told her mother what defendant had done, was relevant to explaining what led to her outcry 11 years later and was not intended to elicit sympathy or inflame the jury.

¶ 33 Defendant also takes issue with Kimberly's testimony on direct examination regarding the conversations she had with the counselor when E.C. was in the hospital. Kimberly testified that the counselor told her that E.C. was in a "very sensitive state," needed more counseling, and was not "really quite ready to talk about it more." This testimony was relevant to explain why Kimberly waited until December 2013 to go to the police and was not intended to elicit sympathy or inflame the jury. We note that defendant asserts that, on E.C.'s direct examination, the State also asked E.C. about the details of the conversation between and her therapist. Although the State asked E.C. if she told her mother when she was hospitalized, from our review of the record, including the pages cited by defendant, defense counsel, not the State, asked E.C. details about the conversation she had with her mother and counselor when she was in the hospital.

¶ 34 Accordingly, the testimony about E.C.'s suicide attempt and subsequent hospitalization in May 2013 was relevant to show when E.C. first told anyone about the sexual assaults, what led her to do so, and why Kimberly waited until December 2013 to go to the police, and it was not intended to elicit sympathy or inflame the jury. See *People v. Hodor*, 341 Ill. App. 3d 853, 860 (2003) ("where testimony regarding psychiatric treatment has relevance beyond evoking sympathy from the jury, such testimony is admissible").

¶ 35 Further, throughout the trial, defendant attempted to discredit E.C. and her version of events by, in part, focusing on the fact that, from 2002 to 2013, she did not tell anyone about the assaults. For example, during E.C.'s cross-examination, defense counsel focused on the fact that, from 2002 until 2013, E.C. did not tell anyone, including her brother, father, mother, counselors at school, and pastor, about what defendant had done. And, during closing, defense counsel asserted it was "a horrible thing to be locked in a closet when you're little \*\*\* but don't come eleven years later and say that there was sex attached to it." Accordingly, given that defendant attempted to discredit E.C.'s version of events and attacked her credibility by focusing on the fact that she did not tell anyone for 11 years, the testimony about E.C.'s suicide attempt and subsequent hospitalization in 2013, during which she first told her mother about the sexual assaults was relevant to E.C.'s credibility. See *People v. Williams*, 223 Ill. App. 3d 692, 698-99 (where the victim testified about the adverse emotional effects of the assault and the defendant attempted to discredit her version of events by claiming the sexual encounter was consensual, the court found that the victim's testimony about the adverse effects of the sexual assault was relevant and did not prejudice the defendant).

¶ 36 Defendant asserts that the testimony about E.C.'s suicide attempt was prejudicial and irrelevant because there was no evidence that showed the sexual assault caused E.C.'s attempted suicide or that the suicide attempt caused her outcry. He asserts the State did not solicit "one bit of evidence that there was a connection between the suicide and the assault" and "[t]he evidence of attempted suicide was then used to make another inferential leap, that it was the cause of the outcry."



¶ 37 We find the evidence was sufficient for the jury to reasonably conclude that the sexual assaults were connected to E.C.'s suicide attempt and subsequent hospitalization. E.C. testified that she did not tell anyone from 2002 to 2103 because she was afraid, thought it was her fault, and "thought it was something that I probably would have got in trouble for, and I just kept it to myself." She then testified she tried to commit suicide in 2013 because she was "just so tired of living because I beat myself up about the situation everyday, so I just said I was ready to go. And then at school it's just I was tired." E.C. further testified that, from 2002 until 2013, when she had the "episode," she "just bit her tongue and just prayed that it all would go away, but it only got worse." From this testimony, the jury could reasonably conclude that the sexual assaults were connected to E.C.'s suicide attempt and subsequent hospitalization and that these events caused her outcry. Thus, we are unpersuaded by defendant's argument that the suicide attempt was prejudicial and irrelevant because there was no evidence that there was a connection between the assaults and suicide attempt or that the suicide attempt caused her outcry.

¶ 38 Moreover, any prejudicial effect from the testimony of E.C.'s suicide attempt and hospitalization did not outweigh the probative value. From our review of the record, we find that the State's questions and the witnesses's testimony regarding the suicide attempt and subsequent hospitalization were minimal and limited to explaining the events that led to E.C.'s outcry 11 years later. The probative value however was significant because, as previously discussed, defendant attempted to discredit E.C. by focusing on the fact that she took 11 years to tell anyone, and the testimony about E.C.'s suicide attempt and hospitalization was relevant to explaining her delayed outcry and why her mother waited even longer to go to the police. Thus, any prejudicial effect from the testimony did not outweigh the probative value.

¶ 39 Defendant relies on *People v. Fuelner*, 104 Ill. App. 3d 340, 351-52 (1982), and *People v. Gillman*, 91 Ill. App. 3d 53, 60-61 (1980), to support his argument that the testimony about E.C.’s suicide attempt was irrelevant and prejudicial. We find these cases distinguishable. In *Fuelner*, the victim, victim’s father, and treating physician testified about the victim’s suicide attempt a couple days after the defendant raped her. *Fuelner*, 104 Ill. App. 3d at 344, 351. The court found that the testimony about the victim’s suicide attempt and subsequent five-week hospitalization was irrelevant to defendant’s guilt or innocence and prejudiced the jury against him. *Id.* at 351-52. In *Gillman*, the State brought out testimony about the victim’s psychiatry treatment and the cost of it. *Gillman*, 91 Ill. App. 3d at 60. The court found that the testimony was irrelevant to the issue of the defendant’s guilt or innocence and the testimony about her visits to a psychiatrist were “deliberately intended to elicit the sympathy of the jury and prejudice the defendant.” *Id.* at 60.

¶ 40 Here, unlike the victims in *Fuelner* and *Gillman*, E.C. did not tell anyone about the sexual assault and abuse for 11 years. The testimony about E.C.’s suicide attempt and subsequent hospitalization in May 2013 was relevant to explaining the events that led to her outcry 11 years later. Further, unlike *Gillman*, as previously discussed, the testimony was not intended to deliberately elicit sympathy from the jurors but to explain what occurred in 2013 that led to E.C.’s outcry.

¶ 41 Accordingly, based on the foregoing, the trial court did not abuse its discretion when it allowed the witnesses to testify about E.C.’s suicide attempt and hospitalization. The court therefore did not err and defendant’s claim remains forfeited.

¶ 42 Defendant argues, in the alternative, that counsel was ineffective for failing to object to the testimony about E.C.'s suicide attempt. To prove ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and he suffered prejudice as a result. *People v. Smith*, 2014 IL App (1st) 103436, ¶ 63. Generally, a decision on whether to object to the admission of evidence is a strategic decision that may not form the basis for a claim of ineffective assistance of counsel. *Smith*, 2014 IL App (1st) 103436, ¶ 63. A defendant must establish both prongs. *People v. Temple*, 2014 IL App (1st) 111653, ¶ 53. Here, as previously discussed, because the testimony about E.C.'s attempted suicide was relevant and its prejudicial effect did not outweigh its probative value, had counsel objected to the testimony, the objection would not have been meritorious. Thus, counsel was not deficient when he failed to object. Defendant therefore has not established a claim for ineffective assistance of counsel.

¶ 43 Defendant next contends that E.C.'s handwritten statement was an inadmissible prior consistent statement and he was prejudiced when the statement was admitted into evidence and subsequently sent to the jury during deliberations. Defendant asserts that E.C. was the sole witness to the offense and her prior consistent statement was used as substantive evidence to bolster her testimony. Defendant requests that we reverse his convictions and remand for a new trial.

¶ 44 Initially, we note that defendant objected at trial to the admission of E.C.'s statement into evidence but acknowledges he did not properly preserve his challenge by raising the issue in his posttrial motion. See *Woods*, 214 Ill. 2d at 470. However, defendant nevertheless asserts that we may review the issue under the plain error doctrine. As previously discussed, before we apply the

plain error doctrine, we must first determine whether any error occurred at all. See *Piatkowski*, 225 Ill. 2d at 565.

¶ 45 Hearsay is defined as an out-of-court statement offered in court to prove the truth of the matter asserted. *In re Jovan A.*, 2014 IL App (1st) 103835, ¶ 23. Generally, hearsay is inadmissible unless it falls within an exception to the rule against hearsay. *In re Jovan A.*, 2014 IL App (1st) 103835, ¶ 23. One exception provides that a police officer may testify to information received during the course of an investigation to explain his or her actions. *Id.* However, under this exception, an officer may not testify to the content of any statements received or to information beyond what is necessary to explain his actions. *Id.*

¶ 46 Further, a witness's prior statement that is consistent with his or her trial testimony is considered hearsay and is "inadmissible to bolster that witness's credibility or to rehabilitate the witness when he has been impeached by a prior inconsistent statement." *People v. Randolph*, 2014 IL App (1st) 113624, ¶ 14. The rule is based on the concern that a fact finder may unfairly enhance the credibility of a witness because the witness repeated a statement. *Randolph*, 2014 IL App (1st) 113624, ¶ 14.

¶ 47 However, prior consistent statements are admissible to rebut an express or implied suggestion on cross-examination that the witness has a motive to testify falsely or his testimony is a recent fabrication. *Randolph*, 2014 IL App (1st) 113624, ¶ 15; Ill. R. Evid. 613(c) (eff. Oct. 15, 2015). The witness must have made the prior consistent statement before the alleged fabrication or motive to lie arose. *McWhite*, 399 Ill. App. 3d at 641. When prior consistent statements are admissible, they may only be used for rehabilitative purposes and are not admissible as substantive evidence. *Id.* Prior consistent statements may not be admitted to rebut a

charge of mistake, poor recollection, or inaccuracy. *Id.* We review a trial court's admission of evidence under the abuse of discretion standard. *Randolph*, 2014 IL App (1st) 113624, ¶ 16.

¶ 48 Here, E.C.'s handwritten statement was an inadmissible prior consistent statement. The statement is consistent with E.C.'s testimony that defendant laid her on her brother's race car bed and inserted his fingers in her vagina. The State asserts that E.C.'s statement cannot be characterized as a prior consistent statement because it never attempted to use the statement to prove the truth of the matter asserted but only used it to show the course of the investigation, which is permissible. See *People v. Henderson*, 2016 IL App (1st) 142259, ¶ 177 ("When a police officer recounts the steps of his or her investigation for the limited purpose of showing only the course of the investigation, that testimony is not hearsay, because it is not being offered for its truth."). We recognize that the State never asked E.C. or Piszczor about the content of the statement and their testimony was limited to identifying it and explaining that E.C. wrote it because she was not able to talk about what happened. We therefore agree with the State that the testimony about Piszczor's course of investigation related to the statement was admissible under the course of investigation exception to the hearsay rule.

¶ 49 However, the trial court ultimately admitted the statement into evidence and, under the course of investigation exception to the hearsay rule, the content of the statement was not admissible. See *Henderson*, 2016 IL App (1st) 142259, ¶ 178 ("The State may not use this 'limited investigatory procedure' to place into evidence the substance of any out-of-court statement that the officer hears during his investigation, but may elicit only the substance of a conversation to establish the police investigative process."); *In re Jovan A.*, 2014 IL App (1st)

103835, ¶ 34 (“Generally, under the course-of-investigation exception, an officer may not testify to a statement’s content.”).

¶ 50 Further, the content of E.C.’s handwritten statement was not admissible under the two exceptions for admitting prior consistent statements. Defense counsel did not assert that E.C. had a motive to lie or recently fabricated her testimony. Although defense counsel attacked E.C.’s credibility, a prior consistent statement may not be admitted simply because counsel sought to challenge a witness’s credibility. See *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 60.

¶ 51 Further, we note that E.C. testified at trial that defendant laid her on the bed and took her clothes off and defense counsel asked Piszczor if E.C.’s statement indicated anything about her clothes being taken off before defendant laid her down. Piszczor acknowledged that this fact was not in E.C.’s statement. Thus, defense counsel was attempting to impeach E.C.’s credibility with the omission of facts from her statement. See *People v. McWhite*, 399 Ill. App. 3d 637, 642 (2010) (“Impeachment by omission of facts may be used where, as here, it is shown that the witness had the opportunity to make a statement about the omitted facts and, under the circumstances, a reasonable person ordinarily would have included the facts.”). However, “the mere introduction of contradictory evidence, without more, does not constitute an implied charge of fabrication or motive to lie” and “falls short of raising a charge or inference that the witness was motivated to testify falsely or that his testimony was of recent fabrication.” *McWhite*, 399 Ill. App. 3d 637 at 642. This impeachment therefore was not sufficient to raise a charge or inference that E.C. was motivated to testify falsely or that her testimony was recently fabricated. Because the exceptions to admitting a prior consistent statement do not apply, the admission of E.C.’s statement into evidence was improper. See *Id.* (where defense counsel impeached the

officer's credibility on cross-examination by asking about the omission of facts in a vice case report, the reviewing court found that the officer's prior consistent statements at a preliminary hearing and in the arrest reports were inadmissible prior consistent statements when defense counsel neither asserted nor implied that the officer had recently fabricated his testimony or had a motive to lie).

¶ 52 Accordingly, because E.C.'s handwritten statement was an inadmissible prior consistent statement, the court erred when it admitted her statement into evidence and subsequently sent it to the jury during deliberations. Because the trial court erred, we must determine whether the error is considered plain error under the plain error doctrine.

¶ 53 As previously discussed, under the plain error doctrine, we may review unpreserved error when (1) the evidence was closely balanced that the verdict against defendant may have resulted from the error or (2) the error was so serious that the defendant was denied a substantial right and the error challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Matthews*, 2012 IL App (1st) 102540, ¶ 26. Under both prongs, defendant has the burden of persuasion. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Defendant contends we may review the unpreserved error under the plain error doctrine because, under the first prong, the evidence was closely balanced. Under the first prong, defendant must show that the evidence at trial was so closely balanced that the error alone tipped the scales toward a guilty verdict. *People v. Jackson*, 2016 IL App (1st) 133741, ¶ 49.

¶ 54 Here, we find that the evidence was not closely balanced such that the error alone tipped the scales toward a guilty verdict. At trial, E.C. and defendant testified about competing versions of events and defendant denied that he ever engaged in any sexual activity with E.C. However,

E.C.'s version of events was corroborated by defendant's admission as well as the Facebook messages, in which defendant apologized to E.C. in response to her accusations that he "sexually assaulted" her and locked her in the closet. Further, E.C.'s testimony about her outcry in 2013 was corroborated by Kimberly's testimony.

¶ 55 Defendant asserts that the evidence was closely balanced because it consisted of E.C.'s and his own competing versions without any other evidence. Defendant cites *People v. Naylor*, 229 Ill. 2d 605-609 (2008), to support his argument. We find *Naylor* distinguishable.

¶ 56 In *Naylor*, our supreme court found that the evidence was closely balanced because the trial court was faced with two credible versions of events, including two officers who testified that the defendant sold them heroin and the defendant who testified that he was mistakenly swept up in a drug raid. *Naylor*, 229 Ill. 2d at 607. In finding the evidence closely balanced, the court noted that there was no evidence to corroborate or contradict either version of events and the defendant's testimony was credible in that it was consistent with much of the officers' testimony. *Id.*; see *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 88.

¶ 57 Here, unlike *Naylor*, as previously discussed, there was evidence corroborating E.C.'s version of events and evidence contradicting defendant's versions of events, as his admission contradicted his trial testimony in which he denied any sexual involvement with E.C. Further, unlike *Naylor*, where the defendant's testimony was consistent with much of the officers' testimony, here, defendant's testimony denying any sexual activity was not consistent with much of E.C.'s testimony. In addition, we note that this court has previously concluded: "*Naylor* does not stand for the proposition that evidence is 'closely balanced' whenever the defense version of events differs from the State's version and the accounts are 'equally consistent with the physical



evidence.’ ” *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 87. Thus, we are unpersuaded by defendant’s reliance on *Naylor* to support his argument that the evidence was closely balanced because it consisted of two competing stories and depended on E.C. and defendant’s credibility.

¶ 58 Accordingly, because the evidence was not closely balanced, defendant has not established plain error under the first prong of the plain error doctrine.

¶ 59 With respect to the second prong of the plain error doctrine, defendant has not argued his unpreserved claim is reviewable under the second prong. When a defendant fails to make a plain error argument, as here, the defendant cannot meet his burden of persuasion that the plain error doctrine has been satisfied, and we must honor the procedural default. See *People v. Temple*, 2014 IL App (1st) 111653, ¶ 50. Further, the second prong of plain error review is equated with structural error and we have previously concluded that the error of admitting a prior consistent statement does not fall under the umbrella of a structural error. *Temple*, 2014 IL App (1st) 111653, ¶ 51.

¶ 60 In the alternative, defendant argues that we should review his claim because trial counsel was ineffective for failing to preserve a meritorious objection. He asserts that there was no strategic purpose to allow a complaining witness’s statement into evidence and, if defense counsel wanted to explore E.C.’s outcry, she could have done so by “still objecting to the actual statement being admitted into evidence.” We note that the record shows that defense counsel did object both when the trial court admitted E.C.’s statement into evidence and when it sent the statement to the jury during deliberations. Defense counsel however did not include the issue in defendant’s posttrial motion and, thus, did not properly preserve the claim for review.

¶ 61 To prove ineffective assistance of counsel, a defendant must show his counsel's performance was deficient and he was prejudiced by the deficient performance. *Temple*, 2014 IL App (1st) 111653, ¶ 53. To prove counsel's performance was deficient, a defendant must show that counsel's performance was "objectively unreasonable under prevailing professional norms." *People v. Colon*, 225 Ill. 2d 125, 135 (2007). To prove prejudice, a defendant must show that, but for counsel's deficient performance, there is a reasonable probability that the trial outcome would have been different. *Temple*, 2014 IL App (1st) 111653, ¶ 53. A defendant must satisfy both prongs. *Id.*

¶ 62 Here, defendant did not prove prejudice because he cannot establish that, had counsel properly preserved the claim for review, the result of the proceeding in the trial court would have been different. As previously discussed, E.C. testified about the details of the sexual assault and abuse defendant committed against her. Based on the jury's guilty findings, it necessarily determined that her testimony was credible, which was its "prerogative in its role as the trier of fact." See *People v. Moody*, 2016 IL App (1st) 130071, ¶ 52. Further, E.C.'s testimony was corroborated by defendant's admission. Moreover, the Facebook messages, in which defendant apologized to E.C. in response to her accusation that he "sexually assaulted" her, provided additional circumstantial evidence to support defendant's guilt. Thus, because the evidence against defendant was overwhelming, had defense counsel properly preserved the claim for review by including the issue in a posttrial motion, defendant has not established that there is a reasonable probability that the trial or posttrial outcome would have been different.

¶ 63 Defendant lastly contends he was improperly assessed that the \$5 electronic citation fee (705 ILCS 105/27.3e (West 2016)) and the \$25 court services assessment (55 ILCS 5/5-1103

(West 2016)). He also contends he is entitled to presentence custody credit to be applied toward the \$15 State Police operations fee (705 ILCS 105/27.3a(1.5) (West 2016)).<sup>3</sup>

¶ 64 While this appeal was pending, our supreme court adopted Illinois Supreme Court Rule 472 (eff. Mar. 1, 2019). Rule 472 provides the procedure for correcting sentencing errors involving, as relevant here, “the imposition or calculation of fines, fees, assessments, or costs” and the “application of *per diem* credit against fines.” Ill. S. Ct. R. 472 (a)(1), (2) (eff. Mar. 1, 2019). After we issued our opinion on May 14, 2019, in which we addressed defendant’s challenge to the assessed fines and fees even though he raised his challenge for the first time on appeal, Rule 472 was amended on May 17, 2019. The amendment provides that, “[i]n all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule.” Ill. S. Ct. R. 472 (e) (eff. May 17, 2019). Rule 472 also states that “[n]o appeal may be taken by a party from a judgment of conviction on the ground of any sentencing error specified above unless such alleged error has first been raised in the circuit court.” Ill. S. Ct. R. 472 (c) (eff. May 17, 2019). Thus, under Rule 472, we must remand to the circuit court to allow defendant to file a motion under this rule and raise his challenge to the assessed fines and fees, including that the \$5 electronic citation fee and the \$25 court services assessment were improperly assessed and he is entitled to presentence custody credit against the \$15 State police operations charge.

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<sup>3</sup> Defendant also argues that he is entitled to presentencing credit to be applied against the \$2 State’s Attorney Records Automation Fund Fee (55 ILCS 5/4-2002.1(c) (West 2016)) and \$2 Public Defender Records Automation Fee (55 ILCS 5/3-4012) (West 2016)). However, in defendant’s reply brief he concedes that, under *People v. Clark*, 2018 IL 112495, he is not entitled to offset these charges.

¶ 65 Finally, defendant argued in his opening brief that the trial court erred when it imposed consecutive sentences. However, defendant withdrew this argument in his reply brief. Therefore, we need not address it.

¶ 66 For the reasons explained above, the fines and fees issue is remanded to the circuit court pursuant to Rule 472(e). The trial court's judgment is affirmed in all other respects.

¶ 67 Affirmed; remanded as to fines and fees.