2013 IL App (4th) 120337-U

NO. 4-12-0337

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 12, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
MANUEL MARTINEZ,	)	No. 10CF1336
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Knecht concurred in judgment.

ORDER

¶ 1 *Held*: (1) Where defendant did not invoke his right to counsel during police questioning, he failed to show his counsel was ineffective in not filing a motion to suppress; (2) where defendant failed to raise the issue as to the admission of hearsay evidence in a posttrial motion, he forfeited his argument on appeal; and (3) where defendant failed to raise a posttrial claim of ineffective assistance of counsel, the trial court did not err in not addressing the issue.

¶ 2 In February 2012, a jury found defendant, Manuel Martinez, guilty of predatory criminal sexual assault of a child, criminal sexual assault, and aggravated criminal sexual abuse. In April 2012, the trial court sentenced him to 22 years for predatory criminal sexual assault, 15 years for criminal sexual assault, and 7 years for aggravated criminal sexual abuse.

¶ 3 On appeal, defendant argues (1) his trial counsel was ineffective, (2) hearsay evidence was improperly admitted, and (3) his case should be remanded for a hearing to address his posttrial allegations of ineffective assistance of counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In August 2010, the State charged defendant by information with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2010)), alleging he, who was at least 5 years older than the victim, committed an act of sexual conduct with M.M., who was at least 13 years of age but under age 17 when the act was committed, in that he intentionally fondled her breast for the purpose of his sexual arousal (count I) and intentionally penetrated her vagina with his finger (count II). The State charged him with one count of aggravated criminal sexual abuse of a second victim (count III) (720 ILCS 5/12-16(c)(1)(i) (West 2010)), alleging he, who was 17 years of age or older, committed an act of sexual conduct with T.M., who was under 13 years of age when the act was committed, in that he intentionally licked her leg for the purpose of his own sexual arousal. In January 2011, the State charged defendant by information with one count of predatory criminal sexual assault of a child (count IV) (720 ILCS 5/12-14.1(a)(1) (West 2010)), alleging he, who was 17 years of age or older, committed an act of sexual penetration with T.M., who was under 13 years of age when the act was committed, in that he intentionally inserted his finger into her vagina. The State also charged defendant with one count of criminal sexual assault (count V) (720 ILCS 5/12-13(a)(4) (West 2010)), alleging he, who was 17 years of age or older and held, as the live-in boyfriend of T.M.'s mother, a position of trust, supervision, or authority, committed an act of sexual penetration with M.M., who was at least 13 years of age but under 18 when the act was committed, in that he placed his finger in her vagina while she was spending the night at the home of T.M. and defendant. Defendant pleaded not guilty.

¶ 6 A. Section 115-10 Hearing

¶ 7 In October 2010, the State filed a motion to admit statements under section 115-10 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/115-10 (West 2010)). The State alleged T.M., age 11, made statements about the alleged offenses to Kathryn Kirkhart, her mother; Champaign police officer Brian Rogers; and Champaign police investigator Mary Bunyard.

¶ 8 In January 2011, the trial court held a hearing on the State's motion. Kirkhart testified she was living in a Champaign apartment with defendant in August 2010. On August 7, 2010, Kirkhart's niece, M.M., and T.M. were spending the night. Kirkhart went to sleep on the couch and T.M. woke her up at approximately 2:30 a.m. At that time, M.M. was "curled up in a ball on the love seat crying hysterically." T.M. stated defendant "kept going in and out of their bedroom touching them in certain areas of their bodies and they kept telling him that they were going to wake up her mom." T.M. also stated defendant "had been touching [M.M.] in her bosoms and down below her belt and she told me that then she—then she started telling me that she had woke up and [M.M.]—and [defendant] was licking on her legs." Kirkhart got off the couch and saw defendant in the hallway. He told her he had done nothing wrong. Kirkhart then smacked him. T.M. continued to talk and told her mother that defendant had been licking her legs. She also stated she woke up and found her shorts were unfastened and open. Kirkhart smacked defendant again and called the police.

¶ 9 Officer Rogers testified he arrived at the apartment at approximately 3:40 a.m. He talked with Kirkhart first and then to each girl. He found them to be upset and crying. Rogers stated T.M. said she awoke to find defendant in bed with her with his face in her groin and licking her legs. Defendant did not stop when she asked and only did so when she hit him on top

of the head. T.M. got up to tell her mother and noticed her shorts were unbuttoned and unzipped. T.M. attempted to wake up her mother without success and returned to her bedroom. Defendant returned to the room and got into bed with M.M. T.M. stated defendant told the girls they had "sexy bodies" and Kirkhart had other boyfriends on the Internet. T.M. again attempted to wake up Kirkhart and was successful.

¶ 10 Detective Bunyard testified she interviewed 11-year-old T.M. on August 12, 2010. She stated T.M. used language appropriate for her age.

¶ 11 The trial court found T.M.'s statements were volunteered and spontaneous. The court limited the statements to what T.M. reported happened to herself. Statements T.M. made about what happened to M.M. were excluded, as were any references T.M. made regarding prior incidents with defendant that remained uncharged.

¶ 12 B. Jury Trial

¶ 13 In January 2012, defendant's jury trial commenced. The State moved to dismiss count II. Kirkhart testified T.M. was 11 years old and M.M. was 13 years old in August 2010. T.M. normally lived in Danville with her father, but she was staying with Kirkhart during summer vacation. T.M., M.M.'s cousin, also spent time with them in Champaign. Kirkhart began dating defendant in January 2005, and they lived together in an apartment. Defendant held a position of trust and authority with the girls, and they "thought a lot about him."

¶ 14 On August 6, 2010, M.M. had been staying with them for about a week. The girls played during the day, and defendant started drinking beer in the morning. The four ate dinner between 6 and 7 p.m., and Kirkhart stated defendant was intoxicated. During the evening, the girls watched movies in T.M.'s bedroom, and Kirkhart and defendant sat on a couch and watched

a movie. T.M. had a trundle bed, so each girl could sleep on her own mattress.

¶ 15 At approximately 2:30 a.m., Kirkhart stated she was asleep on the couch when she was awakened by T.M. Kirkhart saw M.M. curled up and crying on the love seat. T.M. told her she woke up to find defendant "underneath her sheets, licking her leg from her inner thigh above her kneecap, towards her waistline." When she heard this, Kirkhart slapped defendant in the hallway. He told her he did not do anything wrong. Kirkhart eventually called the police.

¶ 16 On cross-examination, Kirkhart testified defendant played games with the girls, including one called "don't poke the bear, don't poke the cub," in which they would poke each other's bellies and laugh. T.M. had a cell phone, but Kirkhart did not know if she texted any boys in the neighborhood.

¶ 17 Officer Rogers testified he arrived at the apartment at approximately 3:40 a.m. He spoke to T.M., who was "calm," and she stated she awoke to find defendant under the covers of her bed and licking her thighs and groin area. She told him to stop, but he did so only after she hit him on the head several times. When she woke up, she stated her legs were wet and her pants had been unbuttoned and unzipped. Defendant told her he thought T.M. and M.M. had "sexy bodies." After defendant left, T.M. tried to awaken her mother without success. T.M. returned to her bedroom and so did defendant. After he left, T.M. was then able to wake her mother. Officer Rogers then had a conversation with M.M., who was also calm.

¶ 18 T.M. testified M.M. woke her up in the middle of the night and told her defendant had touched her inappropriately. T.M. told her it was okay and to go back to bed. M.M. woke her up a second time, and M.M. was crying. M.M. "got more scared," and they went to wake T.M.'s mother. At that time, T.M. noticed her legs were "kind of wet" on her bare skin. She

thought it was "the beer saliva" of defendant because it smelled like alcohol. She also noticed her jean shorts were unbuttoned and unzipped. T.M. stated her mother said she would be up in a minute, but she never woke up. The girls returned to their bedroom, and defendant came in as well. He told them Kirkhart had boyfriends on the computer and that they had "very sexy bodies." Defendant left, and the girls went to wake Kirkhart. Once awake, Kirkhart started yelling at defendant, hit him, and then called the police.

¶ 19 M.M. testified she was sick on August 6, 2010, and she and T.M. watched movies and played video games. Defendant wanted to play throughout the day, and M.M. told him to stop. M.M. fell asleep on the top bed and T.M. was on the lower bed. M.M. woke up around 2 a.m. with defendant shining the light from her cell phone in her eyes. He rubbed her head and told her to go back to sleep. M.M. told him he needed to go to bed because he had been drinking too much. Defendant left and came back in 5 to 10 minutes. M.M. saw defendant put his head under T.M.'s covers. M.M. could not see what he was doing underneath the covers but "his hands were moving a lot" up and down her legs. M.M. estimated defendant was under the sheets for about two minutes before he got up and left.

¶ 20 M.M. testified defendant came back a third time within two to three minutes. He reached over to M.M. and put his hand in her shirt and his other hand down her pants. M.M. stated he lifted up her shirt and put his hand under her bra. Defendant said, "we're going to do it tomorrow." His other hand went down her shorts under her underwear. She stated he touched her vagina with his finger. Defendant eventually left, and M.M. started to cry and woke T.M. The girls tried to wake Kirkhart without success. Defendant returned to their bedroom and told them they had "sexy bodies." The girls woke Kirkhart, and M.M. told her defendant had touched

her down her legs. Kirkhart then smacked defendant in the face. He tried to hit back but he was "too drunk." Kirkhart called the police.

¶ 21 Detective Bunyard testified she conducted separate interviews with M.M. and T.M. on August 12, 2010, at the Champaign Children's Advocacy Center. T.M. told her she woke up and found defendant licking her leg from her knee up toward the rest of her body. She stated her legs were wet and they "stunk like beer." She also stated defendant had come in earlier and told the girls they had "sexy bodies." When she went to wake her mother, T.M. noticed her shorts were unbuttoned and unzipped. During Bunyard's interview with M.M., M.M. said defendant was rubbing T.M.'s hair.

¶ 22 Champaign police officer Justin Prosser testified he arrived at the apartment and found defendant "highly intoxicated." Defendant was slurring his speech but he was able to follow and obey Prosser's commands. Defendant was arrested and taken to the police station.

¶ 23 Champaign police detective Dale Rawdin testified he started interviewing defendant at the police station between 5:30 and 6 a.m. on August 7, 2010. Rawdin initially found defendant sleeping in the interview room. After he woke up, defendant appeared "pretty intoxicated" and "groggy." Rawdin advised defendant of his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)), and defendant signed a written form.

¶ 24 The taped interview was played for the jury. Defendant denied any intentional inappropriate contact with T.M. and M.M. He stated M.M. had made sexual advances toward him in the past. Defendant claimed M.M. came on to him in a sexually inappropriate manner on several occasions and would pet defendant's dog while it was sitting in his lap. M.M. would pet or kiss the dog and say "ooh, ooh, ooh" in a way that suggested oral sex. Defendant admitted

being in the bedroom with the girls, but only to check on them. He mentioned they had played "don't poke the bear, don't poke the cub," and it was possible he may have touched one of them on the breast. When asked if he could have accidently put his finger in one of the girls' vaginas, he responded, "Hell, no."

¶ 25 Both T.M. and M.M. were examined at the hospital by sexual assault nurse examiners. A sexual assault kit was administered to each girl and vaginal swabs were taken. Swabs of T.M.'s legs and M.M.'s neck were also obtained.

¶ 26 Dana Pitchford, a forensic scientist specializing in forensic biology and deoxyribonucleic-acid (DNA) analysis, testified she tested the vaginal swabs from T.M. and M.M. She stated semen was indicated on the vaginal swabs of M.M., although no sperm cells were identified. Semen was identified on T.M.'s swab. Pitchford sent all of the swabs to Amanda Humke, a forensic scientist, for DNA analysis. Humke found that none of the swabs were suitable for normal DNA analysis and sent three swabs (M.M.'s neck swab, T.M.'s vaginal swab, and T.M.'s thigh swab) back to Pitchford to perform Y-Short Tandem Repeat (Y-STR) analysis, which looks to the Y chromosome to amplify male DNA.

¶ 27 Pitchford performed the Y-STR analysis on the swabs and concluded defendant could not be excluded from T.M.'s vaginal swab. The thigh swab of T.M. matched defendant, but because the Y-STR analysis has lower statistics than traditional DNA analysis, this means the swab would match 1 in 110 unrelated Hispanic males. The neck swab of M.M. contained a mixture of DNA from three males, and defendant—as well as 95% of unrelated males—could not be excluded from this profile. Pitchford stated DNA from male semen could be transferred from someone's finger into a female's vagina.

¶ 28 Defendant exercised his constitutional right not to testify. Following closing arguments, the jury found defendant guilty of aggravated criminal sexual abuse (touching M.M.'s breast), criminal sexual assault (M.M.), aggravated criminal sexual abuse (licking T.M.'s leg), and predatory criminal sexual assault of a child (T.M.).

¶ 29 In March 2012, defendant filed a motion for acquittal or, in the alternative, a new trial. Along with claiming the jury's verdict was against the weight of the evidence, defendant argued the trial court erred in granting the State's request to allow victim statements into evidence pursuant to section 115-10. The court denied the motion. At the sentencing hearing, defendant stated he was wrongfully accused and was found guilty "because [he] didn't really have anyone to fight for [him]." Defendant also stated he was told a DNA expert would testify and it would have "made a big difference in [his] trial." The court sentenced him to 7 years on counts I and III (aggravated criminal sexual abuse), 15 years on count V (criminal sexual assault), and 32 years on count IV (predatory criminal sexual assault). The sentences in counts I and III were to be served concurrently with one another and consecutive to counts IV and V. Counts IV and V were to be served consecutively with one another and with counts I and III.

¶ 30 Defendant filed a motion to reconsider sentence. The trial court reduced defendant's sentence on count IV to 22 years in prison to be served consecutively to the 15-year sentence on count V and concurrently with the 7-year sentences on counts I and III. This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 A. Assistance of Counsel

¶ 33 Defendant argues his trial counsel was ineffective for failing to file a motion to

suppress statements, where he stated he had a lawyer and thus made an unambiguous invocation of his right to counsel which was ignored by the police. We disagree.

¶ 34 Claims of ineffective assistance of counsel are analyzed under the standard articulated by *Strickland v. Washington*, 466 U.S. 668 (1984). To set forth a claim under the *Strickland* test, "a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. Our supreme court has recently clarified the standard utilized in cases involving the issue now before us and held "where an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Henderson*, 2013 IL 114040, ¶ 15, 989 N.E.2d 192. "A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192.

¶ 35 In the case *sub judice*, defendant argues his trial counsel was ineffective in failing to file a motion to suppress statements he made to Detective Rawdin after defendant had invoked his right to counsel. During the initial moments of the interview, Rawdin attempted to determine whether defendant was able to understand what was going on and the *Miranda* rights Rawdin was about to read him. The following exchange occurred:

"DR: Okay. Um, you're in the police department. You're in an interview room in the Champaign Police Department, and

there's a recording device going right now. Do you understand that?

MM: Yes, sir.

DR: Do I have your permission to continue that audio-tape?

MM: Well, I, I've, uh, uh, attorney here, so . . .

DR: No, you don't have an attorney here, and we'll get to that in just a moment, but I want to make sure that you understand what's going on. Okay?

MM: Okay.

DR: And that's . . .

MM: I probably need some kind of attorney here to, um . . .

DR: Well, I'm, I'm going to explain . . .

MM: (inaudible)

DR: I'm, I'm going to . . .

MM: (inaudible) I hate to bother you, but see what (inaudible) I should have to say or not say or anything else like that.

DR: I'm going to explain that to you, Manuel. Okay? I'm gonna give you, I'm gonna read to you Miranda Rights in just a moment. But before I read you your Miranda Rights, it's very important that you understand what's going on in this room.

MM: Yes, sir. I understand that."

After Rawdin questioned defendant about his language skills, educational background, whether he was on medications, and how much he had to drink, he advised him of his *Miranda* rights and asked if he understood. Defendant indicated he did, signed the *Miranda* form, and discussed with Rawdin the circumstances of the offenses.

¶ 36 "Under *Miranda*, and as a means to protect the fifth amendment right against self-incrimination, an individual subjected to custodial interrogation or under the imminent threat of interrogation is entitled to have retained or appointed counsel present during the questioning." *People v. Harris*, 2012 IL App (1st) 100678, ¶ 69, 977 N.E.2d 811. "A suspect who expresses the desire to deal with police only through counsel is not subject to further interrogation until counsel has been made available, unless the suspect initiates further communication with the police." *In re Christopher K.*, 217 Ill. 2d 348, 376, 841 N.E.2d 945, 962 (2005). The question of whether a defendant's statements made during custodial interrogation can be used against him depends on "whether the accused actually invoked his right to counsel." *Christopher K.*, 217 Ill. 2d at 376, 841 N.E.2d at 962.

¶ 37 This determination as to whether the suspect actually invoked his right to counsel is an " 'objective inquiry.' " *Christopher K.*, 217 Ill. 2d at 378, 841 N.E.2d at 963 (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)).

> "According to the [*Davis*] Court, 'if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel,' the officer is not required to cease questioning the suspect. (Emphasis in

> original.) [Citation.] The Court went onto state that a suspect 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' [Citation.]" *Christopher K.*, 217 Ill. 2d at 378-79, 841 N.E.2d at 963.

See also *Harris*, 2012 IL App (1st) 100678, ¶ 69, 977 N.E.2d 811 (stating "the invocation must be sufficiently free from indecision or double meaning so as to reasonably inform authorities that the accused wishes to speak to counsel").

¶ 38 Here, we find defendant's statements did not amount to an unambiguous and unequivocal invocation of his right to counsel. Defendant's first statement, "Well, I, I've, uh, uh, attorney here, so," is nonsensical and unclear. See *People v. Krueger*, 82 Ill. 2d 305, 311, 412 N.E.2d 537, 540 (1980) (stating that simply referring to an attorney, no matter how vague, indecisive, or ambiguous, does not automatically constitute an invocation of the right to counsel). Also, defendant's second statement, "I probably need some kind of attorney here to, um," was not an unequivocal invocation of his right to counsel. See *Krueger*, 82 Ill. 2d at 311-12, 412 N.E.2d at 540 (finding the defendant's remarks that "maybe I need a lawyer" and "maybe I ought to talk to an attorney" did not invoke his right to counsel); *People v. Tackett*, 150 Ill. App. 3d 406, 419, 501 N.E.2d 891, 900 (1986) (finding the defendant's statement, "I might be needing [an attorney]," and "I probably should" made in response to the officer's statement that an attorney would be made available to him was an insufficient manifestation of an invocation of his right to counsel).

¶ 39 Defendant points out that at the end of the interview he reminded Rawdin that he

had asked for an attorney. The following exchange occurred:

"DR: I advised you of your Miranda rights, that you said you understood.

MM: Yeah, I did say that, uh, I want an attorney, too, because . . .

DR: When you [*sic*] did say that?

MM: I did tell you that. I said that before I even signed that.

DR: No, you didn't.

MM: Yes, I did.

DR: And it's on tape.

MM: Okay, fine."

Despite defendant's contention, the analysis as to whether a suspect has invoked his right to counsel involves consideration of the circumstances at and before, but not subsequent to, the purported invocation. See *Smith v. Illinois*, 469 U.S. 91, 100 (1984) (*per curiam*) (stating "an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself") (Emphasis in original.); *People v. St. Pierre*, 122 Ill. 2d 95, 112, 522 N.E.2d 61, 68 (1988). Thus, defendant's statements at the end of the interview are irrelevant to whether his earlier statements invoked his right to counsel.

¶ 40 We also point out defendant's statements regarding an attorney occurred shortly before Rawdin read him his *Miranda* rights and defendant signed the rights form. Our supreme court noted "the holding in *Davis* is limited to the situation where the alleged invocation of the

right to counsel comes after a knowing and voluntary waiver of the suspect's *Miranda* rights." *Christopher K.*, 217 Ill. 2d at 380-81, 841 N.E.2d at 964. "By implication, this suggests the United States Supreme Court has left open the issue of whether the objective test applies in a prewaiver setting." *Christopher K.*, 217 Ill. 2d at 381, 841 N.E.2d at 964.

¶ 41 Defendant does not contend that some heightened scrutiny is required in a prewaiver setting or that the officer must clarify the meaning of the statements, and we find no need to make such a distinction under the facts of this case. See *Christopher K.*, 217 Ill. 2d at 381, 841 N.E.2d at 965 (stating "[t]he fact waiver has not yet occurred can simply be subsumed into the objective test"); see also *State v. Climer*, 400 S.W.3d 537, 561 (Tenn. 2013) (finding any prewaiver/postwaiver distinction has been abrogated by the United States Supreme Court's decision in *Berghuis v. Thompkins*, 560 U.S. 370 (2010)). Defendant made the equivocal and ambiguous statements early on in the interview when Rawdin was attempting to explain to defendant that he was at the police station and he was being recorded by audio and video. After the statements in question were made, Rawdin continued to make sure defendant understood what was going on and that he was being arrested. Rawdin then read the *Miranda* rights to defendant, and defendant stated he understood them and signed the rights form. Thus, Rawdin informed defendant of his right to counsel and defendant did not invoke that right. Accordingly, as a motion to suppress would not have been meritorious, defendant cannot establish he was denied the effective assistance of counsel in counsel's decision not to file the motion.

¶ 42 Even if it could be argued the statements made by defendant invoked his right to counsel and thus the entire interview should have been suppressed, defendant cannot establish prejudice because no reasonable probability exists that the outcome of the trial would have been

different had the statement been suppressed. The descriptions of the offenses by the victims in their testimony and in T.M.'s statements to witnesses admitted pursuant to section 115-10 were consistent in most material respects and proved defendant guilty beyond a reasonable doubt.

¶ 43 B. Section 115-10

¶ 44 Defendant argues the hearsay evidence admitted under section 115-10 from multiple witnesses recounting out-of-court statements in which T.M. said he licked her legs denied him a fair trial where the statements exceeded the intended scope of section 115-10's hearsay exception and their prejudicial effect outweighed any probative value as they were unnecessarily duplicative.

¶ 45 Initially, we note defendant did not raise this precise issue in the trial court. In the posttrial motion, defense counsel argued the court erred in granting the State's request to allow victim statements pursuant to section 115-10 because there was insufficient evidence that the statements were made with guarantees of trustworthiness. Because the issue as to the number of hearsay statements allowed and their alleged prejudicial effect was not raised, defendant has forfeited the issue on appeal.

¶ 46 Recognizing the issue to be forfeited, defendant asks this court to consider it under the plain-error doctrine. The plain-error doctrine allows a court to disregard a defendant's forfeiture and consider unpreserved error when either:

> "(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 was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial

process, regardless of the closeness of the evidence." *People v. Wilmington*, 2013 IL 112938, ¶ 31, 983 N.E.2d 1015.

Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. As the first step in the analysis, we must determine whether any error occurred at all. *People v. Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431. "If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272.

¶ 47 Section 115-10 of the Procedure Code provides an exception to the hearsay rule and permits testimony of out-of-court statements by victims of sexual offenses who are under 13 years of age. 725 ILCS 5/115-10 (West 2010). Hearsay statements may be admissible if, outside the presence of the jury, the trial court finds (1) the time, content, and circumstances of the statements provide sufficient safeguards of reliability and (2) the child either testifies at the proceeding or is unavailable as a witness and corroborative evidence of the subject of the hearsay statement exists. 725 ILCS 5/115-10(b) (West 2010). "A trial court has considerable discretion in determining the admissibility of hearsay statements." *People v. Byron*, 269 Ill. App. 3d 449, 454, 645 N.E.2d 1000, 1005 (1995).

¶ 48 Defendant argues the corroborative statements from Officer Rogers and Detective Bunyard were unnecessary and exceeded the intended scope of section 115-10's hearsay exception where the testimony of Kirkhart, to whom T.M. made her first outcry, would have been sufficient to establish T.M.'s allegation that defendant licked her legs. Defendant claimed the cumulative testimony of Officer Rogers and Detective Bunyard served no purpose other than to bolster her and Kirkhart's testimony.

¶ 49 "Section 115-10 contains no limitation on the number of witnesses who may testify." *People v. Moss*, 275 Ill. App. 3d 748, 756, 656 N.E.2d 193, 199 (1995). Moreover, courts "will not limit the corroborating complaint testimony to one witness." *Moss*, 275 Ill. App. 3d at 756, 656 N.E.2d at 199; see also *People v. Greenwood*, 2012 IL App (1st) 100566, ¶ 31, 971 N.E.2d 1116 (noting courts have rejected arguments that multiple witness testimony as to outcry statements was cumulative); *People v. Lofton*, 303 Ill. App. 3d 501, 508, 708 N.E.2d 569, 574 (1999) (stating "section 115-10 contains no limitations on the number of witnesses who may testify under its strictures"); *People v. Anderson*, 225 Ill. App. 3d 636, 648, 587 N.E.2d 1050, 1059 (1992) (finding the defendant was not denied a fair trial by the repetition of the victim's statements by three witnesses); *People v. Branch*, 158 Ill. App. 3d 338, 341, 511 N.E.2d 872, 874 (1987) (citing previous cases that have allowed more than one corroborating complaint witness to testify on the victim's behalf).

> "The legislature by enacting section 115-10 obviously determined that a corroborative complaint is sufficiently reliable to enjoy an exemption from the rule against hearsay evidence. [Citation.] A second or third complaint is no less reliable or credible. True, there is opportunity for exaggeration or embellishment the longer the time between the incident and each successive complaint. This factor is remedied though through cross-examination (and possible impeachment of the victim from prior inconsistent statements). [Citations.] Once the victim testifies and is subject to cross-examination, the rationale for the rule against hearsay evidence virtually

disappears. [Citations.]" *Branch*, 158 Ill. App. 3d at 340-41, 511 N.E.2d at 873.

We find no error in the admission of T.M.'s statements to Officer Rogers and Detective Bunyard. See *Greenwood*, 2012 IL App (1st) 100566, ¶ 31, 971 N.E.2d 1116 (finding the testimony of four outcry witnesses did not constitute plain error based on the number alone). Moreover, we see no reason to abandon this long line of case law based on our supreme court's decision in *People v. Dabbs*, 239 Ill. 2d 277, 940 N.E.2d 1088 (2010), which did not deal with this issue.

¶ 50 Defendant argues the statements' prejudicial effect outweighed their probative value. He contends the evidence at trial was closely balanced and plain-error review is warranted. In addressing issues like the one before us, courts have noted "that in a more closely balanced case, a new trial might be warranted if it appears that 'the delicate scales of justice have been unfairly tilted by the sheer weight of repetition.' " *Moss*, 275 Ill. App. 3d at 756, 656 N.E.2d at 199 (quoting *Anderson*, 225 Ill. App. 3d at 648, 587 N.E.2d at 1059).

¶ 51 In his brief on appeal, defendant complains about the admission of testimony concerning T.M.'s statements that defendant had licked her legs. T.M. testified that when she fell asleep her jean shorts were buttoned and zipped and her legs were dry. When she attempted to wake up her mother the first time, she noticed her legs were "kind of wet" on her bare skin. She thought it was "beer saliva" of defendant because it smelled like alcohol. She also noticed her shorts were unbuttoned and unzipped.

¶ 52 On cross-examination, T.M. testified she did not remember defendant licking her legs or telling Bunyard he did or that it was what first awakened her. She also did not remember telling Rogers that defendant may have just been licking her clothes.

¶ 53 Kirkhart testified T.M. woke up to find defendant "underneath her sheets, licking her leg from her inner thigh above her kneecap, towards her waistline." Rogers stated T.M. told him that she awoke to find defendant under the covers of her bed and licking her thighs and groin area. On cross-examination, Rogers testified he believed T.M. stated defendant was licking her legs and her clothes around her crotch. He then stated T.M. told him that defendant had only licked the outside of her clothes.

¶ 54 Bunyard testified T.M. told her she awoke to find defendant licking her leg. She also stated her legs were wet and "stunk like beer." On cross-examination, Bunyard testified T.M. said at one point she was awakened by the licking and at another that she was awakened by M.M. yelling. Further, T.M. realized her shorts were unzipped and unbuttoned on her way back to the room after first attempting to wake her mother.

¶ 55 Here, a review of the testimony indicates there were differences in T.M.'s description of the leg licking and in her statements to Kirkhart, Rogers, and Bunyard (as recalled by those witnesses), including as to whether when she awoke she found defendant licking her legs or only that her legs were wet and smelled like beer. Thus, the statements admitted pursuant to section 115-10 were not repetitive. Moreover, their admission allowed defense counsel to highlight differences in them on cross-examination and in closing argument. There was no danger that the scales of justice were unfairly tilted by the sheer weight of repetition in a closely balanced case, as the evidence here was not closely balanced and the statements were not repetitive. As defendant has failed to show any error occurred, his forfeiture of the issue stands. Moreover, as defendant has not established he was prejudiced by defense counsel's failure to raise the issue in a posttrial motion, his claim of ineffective assistance of counsel has no merit.

¶ 56 C. *Krankel* Hearing

¶ 57 Defendant argues his case must be remanded for further proceedings pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), and *People v. Moore*, 207 Ill. 2d 68, 797 N.E.2d 631 (2003), where the trial court failed to address his posttrial allegations of ineffective assistance of counsel for failing to call a DNA expert on his behalf. We disagree.

¶ 58 When confronted with a defendant's posttrial allegations of ineffective assistance of counsel, our supreme court set out the procedural steps to follow in *People v. Moore*, 207 Ill. 2d 68, 797 N.E.2d 631 (2003) (noting the rule that had developed since *Krankel*).

> "New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. Rather, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *Moore*, 207 Ill. 2d at 77-78, 797 N.E.2d at 637.

¶ 59 In this case, defendant did not raise a claim of ineffective assistance of counsel in a posttrial motion or in correspondence to the trial court following the trial. During his sentencing hearing, defendant stated, in part, as follows:

> "At the end of the trial, I was found guilty, guilty because I

didn't really have anyone to fight for me. Yes, I had a public defender, but the public defender doesn't have the time to put his or her knowledge on just one case. They have too many cases assigned to them.

* * *

DNA is transferable and, if I had a DNA expert on my behalf, which I was told, then this would have made a big difference in my trial. Since this didn't happen, I lost."

During the imposition of sentence, the court stated, in part, as follows:

"This is a man that violated trust that was extended to him in a reprehensible manner and to this date, even in the statement of allocution, portrays himself as the victim, denies responsibility, blames his lawyers, and I am constrained to note that I believe [defense counsel] Mr. Rosenbaum did an absolutely excellent job under very difficult circumstances because, frankly, the evidence was overwhelming."

¶ 60 We note that nowhere in defendant's statement at sentencing did he specifically complain about his attorney's performance or expressly state he was claiming ineffective assistance of counsel. His first statement about the public defender is too general to constitute an ineffectiveness claim that would require a *Krankel* inquiry. His second statement about the DNA expert goes to the calling of witnesses, and the decision to call witnesses is a matter of trial strategy. See *People v. Beard*, 356 Ill. App. 3d 236, 244, 825 N.E.2d 353, 361 (2005). "Where a

defendant's *pro se* posttrial ineffective assistance claims address only matters of trial strategy, the court may dismiss those claims without further inquiry." *People v. Ward*, 371 Ill. App. 3d 382, 433, 862 N.E.2d 1102, 1149 (2007). In this case, the trial court had a lengthy opportunity to observe defense counsel and his manner of representing defendant, including his cross-examination of the State's DNA experts, and found he did an "absolutely excellent job." With only general allegations or complaints referring to matters of trial strategy, we find the court did not err in not conducting a *Krankel* inquiry.

¶ 61 III. CONCLUSION

¶ 62 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 63 Affirmed.