2012 IL App (1st) 081491-U

FIFTH DIVISION
March 9, 2012

No. 1-08-1491

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	00 CR 2106
	)	
JASON ATKINS,	)	
	)	Honorables
Defendant-Appellant.	)	Edward Fiala and
	)	Marjorie C. Laws,
	)	Judges Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justice J. Gordon and Justice Howse concurred in the judgment.

O R D E R

¶ 1 HELD: Defendant failed to show that it was plain error to admit child declarant's out-of-court statements pursuant to section 115-10 (725 ILCS 5/115-10 (West 2000)). Defendant also failed to show that the admission of the child abuse expert's testimony was plain error. The supreme court has held that section 115-10 is not facially unconstitutional.

¶ 2 Following a bench trial, defendant Jason Atkins was convicted of two counts of predatory criminal sexual assault, six counts of aggravated criminal sexual assault, eight counts of aggravated criminal sexual abuse and one count of unlawful restraint against T.W. The trial

court sentenced defendant to consecutive terms of 27 1/2 years in prison for the two counts of predatory criminal sexual assault. Defendant appeals, arguing that: (1) it was plain error to admit the out-of-court hearsay statements of a child witness made during an interview with a police investigator under section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10 (West 2000)) when the State failed to show that the interview contained sufficient indicia of reliability; (2) it was plain error to admit the hearsay testimony of a child's statements through the testimony of a child abuse expert physician; and (3) section 115-10 violates the confrontation clause, even when the child declarant testifies at trial, because it is facially unconstitutional.

¶ 3 Prior to trial, the State filed a motion for a hearing to admit testimony under section 115-10 (725 ILCS 5/115-10 (West 2000)). Section 115-10 provides for an exception to the hearsay rule and allows the admission of an out of court statement made by the child victim of certain sexual offenses complaining of the acts subject to prosecution to another person if: the trial court determines at a hearing that the time, content and circumstances of the statement provide sufficient safeguards of reliability; and the child testifies at trial or there is corroborative evidence of the act that is the subject of the statement. 725 ILCS 5/115-10 (West 2000).

¶ 4 At the July 2001 hearing on the State's motion, Investigator Jesse Terrazas testified that he is a youth investigator with the Chicago police department. Investigator Terrazas stated that on December 18, 1999, he was working at the Area 2 police offices. He was involved in an investigation concerning defendant. As part of that investigation, he spoke with T.W. T.W. was accompanied to the police station by his parents, but Investigator Terrazas spoke with T.W. in a conference room alone regarding his relationship with defendant.

¶ 5 Investigator Terrazas testified that he told T.W. that his name was Jesse and he was here to ask T.W. some questions. Investigator Terrazas stated that T.W. said he knew Investigator Terrazas was a police officer and T.W. was able to answer basic questions, such as, his name, age, birth date, but not the year. T.W. told Investigator Terrazas that he was 5 years old and attended kindergarten. Investigator Terrazas asked T.W. if he knew anybody by the name of Jason. T.W. answered that he knew Jason from the field house. Investigator Terrazas asked T.W. about his relationship with Jason. T.W. responded that he knew Jason from the field house, but Jason also stayed with T.W., his mother and his brother sometime in May and June 1999.

¶ 6 T.W. also told Investigator Terrazas that Jason would play with him, "and that they would wrestle and at sometimes [*sic*.] [Jason] would do things that [T.W.] did not like." Investigator Terrazas testified that he asked T.W. what defendant did that T.W. did not like. T.W. answered that defendant "would touch his wee-wee, indicating his penis." Investigator Terrazas stated that he asked T.W. to identify various body parts. He said that T.W. called his penis a "wee-wee, and that it was used for peeing" and T.W. called his rectum "a booty, or butt, and that it was used to make poo-poo."

¶ 7 Investigator Terrazas testified that T.W. initially told him that "Jason put his mouth on [T.W.'s] wee-wee." Investigator Terrazas asked if anything else happened. T.W. said that when defendant was staying at their residence, defendant would come into T.W.'s room and pull down T.W.'s underwear. T.W. would lay on the bed and defendant "would get on top of him on his back side." Investigator Terrazas stated that T.W. used the term "freaked," and the investigator asked T.W. what "freaked" meant. T.W. told him it meant "shaking back and forth." T.W. said

he saw defendant's "wee-wee" or penis. T.W. said that defendant would rub his penis against T.W.'s buttocks. T.W. told the investigator that defendant would get "some sort of cream from the drawer and rub it both on his penis and on [T.W.'s] buttocks and then proceed to continue to rub." Investigator Terrazas stated that T.W. told him that "white stuff would come out of Jason's wee-wee." Investigator Terrazas testified that T.W. said that while defendant was "freaking on [T.W.] that [defendant] had his penis inside of [T.W.'s] booty."

¶ 8 Investigator Terrazas stated that T.W. told him defendant would try to kiss T.W. on the mouth with his tongue and T.W. "didn't like that at all." T.W. also said that defendant would make T.W. hold defendant's penis and "rub it up and down" and "white stuff" would come out of defendant's penis.

¶ 9 Investigator Terrazas further testified that he asked T.W. if he knew the difference between the truth and a lie. Investigator Terrazas stated that T.W. said "a truth is what happens, he said that lie gets people in trouble and that you're not suppose [*sic*.] to do it." Investigator Terrazas described T.W. as "willing," "very articulate, and "very able to articulate about the facts and answered questions."

¶ 10 On cross-examination, Investigator Terrazas stated that he and other police officers contacted T.W.'s family after T.W.'s name was mentioned during an interview with defendant. T.W.'s parents did not make any allegations against defendant before coming to the police station. Investigator Terrazas testified that T.W.'s parents asked to be present during his interview with T.W., but he felt T.W. would be more forthcoming if his parents were not present. Investigator Terrazas admitted that he did not record T.W.'s statements on a tape recorder or with

a court reporter, but he reduced T.W.'s statement to a handwritten report. Investigator Terrazas said that T.W. stated that sometimes T.W.'s brother was home, but he did not believe his mother was home during any of the incidents. T.W.'s father did not live with them.

¶ 11 Investigator Terrazas stated that T.W. met defendant when defendant was a counselor at the summer camp that T.W. attended at Rainbow Beach. When asked if "any contact of an illegal nature" occurred between defendant and T.W. while T.W. was involved in the program, Investigator Terrazas responded that the time frame "would indicate yes," but if the question related to whether any contact happened at the park district, he "would have to answer no." Investigator Terrazas admitted that the allegations occurred six or seven months prior to the interview with T.W.

¶ 12 Following arguments, the trial judge recounted the testimony presented and held that "upon very careful consideration of all these factors, I find that considering the time, content and circumstances these circumstances all provide a sufficient degree of reliability." The judge then granted the State's motion to allow the testimony.

¶ 13 In September 2002, defendant filed a motion to suppress statements. In his motion, defendant alleged that the statements made to law enforcement officials "were obtained as the result of psychological coercion" involving repeated interrogation over a period of hours and a warning that defendant must make a statement or face multiple charges.

¶ 14 Investigator Melvin Roman testified at the suppression hearing that he is employed as a youth investigator with the Chicago police department. On December 18, 1999, Investigator Roman was assigned to investigate a case of possible child abuse involving a victim named F.B.

In the course of that investigation, Investigator Roman met defendant. He spoke with defendant in an interview room at Area 2 at approximately 1 a.m. He advised defendant of his *Miranda* rights. Defendant answered that he understood his rights and began to speak with Investigator Roman. Investigator Roman stated that he stopped defendant from giving any further information because the investigator was not fully advised of the whole investigation. He denied threatening defendant by stating that defendant must make a statement or he would be face multiple charges. He denied physically touching defendant or threatening physical harm. Investigator Roman denied withholding food from defendant and further stated that when he offered defendant food, defendant responded that he was fasting. Defendant was brought food, but Investigator Roman did not believe defendant ate the food. Investigator Roman stated that defendant was provided water and was allowed to use the restroom and to sleep.

¶ 15 On cross-examination, Investigator Roman testified that he spoke with defendant about 10 minutes after defendant had brought to the police station. Defendant was handcuffed when he was brought in, but the handcuffs were removed when he was seated in the interview room. Investigator Terrazas returned to the station about an hour to an hour and a half after defendant was brought to Area 2. Investigator Roman spoke with defendant around 3 a.m. and later at 9 a.m. Investigator Terrazas was present for the 3 a.m. interview, but another investigator was present for the 9 a.m. interview. Investigator Roman stated that the 3 a.m. interview last approximately four or five hours. Additional interviews took place throughout the day until about 4 p.m. Investigator Roman said that he gave defendant his Miranda rights again before the 9 a.m. interview and Investigator Terrazas gave defendant his right before the 3 a.m. interview.

Investigator Roman testified that defendant did not indicate that he wanted a lawyer present.

¶ 16 Investigator Terrazas testified that at 3 a.m. on December 18, 1999, he was investigating a case of child abuse against F.B. and spoke with defendant. He stated that he advised defendant of his *Miranda* rights and defendant indicated that he understood his rights. Investigator Terrazas testified that defendant stated that he wanted to cooperate because "he wanted to get this all over with."

¶ 17 Investigator Terrazas stated that defendant gave the police information on victims the police were unaware of before speaking with defendant. The police tracked down the additional victims and also contacted parents of several children who had been under defendant's supervision at the park district. While the police spoke with additional victims, defendant was in the interview room at Area 2. Investigator Terrazas said that defendant was allowed to sleep and use the washroom. He also stated that defendant was offered food several times, but defendant refused to eat. Defendant was also provided water. Investigator Terrazas testified that defendant did not ask for a lawyer.

¶ 18 Investigator Terrazas denied telling defendant that he had to make a statement or the police would charge him with multiple charges. He also denied hearing anyone else say this to defendant. He denied hearing defendant ask about the consequences of the crimes he was admitting to.

¶ 19 On cross-examination, Investigator Terrazas stated that he arrested defendant at about 12:30 a.m. on December 18, 1999, and he had defendant transported to Area 2. He first interviewed defendant at approximately 3 a.m. with Investigator Roman and a third investigator.

He testified that he had several interviews with defendant over December 18, 19 and 20. He estimated that he interviewed defendant between 12 and 20 times and defendant was cooperative. Many of the interviews were brief, between one and five minutes long. Investigator Terrazas stated that he worked the "entire next three tours" and did not return home. He said that defendant was allowed to sleep for long periods of time. Investigator Terrazas testified on redirect that defendant gave eight handwritten statements during the interviews.

¶ 20 Assistant State's Attorney (ASA) Sandra Blake testified that on December 18, 1999, she was assigned a sexual assault case and she traveled to Area 2. She met with defendant on December 19, at approximately 3:45 p.m. She advised defendant that she was an ASA, she was a lawyer and prosecutor, and not his lawyer. Defendant responded that he understood. ASA Blake then advised defendant of his *Miranda* rights. Defendant indicated that he understood his rights and agreed to speak with her. She spoke with defendant for about an hour to an hour and 15 minutes. She spoke with defendant again around 8 p.m. that evening for an hour and then a third meeting at approximately 9:30 to 10 p.m. ASA Blake testified that she spoke with defendant regarding T.W. at about midnight and into the morning of December 20. During this interview, she wrote defendant's statement. After she finished writing the statement, ASA Blake asked defendant to read part of it and then she read the rest of the statement back to defendant.

¶ 21 ASA Blake testified that defendant did not tell her that he wanted an attorney. She also denied telling defendant that he needed to confess to the charges or multiple charges would be brought against him and did not hear anyone else make this statement to defendant in her presence. ASA Blake asked defendant about his treatment by the police and defendant told her

that he had been treated well.

¶ 22 On cross-examination, ASA Blake stated that she spoke with at least five investigators regarding defendant's case. She said that she spoke with defendant about T.W. first and later reduced defendant's statement to writing. She stated that Investigator Terrazas was present for the reading back of the statement, but she was unsure if he was present the entire time when she wrote it. ASA Blake denied discussing the consequences of predatory criminal sexual assault with defendant. ASA Blake testified that she wrote five to seven statements from defendant and her partner also wrote some statements. The State then rested on the motion.

¶ 23 Defendant testified on his own behalf at the suppression hearing. Defendant stated that on December 20, 1999, he was 23 years old and lived on South Drexel in Chicago. On December 18, 1999, defendant testified that officers came to his house and told him that he was wanted for questioning at the police station. He was handcuffed and taken to a holding room at the police station.

¶ 24 Defendant stated that he first spoke with Investigator Roman. He said the investigator gave him his rights and then he asked to have an attorney present. Defendant further testified that Investigator Terrazas came in while Investigator Roman was reading defendant his rights and said "we got you. You can't go nowhere. You might as well tell us what happened ***." Defendant said he asked for a lawyer again and Investigator Terrazas told him that did not need a lawyer and "Just come on confess up. Just say whatever it is that you did." Defendant testified that the officer's "gesture alone showed [him] that the consequences would have been that they would have jumped on [him.]" Defendant stated that Investigator Terrazas threatened him with

multiple charges. Defendant testified that Investigator Terrazas told him that he "might as well confess up or we're going to hit you with this." Defendant said he slept "very rarely."

¶ 25 Defendant testified that when he met with ASA Blake, she told him what he was being charged with committing. He also said that she "just set some papers before me and said that this is the written statement and I would like you to sign your name to it." He denied sitting down with the ASA as she wrote the statement. He admitted to signing the document multiple times because he was depressed and he "gave up on life, period." He said he was "barely even was listening to what they were saying."

¶ 26 On cross-examination, defendant admitted that he knew T.W. and his brother D.J. and he lived with them. He stated that Investigator Terrazas was the only investigator that threatened him. Defendant said he felt threatened when Investigator Terrazas had his right hand in a fist and his left hand rubbed the upper knuckles. Defendant testified that after that gesture by Investigator Terrazas, he began to list names of children from the park district "randomly." He stated that he was not confessing, but that he was "just pulling some names out." When discussing his signature on his statement to ASA Blake, defendant claimed he had a learning disability. The parties stipulated that a learning disability was not claimed in the motion to suppress statements. He testified that ASA Blake did not promise him leniency if he made a statement. The defense then rested.

¶ 27 Following arguments, the trial judge found that Investigators Terrazas and Roman testified credibly and that she did not believe that defendant was ever placed in a threatening situation by the investigators. The judge also noted that defendant's request for a lawyer and a

learning disability were not raised in the motion to suppress statements. The judge held that defendant's constitutional rights were not violated and the motion to suppress was denied.

¶ 28 The following evidence was admitted at defendant's September 2002 bench trial.

¶ 29 ASA Blake testified consistently with her testimony from the suppression hearing. She stated that she first met with defendant on December 19, 1999, at approximately 3:45 p.m. at Area 2. She introduced herself and explained that she was a prosecutor and was not defendant's lawyer. She also gave defendant his *Miranda* rights. She spoke with defendant for an hour to an hour and 15 minutes. After the meeting, she left the room and spoke with other children. She met with defendant a second time around 8 or 9 p.m. to reduce his earlier statements to writing.

¶ 30 ASA Blake stated that Investigator Terrazas was present when she read back defendant's statement about T.W. After she wrote the statement, she had defendant read the first typewritten paragraph and the first handwritten paragraph aloud. Then, she read the rest of the statement to defendant and at the end of each page, she asked defendant if the page was correct. Defendant responded that it was and signed it. ASA Blake and Investigator Terrazas also signed the statement.

¶ 31 On cross-examination, ASA Blake stated that she had discussed the investigation with the police and she had reviewed the notes from their conversations with defendant. She admitted that the handwritten statement was a summary of defendant's words and that she did not write down everything defendant told her.

¶ 32 ASA Blake published defendant's statement on redirect. According to defendant's statement, he stayed in the basement apartment with T.W., his brother D.J., and the boys' mother

Misty J. Defendant knew T.W. and D.J. from the Rainbow Park where defendant cared for the kids. Defendant stated that twice in June 1999 he "sucked" on T.W.'s penis and ejaculated. Defendant also "fondled" T.W.'s penis. Defendant also stated that he had anal intercourse with T.W. two times, once on the couch in the living room and once in T.W.'s bed. Defendant stated that he would put oil from a white bottle in T.W.'s room on his penis and on T.W.'s "butt." Defendant explained that by anal intercourse he meant that he put his penis in T.W.'s anus. He said he ejaculated on the floor when he had anal intercourse with T.W.

¶ 33 Defendant stated he had been treated well by the police. He was offered food, but he did not want anything to eat. He was allowed to use the bathroom and sleep when he wanted. He stated that no threats or promises were made to him in exchange for his statement.

¶ 34 Doctor Michelle Lorand testified and was qualified as an expert in child abuse. Doctor Lorand stated that on January 7, 2000, she examined T.W. at the children's emergency room at Cook County Hospital. T.W.'s father was present during the examination. Doctor Lorand testified that she asked T.W. if he knew why he was there and T.W. responded that it was because "Jason" touched him. Doctor Lorand asked T.W. where "Jason" touched him and T.W. said his penis. When the doctor asked T.W. how many times, T.W. held up two fingers. T.W. said it happened at T.W.'s house when defendant was babysitting. T.W. also told Doctor Lorand that defendant had put his penis in "his butt." T.W. told her it hurt.

¶ 35 Doctor Lorand then examined T.W. She found his general health to be good. Doctor Lorand testified that T.W.'s rectal exam "revealed two scars." Doctor Lorand stated that if one looked at the rectum as though it was the face of a clock, then one scar was located at the 10 to

11 o'clock position and the other was at the 4 to 5 o'clock position. She described the scars as "cleft like and fan shaped." She testified that these type of scars are consistent with "penetrating type trauma to the rectum." Her diagnosis based on T.W.'s history and physical was sex abuse.

¶ 36 On cross-examination, Doctor Lorand admitted that she could not determine the age of the scars. Doctor Lorand stated that she did not know T.W.'s prior history and the family had been referred to her by police.

¶ 37 Prior to T.W.'s testimony, the trial court conducted a competency hearing and held that T.W. was competent to testify.

¶ 38 T.W. testified that he was eight years old and in second grade. At the time of trial, T.W. lived with his father, but he used to live with his mother. T.W. stated that defendant was a friend that he met at the field house by Rainbow Beach. He said defendant came to his apartment when he was five.

¶ 39 T.W. testified that when he went to use the bathroom, defendant would come in the room. Then he went to his room and defendant came in there. He stated that defendant pulled down his pants and underpants. Defendant then "put his penis in [T.W.'s] butt and he put his mouth on [T.W.'s] penis." T.W. testified that this happened on his bed. He further stated that the penis/anus and penis/mouth contacts happened two times each. T.W. said it felt "not really good" when defendant put his penis in T.W.'s anus. T.W. stated that he did not tell anybody after this happened because he "thought [he] was going to get in trouble by [his] mom or [his] dad."

¶ 40 On cross-examination, T.W. testified that when he lived with his mother, he shared a bedroom with his brother D.J. He also said one of his sisters sometimes stayed with them. He

stated that Rainbow Beach was across the street from his house and he walked there with his brother when it was hot. T.W. said he met defendant at the field house. T.W. then testified that defendant took him into the field house kitchen. T.W. stated that defendant opened his zipper, took out T.W.'s penis, and defendant put it in his mouth. T.W. said that defendant made "white stuff come out of his penis." T.W. agreed that he did not tell the prosecutor about anything happening at the field house. He said his mother met defendant when she picked him up at the field house. T.W. stated that he did not tell his mother about what happened in the field house because he was afraid that he would get in trouble and be punished.

¶ 41 T.W. testified that defendant came to his house to babysit, but did not stay over. He admitted that he did not tell his mother that he did not want defendant to babysit. T.W. said that his brother D.J. was at the field house and defendant was babysitting when the contact happened between defendant and T.W. T.W. testified that it hurt when defendant put his penis in T.W.'s anus. T.W. stated that he did not know defendant's last name, he only called defendant "Jason." T.W. testified that the first time he told anyone was when he talked with the police officer.

¶ 42 Investigator Roman testified consistently with his testimony from the suppression hearing that he advised defendant of his *Miranda* rights at 1 a.m. on December 18, 1999, at Area 2. He stated that defendant indicated that he understood his rights and started to give a statement, but Investigator Roman stopped defendant because the investigator was not aware of all the facts of the investigation.

¶ 43 Investigator Terrazas also testified consistently with his prior testimony from the suppression hearing. He stated that he was assigned to investigate a case of abuse involving

defendant. He proceeded to defendant's residence and informed defendant that he had to come with the police. Investigator Terrazas allowed defendant to change clothes. Defendant left with other officers while Investigator Terrazas remained at the residence for an evidence technician. He returned to Area 2 at approximately 3 a.m.

¶ 44 Investigator Terrazas spoke with defendant at approximately 3 a.m. He advised defendant of his *Miranda* rights and defendant indicated that he understood his rights. He spoke with defendant until about 7 a.m., with breaks. During that conversation, Investigator Terrazas became aware of T.W. as a potential victim. He did not know about T.W. before speaking with defendant. Defendant told the investigator that he was staying with a family that included D.J. and T.W. Defendant said while he stayed with them, he had a sexual relationship with T.W. Defendant stated that T.W. "would walk around the house in his underwear and that [defendant] would remove his penis and that it would get hard."

¶ 45 Investigator Terrazas testified that defendant told him that defendant would pull T.W.'s pajamas and underwear down, take some baby oil and rub it on his penis and T.W.'s bottom. Defendant would then insert his penis in the rectal area of T.W. Investigator Terrazas recalled that defendant stated that "he was unable to completely penetrate [T.W.'s] anus but that he continued to rub his penis in between [T.W.'s] buttocks cheeks." Defendant told the investigator that this occurred several times. Defendant also said that he performed oral sex on T.W. on "at least ten occasions." Investigator Terrazas stated that defendant said T.W. was the initiator and he approached defendant saying that T.W. wanted defendant to "freak him in the booty." Investigator Terrazas asked defendant what that meant and the investigator understood it to mean

that T.W. "wanted [defendant] to anally penetrate him."

¶ 46 Investigator Terrazas testified that he spoke with T.W. on December 18. During the conversation, only the investigator and T.W. were present. Investigator Terrazas stated that he asked T.W. open-ended questions to allow T.W. to give an answer in his own words.

¶ 47 T.W. told the investigator that he knew defendant from the park district and an after school program at Rainbow Beach. T.W. said defendant lived with his family in May or June 1999. When Investigator Terrazas asked T.W. what he thought of defendant, T.W. responded that he "didn't like the things that [defendant] would do to him." Investigator Terrazas had T.W. explain the parts of the body. T.W. used the term "wee-wee" for the penis and he called the rectal area "a butt," where "poo-poo" came from.

¶ 48 T.W. said defendant would pull T.W.'s pajama bottoms and underwear down. Defendant would get baby oil and rub it on defendant's "wee-wee" and T.W.'s "butt." Then defendant would get on top of T.W. with defendant's penis inside of T.W.'s "butt." Investigator Terrazas stated that T.W. referred to this as "freaking." He asked T.W. what that meant and T.W. answered that "the wee-wee goes into his butt and [defendant] moves back and forth." T.W. said this happened in the bedroom. When Investigator Terrazas asked T.W. if anything else happened, T.W. said that defendant put his mouth around T.W.'s penis. T.W. told Investigator Terrazas that defendant took out his penis and had T.W. hold defendant's penis while defendant moved T.W.'s hand up and down defendant's penis until "the white stuff" came out. Investigator Terrazas testified that he arrested defendant.

¶ 49 On cross-examination, Investigator Terrazas admitted that T.W. was unable to remember

the specific dates the alleged sexual contact with defendant occurred. He also stated that T.W. did not tell him of any sexual incidents occurring with defendant at the field house.

¶ 50 Misty J. testified that she is T.W.'s mother. She stated that T.W. was born May 14, 1994. She said she knew defendant from the Rainbow Beach field house when she would pick up D.J. and T.W. from the after school program. She testified that the police came to her house in December 1999 and then she went to the police station. She stated that before that date, she did not report that T.W. had been sexually assaulted by defendant because she did not have any knowledge of it.

¶ 51 On cross-examination, Misty testified that her sons participated in after school programs at the field house and would go there nearly every day. Defendant would escort them from school to the field house and she would pick the boys up from the field house. She first met defendant in the fall of 1998 while defendant worked at the field house. She stated that defendant came to her house to help with the boys in April 1999. Defendant would pick T.W. up from preschool in the morning while Misty was at work. Misty left her key with defendant while he babysat T.W. She stated that defendant stayed at her house in exchange for babysitting. He stayed until the end of June when she asked him to leave. Misty testified that defendant slept in the living room.

¶ 52 Following Misty's testimony, the State asked to admit defendant's handwritten statement, which the trial court admitted over defendant's objection. The State then rested. Defendant moved for a directed finding, which the trial court denied. The defense rested without presenting any evidence. After arguments, the court took the case under advisement. On September 20,

2002, the trial court reconvened. The court detailed the testimony presented at trial. The court considered the testimony of Investigator Terrazas and ASA Blake to be credible. The trial court then found defendant guilty of all counts.

¶ 53 In October 2002, defendant filed a motion for a new trial, arguing that the case was based solely on a statement by the defendant and that statement was insufficient for finding of guilty, that T.W. was an incompetent witness at trial, that the testimony of "the police officer" was uncorroborated and contained false testimony, and the finding is based upon evidentiary facts that do not exclude every reasonable hypothesis beyond a reasonable doubt. The trial court denied defendant's motion. When the court denied the posttrial motion, defendant began shouting in the courtroom and the case was continued for a behavioral clinical examination. Defendant was subsequently found fit for sentencing. In December 2002, the trial court conducted a sentencing hearing. The State presented testimony of Investigator Terrazas regarding defendant's statements that he engaged in sexual acts with over 60 children over a ten-year period as well as interviews with other victims. ASA Blake also testified about interviews with other victims. T.W.'s father gave a victim impact statement. After arguments, the trial court merged all the counts into the two counts of predatory criminal sexual assault. The court sentenced defendant to consecutive terms of 27 1/2 years in prison for each of the predatory criminal sexual assault convictions.

¶ 54 This appeal followed.

¶ 55 Defendant first argues that it was plain error to admit the out-of-court statement made by T.W. in his interview with Investigator Terrazas under section 115-10 of the Code of Criminal

Procedure (725 ILCS 5/115-10 (West 2000)) because the State failed to show that the interview contained sufficient safeguards of reliability at the hearing on the State's motion to admit the statement. Defendant admits that he failed to raise this issue in his motion for a new trial. To preserve an issue for review, defendant must both object at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992).

¶ 56 However, defendant asks this court to review this issue as plain error. Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). However, the plain error rule "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the supreme court has held that the plain error rule is narrow and limited exception to the general rules of forfeiture. *Herron*, 215 Ill. 2d at 177.

¶ 57 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that both prongs of the plain error rule apply in this case because the evidence was very closely balanced and he was denied a substantial right because the error was "serious." However, we find that neither prong of the plain error rule is applicable for defendant's claim.

¶ 58 First, the evidence in this case was not closely balanced. The evidence presented at trial established that defendant sexually assaulted T.W. on more than one occasion. Defendant admitted to penetrating T.W.'s anus with his penis on two occasions and to putting T.W.'s penis in defendant's mouth on two occasions. Both Investigator Terrazas and ASA Blake testified that defendant made these admissions, both orally and in a handwritten statement. Further, Investigator Terrazas testified that the police were not investigating allegations against defendant involving T.W. when defendant was arrested, but defendant told the police about the sexual assaults on T.W. When T.W. was interviewed at the station, he told Investigator Terrazas that defendant had put his penis inside T.W.'s "butt" and defendant had also put T.W.'s penis in defendant's mouth. Even if we do not consider T.W.'s statement to Investigator Terrazas, T.W. testified at trial about these incidents and his testimony was consistent with the prior statement and defendant's own admissions. Additionally, Doctor Lorand testified about scarring on defendant's rectum that was consistent with child abuse. Based on our discussion of the facts of this case and the entire record before us, we cannot say that the evidence was closely balanced.

¶ 59 As for the second prong of the plain error rule, defendant only makes a single statement that the error is "serious," but does not discuss how the second prong applies in the instant case

nor does defendant cite any relevant authority to support his claim that any error was so serious that it affected the fairness of defendant's trial. This reference is not sufficient to raise the plain error rule on appeal and it is forfeited. See *People v. Nieves*, 192 Ill. 2d 487, 503 (2000) (finding that the failure to argue "that the evidence was closely balanced nor explain[] why the error is so severe that it must be remedied to preserve the integrity of the judicial process" waived plain error on appeal); Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006). Accordingly, we conclude that the plain error rule does not apply in this case and defendant's claim has been forfeited.

¶ 60 Next, defendant asserts that the testimony of Doctor Lorand exceeded the proper bounds of admissibility. Specifically, defendant contends that Doctor Lorand's testimony was impropr under both section 115-10 because no hearing was conducted and section 115-13 because T.W.'s statement identified defendant and it lacked the necessary foundation for reliability. However, no objection was made at trial as to Doctor Lorand's testimony nor was any issue regarding this testimony raised in defendant's motion for a new trial. As we previously noted, to preserve an issue for review, defendant must both object at trial and in a written posttrial motion (*Enoch*, 122 Ill. 2d at 186) and the failure to do so operates as a forfeiture as to that issue on appeal (*Ward*, 154 Ill. 2d at 293). Defendant concedes that the issue was not preserved for appeal, but asks this court to review the issue under the plain error rule. Since we have already concluded that the evidence was not closely balanced in this case, defendant's claim can only be considered under the second prong of the plain error rule. However, we first will determine whether any error occurred at all before considering it under plain error. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 61 Defendant argues that Doctor Lorand's testimony was improperly admitted under section

115-10 because a hearing was not conducted to determine whether sufficient safeguards of reliability were present when Doctor Lorand spoke with T.W. Defendant makes the conclusory statement that Doctor Lorand's testimony was admitted under section 115-10, but fails to explain how section 115-10 applied to the doctor's testimony. Defendant only states that a hearing should have been conducted and that it was plain error because the statute requires a hearing. Defendant does not specifically discuss the second prong of plain error, but concludes that the error was "plain, clear and obvious." However, Doctor Lorand's testimony was not admitted pursuant to section 115-10 as an out of court statement made by the victim. See 725 ILCS 5/115-10 (West 2000).

¶ 62 Rather, Doctor Lorand's testimony was admitted pursuant to section 115-13. Defendant also challenges Doctor Lorand's testimony as improper under section 115-13 for exceeding the scope of admissibility because T.W. identified the alleged perpetrator and a reliability hearing should have been conducted.

¶ 63 In prosecutions of certain sex offenses, section 115-13 provides that "statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule." 725 ILCS 5/115-13 (West 2000).

¶ 64 Here, Doctor Lorand testified as a child abuse expert regarding her examination of T.W. She stated that she asked T.W. if he knew why he had come for an exam and T.W. responded that he came to be checked " 'because Jason touched me.' " The doctor then asked where "Jason"

touched him. T.W. said his penis and he also said that "Jason" had put his penis in T.W.'s "butt." T.W. told Doctor Lorand that defendant used "oil" on defendant's penis before he penetrated T.W.'s anus and that "it hurt." Doctor Lorand then testified about her physical examination of T.W., specifically, the scarring she discovered on T.W.'s rectum.

¶ 65 "A trial court is vested with discretion in determining whether the statements made by the victim were 'reasonably pertinent to the victim's diagnosis or treatment.' " *People v. Davis*, 337 Ill. App. 3d 977, 989-90 (2003) (quoting *People v. Williams*, 223 Ill. App. 3d 692, 700 (1992)). Further, as in the instant case, "[a] trial judge, when acting as the finder of fact, is presumed to have considered only admissible evidence in reaching his decision." *Davis*, 337 Ill. App. 3d at 990. "Generally, statements concerning a cause of injury made to a treating physician are admissible under the physician-patient exception to the hearsay rule; however, identification of the offender is outside the scope of the exception." *Davis*, 337 Ill. App. 3d at 990 (citing *People v. Hudson*, 198 Ill. App. 3d 915, 921–22 (1990)).

¶ 66 In *Davis*, a nurse testified that she treated the victim following a sexual assault and kidnaping. The nurse assessed the victim's injuries and further testified that the victim described the circumstances of the assault, including the event prior to her kidnaping and the physical description of the offenders. *Davis*, 337 Ill. App. 3d at 982. The defendant failed to object to this testimony at trial, but asked the court to consider it under the plain error rule. *Davis*, 337 Ill. App. 3d at 989. The court found that the circumstances of the sexual assault and the manner of her injuries fell within the statute, but the identity of the persons who attacked the victim and events leading up to her kidnaping did not fall under the hearsay exception because these

statements were not necessary for the victim to receive proper medical treatment. *Davis*, 337 Ill. App. 3d at 990.

¶ 67 However, the *Davis* court found that the evidence was not closely balanced and any error in admitting this testimony was harmless. *Davis*, 337 Ill. App. 3d at 990-91. "The hearsay testimony was cumulative and corroborated by substantial other evidence. No fact regarding the crime was introduced through hearsay testimony that was not also established by [the victim's] own testimony." *Davis*, 337 Ill. App. 3d at 990-91.

¶ 68 In the present case, any error in Doctor Lorand's testimony regarding T.W.'s identification of "Jason" as the perpetrator was harmless. T.W.'s statements to Doctor Lorand as to how and where he was touched by defendant were within the exception recognized in section 115-13 to allow for diagnosis and treatment. While T.W.'s identification of "Jason" as the perpetrator was unnecessary for medical treatment, this testimony from Doctor Lorand was cumulative of other evidence at trial. Defendant admitted to Investigator Terrazas and ASA Blake, both orally and in a handwritten statement, that he engaged in these acts against T.W. T.W. also testified at trial about these sexual assaults and identified defendant as the perpetrator. Any error in admitting the identification testimony was harmless. " 'Admission of hearsay evidence is harmless error if there is no reasonable possibility the verdict would have been different had the hearsay been excluded.' " *People v. Garmon*, 394 Ill. App. 3d 977, 989 (2009) (quoting *People v. McCoy*, 238 Ill. App. 3d 240, 249 (1992)). Given the cumulative nature of this testimony and the overwhelming evidence presented at trial, there is no reasonable possibility that the result of the trial would have been different absent this testimony from Doctor Lorand.

¶ 69 We further reject defendant's argument that a reliability hearing is required under section 115-13. Unlike in section 115-10, which specifically requires a hearing to determine the reliability of the out of court statements (725 ILCS 5/115-10(b)(1) (West 2000)), section 115-13 contains no such requirement. We decline to expand the statute beyond its language. Under these circumstances, defendant has failed to show that the trial court's error "was so serious that it affected the fairness of [his proceeding] and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187. Accordingly, the error in this case does not rise to the level of plain error and we find that it is forfeited.

¶ 70 Finally, defendant argues that section 115-10 (725 ILCS 5/115-10 (West 2000)) is facially unconstitutional and violates the confrontation clause in light of the Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36 (2004). "*Crawford* held that the confrontation clause requires the reliability of testimony to be tested through cross-examination, and that no judicial assessment of 'reliability' may be substituted for this form of credibility testing. *Crawford*, 541 U.S. at 61-62. Now, under *Crawford*, testimonial statements of an unavailable witness may be admitted—regardless of their perceived 'reliability'—only if the defendant had a prior opportunity to cross-examine the declarant." *People v. Kitch*, 239 Ill. 2d 452, 468 (2011) (citing *Crawford*, 541 U.S. at 68).

¶ 71 Here, defendant contends that section 115-10 is unconstitutional and cannot be used even when the child witness testifies because its provisions are not severable as the outdated reliability standard set forth in section 115-10(b)(1) pervades the entire statute and applies to both witnesses who testify and those who do not.

¶ 72 However, after defendant's opening brief was filed with this court, the Illinois Supreme Court rejected a challenge that section 115-10 is facially unconstitutional "in light of *Crawford*'s reinterpretation of the confrontation clause." See *Kitch*, 239 Ill. 2d at 470. In that case, as in the instant case, the child witnesses testified at trial. The *Kitch* court found that "[u]nder *Crawford*, the confrontation clause poses no restrictions on the admission of hearsay testimony if the declarant testifies at trial and is present 'to defend or explain' that testimony." *Kitch*, 239 Ill. 2d at 467. Therefore, where the child witnesses were present to defend or explain their testimony on cross-examination, the admission of their hearsay statements under section 115-10 did not violate the confrontation clause. *Kitch*, 239 Ill. 2d at 467. The supreme court noted that section 115-10 provides additional protection for reliability over and above the confrontation clause because hearsay statements must satisfy *Crawford*'s constitutional requirements as well as statutory requirements. *Kitch*, 239 Ill. 2d at 469. The supreme court further held that

> "the evidentiary question of whether hearsay testimony satisfies a statutory exception (such as section 115–10) is separate from, and antecedent to, the issue of whether admitting the testimony satisfies the confrontation clause. See *In re E.H.*, [224 Ill. 2d 172, 179–80 (2006)] (courts must engage in two-step analysis, first statutory and then constitutional, to determine admissibility of hearsay testimony). Because testimony is admissible only if it meets *both* evidentiary and constitutional requirements, the two standards need not be identical." (Emphasis in original.) *Kitch*, 239 Ill. 2d at 469-

¶ 73 Since the supreme court has upheld the constitutionality of section 115-10, defendant's argument fails.

¶ 74 Based on the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 75 Affirmed.