

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

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06—CF—3370
)	
MATTHEW D. SPICKERMAN,)	Honorable
)	Kathryn E. Creswell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

Held: Where the probative value of evidence of other crimes admitted under section 115—7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115—7.3 (West 2008)) was not outweighed by undue prejudice, the trial court did not abuse its discretion in admitting the other-crimes evidence, defendant was unable to establish plain error, and he forfeited his argument.

Where the trial court erred in failing to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire*, but defendant failed to establish either that the evidence was so closely balanced that the jury's verdict may have resulted from the error or that the error resulted in jury bias, defendant forfeited his argument.

Following a jury trial, defendant, Matthew D. Spickerman, was convicted of aggravated criminal sexual assault (720 ILCS 5/12—14(b)(i) (West 2000)). He was sentenced to 15 years' imprisonment. On appeal, defendant argues that (1) the trial court improperly admitted other-crimes evidence under section 115—7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115—7.3 (West 2008)) and then failed to properly instruct the jury on the use of that evidence, (2) the trial court did not comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire*, and (3) two scrivener's errors on the order of judgment and sentence must be corrected. We initially reversed and remanded the case, concluding that the trial court committed reversible error in failing to comply with Supreme Court Rule 431(b). *People v. Spickerman*, No. 2—08—0881 (2010) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court issued a supervisory order on January 26, 2011, which directed us to vacate our judgment and to reconsider our decision in light of *People v. Thompson*, 238 Ill. 2d 598 (2010). *People v. Spickerman*, No. 110782 (Jan. 26, 2011). We now affirm, but remand with directions to correct the scrivener's errors.

BACKGROUND

On November 16, 2006, defendant was indicted on one count of aggravated criminal sexual assault (720 ILCS 5/12—14(b)(i) (West 2000)) in that defendant placed his finger in the vagina of C.P. and one count of aggravated criminal sexual abuse (720 ILCS 5/12—16(c)(2)(i) (West 2000)) in that defendant intentionally touched the vagina of C.P. for the purpose of defendant's sexual gratification, with both counts alleging that defendant was under 17 years of age and C.P. was under 9 years of age at the time of the offenses. The charges stemmed from an incident that occurred during C.P.'s eighth birthday party at her father's house in Lombard, Illinois, sometime between July

1 and October 31, 2000. On the State's motion prior to trial, the court dismissed the aggravated criminal sexual abuse count.

Also prior to trial, the State filed a motion *in limine* under section 115—7.3 of the Code to admit evidence of other offenses committed by defendant. The State sought to admit evidence about defendant's alleged sexual misconduct with C.P. in defendant's home in Waterman, Illinois, when C.P. was there for a sleep over with defendant's sister (Waterman incident). The Waterman incident occurred shortly after the charged offense and involved defendant's rubbing his penis on C.P.'s buttocks while she slept. The State also sought admission of evidence regarding defendant's 2007 conviction in Utah of unlawful sexual activity with a minor (Utah incident). There, defendant pleaded guilty to having consensual sexual intercourse and sexual conduct with R.F., a minor, following correspondence between the two via e-mail.

After hearing argument on the State's motion *in limine*, the trial court stated:

“Well, the section at issue here is 115—7.3[,] which tells the Court that in weighing the probative value versus the prejudicial effect, the Court has to look at the proximity in time to the charge of the predicate offense, the degree of factual similarity to the charge of predicate offense[,] or other relevant facts and circumstances.

And regarding that Utah incident, there is certainly some disparity in the time that the offenses are alleged to have occurred, they're not factually similar, it would be extremely prejudicial, and so the State's request to introduce the Utah incident, the facts surrounding that, will be denied.^[1]

¹The court also ruled that the Utah conviction could be used by the State for impeachment purposes should defendant choose to testify.

However, the contact between the defendant and C.P. and other allegations of inappropriate touching or contact are certainly relevant, they're extremely probative, they go to the course of conduct and the relationship between the parties.

So the request to introduce that evidence will be granted.”

Jury selection commenced on July 15, 2008. The trial court told the entire venire that defendant was presumed to be innocent, that the State bore the burden of proving defendant's guilt beyond a reasonable doubt, that defendant was not required to prove his innocence or call witnesses, that defendant did not have to testify, and that if defendant chose not to testify, the jury could not hold it against him.

Thereafter, 12 prospective jurors were called to the jury box and questioned in panels of 6.² The trial court asked each prospective juror whether he or she understood that the State had the burden to prove defendant guilty beyond a reasonable doubt, that defendant was not required to testify, and that if he chose not to testify, the jury could not hold it against him. Each responded affirmatively.

The trial court asked six prospective jurors whether they understood that defendant was not required to prove his innocence. The court questioned one prospective juror about his understanding of the principle that defendant did not need to prove anything. The court asked one juror if he understood that defendant did not need to call witnesses. The trial court asked another if she understood that defendant was not required to prove anything or to call witnesses. The trial court

²During the *voir dire*, several of the prospective jurors were excused and then replaced in the jury box by other members of the venire. Our discussion focuses on those prospective jurors who were ultimately selected to sit on the jury and we refer to them as prospective jurors.

asked the three final prospective jurors whether they understood that defendant was not required to prove anything or to present any evidence. Each of the 12 prospective jurors responded affirmatively to these questions.

Additionally, the trial court asked each prospective juror if he or she agreed to follow the law even if he or she disagreed with it. Each responded affirmatively. After the State and defendant accepted the two panels, the jury was sworn in.

In the State's case-in-chief, C.P. testified that she was born in September 1992 and was 15 years old at the time of trial. She said that her eighth birthday party took place in the summer sometime after July 1.³ The party was held on the backyard deck of her father's house in Lombard, Illinois, and was attended by family and friends from early in the afternoon until late in the evening. When it began getting late, the adults suggested that the children get ready for bed and C.P. changed into her nightgown. She then went to her bedroom with her cousins: defendant, Kimberly, Trevor, Lexi, and Demi. C.P. did not recall what her cousins wore. One of the bedroom windows overlooked the deck and the party could be heard from the bedroom. At some point, Trevor, Lexi, and Demi left the room. Defendant and Kimberly (defendant's sister) remained with C.P. in her bedroom sitting on the floor watching television. Defendant asked Kimberly to get popsicles. Although C.P. had no reason to be uncomfortable with defendant, she was a "little nervous" because defendant usually sent C.P. with Kimberly.

C.P. recounted that when Kimberly left the room, defendant told C.P. that he had a secret to tell her and put his hand on her left inner thigh. He began to move his hand up her leg and pushed inside of her underwear through the leg opening. Defendant then put his finger inside of C.P.'s

³It became clear later in the record that C.P. was referring to the year 2000.

vagina and moved his finger inside of her. C.P. did not know how long defendant had his finger inside of her, but it “felt like forever.” Defendant removed his finger when he heard Kimberly returning. Neither defendant nor C.P. said anything during the incident. C.P. did not tell Kimberly or anyone else what happened because she was “afraid.” She had not told defendant to stop because she was “confused and scared.” When Kimberly returned to the bedroom with the popsicles, C.P. ate a popsicle and rejoined the party outside by going to the swing set.

Before C.P. continued her testimony by describing the Waterman incident, the trial court instructed the jury:

“[Y]ou are about to hear evidence that the defendant has been involved in conduct and offenses other than those charged in the indictment. This evidence will be received on the issues of the defendant’s course of conduct and to corroborate the testimony of the victim concerning the charged offense and for its bearing on any matter to which it is relevant. It is for you to determine whether the defendant was involved in that conduct and offenses and if so, what weight should be given to this evidence on the issues previously stated.”

C.P. testified that defendant inappropriately touched her in a sexual manner one other time. The touching occurred sometime during the year following her eighth birthday party. C.P. had a sleep over with Kimberly at Kimberly’s and defendant’s family home in Waterman, Illinois. Also living at the house at the time were defendant’s parents and his brother, Joe. C.P. did not really want to go to defendant’s house, but she did not have much chance to see Kimberly otherwise. She did not recall who arranged the sleep over, who drove her to Waterman, or whether she ate dinner there.

C.P. explained that on the night of the sleep over, she slept in a T-shirt and sweat pants in Kimberly’s room. The girls slept on the floor because the room was under construction and had no

furniture. C.P. fell asleep with her back to the door, which was closed. At some point during the night, she woke to feeling “a random cold on [her] butt.” Her underwear and sweat pants were partially pulled down. C.P. “felt the presence of a person behind [her], and [she] felt a cold wet object rubbing against [her].” The person was lying behind her, “spooning” her. C.P. could tell that the person was defendant, whom she had known her whole life, because “the body type of a [sic] person was tall and skinny, and [she] could tell by the way he was breathing.” Defendant’s brother, Joe, was shorter and wider than defendant; he was “more built.” C.P. explained that the cold object rubbing her buttocks was defendant’s penis. Kimberly did not awaken. C.P. did not say or do anything because she was “petrified.” At some point, the touching ended and C.P. rolled over onto her stomach. The person left the room and C.P. went back to sleep. C.P. did not tell anyone about the incident because she was “afraid.” The next morning, C.P. did not see defendant. Her stepmother picked her up. Following the Waterman incident, C.P. never went back to Waterman and saw Kimberly only at family parties.

After C.P.’s testimony about the Waterman incident, the trial court instructed the jury that the limiting instructions did not apply to the testimony that followed. C.P. then testified that in May 2006, she communicated with defendant via an online instant messaging service through AOL. Defendant initiated the online conversation in which he asked C.P. exactly what she remembered and apologized for the Lombard incident. C.P. told defendant that she “remembered everything.” At that time, no one else knew about the Lombard incident. C.P. printed out the conversation from her computer.

In June 2006, C.P. and her mother reported the Lombard incident to police. C.P. met with investigators from the Du Page County Children’s Center and told them about the Lombard and

Waterman incidents. With respect to the Waterman incident, C.P. told the investigators that she had been anally raped. She testified that she was not anally raped, but had told the investigators that she was because she “couldn't really find a generic term of what had occurred.”

After C.P.'s testimony, over defendant's objection, the trial court admitted into evidence People's exhibit 1, the computer printout of the instant message conversation between C.P. and defendant.

C.P.'s mother, Carrie, testified that C.P.'s eighth birthday party was the only birthday party held for C.P. in the Lombard house. Carrie did not notice C.P. acting unusually at any time during the party.

Boris Vrbos testified that he was an investigator with the Du Page County Children's Center and had investigated C.P.'s allegations against defendant. As part of his investigation, Vrbos obtained a court order allowing him to record a telephone conversation between defendant and Chris P., defendant's uncle. Vrbos was present when the telephone call took place on September 28, 2006, at the children's center. Vrbos identified the People's exhibit 2 as the audiotape of the telephone conversation. He also identified the People's exhibit 3 as a transcript of the audiotape.

The trial court allowed the State to publish its previously admitted exhibit 1 to the jury—the printout of the instant message conversation between defendant and C.P. Vrbos and the assistant state's attorney read from the printout, with Vrbos reading the part of defendant and the attorney reading the part of C.P.

Chris P. testified that he was both C.P.'s and defendant's uncle.⁴ Chris said that he had known defendant all of defendant's life and that they had a great relationship. Chris babysat for

⁴C.P. was Chris's brother's daughter. Defendant was Chris's sister's son.

defendant and was involved with defendant's activities in Eagle scouts, birthdays, graduation, and civil war re-enactments. In July 2006, Chris learned from C.P.'s mother that defendant had sexually molested C.P. Chris called defendant to "find out what was going on." Chris and defendant talked for about 45 minutes. Chris did not have much recollection of this phone call, but said that defendant admitted to him that he had engaged in sexual misconduct with C.P. Chris could not recall precisely what defendant had said; defendant provided no detail, but told Chris that he (defendant) had "inappropriate sexual contact" with C.P. on two occasions. There was no mention of the Waterman incident. Chris did not press the issue and told defendant that he would get back to him.

Chris testified that he met with Vrbos on September 28, 2006, at the children's center to make a phone call to defendant and have it recorded. Chris identified People's exhibits 2 and 3 as the audiotape and transcript of that telephone call, respectively. The trial court admitted the exhibits and published the transcript to the jury. The audiotape was then played for the jury.

Chris acknowledged that during the taped phone conversation he told defendant that he (Chris) had talked with C.P.'s counselor, and that defendant's account to Chris of what happened differed from what the counselor said happened. Chris admitted at trial that he never spoke with C.P.'s counselor. Vrbos was present during Chris's taped phone conversation with defendant, but Chris had not been coached by anyone as to what to say. Although during the taped phone conversation, defendant repeatedly denied having put his finger in C.P.'s vagina, Chris kept asking the question. Chris told defendant several times that he wanted defendant to "get this behind him."

The trial court admitted People's exhibit 4, a certified copy of defendant's birth certificate.

The State rested.

Defendant called Vrbos to testify. On July 31, 2006, Vrbos interviewed C.P.'s mother, Carrie, for about one-half hour. On the same day, he also interviewed C.P. for about the same time. Vrbos had no additional meetings with C.P. or Carrie. He met with Chris on August 4, 2006, for 30-40 minutes. Vrbos testified that Chris told him that he (Chris) had spoken with defendant on the telephone. Vrbos and the children's center staff decided to apply for the eavesdropping. Vrbos made no arrangements for defendant to come in to make a statement because defendant had gone to Utah before he could do so.

Betty Spickerman, defendant's mother, testified that she attended C.P.'s eighth birthday party at the Lombard house. Betty never noticed anything unusual during the party and she never saw C.P. act strangely. In 2000, Betty resided in Waterman with her husband and their children—defendant, Kimberly, and Joe. At that time, Kimberly did not have her own bedroom because it was under construction from the summer of 2000 until 2002. The room they were constructing for Kimberly was formerly a bathroom. It contained no furniture during the construction. Kimberly slept in a bunk bed in her brothers' bedroom with Joe, while defendant slept on a couch in the room. C.P. never spent the night in the Waterman house.

Joe Spickerman testified that he was defendant's older brother. Joe attended family parties at the Lombard house. He got along well with his cousin, C.P., and was not aware of any problems between C.P. and defendant. C.P. was at the Waterman house once in 2004 when Joe graduated from high school, but she did not stay overnight. Joe acknowledged that it was possible that C.P. could have been at the Waterman house without his being aware of it. Joe had no specific recollection of C.P.'s eighth birthday party.

The trial court admonished defendant regarding his right to testify. Defendant himself informed the court that he did not wish to testify. The defense rested.

The State called a rebuttal witness, Theresa Ingstrup, C.P.'s stepmother, who testified that C.P. stayed overnight at the Waterman house more than once between 2000 and 2001. After C.P.'s grandmother dropped C.P. off at the Waterman house, Theresa would pick C.P. up the next day. She did not recall the exact dates. Theresa never noticed C.P. act unusually after being in Waterman.

Following closing arguments, the trial court instructed the jury. Specifically, the court told the jury that, "[a]ny evidence that was received for a limited purpose should not be considered by you for any other purpose." The court further instructed the jury that defendant was presumed innocent, that the State had the burden of proving him guilty beyond a reasonable doubt, that defendant was not required to prove his innocence, and that the fact that defendant chose not to testify could not be considered by the jury. The trial court also instructed:

"Evidence has been received that the defendant has been involved in conduct other than that charged in the indictment. This evidence has been received on the issues of the defendant's intent, course of conduct, to corroborate the testimony of victim concerning the charged offense, and for its bearing on any matter to which it is relevant.

It is for you to determine whether the defendant was involved in that conduct, and if so, what weight should be given to this evidence on the issues of the defendant's intent, course of conduct, to corroborate the testimony of the victim concerning the charged offense, and for its bearing on any other matter to which it is relevant."

The jury returned a verdict of guilty. Defendant filed a motion for new trial, which the trial court denied. On August 21, 2008, the trial court sentenced defendant to 15 years' imprisonment (to run concurrently with the Utah sentence). Defendant timely appealed.

ANALYSIS

Defendant argues that (1) the trial court abused its discretion under section 115—7.3 of the Code when it admitted evidence of the Waterman incident and failed to properly instruct the jury on the limited purpose of the evidence; (2) the trial court failed to fully comply with Rule 431(b) in that it did not ask each potential juror whether he or she understood and accepted each of the four key principles of criminal trials; and (3) we should correct the scrivener's errors on the judgment and sentence order regarding the subsection of the statute under which defendant was convicted and the length of the term of mandatory supervised release (MSR). We address each of defendant's arguments in turn.

Other-Crimes Evidence

Defendant argues that the trial court failed to balance the probative value of the evidence of the Waterman incident against its prejudicial effect and that, had the court conducted a meaningful assessment, it "likely" would have found the evidence inadmissible. Defendant concedes that he failed to preserve this issue for review by failing to include it in his posttrial motion, but urges us to review it under the plain-error doctrine.

The plain-error doctrine, provided for in Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967), is an exception to the general rule of forfeiture, which we invoke only when necessary to protect a defendant's right to a fair, though not a perfect, trial and to protect the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). We may review an otherwise

forfeited issue when either (1) “the evidence in a case is so closely balanced that the jury’s guilty verdict may have resulted from the error and not the evidence” or (2) “the error is so serious that the defendant was denied a substantial right, and thus a fair trial.” *Herron*, 215 Ill. 2d at 178-79. The defendant bears the burden of persuasion under both prongs. *Herron*, 215 Ill. 2d at 187. The threshold question in plain-error analysis is whether error occurred. *Thompson*, 238 Ill. 2d at 613.

Evidence of a defendant’s other crimes is generally not admissible to demonstrate the defendant’s bad character or propensity to commit crime. *People v. Walston*, 386 Ill. App. 3d 598, 609-10 (2008). Exceptions exist to admit such evidence for the limited purposes of showing “intent, *modus operandi*, identity, motive, absence of mistake, and any material fact other than propensity that is relevant to the case.” *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Effective in 1998, the legislature created a statutory exception to the common-law prohibition on other-crimes evidence when it enacted section 115—7.3 of the Code. Section 115—7.3 provides in relevant part:

“(a) This Section applies to criminal cases in which:

(1) the defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, child pornography, aggravated child pornography, or criminal transmission of HIV;

(2) the defendant is accused of battery, aggravated battery, first degree murder, or second degree murder when the commission of the offense involves sexual penetration or sexual conduct as defined in Section 12—12 of the Criminal Code of 1961; or

(3) the defendant is tried or retried for any of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, or aggravated indecent liberties with

a child.

(b) If the defendant is accused of an offense set forth in paragraph (1) or (2) of subsection (a) or the defendant is tried or retried for any of the offenses set forth in paragraph (3) of subsection (a), evidence of the defendant's commission of another offense or offenses set forth in paragraph (1), (2), or (3) of subsection (a), or evidence to rebut that proof or an inference from that proof, 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.

(c) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(1) the proximity in time to the charged or predicate offense;

(2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances.” 725 ILCS 5/115—7.3(a), (b), (c) (West 2008).

If the statutory requirements are satisfied, section 115—7.3 allows admission of evidence of other crimes for the broad purpose of demonstrating a defendant's propensity to commit sex offenses. *Donoho*, 204 Ill. 2d at 176; *Walston*, 386 Ill. App. 3d at 611.

As under the common-law exception to the general rule against admission of other-crimes evidence, under section 115—7.3, the trial court must weigh the probative value of the evidence against its prejudicial effect. *Donoho*, 204 Ill. 2d at 170; *People v. Ward*, 389 Ill. App. 3d 757, 765 (2009). The trial court must engage in a “meaningful assessment.” *Donoho*, 204 Ill. 2d at 186. A trial court's decision to admit other-crimes evidence to show a defendant's propensity will not be disturbed absent an abuse of discretion. *People v. Ross*, 395 Ill. App. 3d 660, 674 (2009). A trial

court abuses its discretion if its determination is unreasonable, arbitrary, or fanciful, or where no reasonable person would adopt the trial court's view. *Ross*, 395 Ill. App. at 674.

Review of the record indicates that the trial court undertook the meaningful assessment required under section 115—7.3 and *Donoho*. After hearing arguments on the State's motion *in limine* to introduce evidence of the Waterman incident and the Utah incident, the trial court recited the factors it was to consider under section 115—7.3(c). Addressing those factors, the trial court stated, "And regarding that Utah incident, there is certainly some disparity in the time that the offenses are alleged to have occurred, they're not factually similar, it would be extremely prejudicial, and so the State's request to introduce the Utah incident, the facts surrounding that, will be denied." The trial court, in excluding evidence of the Utah incident, was clearly aware of its statutory obligation to address the factors and conduct a meaningful analysis of the probative value and prejudicial effect of the evidence.

Immediately turning to the evidence of the Waterman incident, the trial court stated, "However, the contact between the defendant and C.P. and other allegations of inappropriate touching or contact are certainly relevant, they're extremely probative, they go to the course of conduct and the relationship between the parties." The trial court explicitly addressed the probative value of the Waterman incident (same victim, other additional allegations of inappropriate touching). Furthermore, the trial court implicitly addressed the prejudicial effect when it contrasted its ruling on the Utah incident, which it found extremely prejudicial, by stating "however," and signaling that, unlike the Utah incident, which was not factually similar to the charged offense, the Waterman incident was factually similar and therefore, extremely probative. In other words, the trial court's finding that the Utah incident was extremely prejudicial carried the implication that the extreme

prejudicial effect outweighed any probative value, while its finding that the Waterman incident was extremely probative carried the implication that the probative value outweighed any undue prejudicial effect. See *Walston*, 386 Ill. App. 3d at 610, n.3 (prejudicial effect and probative value are “technically synonymous” because the “effect, and purpose, of all probative evidence is that it will prejudice the party against whom it is introduced”). The trial court’s analysis was sufficiently meaningful under section 115—7.3 and *Donoho*.

We next examine whether the trial court abused its discretion because the probative value of the evidence of the Waterman incident was outweighed by undue prejudice. The first statutory factor to be considered is the proximity in time between the charged offense and the other crime. The Waterman incident was alleged to have occurred within less than two years after the charged offense and was thus proximate in time. See *Donoho*, 204 Ill. 2d at 184 (holding that the 12-15 year time gap was insufficient to render the admission of the other offense an abuse of discretion).

The next statutory factor is the degree of factual similarity between the charged offense and the other crime. Both the charged offense and the Waterman incident involved the same victim, which is extremely probative. Moreover, both incidents occurred in bedrooms located in the family dwelling of either defendant or C.P., where C.P. had an expectation of safety. Also in both incidents, defendant took advantage of the family relationship to gain access to C.P. Although the charged offense involved digital penetration of C.P.’s vagina while she was awake and the Waterman incident consisted of defendant’s rubbing his penis on C.P.’s buttocks while she slept, both incidents involved defendant’s taking sexual advantage of C.P. while she was isolated—either because no one else was present (charged offense) or because the room’s other occupant was sleeping (Waterman incident). There was a sufficient degree of similarity between the incidents so that we cannot say

that the trial court abused its discretion in admitting the evidence. See *Donoho*, 204 Ill. 2d at 185 (that some differences exist “does not defeat admissibility because no two independent crimes are identical”); *Ross*, 395 Ill. App. 3d at 676 (unless the other-crimes evidence is being offered to demonstrate *modus operandi*, general areas of similarity are sufficient).

Nonetheless, defendant argues that the Waterman incident “could easily be considered more heinous” than the conduct alleged in the charged offense since, according to defendant, C.P. described the Waterman incident as a “bold assault that took place in the defendant’s home in Waterman, while his own sister was lying next to C.P.” Citing *Walston*, defendant concludes that the evidence of the Waterman incident was therefore unduly prejudicial. See, 386 Ill. App. 3d at 622, n.9 (“the question of whether a specific other crime may be proven could also raise questions regarding whether a description of the circumstances of that other crime, which may be more heinous than the charged crime, causes undue prejudice”). However, as the State argues, the Waterman incident was arguably less heinous than the charged offense because it did not involve penetration while the charged offense did. Although perhaps defendant’s conduct in the Waterman incident could be considered more heinous because the victim was asleep, that one difference alone does not compel the conclusion that the probative value was outweighed by undue prejudice. See *People v. Childress*, 338 Ill. App. 3d 540, 553 (2003) (holding that the trial court abused its discretion in excluding other-crimes evidence of a sexual assault where any undue prejudice from the jury thinking the defendant was a “mean, nasty guy” because the defendant wanted to punish the victim in the other crime did not outweigh the probative value of showing propensity). Accordingly, the trial court did not abuse its discretion in allowing admission of the other-crimes evidence. See *Walston*, 386 Ill. App. 3d at 617 (the trial court should conduct its analysis in such a way to allow

section 115—7.3 to operate as the legislature intended—to allow admission of other-crimes evidence to show propensity to commit sex offenses).

Defendant next asserts that, even if the evidence of the Waterman incident were properly admitted, the trial court erred in instructing the jury on its limited use. Defendant acknowledges his forfeiture of this argument, but asks us to review it under the plain-error doctrine pursuant to Illinois Supreme Court Rule 451(c) (eff. July 1, 2006). Rule 451(c) provides that “substantial defects” in jury instructions in criminal cases “are not waived by failure to make timely objections thereto if the interests of justice require.” “Rule 451(c) is coextensive with the plain-error clause of Supreme Court Rule 615(a), and the two rules are construed identically.” *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Thus, we must first determine if there was error. *Piatkowski*, 225 Ill. 2d at 565.

The limiting instruction contained in IPI 3.14 (Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000)), addresses the problem of a jury improperly considering evidence of other-crimes as showing a defendant’s propensity to commit the charged offense. *People v. Tolbert*, 323 Ill. App. 3d 793, 800 (2001). A trial court using this instruction must inform the jury of the limited purpose for which the evidence of other crimes has been received and that the evidence “may be considered by [the jury] only for that limited purpose.” Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000). Under section 115—7.3, however, evidence of other crimes is admissible for the broad purpose of demonstrating a defendant's propensity to commit sex offenses. *Donoho*, 204 Ill. 2d at 176; *Walston*, 386 Ill. App. 3d at 611.

Here, after closing arguments, the trial court told the jury, “Any evidence that was received for a limited purpose should not be considered by you for any other purpose.” After other instruction, the court continued:

“Evidence has been received that the defendant has been involved in conduct other than that charged in the indictment. This evidence has been received on the issues of the defendant's intent, course of conduct, to corroborate the testimony of victim concerning the charged offense, and for its bearing on any matter to which it is relevant.

It is for you to determine whether the defendant was involved in that conduct, and if so, what weight should be given to this evidence on the issues of the defendant's intent, course of conduct, to corroborate the testimony of the victim concerning the charged offense, and for its bearing on any other matter to which it is relevant.”

Despite the trial court's silence on admissibility for the purpose of showing defendant's propensity, the evidence was admissible for that purpose. See *People v. Boyd*, 366 Ill. App. 3d 84, 93 (2006). Even assuming *arguendo* that the trial court's instruction patterned on IPI 3.14 erroneously omitted the phrase, “and may be considered by you only for that limited purpose,” defendant fails to meet his burden under either prong of the plain-error doctrine.

Under the first prong of the plain-error doctrine, a defendant must show that “the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence.” *Herron*, 215 Ill. 2d at 178. Defendant contends that, absent the evidence of the Waterman incident, the State relied on “the testimony of a single witness' memory from eight years earlier, when she was only eight-years old, and no physical evidence.” Our review of the record reveals that the evidence was not closely balanced. Although there was no physical evidence, in addition to C.P.'s testimony, the State presented the computer printout of the instant messaging conversation between defendant and C.P. in which defendant apologized for the incident at the party and Uncle Chris's testimony that defendant admitted to him that he had engaged in sexual

misconduct with C.P. The defense’s case did not directly rebut the evidence presented in the State’s case.

Defendant offers no explanation as to how this evidence was closely balanced. Defendant’s summary statement that the State relied on C.P.’s testimony about an incident that occurred eight years earlier when she was eight years old essentially attempts to challenge C.P.’s credibility. Credibility determinations are the province of the factfinder. *People v. Evans*, 209 Ill. 2d 194, 211 (2004). Accordingly, defendant has not met his burden of establishing plain error under the first prong—that the evidence was so closely balanced that the jury’s guilty verdict may have resulted from any error in the trial court’s omission of language from IPI 3.14. See *People v. Brazziel*, No. 1—08—1455, slip op. at 31 (Nov. 22, 2010) (rejecting the defendant’s first-prong plain-error attack that the evidence was closely balanced because the State presented two “unreliable” witnesses while the defense presented three “strong” witnesses).

As noted above, under the second prong of the plain-error doctrine, defendant must demonstrate that the error was so serious that he was denied a substantial right, and thus a fair trial. Defendant relies on *People v. Brown*, 319 Ill. App. 3d 89 (2001), to demonstrate the seriousness of the trial court’s alleged error. We first note that *Brown* is distinguishable because it did not involve admission of other-crimes evidence pursuant to section 115—7.3. In *Brown*, the defendant was charged with aggravated battery of a child and the trial court allowed the State to admit evidence of a prior incident regarding the defendant and the same child. *Brown*, 319 Ill. App. 3d at 92. At the close of evidence, the trial court instructed the jury that the evidence “may be considered by you for that limited purpose,” thus omitting the word “only” from the IPI 3.14 instruction. *Brown*, 319 Ill. App. 3d at 99. The appellate court held that the trial court’s “inadvertent typographical omission”

of the word “only” was a “material” error. *Brown*, 319 Ill. App. 3d at 98 (addressing the issue despite the defendant’s failure to raise it on appeal). The appellate court reasoned that, because jury instructions are to convey the correct principles of law to the jury, the word “only” was necessary to inform the jury that the other-crimes evidence could be considered solely on the issues enumerated, and not for any other purpose. *Brown*, 319 Ill. App. 3d at 99. The court noted the reason for exclusion of other-crimes evidence under the common law—that “the law distrusts the inference that, because a person committed other crimes or bad conduct, he is more likely to have committed the crime charged.” *Brown*, 319 Ill. App. 3d at 99. Therefore, the court concluded, jury instruction on the appropriate limited purpose is “imperative.” *Brown*, 319 Ill. App. 3d at 99.

The court’s concern in *Brown* was that the jury might have considered the other-crimes evidence to show the defendant’s propensity to commit aggravated child battery. Although that concern is valid under the common law, in contrast, where, as in the instant case, other-crimes evidence is admitted section 115—7.3, the concern is eliminated because the legislature intended that other-crimes evidence be admissible in certain types of cases to show a defendant’s propensity. *Donoho*, 204 Ill. 2d at 176; *Walston*, 386 Ill. App. 3d at 611. Defendant asserts several arguments regarding the error allegedly committed by the trial court (*e.g.*, jury confusion from inconsistent instructions). None of these arguments is pertinent to our analysis under the plain-error doctrine and none is supported by relevant authority. Defendant also urges us to conclude that the trial court improperly left the meaning of relevance to the jury’s determination. However, defendant articulates no potentially improper purpose, and no irrelevant matter, for which the jury might have considered the evidence. Accordingly, he has failed to meet his burden of persuasion under the second-prong of the plain-error doctrine. See *Herron*, 215 Ill. 2d at 179 (a defendant must demonstrate an error

“so serious that he was denied a substantial right, and thus a fair trial”); *Walston*, 386 Ill. App. 3d at 615 (“Unlike typical other-crimes evidence, *** the undue prejudice that excludes evidence under section 115–7.3 must come from some source other than its tendency to show bad character or propensity.”).

Because defendant has failed to establish plain error under either prong, we will not overlook his forfeiture of the other-crimes-evidence issue. See *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (where a defendant neglects to preserve an issue for review and fails to establish plain error, the reviewing court must honor the procedural default).

Rule 431(b)

Defendant next contends that the trial court committed reversible error by failing to fully comply with Rule 431(b). Defendant acknowledges that he failed to object to the *voir dire* during the proceedings and did not raise the issue in his posttrial motion. However, he requests that we determine that the issue is not forfeited because the trial court had a *sua sponte* duty to follow Rule 431(b) or, alternatively, that we address the issue under the doctrine of plain error.

Although the current version of Rule 431(b) imposes a *sua sponte* duty on the trial court, it does not eliminate a defendant’s burden to properly preserve the issue for review. *People v. Stewart*, No. 1—08—3092, slip op. at 25 (2010) (rejecting the defendant’s claim that, because the trial court’s conduct was at issue, the defendant’s procedural default should be relaxed, stating that there was nothing to indicate that the trial court would not have been receptive to an objection and that there was a presumption that the trial court would have corrected its error had the defendant raised it). Thus, in order to overcome forfeiture, defendant must establish that plain error occurred.

As noted above, we may review an otherwise forfeited issue when either (1) “the evidence in a case is so closely balanced that the jury’s guilty verdict may have resulted from the error and not the evidence” or (2) “the error is so serious that the defendant was denied a substantial right, and thus a fair trial.” *Herron*, 215 Ill. 2d at 178-79. The defendant bears the burden of persuasion under both prongs. *Herron*, 215 Ill. 2d at 187. The threshold question in plain-error analysis is whether error occurred. *Thompson*, 238 Ill. 2d at 613.

Rule 431 governs *voir dire* and was amended in 1997 to codify the decision in *People v. Zehr*, 103 Ill. 2d 472 (1984), which held that “essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him.” *Zehr*, 103 Ill. 2d at 477. In its original form, Rule 431(b) required a trial court to admonish and question prospective jurors on what are known as the *Zehr* principles only when requested by a defendant. *Thompson*, 238 Ill. 2d at 608. Amended in 2007, Rule 431(b) now imposes an affirmative obligation on trial courts to do so. *People v. Lampley*, 405 Ill. App. 3d 1, 9 (2010). In its entirety, the rule provides:

“The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant’s failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant’s failure to testify when the defendant objects.

The court’s method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section.” Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Review of the record reveals that the trial court expressly questioned each of the prospective jurors as to whether he or she understood the principles enunciated in Rules 431(b)(2) and (b)(4), that the State bears the burden of proving defendant’s guilt beyond a reasonable doubt, and that a defendant’s decision not to testify cannot be held against him, respectively. The trial court also questioned the prospective jurors about their understanding of the principle of Rule 431(b)(3)—that a defendant is not required to present any evidence. For three of the prospective jurors, the trial court explicitly stated that defendant was not required to present evidence, while for the other nine, the trial court variously said that defendant did not have to prove his innocence, call witnesses, or prove anything. The trial court did not expressly question any prospective juror regarding the presumption of innocence in Rule 431(b)(1).

We first reject defendant’s argument that the trial court’s questioning of the nine prospective jurors as to his not having to prove his innocence, call witnesses, or prove anything was insufficient to constitute questioning about Rule 431(b)(3)—the principle that defendant was not required to present evidence. The trial court explained to the venire that calling witnesses is one way of presenting evidence. Moreover, the trial court need not recite the *Zehr* principles verbatim. See *People v. Atherton*, No. 2—08—1169, slip op. at 15 (Dec. 16, 2010) (concluding that the trial court’s questioning about the defendant’s not needing to prove his innocence was sufficient to comply with Rule 431(b)(3)). Consequently, the trial court did question prospective jurors about their understanding of the principle that defendant was not required to present evidence.

Nonetheless, we agree with defendant that the trial court failed to question the prospective jurors about either their understanding or acceptance of the first *Zehr* principle announced in Rule 431(b)(1)—that a defendant is presumed innocent. We also agree with defendant that the trial court failed to ascertain the prospective jurors’ acceptance of the other three *Zehr* principles, as opposed to their understanding. The trial court’s failure to fully comply with Rule 431(b) constituted error. See *Thompson*, 238 Ill. 2d at 607 (Rule 431(b) requires questioning on both understanding and acceptance of each of the *Zehr* principles). We must now determine whether that error rises to the level of reversible plain error.

Defendant urges that plain error occurred under both prongs of the doctrine. We first address the second prong. Under the second prong of plain-error analysis, prejudice is presumed, regardless of how strong the evidence was, because of the importance of the right involved. *Herron*, 215 Ill. 2d at 187. However, the defendant bears the burden of demonstrating that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *Thompson*, 238 Ill. 2d at 613. Although the purpose of Rule 431(b) questioning is to help ensure an impartial jury, it is not the only means to do so, and it is therefore not indispensable to a fair trial. *Thompson*, 238 Ill. 2d at 614. Thus, “[w]e cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning.” *Thompson*, 238 Ill. 2d at 614. Therefore, in order to meet the burden of persuasion, a defendant alleging second-prong plain error for a Rule 431(b) violation must show that the violation resulted in a biased jury. *Thompson*, 238 Ill. 2d at 614-15.

Here, defendant makes no argument that the trial court’s failure to ascertain whether each of the prospective jurors accepted three of the *Zehr* principles and whether they understood and accepted the principle that a defendant is presumed innocent resulted in a biased jury. On this record

where the trial court told the entire venire about all four of the *Zehr* principles, asked each of the prospective jurors whether he or she would follow the law even if he or she disagreed with it, and instructed the jury on all four of the *Zehr* principles at the close of evidence, nothing suggests that defendant was tried before a biased jury. As defendant bears the burden of persuasion under the plain-error doctrine, his failure to present any evidence of a biased jury prevents the second prong of the plain-error doctrine from serving as a basis for excusing defendant's forfeiture of this issue. *Thompson*, 238 Ill. 2d at 615 (where the defendant failed to present any evidence of a biased jury, he failed to meet his burden under the second prong of the plain-error doctrine, and the court would not review the error).

Defendant further argues that “review is also appropriate under the closely-balanced evidence theory.” As we discussed above, even without the other-crimes evidence, the evidence here was not closely balanced. Moreover, when the properly admitted other-crimes evidence about the Waterman incident is included, the evidence was overwhelming. Thus, defendant fails to meet his burden of persuasion under the first prong of the plain-error doctrine. Because defendant has failed to establish plain error under either prong, we will not overlook his forfeiture of the Rule 431(b) issue. See *Naylor*, 229 Ill. 2d at 593 (where a defendant neglects to preserve an issue for review and fails to establish plain error, the reviewing court must honor the procedural default).

Scrivener's Errors

Finally, we note that defendant correctly points out, and the State concedes, scrivener's errors on the judgment and sentence order showing the incorrect subsection of the statute under which defendant was convicted and an incorrect term of MSR. The order should reflect that defendant was convicted under section 12—14(b)(i) of the Criminal Code of 1961 (720 ILCS 5/12—14(b)(i) (West

2000), where the victim was under 9 years of age), not section 12—14(b)(ii) (720 ILCS 5/12—14(b)(ii) (West 2000), where the victim was at least 9 years of age, but under 13 years old and force or threat of force was used). Also, pursuant to section 5—8—1(d) of the Unified Code of Corrections (730 ILCS 5/5—8—1(d) (West 2008)), the order should reflect an MSR term of three years, not three years to life.

CONCLUSION

Based on the foregoing reasons, we affirm the judgment of the circuit court of Du Page County, but remand to correct the scrivener's errors.

Affirmed and remanded with directions.