2024 IL App (5th) 220240-U

NO. 5-22-0240

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Edgar County.
	)	
v.	)	No. 20-CF-185
	)	
BRANDON R. FORD,	)	Honorable
	)	Matthew L. Sullivan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.
Presiding Justice Vaughan and Justice Cates concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate the defendant's conviction and sentence for criminal sexual assault, where the conviction violates the one-act, one-crime rule, and affirm the defendant's two convictions and sentences for predatory criminal sexual assault, where the trial court did not err by admitting evidence for the purpose of showing propensity, and the trial court's error in failing to instruct the jury on the proper consideration of hearsay statements did not rise to the level of plain error.

¶ 2 On October 6, 2021, the defendant, Brandon R. Ford, was convicted of two counts of predatory criminal sexual assault of a child in violation of section 11-1.40(a)(1) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/11-1.40(a)(1) (West 2020)) and one count of criminal sexual assault in violation of section 11-1.20(a)(3) of the Criminal Code (*id.* § 11-1.20(a)(3)). On March 25, 2022, the defendant was sentenced to 18 years' incarceration on each count of predatory

criminal sexual assault, to run consecutively, and 10 years' incarceration on the count of criminal sexual assault, to run concurrently.

¶ 3 The defendant appeals his convictions and sentences arguing that the trial court erred in failing to merge the criminal sexual assault conviction with one of the predatory criminal sexual assault convictions where the offenses alleged the same conduct. The defendant also argues that the trial court erred in admitting the testimony of M.C., as other-crime evidence for the purpose of showing propensity, and that the trial court erred when it failed to instruct the jury on the proper consideration of hearsay statements. For the following reasons, we vacate the defendant's conviction and sentence on the count of criminal sexual assault and affirm the defendant's two convictions and sentences on the counts of predatory criminal sexual assault.

¶ 4 I. BACKGROUND

¶ 5 On October 7, 2020, the defendant was charged by information with the following offenses: count I, criminal sexual assault (*id.* § 11-1.20(a)(2)), in that the defendant placed A.K.'s mouth on his sex organ, when the defendant knew the victim was unable to give knowing consent; and count II, predatory criminal sexual assault (*id.* § 11-1.40(a)(1)), in that the defendant committed an act of sexual penetration upon a victim, A.K., who was under 13 years of age when the act was committed. The information stated that the alleged offences occurred on or about June 2020, within the County of Edgar.

¶ 6 On October 1, 2021, the State filed an amended information. The amended information stated that the defendant committed the following offenses during the fall 2017 to December 2019:

> Count I: criminal sexual assault (*id.* § 11-1.20(a)(2)), in that the defendant committed an act of sexual penetration upon a minor victim, A.K., in that the defendant

placed A.K.'s mouth on his sex organ, and the defendant knew the victim was unable to give knowing consent;

Count II: criminal sexual assault (*id.* § 11-1.20(a)(3)), in that the defendant committed an act of sexual penetration upon a minor victim, A.K., in that the defendant placed A.K.'s mouth on his sex organ and the defendant is a family member of the victim and the victim is under 18 years of age;

Count III: predatory criminal sexual assault (*id.* § 11-1.40(a)(1)), in that the defendant was 17 years of age or over and committed an act of sexual penetration, in that the defendant placed his penis in the vagina of A.K., who was under 13 years of age when the act was committed; and

Count IV: predatory criminal sexual assault (*id.* § 11-1.40(a)(1)), in that the defendant was 17 years of age or over and committed an act of sexual penetration, in that the defendant placed his penis in the mouth of A.K., who was under 13 years of age when the act was committed.

¶ 7 Prior to filing the amended information, on September 13, 2021, the State filed a motion *in limine* that requested the trial court to admit into evidence, by testimony, the defendant's commission of a previous specific instance of conduct under section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2020)). The State's motion stated that the defendant was alleged to have committed a previous similar offense of criminal sexual assault in Douglas County in approximately 2005-2006. The State requested the admission of the victim, M.C.'s, testimony regarding the specific instance of sexual conduct performed by the defendant arguing that M.C.'s testimony was highly probative regarding the defendant's

propensity for similar acts and to establish the defendant's depraved sexual instinct towards a class of similarly situated young females.

¶ 8 On September 29, 2021, the trial court conducted a hearing, *inter alia*, on the State's motion *in limine* concerning the testimony of M.C. In support of its motion, the State called two witnesses. The first witness was Lindsay Thomey. Thomey testified that she was A.K.'s mother and in August 2020, she resided with the defendant. Thomey stated that she had resided with the defendant since 2012, and that her two daughters also resided with her and the defendant. Thomey testified that A.K. was her oldest daughter, and that the defendant was the father of Thomey's youngest daughter.

¶ 9 Thomey stated that during the time she resided with the defendant, there were times when they would work opposite work shifts and the defendant would take care of A.K. Thomey stated that the defendant was an authority figure to A.K. in their home. Thomey testified that, after the Illinois Department of Children and Family Services (DCFS) informed her of A.K.'s allegations regarding the defendant, she took A.K. to the Child Advocacy Center (CAC) for an interview. On cross-examination, Thomey stated that she became aware of the defendant's prior allegations concerning the sexual assault of a child "probably a couple years after we started dating maybe."

¶ 10 Next, the State called M.C., who testified that she was currently 22 years old and lived in Urbana, Illinois, with her boyfriend and her son. M.C. testified that she was familiar with the defendant because he was in a relationship with her mother and had resided with them for a couple of years when M.C. was six or seven years old. M.C. stated that she recalled a specific incident that happened in her mother's bedroom. M.C. and the defendant were lying on the bed watching television, and the defendant was touching her vagina area. At the time, M.C. stated that she called it her "pee pee area." The defendant left and returned with a glass of water and started touching

her again. M.C. stated that she told the defendant his fingers were wet, and that the defendant told her not to tell anyone otherwise "he would get in trouble and I would get in trouble."

¶ 11 M.C. stated that she informed her grandmother about the incident and that there were legal proceedings as a result. M.C. acknowledged that there was a trial and that she testified at the trial but stated that she had no specific recollection of the legal proceedings. After reporting the incident, M.C. stated that her mother went home and "kicked [the defendant] out." M.C. stated that she found out about the current charges against the defendant on Facebook. She recognized the defendant and talked to her mother about the current charges. Her mother reached out to A.K.'s mother to offer support and A.K.'s mother brought the prior allegations to the attention of the State.

¶ 12 During arguments, the defendant offered as Exhibit 1, the docket sheet from case 06-CF-27, Douglas County, demonstrating that the defendant was acquitted, after a jury trial, of the offense related to M.C.'s allegations. After arguments, the trial court found as follows:

> "The Court does find that the incidences are remarkably similar, that again we're talking about an authority figure living with the alleged victim's mom, and while we talk about proximity of time it would be pure speculation for me to come up with how long did it take for [the defendant] to find another mom with another correct aged child, so whether this was 15 or 16 years ago or it seems to me almost impossible for it to take place just a—in an incredibly short or close time period. In addition this alleged victim's mother says she was with him for eight years meaning, seven to eight years, meaning the child was simply too young for what—for what the State's argument would be his propensity to have relations with a six, seven, eight, nine-year-old child when he first became involved with the child's mother."

The trial court then granted the State's motion *in limine* and the matter was set for jury trial on October 5, 2021.

¶ 13 The State dismissed count I prior to trial, and the defendant's jury trial was conducted on October 5 and 6, 2021. M.C. testified on the second day of the trial. The State also offered the testimonies of Chrissy Carrell, A.K.'s school counselor to whom A.K. reported the abuse; Robyn Carr, the individual who conducted the interview with A.K. at the CAC; Lindsay Thomey, A.K.'s mother; A.K., the victim; and Jesse Lewsader, the detective that investigated the allegations of sexual abuse. The defendant was the only witness called on behalf of the defense. In the interest of brevity, and also due to the nature of the offenses, we will set forth any testimony or evidence relevant to the issues on appeal in our analysis below.

¶ 14 Prior to deliberations, the trial court instructed the jury. Regarding hearsay evidence, the jury instructions did not include Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. 2000) (hereinafter IPI Criminal), which is generally required when there is testimony regarding a minor's out-of-court statements concerning sexual abuse. The trial court instead provided an instruction based on IPI Criminal No. 1.02, as follows:

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

After deliberations, the jury returned a verdict of guilty on all charges on October 6, 2021.

¶ 15 On October 28, 2021, the defendant's trial counsel filed a motion to withdraw as counsel. The trial court conducted a hearing on November 15, 2021, and granted trial counsel's motion. The trial court then appointed new counsel to represent the defendant; however, that appointment was vacated, and the defendant was appointed a third counsel on November 22, 2021. The defendant filed a motion for a new trial on March 24, 2022.

¶ 16 On March 25, the trial court conducted a sentencing hearing. Upon completion of the hearing, the defendant was sentenced to 18 years' incarceration on counts III and IV, predatory criminal sexual assault of a child, to run consecutively, and 10 years' incarceration on count II, criminal sexual assault, to run concurrent with count IV. The defendant filed a motion to reconsider sentence and an amended motion for a new trial on April 7, 2022.

¶ 17 The trial court conducted a hearing on both of the defendant's pending motions on April 18, 2022. At the hearing, the defense called Evan Bruno, the defendant's trial attorney, to testify. Bruno stated that he was employed at the Bruno Law Office in Urbana, Illinois, since 2015, and that he was a licensed attorney since November 2012. Bruno testified that he was hired by the defendant to represent him, and that Bruno was the attorney that handled the hearing on the State's motions *in limine* and the defendant's trial. Bruno stated that he did not tender any jury instructions and that his failure to tender IPI Criminal No. 11.66 was an "oversight." During arguments, defense counsel also argued that the testimony of M.C. should not have been permitted at trial and that trial counsel was ineffective, not only in failing to tender IPI Criminal No. 11.66, but in failing to interview potential witnesses prior to trial. Upon completion of arguments, the trial court held as follows:

"The Court is going to deny the Amended Motion For New Trial. The—with the exception of the paragraph that alleged the jury instruction, 11.66. They should have been provided. The Court agrees with [defense counsel] that it absolutely should have been provided. ***

***

After reviewing the Supreme Court case of People versus Sargent the Court believes that those are remarkably similar cases. In that the defense counsel did not ask the trial court to give such an instruction. It wasn't given, but at the end of the inquiry it was not an automatic reversible error and considering, including the other instructions given, the Court would also agree, in the Court's opinion, this was not a close case that it did not substantially prejudice the defendant in any way."

¶ 18 The trial court then heard arguments regarding the defendant's motion for reconsideration of his sentence. The trial court stated that the sentence was within the statutory range and denied the defendant's motion to reconsider sentence. Thereafter, the defendant filed a timely notice of appeal.

¶ 19 II. ANALYSIS

¶ 20 On appeal, the defendant argues that his convictions on count II, criminal sexual assault, and count IV, predatory criminal sexual assault, violate the one-act, one-crime rule where the offenses alleged the same conduct. The defendant also argues that the trial court erred in admitting the testimony of M.C., as other-crime evidence for the purpose of showing propensity, and that the trial court erred when it failed to instruct the jury on the proper consideration of hearsay statements. We will address the defendant's issues in the order presented.

¶ 21 A. One-Act, One Crime Rule

¶ 22 The first issue on appeal is whether the defendant's convictions on count II, criminal sexual assault, and count IV, predatory criminal sexual assault, violate the one-act, one-crime rule, where the charged offenses allege the same act. The State acknowledges that, at trial, the victim testified to only one incident of oral sex, and that the victim had also indicated in her CAC interview that only one incident of oral sex had occurred. Because the convictions on counts II and IV arise out of the same act and occurrence of oral sex, the State agrees with the defendant that it is a violation of the one-act, one-crime rule. As such, the State concedes that a sentence should have been imposed on the most serious offense and the conviction of the lesser offense should have been vacated.

¶ 23 The defendant acknowledges that he failed to raise this issue in his posttrial motion, but requests that this court consider this issue under the doctrine of plain error. Ordinarily the failure to raise an issue in a posttrial motion results in forfeiture of the issue on appeal. See *People v. Johnson*, 363 Ill. App. 3d 1060, 1072 (2005); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The plain-error doctrine, however, is a narrow and limited exception to the general rule of procedural default which allows plain errors or defects affecting substantial rights to be noticed although the error or defect was not brought to the attention of the trial court. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). An otherwise unpreserved error may be noticed under the plain-error doctrine, codified in Illinois Supreme Court Rule 615 (eff. Jan. 1, 1967), if the defendant first demonstrates that a clear or obvious error occurred and then shows that either (1) the evidence was 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) the error was so egregious as to challenge the integrity of the judicial process, regardless of the closeness of the evidence. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Walker*, 232 Ill. 3d 113, 124 (2009).

¶ 24 The initial step in conducting a plain-error analysis is to determine whether a clear and obvious error occurred. *Id.* Without reversible error, there can be no plain error. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008). The respondent has the burden of persuasion under either prong of the plain-error doctrine and if the respondent fails to meet his or her burden of persuasion, the reviewing court applies the procedural default. *People v. Jackson*, 2022 IL 127256, ¶ 19.

¶ 25 The one-act, one-crime rule is a question of law that we review *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). The rule provides that a defendant may not be convicted of multiple offenses that are based upon precisely the same single physical act. *Id.*; *People v. Coats*, 2018 IL 121926, ¶ 11. If a defendant is convicted of two offenses based on the same single act, the conviction for the less serious offense must be vacated. *Johnson*, 237 Ill. 2d at 97.

¶ 26 In this matter, both count II and count IV alleged an incident of oral sex and our review of the trial transcript demonstrates that the State did not elicit any testimony indicating that the act of oral sex occurred on more than one occasion. Therefore, we find that the defendant's convictions on count II and count IV are based on the same single physical act and violate the one-act, one-crime rule. As such, an error occurred, and the error was so egregious as to challenge the integrity of the judicial process. See *People v. Nunez*, 236 Ill. 2d 488, 493 (2010) ("one-act, one-crime arguments are properly reviewed under the second prong of plain-error rule because they implicate the integrity of the judicial process").

¶ 27 Count II was charged as a Class 1 felony offense punishable by incarceration of up to 30 years (720 ILCS 5/11-1.20(b)(1) (West 2020); 730 ILCS 5/5-4.5-30(a) (West 2020)) and count IV was charged as a Class X felony offense, punishable by incarceration of up to 60 years (720 ILCS 5/11-1.40(b)(1) (West 2020)). "To determine which of two offenses is the less serious," "common sense indicates that the legislature will provide a greater punishment for the crime it deems to be

more serious." *Johnson,* 237 Ill. 2d at 97. Since count IV carries a greater punishment, we vacate the defendant's conviction and sentence on count II, the lesser offense of criminal sexual assault.

¶ 28 B. Propensity Evidence

¶ 29 Next, the defendant alleges that the trial court erred in admitting the testimony of M.C. as other-crimes evidence for the purpose of showing propensity under section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2020)). The defendant acknowledges that the conduct alleged by M.C. constitutes an offense to which section 115-7.3 applies; however, the defendant argues that the probative value of M.C.'s testimony did not outweigh the danger of undue prejudice. The defendant argues that the prior incident occurred in 2006, and that the defendant was found not guilty in 2009. The defendant states that evidence relating to alleged conduct for which a defendant is acquitted is far less probative than conduct for which a defendant was tried and convicted.

¶ 30 The defendant also acknowledges that the allegations of M.C. and A.K. share some degree of similarity but argues that the offense described by M.C. included details that were not present in A.K.'s disclosure, CAC interview, or trial testimony. The defendant further argues that approximately 11 to 14 years had elapsed between the time of the alleged prior incident and M.C.'s testimony in the instance case, and as such, severely undermines its probative value. Finally, regarding other relevant facts and circumstances, the defendant argues that the transcripts from the prior trial were unavailable, placing the defendant at a disadvantage regarding his ability to access the accuracy and reliability of M.C.'s testimony during the current trial. The defendant acknowledges that none of these factors alone bar the admission of M.C.'s testimony, but argues that collectively, they serve to undermine the probative value of the testimony while also increasing their prejudicial effect.

¶ 31 Evidence concerning other crimes is generally inadmissible to demonstrate propensity to commit the charged crime to protect against a jury convicting a defendant because he or she is bad person deserving punishment. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Section 115-7.3, however, allows for the admission of other-crimes evidence to show a defendant's propensity if the offense charged involves a specified sex offense, including criminal sexual assault and predatory criminal sexual assault of a child. 725 ILCS 5/115-7.3(a)(1) (West 2020). Evidence that the defendant committed another offense or offenses of a listed specified sex offense "may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant." *Id.* § 115-7.3(b). We note, however, that our supreme court has urged "trial judges to be cautious in considering the admissibility of other-crimes evidence to show propensity by engaging in a meaningful assessment of the probative value versus the prejudicial impact of the evidence." *Donoho*, 204 Ill. 2d at 186.

¶ 32 In weighing the probative value of such evidence against undue prejudice to the defendant, the trial court may consider the following:

> "(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 2020).

¶ 33 This court will not reverse a trial court's decision to admit other-crimes evidence unless we determine that the trial court abused its discretion. *Donoho*, 204 Ill. 2d at 182. "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000). Under an abuse of discretion standard, the question is not whether we agree with the trial court's decision, but whether the trial court acted arbitrarily, without employing

conscientious judgment, or whether, considering all the circumstances, the trial court acted unreasonably and ignored recognized principles of law, which resulted in substantial prejudice. *Petryshyn v. Slotky*, 387 Ill. App. 3d 1112, 1116 (2008).

¶ 34 In this matter, in weighing the probative value of such evidence against undue prejudice to the defendant, the trial court considered the proximity in time of the predicate offense to the current charge. The trial court noted that, although there was over 14 years between the alleged offenses, it would be almost impossible for the offenses to have taken place in an incredibly short or close period of time as the defendant would first have to become involved with a mother with another correct age child. Our supreme court has stated that, "while the passage of 12 to 15 years since the prior offense may lessen its probative value, standing alone it is insufficient to compel a finding that the trial court abused its discretion by admitting evidence about it." *Donoho*, 204 Ill. 2d at 184. Our supreme court has also stated that, as a general rule, other offenses which are close in time to the charged offense will have more probative value than those which are remote; however, the admissibility of other-crimes evidence "should not, and indeed cannot, be controlled solely by the number of years that have elapsed between the prior offense and the crime charged." *People v. Illgen*, 145 Ill. 2d 353, 370 (1991).

¶ 35 The trial court also considered the degree of factual similarities to the alleged offenses noting that they were "remarkedly similar" in that the defendant was an authority figure living with the alleged victim's mother. Although the defendant argues that there were also differences between the alleged offenses, the existence of some differences between the prior offense and the current charge does not defeat admissibility because no two independent crimes are identical. *Id.* at 373. " 'Mere general areas of similarity will suffice' to support admissibility." *Donoho*, 204 Ill. 2d at 184 (quoting *Illgen*, 145 Ill. 2d at 373). At the motion *in limine* hearing, the State noted the

following factual similarities: the defendant was an authority figure; the alleged victims were left in the care of the defendant; the age of the alleged victims; the location of the offense (*i.e.*, bedroom); the alleged type of sexual contact; and that the alleged victims were warned against exposure. As such, there are enough general areas of similarities between the alleged prior sexual assault and the charged offenses in this matter to weigh in favor of admissibility.

¶ 36 The defendant further argues that he was acquitted of the prior allegations, and that neither the defense nor the State could locate a transcript from the previous case. Defense counsel argued during the hearing that the missing transcripts "put us in a more difficult position to be able to say how—how accurate is this testimony of [M.C.] who's trying to recall something from over 15 years ago from when she was a child."

¶ 37 These considerations were present and known to the trial court when it made its determination regarding the admissibility of M.C.'s testimony. Section 115-7.3 does not prohibit the admission of allegations that resulted in an acquittal. See 725 ILCS 5/115-7.3 (West 2020); see also *People v. Baldwin*, 2014 IL App (1st) 121725, ¶ 73 (earlier acquittal on criminal sexual assault charge did not bar the subsequent admission of other-crimes evidence on that charge); *People v. Johnson*, 2020 IL App (1st) 162332, ¶ 52 (State does not need to prove the defendant's involvement in the other crimes beyond a reasonable doubt but instead such proof must be more than mere suspicion). Here, the trial court trial court conducted a hearing, properly considered the section 115-7.3 factors, and found M.C.'s testimony to be reliable and adequately demonstrated the defendant's commission of the alleged sexual assault by more than mere suspicion.

¶ 38 For the above reasons, we find that the trial court's ruling was not arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court in weighing the probative value of M.C.'s testimony against undue prejudice to the defendant. Thus,

we cannot say that the trial court abused its discretion in admitting M.C.'s testimony about the defendant's prior sexual assault as other-crime evidence pursuant to section 115-7.3.

¶ 39 C. Jury Instructions

¶ 40 The third issue that the defendant raises on appeal is whether the trial court erred in failing to instruct the jury in the proper consideration of the hearsay statements testified to by Carrell and Carr. The defendant acknowledges that the testimonies of Carrell and Carr fall within the exception provided by section 115-10 of the Code (725 ILCS 5/115-10 (West 2020)) to the general rule that an out-of-court statement offered to prove the truth of the matter asserted constitutes inadmissible hearsay. See Ill. Rs. Evid. 801(c) (eff. Oct. 15, 2015), 802 (eff. Jan. 1, 2011). The defendant argues, however, that section 115-10(c) and Illinois Supreme Court Rule 451(a) (eff. Apr. 8, 2013) require that the trial court provide IPI Criminal No. 11.66 to the jury, when such testimony is admitted.

¶ 41 The defendant also argues that the evidence in this matter was closely balanced as it involved an issue of credibility where the defendant did not confess and further denied A.K.'s allegations in his trial testimony. As such, the defendant states that A.K.'s credibility was at the "heart of the jury's decision" and that the jury should have been properly instructed to consider A.K.'s maturity, the nature of her out-of-court statements, and the circumstances under which she made the statements when determining the credibility of her out-of-court statements. Therefore, the defendant argues that the trial court's failure to provide IPI Criminal No. 11.66, or another instruction consistent with section 115-10(c), constituted plain error. In the alternative, the defendant states that his trial counsel failed to tender IPI Criminal No. 11.66, and that the failure to tender the instruction constitutes ineffective assistance of counsel.

¶ 42 Section 115-10(c) of the Code states as follows:

"If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, *** the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." 725 ILCS 5/115-10(c) (West 2020).

¶ 43 IPI Criminal No. 11.66 is the Illinois pattern jury instruction that tracks the language of section 115-10(c), and states as follows:

"You have before you evidence that ____ made [(*a statement*) (*statements*)] concerning [(*an*) (*the*)] offense[s] charged in this case. It is for you to determine [whether the statement[s] [(*was*) (*were*)] made, and, if so,] what weight should be given to the statement[s]. In making that determination, you should consider the age and maturity of ____, the nature of the statement[s], [and] the circumstances under which [(*a*) (*the*)] statement[s] [(*was*) (*were*)] made."

¶ 44 There is no dispute that the testimonies of Carrell and Carr were admitted pursuant to section 115-10(c) and that an instruction specified by the statute was not given. There is also no dispute that trial counsel failed to tender IPI Criminal No. 11.66, or another instruction consistent with section 115-10(c).

¶ 45 Illinois Supreme Court Rules 366(b)(2)(i) and 451(c) govern the appellate review of jury instructions. Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994); R. 451(c) (eff. Apr. 8, 2013). Rule 366(b)(2)(i) states, "No party may raise on appeal the failure to give an instruction unless the party shall have tendered it." Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994). Illinois Supreme Court Rule 451(c), however, mitigates the otherwise harsh forfeiture effect of Rule 366(b)(2)(i) by allowing a limited review even when a defendant has failed to raise the instruction error at trial. *People v.*

Piatkowski, 225 Ill. 2d 551, 564 (2007). Rule 451(c) states that in criminal cases, "substantial defects [in instructions] are not waived by failure to make timely objections thereto if the interests of justice require." Ill. S. Ct. R. 451(c) (eff. Apr. 8, 2013). The purpose of Rule 451(c) is to permit a reviewing court to correct (1) grave errors and (2) errors in cases so factually close that fundamental fairness requires that the jury be properly instructed. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); *Piatkowski*, 225 Ill. 2d at 564. Rule 451(c) also is coextensive with the plain-error rule, and the two rules are construed identically. *Piatkowski*, 225 Ill. 2d at 564.

¶ 46 As previously stated, the plain-error rule is a narrow and limited exception to the general rule of procedural default and the initial step in conducting a plain-error analysis is to determine whether an error occurred. *Id.* at 565. Our determination regarding plain error has been simplified by the fact that our supreme court has already held that the failure to give the instruction as required by section 115-10(c) (725 ILCS 5/115-10(c) (West 2020)) is "a clear and obvious error." *Sargent*, 239 Ill. 2d at 190. Thus, we proceed to analyze the individual prongs of the plain-error rule.

¶ 47 The defendant makes no argument concerning the second prong of the plain-error rule, but argues that this matter falls within the first prong; that is, that the evidence at trial was closely balanced. According to the defendant, the evidence at trial was closely balanced because there was no physical evidence, no eyewitness, and the defendant did not admit to any of the alleged actions. As such, the defendant argues that the evidence solely involved an issue of credibility, and therefore, the evidence was closely balanced.

¶ 48 In *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 62, the court addressed the issue of whether, in determining if the evidence at trial was closely balanced, "we may place on the scales the very hearsay statements that were at issue in the jury instruction." The *Marcos* court concluded as follows:

"[W]e may consider the hearsay outcry statements on the prosecution's side of the scale as we determine whether the evidence was closely balanced for purposes of plain error review and whether the omitted instruction was the error that tipped the scales of justice against defendant, in light of the fact that a similar, though not identical, instruction was given." *Id.* ¶ 71.

¶ 49 As such, we may consider the testimonies of Carrell and Carr in our evaluation of whether the evidence was closely balanced in this matter. We also note that, in cases involving the sexual abuse of a child, there is always the special problem of proof since many times the only witness to such an offense is a young child who may be unable to testify adequately about what had occurred. "The complaints of youthful victims become more credible, more reliable, and better understandable when supported by the testimony of adults corroborating them." *People v. Mitchell*, 155 Ill. 2d 344, 351 (1993).

¶ 50 In this matter, we are not persuaded that the evidence was closely balanced. First, there was A.K.'s testimony, which was consistent and supported with the section 115-10 statements to both Carrell and Carr. Next, there was the propensity testimony of M.C., which the trial court found, in granting its admission at trial, to be reliable and adequately demonstrated the defendant's commission of the prior sexual assault by more than mere suspicion. As such, it was not solely a credibility contest as the defendant argues, but consistent testimony from A.K. supported by the testimonies of M.C., Carrell, and Carr.

¶ 51 We further note that when reviewing a jury instruction error, we consider the jury instructions as a whole, rather than considering the error in isolation. *People v. Parker,* 223 Ill. 2d 494, 501 (2006). Where the series of instructions fully and fairly provided the applicable law, we will find the instructions sufficient. *Id.* The erroneous omission of any one jury instruction rises

"to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Sargent*, 239 Ill. 2d at 191.

¶ 52 Here, the trial court omitted IPI Criminal No. 11.66 but provided IPI Criminal No. 1.02. The supreme court in *Sargent* noted that "[w]hile the language in these two instructions [IPI Criminal Nos. 11.66 and 1.02] differs, they convey similar principles regarding the jury's role in assessing witness credibility and the various criteria jurors may consider when making that assessment." *Sargent*, 239 Ill. 2d at 192. The *Sargent* court also noted as follows:

> "Moreover, the directive for the jury to take into account the nature of the statement, or the circumstances under which the statement was made, seems implicit in the instruction it did receive 'to take into account [the witnesses'] ability and opportunity to observe *** and the reasonableness of his testimony considered in the light of all the evidence in the case.' " *Id.* at 193.

¶ 53 The jury instruction given in this matter also instructed the jury to consider the witness's age, ability and opportunity to observe, and the reasonableness of the testimony considered in the light of all the evidence. While we acknowledge that the omission of IPI Criminal No. 11.66 was in error, and that our supreme court has stated that trial courts do not have the discretion to tender instructions based on IPI Criminal No. 1.02 instead of IPI Criminal No. 11.66 (*Sargent*, 239 Ill. 2d at 194), we do not find that omission of IPI Criminal 11.66 created a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.

¶ 54 We further note that in *People v. Booker*, 224 Ill. App. 3d 542, 556 (1992), the court found that "[a]lthough the specific instruction required by section 115-10(c) of the Code was not given,

the error was harmless and not subject to the plain error rule because defendant was not denied any substantial right." Based on the foregoing, we conclude that the evidence was not closely balanced, and thus the error, although clear and obvious, did not rise to the level of plain error.

¶ 55 D. Ineffective Assistance of Counsel

¶ 56 The defendant also argues, regarding IPI Criminal No. 11.66, that his trial counsel provided ineffective assistance of counsel for failing to tender the instruction. The defendant notes that trial counsel admitted that he erred in failing to tender IPI Criminal No. 11.66, and that such failure, in light of the closeness of the evidence, prejudiced the defendant as the jury was not properly instructed concerning how to consider the essential hearsay evidence.

¶ 57 We evaluate a claim of ineffective assistance of counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, a defendant must show both (1) that his or her counsel's performance was deficient and (2) that the defendant suffered substantial prejudice as a result of the deficient performance. *People v. Roland*, 2023 IL 128366, ¶ 26. To establish a deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and to establish substantial prejudice, a defendant must demonstrate that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). A defendant must satisfy both prongs of the *Strickland* test and the failure to establish either proposition will be fatal to the claim. *Id.* at 94.

¶ 58 "It will be the rare case indeed where a court finds that the evidence was not closely balanced in a plain error analysis, but then proceeds to find that the same error created the substantial prejudice required for an ineffectiveness claim." *Marcos*, 2013 IL App (1st) 111040,

¶ 75. Effective assistance of counsel refers to competent, not perfect, representation, and *Strickland* only requires that a defendant receive a fair trial, that is, a trial free of errors so egregious that they probably caused the conviction. *People v. Griffin*, 178 Ill. 2d 65, 90-91 (1997). In the case at bar, the defendant's trial counsel did not render perfect representation, as demonstrated by the fact that he failed to tender IPI Criminal No. 11.66. We find, however, that the defendant did not suffer substantial prejudice from his trial counsel's failure to tender the required jury instruction. As we explained above, the evidence was not closely balanced, and the jury was instructed under IPI Criminal No. 1.02 that it was the judge of the credibility and weight of the witness testimony and given the criteria for making that determination. As our supreme court found in *Sargent*, that instruction is similar to IPI Criminal No. 11.66 in providing jurors with the principles for weighing testimony. *Sargent*, 239 Ill. 2d at 192. Thus, we do not see a reasonable probability that the outcome of the trial would have been different if counsel had requested, and the jury had been given, IPI Criminal No. 11.66 as well. Therefore, we find that the defendant has not met his burden of persuasion regarding prejudice, and his claim of ineffective assistance of trial counsel fails.

¶ 59 E. Cumulative Error

¶ 60 The defendant's final argument is that the trial court's alleged improper admittance of other-crimes evidence and failure to ensure that the jury was properly instructed concerning the hearsay statements permitted under section 115-10(c) resulted in the cumulative effect of denying the defendant a fair trial. As such, the defendant argues that reversal is necessary even if no individual error requires reversal.

¶ 61 A new trial may be granted on the grounds of cumulative error where the errors are not individually considered sufficiently egregious for an appellate court to grant a new trial, but the errors, nevertheless, create a pervasive pattern of unfair prejudice to the defendant's case. *People*

v. Green, 2017 IL App (1st) 152513, ¶ 117. Where the alleged errors do not amount to reversible error on any individual issue, however, there is generally no cumulative error. *People v. Doyle*, 328 Ill. App. 3d 1, 15 (2002); *People v. Caffey*, 205 Ill. 2d 52, 118 (2001). Here, we have determined, based on the specific facts of this case, only a single nonreversible error occurred concerning the jury instructions. Since a single error cannot be cumulative without at least one additional error, this argument is moot.

¶ 62 III. CONCLUSION

¶ 63 For the foregoing reasons, we vacate the defendant's conviction and sentence on count II, the lesser offense of criminal sexual assault, and direct the trial court to enter an amended penitentiary mittimus reflecting the vacated conviction and sentence. We further affirm the defendant's convictions and sentences on counts III and IV for predatory criminal sexual assault.

¶ 64 Affirmed in part and vacated in part.