2019 IL App (4th) 160696-U

NO. 4-16-0696

FILED
March 27, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Edgar County
FRED E. COX,	)	No. 14CF121
Defendant-Appellant.	)	
	)	Honorable
	)	Matthew L. Sullivan,
	)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Holder White and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Evidence of defendant's prior sexual abuse of his former stepdaughter was admissible to show propensity.

(2) Defendant forfeited his claim of challenging the jury's consideration of a certified copy of his prior conviction when he affirmatively acquiesced to the alleged error, and in such circumstances, plain-error review is not available.

(3) Defendant forfeited his claim of prosecutorial misconduct when he failed to object at trial.

(4) Defendant forfeited his claim of the improper admission of the video recorded interview by failing to object to the evidence at trial.

(5) The trial court did not err in denying defendant's motion for a new trial based upon newly discovered evidence when that evidence was not of such a conclusive character so as to change the result on retrial.

¶ 2 A jury found defendant, Fred E. Cox, guilty of one count of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)), and the trial court sentenced him to 24 years' imprisonment. Defendant appeals, arguing the following reversible errors occurred: (1) the court ruled that defendant's sexual misconduct in 1993 and 1994 against his preteen stepdaughter was admissible, (2) the court allowed the jury to have a certified copy of defendant's 1994 conviction during deliberations, (3) the prosecutor committed error during his closing argument, (4) the court ruled that certain hearsay statements would be admissible under section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2014)), and (5) the court erred in denying defendant's motion for a new trial on the basis of newly discovered evidence. We disagree with each of defendant's arguments and affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Information

¶ 5 The July 2014 information consisted of two counts. In count I, the State charged defendant with criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2014)). In count II, the State charged him with predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)). Both counts accused defendant of offending on July 12, 2014. Although neither count identified a specific victim (identifying the victim only as "a minor victim" in count I and "a victim who was under 13 years of age" in count II), defendant did not challenge the validity of the charging instrument. See 725 ILCS 5/111-3(a-5) (West 2014) (effective January 1, 2014, the legislature added the requirement that the charging instrument identify the victim by name, initials, or description as an element of the offense). See also *People v. Espinoza*, 2015 IL 118218, ¶¶ 19-20.

¶ 6 B. The State's Motion Pursuant to Section 115-10

¶ 7 On October 16, 2015, pursuant to section 115-10 of the Code, the State moved for a ruling that certain hearsay statements would be admissible in the jury trial, including statements that H.V. had made to her mother, E.R., as well as a digital video disk (DVD) of H.V. being interviewed at the Children's Advocacy Center of East Central Illinois.

¶ 8 On November 6, 2015, after hearing testimony and arguments, the trial court granted the State's section 115-10 motion.

¶ 9 C. The State's Motion Pursuant to Section 115-7.3

¶ 10 Along with the section 115-10 motion, the State filed a motion *in limine* pursuant to section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2014)) requesting a ruling that evidence of defendant's 1994 unrelated sex crimes be admissible in the jury trial. The motion indicated the anticipated evidence would include the testimony of the prior victim, V.E., and be presented as propensity evidence.

¶ 11 On November 17, 2015, after hearing testimony and arguments, the trial court granted the State's motion, finding V.E.'s testimony revealed defendant committed a "remarkably similar offense" 20 years ago. The court found the probative value outweighed the prejudicial effect of the evidence and, therefore, V.E.'s testimony of the 1993 and 1994 events would be admissible at trial.

¶ 12 D. The Jury Trial

¶ 13 The jury trial occurred on December 15 and 16, 2015. The witnesses testified substantially as follows.

¶ 14 1. *The Testimony of V.E.*

¶ 15 V.E., who was now 34 years old, testified she spent most of her childhood in Oakland, Illinois, living with her mother and defendant, her stepfather. They married when she

was six years old and moved to Oakland when she was eight years old. Her brother, who is 13 months younger, also lived in the home. Defendant left the home in February 1994, when V.E. was 12 years old, after she reported to a social worker at school that defendant "had molested and raped" her. According to V.E., the social worker's presentation on sexual abuse to her sixth-grade class gave her the confidence to reveal the abuse. V.E. said the social worker assured her that she "would be safe if [she] told, that [she] would be protected, and that no harm would come to [her] as a result of that." V.E. explained that beginning her sixth-grade year, in August 1993, when she was 11 years old, defendant "began to touch [her] inappropriately, to molest [her]."

¶ 16 V.E. described the first incident as follows. Only she and defendant were home. She was watching television lying on the couch with her feet up on the back of the couch. Defendant was watching television with her sitting in a chair behind her. He walked to the couch and sat down where her feet would have been had she been laying flat. He said, " 'I know I shouldn't be doing this, but—.' " He put his hands down her pants and touched her "in [her] vaginal area." A few weeks later, a similar incident occurred in defendant's bedroom where V.E. was watching television. This time, V.E.'s mother and brother were in the house but in another room. Approximately one week after the second incident, again as V.E. was watching television in defendant's bedroom and again with her mother and brother in the house, defendant touched her vagina with his hand, but "it proceeded to penetration with his penis." Further incidents of penetration occurred thereafter "every few days to once a week." On V.E.'s twelfth birthday, in December 1993, defendant woke V.E. as she slept in her bed and penetrated her vagina with his penis. After the school presentation in February 1994, V.E. spoke with the social worker about the abuse. V.E. told her mother, and her mother told defendant to leave the home. Without

objection, the trial court allowed the admission of People's exhibit No. 1, a certified copy of defendant's 1994 Coles County conviction of aggravated criminal sexual abuse against V.E.

¶ 17 2. *The Testimony of H.V.*

¶ 18 H.V., age 12, testified she lived with her mother, E.R., and E.R.'s boyfriend, Robert "Bob" Burton, in Brocton, Illinois. She was currently in the sixth grade. In July 2014, when she was 10 years old, she and her friend, G.C. were neighbors. G.C. is defendant's daughter. On Friday evening, July 11, 2014, H.V. and G.C. arranged a sleepover at G.C.'s house. H.V. had slept at G.C.'s house a few times before earlier in the summer. After playing outside, eating dinner, playing video games, and watching television, the girls got ready for bed around 9 p.m. G.C. let H.V. borrow a nightgown. Each girl slept on one side of a double recliner in the living room. H.V. believed G.C.'s parents had already gone to bed. Sometime during the night, H.V. was awakened by defendant, who was taking off her underwear. H.V. said: "I tried to fight him and, you know, punch and kick. But he took his—his penis out of his boxers, like in the hole, and he put his penis into my vagina." H.V. said, only after the incident, did she learn the appropriate names for those parts of the body. When the incident first occurred, she referred to them as "private parts." After a few minutes, defendant left, and H.V. said she went back to sleep. She was scared, so she did not wake G.C. or tell anyone immediately. The next day, H.V. went to Walmart, where they saw their school principal, and ate lunch with G.C., her parents, and her nephew. Defendant drove. Afterward, defendant drove H.V. home.

¶ 19 When H.V. got home, she told E.R. about the incident. Burton came home soon after and called the police. Burton and E.R. took H.V. to Sarah Bush Lincoln Health Center for examination. They then went to the Children's Advocacy Center of East Central Illinois where she was interviewed by Edgar County Sheriff's Sergeant Adam Rhoads.

¶ 20 3. *The Testimony of E.R.*

¶ 21 E.R., H.V.'s mother, testified about H.V.'s appearance and demeanor when she returned from home from the sleepover. E.R. said H.V. looked pale and glassy-eyed. H.V. laid on the couch. E.R. knew something was wrong, but H.V. would not talk. Eventually, H.V. "proceeded to tell [her] what had happened with—between [defendant] and—what [defendant] had done." E.R. said H.V. told her defendant "forced himself inside of her." According to E.R., H.V. reported: " 'He put his private parts inside my private parts, Mommy.' " H.V. reported that she tried to fight defendant by kicking and screaming during the assault. E.R. said she was shocked to hear what had happened and tried to verify the assault by further questioning H.V. on the details, but H.V. was too upset to communicate. E.R. said she called the police, who advised her to take H.V. to the hospital for examination. E.R. said on the car ride to the hospital H.V. was "just very, very quiet in the car and just very withdrawn and sad." The police met them at Sarah Bush Lincoln Health Center. After the doctor examined H.V., the police recommended they go to the Child Advocacy Center of East Central Illinois in Charleston. There they met with Marilyn of the advocacy center and Sergeant Rhoads. Sergeant Rhoads interviewed H.V. for approximately one hour.

¶ 22 4. *The Testimony of Dr. John Longano*

¶ 23 The emergency room physician, Dr. Longano, recalled that H.V. told him "she was on a recliner, and a male came in and put his private parts in her." During his examination, the doctor found "some redness on her right labia majora." The doctor performed a rape kit and administered antibiotics and the "morning after" pill.

¶ 24 5. *The Testimony of Sergeant Rhoads*

¶ 25 The State then called Sergeant Rhoads, who testified he was a forensic interviewer for the Child Advocacy Center of East Central Illinois and that on July 12, 2014, he interviewed H.V. He identified a DVD, labeled People's exhibit No. 2, as the audio-video recording of his interview.

¶ 26 Without objection, People's exhibit No. 2 was admitted into evidence and played for the jury. People's exhibit Nos. 3 and 4 were also admitted without objection. Rhoads explained that these were "nude blank drawings" of a female and a male that he used to assist H.V. in identifying and naming parts of the anatomy as she explained what had happened.

¶ 27 On cross-examination, Rhoads indicated the investigators took H.V.'s underwear, her blue jeans, a sexual assault kit, and a sample of defendant's deoxyribonucleic acid (DNA) as evidence. According to Rhoads, as of the date of trial, the crime lab had not reported any results.

¶ 28 The State rested, and the trial court denied defendant's motion for a directed verdict.

¶ 29 6. *Testimony of Christie Cox*

¶ 30 On the second day of trial, on December 16, 2015, the defense called Christie Cox, defendant's wife. She said when H.V. spent the night in July 2014, she went to bed around 11 p.m. while the girls watched television and played games in the living room. They were going to sleep in the love seat recliner. Defendant had gone to bed around 9 p.m. She said around 1 a.m., she woke to use the restroom. She "had felt [defendant] get out of bed at that same time, so [she] laid there for a few minutes, waiting for him to finish and come back." She said: "And he came back to bed a few minutes later, and I went to the bathroom. I checked on the girls before I came back to bed. They were sound asleep in the chairs. And then [I] went to sleep for the rest of the night." She said the recliners "were kicked out." She said H.V. was covered with a blanket

and "still totally dressed." According to Cox, H.V. "had on blue jeans and a hoodie that evening when they were playing." She could see H.V.'s leg "kicked out from the blanket, and blue jeans [were] still on her leg. And [she] could see the hoodie at the top of the blanket."

¶ 31 Cox said she woke up around 6:15 a.m. but stayed in bed until 7 a.m. so as not to disturb the girls. They woke up around 7:30 a.m. H.V.'s phone was charging in the dining room the evening before, but she had it in her possession before Cox went to bed.

¶ 32 After Cox had made their plans for the day, she asked H.V. if she wanted to go home or run errands with them. H.V. chose to run errands. Cox said she, defendant, G.C., and H.V. drove to Paris. They met Cox's son, his wife, and their son at a restaurant for lunch before going to Walmart, where they saw Mrs. Harbaugh, the girls' principal. They returned to Brocton at approximately 1 p.m. and took H.V. to her house. Cox said she did not notice anything unusual about H.V. until they were on their way home after Walmart. Cox described H.V. as typically a "[h]appy, bubbly, giggly 11-year-old girl." But, she said, the closer they got to Brocton, H.V. became noticeably quiet.

¶ 33 7. *Testimony of Defendant*

¶ 34 Defendant testified on the night H.V. slept over, he retired to his bedroom after dinner to watch television. He said he fell asleep around 9 p.m. At 1 a.m., he woke up to use the restroom. He said he "glanced in on the children to see if they were still up playing" and went back to bed. He got up a second time to use the restroom. He said: "And just as I was finishing up, I heard the west door pull open. So I jumped up and pulled my shorts and underwear back up." The bathroom has two doors, one that goes into the utility room and one that goes into G.C.'s bedroom. He always locked the door that went into G.C.'s bedroom, so someone was trying to enter through the utility room. Defendant did not see who it was. He said he turned to

face the vanity and walked out, "looking away from whoever was there." He said the person "apologized for opening the door." He said he went back to bed and did not wake up again. Defendant denied making any physical or sexual contact with H.V.

¶ 35 8. *Testimony of G.C.*

¶ 36 G.C., defendant's 13-year-old daughter, testified she and H.V. played outside until 10 p.m. and then played games and watched television in the living room until approximately 4 a.m. They fell asleep in the love seat recliner; H.V. fell asleep first. H.V. did not mention that anything had happened during the night.

¶ 37 On cross-examination, G.C. denied seeing either of her parents get up during the night. She said she and H.V. finished playing Monopoly at approximately 3 a.m. and then spent some time playing on their phones before going to sleep. G.C. said H.V. slept in a pair of "sleeping pants" she had borrowed from G.C.

¶ 38 9. *Testimony of Jasmine Eveland*

¶ 39 Jasmine Eveland, defendant's step daughter-in-law, testified she is married to G.C.'s brother. She recalled meeting the family at a restaurant in Paris on that particular Saturday afternoon after H.V. had spent the night with G.C. Eveland had not met H.V. until that day. She said H.V. "seemed like a normal girl." H.V. and G.C. played with Eveland's child at the restaurant. She said "[t]hey seemed fine."

¶ 40 10. *Testimony of Joseph Eveland*

¶ 41 Joseph "Tyler" Eveland, G.C.'s brother, testified he lived in Paris with Jasmine and his toddler son. He recalled meeting "G.C.'s friend at the time" at the restaurant in Paris where he and Jasmine met his mom (Cox) and his stepfather (defendant) to eat lunch. When asked about G.C.'s friend's "demeanor," Tyler said the girls were "just talking, eating, being

normal." He said: "Nothing really seemed strange or out of the ordinary." On cross-examination, Tyler said G.C. moved in with him and Jasmine in July or August 2014.

¶ 42 11. *Testimony of Elizabeth Harbaugh*

¶ 43 Elizabeth Harbaugh, the principal at Shiloh school, testified she saw G.C. and H.V., two of her students, at Walmart on the day after the sleepover in July 2014. Harbaugh recalled the meeting but observed nothing out of the ordinary in relation to H.V. She said the girls "were hanging out and getting ready to go to lunch, I think to have Chinese or something like that." She said she did not observe anything unusual about H.V.'s demeanor in the few minutes they spoke.

¶ 44 12. *The Verdict*

¶ 45 After considering the evidence, arguments of counsel, and the trial court's instructions of the law, the jury found defendant guilty of predatory criminal sexual assault of a child.

¶ 46 E. Posttrial Motions

¶ 47 Defendant filed a motion for a new trial, alleging the trial court erred in allowing the evidence of defendant's prior conviction to be admitted at trial pursuant to section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2014)). Defendant also filed a motion pursuant to section 116-3 of the Code (725 ILCS 5/116-3 (West 2014)), requesting the sentencing hearing be continued until DNA testing on evidence was complete. The court granted this motion. Soon thereafter, defendant filed a motion for leave to amend his motion for a new trial, alleging the DNA testing indicated semen was found on H.V.'s underwear and it did not match defendant but instead matched Burton. The court conducted a hearing on the pending motions.

¶ 48 1. *Testimony of Chief Deputy Greg Metcalf*

¶ 49 Greg Metcalf, Chief Deputy of the Edgar County sheriff's office, testified that the nurse at the hospital bagged H.V.'s clothing and gave it to him. A few hours later, he collected from H.V.'s house the underwear she had presumably worn at G.C.'s house. He said E.R. went to get H.V.'s underwear—the pair she believed, based on H.V.'s description, H.V. was wearing at the time of the assault. Metcalf sent this underwear to the crime lab for testing.

¶ 50 2. *Testimony of Karri Broaddus*

¶ 51 Karri Broaddus, a forensic scientist at the crime lab, testified she conducts "Y-STR DNA testing" on evidence submitted. This testing analyzes only the Y chromosome. On July 11, 2016, she submitted a written report indicating she had tested several locations from H.V.'s underwear. One sample tested indicated the presence of semen but microscopically sperm cells were not found. She described the indication as a weak positive and explained that the identified protein could have come from another bodily fluid. The profile found on that sample was a mixture of two males. The major profile matched Burton, although it was a low amount of DNA, and not defendant. On a different sample, defendant could not be excluded as a contributor of a minor profile. Broaddus said there was no way to tell how long the samples had been present on the underwear.

¶ 52 3. *Testimony of E.R.*

¶ 53 E.R. testified that after H.V. went to G.C.'s for the sleepover, she and Burton had sexual relations. Thereafter, Burton "wipe[d] off" with a towel and put the towel in the laundry pile in the bathroom. Before H.V. went to the hospital the next day, she changed her clothes in the bathroom and put her dirty clothes in the laundry pile. When the police came over to collect H.V.'s underwear, E.R. retrieved the underwear from the laundry pile. She said they were close to the top of the pile.

¶ 54 4. *Trial Court's Decision*

¶ 55 The trial court denied defendant's motion regarding the section 115-7.3 evidence, finding the "earlier victim's" testimony was properly admitted. With regard to defendant's motion for a new trial based on the DNA testing, the court found insufficient evidence to warrant a new trial. The court stated:

> "[Broaddus] couldn't even tell me that it was semen—it may contain DNA in a very minute quantity that may have come from semen from an individual who lived at her—at the victim's residence, who, of course, the testimony today was, would have engaged in sexual conduct with the victim's mother, and that the item of clothing did come in contact with the victim's underwear.
>
> I cannot come close to the conclusion that that would probably change the result on retrial. It was strenuously and well argued by [defense attorney] and the State had no evidence; it was her word against his. And the jury took her word for it. So I'm denying this motion for a new trial. We need to set this for a sentencing hearing."

¶ 56 F. Sentencing

¶ 57 In September 2016, the trial court sentenced defendant on his conviction of predatory criminal sexual assault of a child to 24 years in prison. This appeal followed.

¶ 58 II. ANALYSIS

¶ 59 A. Propensity Evidence

¶ 60 In general, evidence of other crimes is inadmissible to show propensity. See generally *People v. Smith*, 2015 IL App (4th) 130205, ¶ 21. Section 115-7.3 of the Code, however, provides an exception, permitting other-crimes evidence when the defendant is accused

of predatory criminal sexual assault of a child. 725 ILCS 5/115-7.3(a)(1), (b) (West 2014). Such evidence is admissible and "may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(b) (West 2014). Subsection (c) states, "[i]n weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider: (1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; or (3) other relevant facts and circumstances." 725 ILCS 5/115-7.3(c) (West 2014). Other-crimes evidence, upon meeting the initial statutory requirements, " 'is admissible if it is relevant and its probative value is not substantially outweighed by its prejudicial effect.' " *Smith*, 2015 IL App (4th) 130205, ¶ 21 (quoting *People v. Vannote*, 2012 IL App (4th) 100798, ¶ 38).

¶ 61 Defendant contends the cumulative impact of three claimed errors related to propensity evidence justifies a new trial. First, he claims the trial court erred by allowing the admission of other-crimes evidence. Second, he claims the court erred by allowing the jury to take the certified copy of the prior conviction into deliberations. And third, he claims the court erred by allowing the prosecutor to define "propensity" and vouch for the credibility of the State's witnesses during his closing argument.

¶ 62 1. *Admission of Other-Crimes Evidence*

¶ 63 Defendant argues his conviction should be vacated and the matter should be remanded for a new trial because the trial court abused its discretion by admitting unduly prejudicial evidence of his prior sexual abuse of V.E. This court will not overturn a decision to admit other-crimes evidence absent an abuse of discretion. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). An abuse of discretion has occurred when the trial court's decision is arbitrary,

fanciful, or unreasonable or when no reasonable person would take the position adopted by the trial court. *Id.*

¶ 64 Defendant claims the prior-abuse evidence admitted was not probative of his propensity to commit the charged offense because the sexual assaults on V.E. were too remote in time and too dissimilar to the charged offense. The abuse against V.E. first occurred in 1993. Defendant was charged, pleaded guilty, and convicted in 1994, 20 years prior to the alleged offense. Defendant argues this court "has not ruled on a case where the gap exceeds 20 years."

¶ 65 However, defendant recognizes that our supreme court has specifically stated the number of years between the crimes cannot and should not dictate the admissibility of the other-crimes evidence. Rather, such admissibility must be made on a case-by-case basis. *People v. Illgen*, 145 Ill. 2d 353, 370-71 (1991) (while the passage of time may lessen the probative value of the other-crimes evidence, it does not determine its admissibility).

¶ 66 For example, the Second District affirmed the trial court's admission of 20-year old evidence finding it credible and probative. *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994). Similarly, the Fifth District found the 20-year-old other-crimes evidence admissible based upon the prior victim's credible and reliable testimony, making it sufficiently probative. *People v. Braddy*, 2015 IL App (5th) 130354, ¶ 37. There is no *per se* rule against a 20-year span between past and current conduct.

¶ 67 Instead, we must consider the 20-year gap along with the other factors, such as the degree of factual similarities between the crimes and any other relevant facts and circumstances. Other-crimes evidence must have " 'some threshold similarity to the crime charged.' " *Donoho*, 204 Ill. 2d at 184 (quoting *People v. Bartall*, 98 Ill. 2d 294, 310 (1983)). Although the crimes should be similar, the admissibility is not defeated if the crimes are not identical. *Id.* at 185.

¶ 68 The trial court found "substantial similarities" between the abuse of V.E. and the abuse of H.V. Both crimes involved 11-year-old victims, took place within defendant's residence, occurred while others were present in the residence, and reportedly involved no verbal or physical foreplay. Although V.E. was assaulted a number of times, she described one incident that was markedly similar to H.V.'s account. On one occasion, V.E. awoke to find defendant taking off her clothes and underwear and proceeding to penetrate her vagina with his penis. Although defendant's abuse of V.E. increased over time from touching to penetration, while defendant penetrated H.V. on his first occasion, this distinction could be attributed only to defendant's opportunity. That is, defendant lacked continued access to H.V. See *Donoho*, 204 Ill. 2d at 186. This discrepancy does not defeat the otherwise factual similarities between the crimes. We agree with the trial court that the two crimes were "remarkably similar offense[s]." Taking V.E.'s credible and straightforward testimony, in light of the court's consideration of the relevant admissibility factors, we find no abuse of discretion in the court's decision that the probative value of the other-crimes evidence outweighed its prejudicial effect.

¶ 69 2. *Certified Copy of Conviction*

¶ 70 Second, defendant claims the trial court erred by tendering a certified copy of defendant's 1994 conviction to the jury during deliberations. The jury sent a request for "all material evidence available." In response, the court tendered, without objection, the following four documents admitted into evidence: (1) the certified copy of the conviction, (2) a photograph of the double recliner, (3) the drawing of the female anatomy, and (4) the drawing of the male anatomy. Defendant acknowledges he forfeited the issue for the purposes of this appeal by not objecting at the time. However, he urges this court to nevertheless consider the issue citing plain error.

¶ 71 Contrary to defendant's assertion, the plain-error doctrine does not apply to this case. " '[P]lain-error analysis applies to cases involving procedural default [citation], not affirmative acquiescence [citation].' " *People v. Peel*, 2018 IL App (4th) 160100, ¶ 32 (quoting *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011)). Here, defendant's attorney not only failed to object to tendering the certified copy of conviction to the jury but he agreed to allow the jury to have the documents they requested. He indicated he had no objection, "if that's what they want."

¶ 72 As this court stated:

> "In a situation like this, where defense counsel affirmatively acquiesces to actions taken by the trial court, a defendant's only challenge may be presented as a claim for ineffective assistance of counsel on collateral attack. (We note that defendant is not contending in this appeal that counsel was ineffective.)" *Bowens*, 407 Ill. App. 3d at 1101.

¶ 73 3. *The State's Closing Argument*

¶ 74 For his third propensity-based issue, defendant claims the prosecutor improperly defined "propensity" for the jury and gave his personal opinion as to how propensity supports H.V.'s credibility during his closing argument. The prosecutor stated:

> "And there was no relationship where a manipulation of the facts would benefit or gain [H.V.].
>
> That makes me wonder. She's got no axe to grind with the defendant. The defendant doesn't control anything for her. There's no incident that we know of that triggered any animosity. They're neighbors. The two kids were friends at school, no drama there that we heard about. There's nothing to be gained or

extracted from [defendant] or his family by a 10-year-old. So that helps me to try and evaluate credibility, her believability.

There's something else that helps me to judge her credibility, and I think it's going to be helpful to the jury. And it's something we could call propensity. And propensity is defined as 'often intense natural inclination or preference,' as defined in Merriam-Webster's dictionary. Basically, a tendency toward or urge toward doing something.

Do we have evidence of propensity? Did we hear any evidence of propensity? Yes, we did. That's the first witness you heard today, from the State—or yesterday, from the State's case. You heard from [V.E.], the former stepdaughter.

* * *

I thought [V.E.] was very clear, very sincere, and very straightforward in her testimony. She's a—I don't think I pinned it down—a 30-something-year-old woman. I'm going to say young 30's. And she testified to a very private invasion, calmly, no hysteria, no vendetta. She just came and shared what happened to her."

¶ 75 The State argues the issue is forfeited on appeal and not sufficiently framed as plain error. We agree with the State. "To preserve claimed improper statements during closing argument for review, a defendant must object to the offending statements both at trial and in a written posttrial motion." *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). Defendant did not object to this portion of the State's closing argument. As a result, he has forfeited any claim of error. In his brief, defendant mentions the concept of plain error and what it would take to find plain error (if the statements were so

inflammatory or flagrant), but he fails to provide this court with a properly framed argument upon which we could apply the plain-error doctrine. Defendant's single and conclusory statement that "the prosecutor's statements during closing argument constitute plain error" is insufficient.

¶ 76 Based upon our analyses above, we find no error related to the admission of propensity evidence. Defendant's arguments, posed neither singularly nor cumulatively, provide a basis for reversal.

¶ 77 B. Admission of Recorded Interview

¶ 78 Defendant claims the trial court erred by admitting as unreliable the recording of Sergeant Rhoads's interview of H.V. conducted at the Child Advocacy Center of East Central Illinois. The State claims defendant forfeited review of this issue by not objecting at trial. Defendant acknowledges that, although he objected to the admission of the evidence during the hearing on the State's section 115-10 (725 ILCS 5/115-10 (West 2014)) motion, he failed to include the issue in his posttrial motion. He asserts "this court will review this issue under the plain error doctrine" on the grounds that the evidence was closely balanced. Again, we agree with the State.

¶ 79 As stated, defendant did not object when the recording was admitted at trial. He has therefore forfeited his claim that the recording should not have been admitted into evidence. *People v. Johnson*, 2016 IL App (4th) 150004, ¶ 70 (quoting *People v. Woods*, 214 Ill. 2d 455, 470 (2005) ("[A] defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review.") (Internal quotation marks omitted)).

¶ 80 In this appeal, for the first time, defendant challenges Sergeant Rhoads's qualifications as a forensic interviewer and the manner in which he conducted the interview of H.V. "This court's forfeiture rules exist to encourage defendants to raise issues in the trial court, thereby ensuring both that the trial court has an opportunity to correct any errors prior to appeal and that the defendant does not obtain a reversal through his or her own inaction." *People v. Denson*, 2014 IL 116231, ¶ 13. By not raising the issue in the trial court, the State was deprived of the opportunity to address defendant's concerns. See *Woods*, 214 Ill. 2d at 470 ("[D]efendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level.").

¶ 81 In this case, had defendant objected, he could have raised any potential misgivings about the reliability of the interview. If defendant had raised any meritorious concerns with Sergeant Rhoads's qualifications—which he did not in this case—the trial court could have allowed the State to elicit additional evidence to address those concerns. See *Johnson*, 2016 IL App (4th) 150004, ¶ 71 (defendant forfeited his claim that recorded interview should not have been admitted into evidence on lack-of-foundation grounds). Accordingly, we find this issue forfeited.

¶ 82 C. Motion for New Trial

¶ 83 Finally, defendant claims the trial court erred in denying his motion for a new trial based upon the results of the DNA evidence discovered after the trial. We review a trial court's order denying a motion for a new trial based on newly discovered evidence for an abuse of discretion. *People v. Gabriel*, 398 Ill. App. 3d 332, 350 (2010).

¶ 84 In order to grant a motion for a new trial on the basis of newly discovered evidence, the new evidence must be so conclusive that it would probably change the result if a

new trial is granted, must be material to the issues, and must be more than merely cumulative to the trial evidence. *People v. Davis*, 2012 IL App (4th) 110305, ¶ 26. In this case, the only issue for this court is whether the DNA evidence is of such conclusive character it would probably change the result of a retrial.

¶ 85 In his motion, defendant alleged the DNA evidence showed semen found on H.V.'s underwear matched Burton, not him. According to defendant, the new evidence "arguably excluded defendant and included someone with access to the victim." Thus, it was possible, defendant claims, the presentation of this new evidence would likely change the outcome of the trial. We find defendant mischaracterizes the new evidence.

¶ 86 Forensic scientist Broaddus testified at the motion hearing that although semen was indicated on the underwear, no sperm was microscopically identified. It was possible then that the indicator was the result of another bodily fluid. Further, of the three samples tested, defendant's DNA profile could not be excluded from two. One of the samples matched Burton's profile, but Broaddus testified it was possible that Burton's DNA could have transferred to H.V.'s underwear while laying in the same laundry basket.

¶ 87 Like the trial court, this court does not find the evidence to be of a conclusive nature so as to undermine the confidence of the verdict. Even assuming a new jury would consider this new DNA evidence, it would not serve to negate H.V.'s positive identification testimony. The evidence defendant presented in support of his motion was not *so conclusive* to undermine confidence in the outcome of the trial. See *Davis*, 2012 IL App (4th) 110305, ¶ 26. We affirm the trial court's order denying defendant's motion for a new trial based upon newly discovered evidence on the grounds that defendant "failed to meet his burden of satisfying the above stringent requirements." *People v. Miner*, 17 Ill. App. 3d 661, 664 (1974).

¶ 88 III. CONCLUSION

¶ 89 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 90 Affirmed.