SIXTH DIVISION
March 16, 2012

No. 1-10-0933

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 11388
	)	
JOHN MCDOWELL,	)	The Honorable
	)	Lawrence Edward Flood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. E. Gordon and Justice Palmer concurred in the judgment.

ORDER

¶ *1* *Held*: The defendant's conviction for criminal sexual abuse is affirmed over the defendant's claim that victim's testimony was too contradictory to be believed by the jury. The trial court's admission of out-of-court statements of the minor victim did not give rise to plain error because admission of the statements did not threaten to tip the scales of justice against him. However, a new sentencing hearing is ordered because the trial court was mistaken about the proper sentencing range, and that mistake arguably influenced the sentencing decision.

¶ 2 A jury convicted the defendant of criminal sexual abuse for the act of touching his five-

year-old daughter's vagina with his hand. It acquitted him of placing her hand on his penis. The victim testified at trial. Pursuant to 725 ILCS 5/115-10 (West 2006), the trial court admitted several out-of-court statements the victim made accusing the defendant of improper touching. The statements concerned sexual conduct for which the defendant was charged and conduct for which he was not charged. Police investigators testified that the defendant admitted to engaging in the alleged acts of sexual conduct; the defendant testified at trial that he made the admissions only because he was enraged about the charges. The trial court sentenced the defendant to seven years' incarceration. The judge stated he was imposing a mid range sentence in light of a possible extended sentence of 14 years. In fact, the maximum sentence for the convicted offense was seven years.

¶ 3 The evidence was sufficient to prove the defendant's guilt beyond a reasonable doubt; the trial court did not commit plain error in admitting the victim's out-of-court statements regarding other crimes. The trial judge's mistake regarding the sentencing range arguably influenced his sentencing decision, which mandates a new sentencing hearing. The defendant is also entitled to 88 days in presentencing custody credit rather than the 84 listed on the mittimus.

¶ 4 BACKGROUND

¶ 5 In December 2009, the defendant was tried by a jury on two counts of aggravated criminal sexual abuse. The two counts charged that the defendant (1) touched the vagina of his five-year-old daughter, D.N.[1] and (2) placed D.N.'s hand on his penis. The jury convicted him of the hand-to-vagina count and acquitted him of the hand-to-penis count. At a pretrial hearing, the

[1] We abbreviate the names of the victim and her mother to protect the child's privacy.

State moved to admit some of D.N.'s out-of-court statements under 725 ILCS 5/115-10 (West 2006), which allows admission of hearsay statements of a minor child that describe sexual abuse. The hearing was held over two days during which D.N.'s mother, P.N., testified, along with Dr. Emily Siffermann, a pediatrician who examined D.N., Cynthia Chambers, a clinical therapist who interviewed D.N., and Alexandra Levi, a social worker who interviewed D.N.

¶ 6 P.N. testified that on March 5, 2007, she was at her home with her five-year-old daughter, D.N., when the phone rang. When P.N. told D.N. it was her father, the defendant, calling, she refused to answer and began crying. In response to questions, D.N. said that when she and her brothers were visiting the defendant at his apartment he had touched her "no-no" with his hand and had placed her hand on his "no-no." P.N. testified that she taught her children to call their genitals "no-nos" because no one was allowed to touch them. D.N. also told P.N. that "red juice" came out of her vaginal area. Using two dolls, D.N. demonstrated how her hand touched her father's genitals and how he touched her genitals. She also used the dolls to show her father putting his mouth near her genital area. P.N. testified that she asked D.N. why she did not mention these incidents earlier. D.N. responded that her father told her that, if she did, she would never see her mother again. P.N. said that D.N. used to refer to the defendant as "Dad," but after D.N. complained of the abuse, she began calling him "John."

¶ 7 Dr. Siffermann testified that she worked at Stroger Hospital of Cook County and the Children's Advocacy Center. She interviewed D.N. on March 14, 2007. She asked D.N. to identify her genital region, which D.N. did. When she asked D.N. if anything hurt her, D.N. answered that it hurt "where she pees" because her father had "touched on her." D.N. also told

Dr. Siffermann that her father had touched her chest, her anus, and had hit her with a belt in her genital area. Finally, Dr. Siffermann testified that D.N. said her father had touched "her part with his part" vaginally and anally. When asked what she meant by "his part," D.N. was not able to explain, but she pointed to her genital region. At the end of her meeting with D.N., Dr. Siffermann conducted a physical examination about which she did not testify.

¶ 8 Chambers testified that she interviewed D.N. in her office on April 9, 2007, with P.N. present. She asked D.N. what she would consider a good experience and a bad experience. D.N. stated that going to a restaurant is a good experience and going to school is a bad experience. Chambers found these answers appropriate. When Chambers asked D.N. if she knew why she was there, D.N. responded that it was because "the old man had touched her no-no." Chambers asked D.N. to identify her no-no and D.N. pointed to her vagina. At the end of the interview, D.N. asked P.N. if she was angry at her for telling Chambers what happened. A second meeting took place on May 2, 2007. At that time, D.N. told Chambers that she did not like seeing "that old man because he touched her no-no, and that it makes her sad when she sees him at the bank or the laundromat."

¶ 9 Levi testified that she spoke to D.N. on March 14, 2007. At the time, Levi was a forensic interviewer for the Children's Advocacy Center. Levi conducted a victim sensitive interview, or VSI, which is an interview designed for a child who is suspected of being the victim of abuse. A VSI takes place in a neutral, non-traumatic setting and consists of open-ended, non-leading questions. Only Levi and D.N. were in the room, but several others watched through a two-way mirror. D.N. told Levi that her father had touched her vaginal area with his hand, had her touch

his penis with her hand, and put a "stick" inside her vagina and anus. D.N. told Levi that the defendant put his hand under her panties. She said that she touched the defendant's penis with her hand inside his clothes. Levi determined that D.N. knew the difference between over and under and inside and outside.

¶ 10 At the termination of the hearing, the court found the hearsay statements consistent and reliable and concluded that they were admissible. The court noted the spontaneous nature of the initial outcry, the consistency of the statements, the lack of a motive to fabricate, D.N.'s age, and the terminology D.N. used.

¶ 11 By the time of trial, D.N. was seven years old. D.N. testified that she lived with her mother but visited the defendant with her brothers. These visits occurred at the defendant's apartment, which D.N. described as "little." In fact, it was a studio apartment. D.N. testified that sometime in January or February 2007, she was visiting her father at his apartment with her brothers, Darryl and Dartrell. During that visit, her father touched her "no-no" with his hand. She was wearing pajamas, and her father touched her under her pajamas. She also testified that he made her touch his "no-no" with her hand. The defendant was also wearing pajamas and D.N. touched him under his pajamas. D.N. identified two pictures she had drawn. One showed her touching her father's genital area and the other showed her father touching her genital area. One of the pictures included a ceiling fan. The defendant's apartment had a ceiling fan above the bed.

¶ 12 On cross-examination, D.N. testified that the events occurred during the day after dinner. She testified that it was light in the apartment, but that no lights were on. She said that Darryl and Dartrell were "washing up." Darryl was in the bathroom and Dartrell was washing his face

in the sink. D.N. testified that she did not know when the events occurred or how old she was at the time. She said her father did not use a "stick" to touch her, and she denied telling anyone he used a stick. During cross-examination, D.N. maintained that she had pajamas on at the time of the incident, but also said that the defendant took her underpants off and put them on the bed. She also said that she told the defendant to "stop" in a loud voice. She said she told a "lady doctor" about telling the defendant to stop but did not tell her mother. After she said stop, Dartrell came out of the bathroom. Dartrell asked why D.N. said stop and she told him it was because the defendant touched her "no-no." At this time, Darryl was in the shower, but when he came out, D.N. told him the defendant touched her. According to D.N., Dartrell then called P.N. Soon after, P.N. came to pick them up and D.N. walked down the stairs to the car. When they got home, D.N. told her mother and her step-father what had happened.

¶ 13 P.N. testified next. She reiterated the testimony she gave at the section 115-10 hearing regarding what D.N. had told her. She also testified that D.N. told her that the defendant had touched her chest and mouth. On cross-examination, P.N. denied receiving a phone call about the incident between D.N. and the defendant. D.N. never told P.N. that she said "stop" to the defendant. On the night D.N. told P.N. about the abuse, she had not been at the defendant's apartment, nor had D.N. been there during the previous week. On redirect-examination, P.N. explained that she bought sleeping bags for her sons and D.N. to sleep in when they stayed at the defendant's house. Her sons informed her that D.N. had stopped sleeping in her sleeping bag and resumed sleeping in the bed with the defendant. P.N. confronted the defendant about it, and he assured her that he would make sure D.N. slept in the sleeping bag.

¶ 14 Levi testified and reiterated much of what she said at the pretrial hearing. She also explained that children do not have a firm understanding on the passage of time. On cross-examination, she stated that D.N. never told her that her brothers were present at the time of the incident or that she called her mother to pick her up. Levi testified that D.N. referred to the defendant as "Dad," not "John," during the interview.

¶ 15 Dr. Siffermann testified in conformity with her testimony at the pretrial hearing. She also gave details about the physical exam that she performed on D.N. She found no physical injuries, but stated it was common for females to have a normal exam even after abuse has occurred because the affected areas heal quickly.

¶ 16 Detective Michael Nolan testified next for the State. He stated that on May 9, 2007, just after midnight, the defendant agreed to speak to him. Detective Nolan said this conversation occurred after he advised the defendant of his *Miranda* rights. Detective Nolan told the defendant of the charges against him. The defendant admitted that they were true and stated that he had touched D.N.'s vagina under her clothes and placed her hand on his penis under his clothes during two separate incidents. D.N.'s brothers were also in the apartment on both occasions. He said he was sorry, promised not to do it again, and said he wanted to seek help. The defendant said he was thinking of his girlfriend during the incident. The statement was never reduced to writing. After the defendant made these statements, he was taken into custody and transferred to another police station.

¶ 17 At the close of the State's case-in-chief, the defendant moved for a directed verdict, arguing that reasonable doubt remained in light of the inconsistent evidence. The court denied

the motion. The defendant testified that he was a CTA mechanic and used his earnings to provide financial support for D.N., Darryl, and Dartrell, although only D.N. is his biological daughter. He denied ever having any inappropriate contact with D.N. He admitted telling Detective Nolan "Yeah I did it" when confronted with the allegations, but said he answered that way only because he was "enraged" by the charges and he was tired and hungry. The trial transcript also reveals that the defendant was asked by his defense counsel, "When you told them that, were you telling them the truth?" The defendant responded, "When I told them that? Yes." The defendant also testified that the detectives yelled at him and said "F' you" over and over. The defendant admitted that D.N. slept in bed with him, wearing his t-shirt and her panties. The defendant identified a photograph of his apartment, which showed three sleeping bags rolled up and a ceiling fan over the bed.

¶ 18 In rebuttal, the State called a single witness, Detective Tannia Franchini. Detective Franchini was present during the defendant's interview on May 9. According to the detective, the defendant was not in a rage but was "calm and apologetic." She denied that anyone yelled at the defendant or said "F' you." She testified that both she and Detective Nolan were calm during the interview.

¶ 19 During deliberations, the jury wrote several notes to the court. The first asked whether the jury could view the written notes from the Child Advocacy Center and from the detectives that investigated the case. The court responded that the documents were not admitted into evidence and they should continue to deliberate. The second note asked for a definition of reasonable doubt. The court informed the jury that it had all the instructions and directed that it

continue to deliberate. The third note stated that the jury was deadlocked 10-2 and requested "some more coaching." The court responded with "keep deliberating." The final note reached the court at 6:30 p.m. It stated that the jury had been deadlocked at 10-2 for some time and requested some "pointers." The note indicated that some jurors were concerned about getting home to their families. The defense requested that the court send the jurors home for the day and allow them to resume deliberations the next day. Defense counsel reminded the court that the jurors had been told at the start of the trial that they would leave each day around 5 p.m. or 5:30 p.m. The court refused, stating that they had only been deliberating for three-and-a-half hours and had eaten dinner. The court instructed the jury to continue deliberating.

¶ 20 At 7:20 p.m., the jury informed the court that it had reached a verdict. The jury found the defendant "guilty of aggravated criminal sexual abuse, hand to vagina." It found the defendant "not guilty of aggravated criminal sexual abuse, penis to hand."

¶ 21 At the sentencing hearing, the State stated that the crime was a Class 2 felony with a sentencing range of two to five years. The court interjected that the correct range for a Class 2 felony is three to seven years and added that the defendant would be eligible for an extended sentence because the victim was under 12 years of age. According to the court, the sentencing range the defendant faced was three to 14 years. The State asked the court to impose "a sentence of penitentiary time above the minimum." The defense asked for a sentence of probation.

¶ 22 The court sentenced the defendant to seven years in prison. The court explained that its sentence was based on the "facts and circumstances" of the case. It called the penitentiary sentence a mid range sentence for the crime. The court credited the defendant with 84 days for

time served.

¶ 23 ANALYSIS

¶ 24 The defendant asserts three arguments on appeal. He urges that the evidence was insufficient to prove his guilt beyond a reasonable doubt because D.N.'s testimony and her outcry statements were full of inconsistencies. He seeks a reversal of his conviction. Next, the defendant argues that some of the victim's hearsay statements were improperly admitted because they did not relate to the crimes charged. He argues this error compels a new trial. Finally, the defendant argues that the court was mistaken when it stated he was eligible for an extended sentence of up to 14 years. He also claims that the court abused it discretion in imposing a seven-year sentence, which he describes as excessive. The defendant seeks a new sentencing hearing. He also claims he spent 88 days in pretrial custody rather than the 84 days awarded.

¶ 25 Sufficiency of the Evidence

¶ 26 "In reviewing a sufficiency of the evidence claim, a reviewing court must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. DeFilippo*, 235 Ill. 2d 377, 384-85 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In reviewing the evidence to determine whether guilt beyond a reasonable doubt was proved (*People v. Ash*, 102 Ill. 2d 485, 492-93 (1984)), we must not substitute our judgment for that of the jury on the issues of witness credibility, weight accorded to evidence, or reasonable inferences that can be drawn from the evidence (*People v. Emerson*, 189 Ill. 2d 436, 475 (2000)). "[A] reviewing court will not reverse a criminal

conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). "It is not our function to retry the defendant; rather, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Meador*, 210 Ill. App. 3d 829, 830 (1991).

¶ 27 The State was required to prove that the defendant, being over 17 years of age, committed an act of sexual conduct with a victim who was under the age of 13. 720 ILCS 5/11-1.60(c)(1)(i) (West 2006). The State's case relied almost exclusively on witness testimony, with D.N. being the chief witness. The jury heard testimony about how D.N.'s age might affect her ability to recollect and describe her experiences. The jury also heard conflicting statements from the defendant. According to the detectives, the defendant admitted he committed the crimes, but the defendant testified that his confession came about because of his rage, hunger, and tiredness. He denied he committed the crimes.

¶ 28 It fell to the jury to sort fact from fiction. It was within the jury's province to determine whether D.N.'s testimony was truthful, accurate, and credible. *Emerson*, 189 Ill. 2d at 475. The defense performed significant impeachment on cross-examination, raising some inconsistencies in D.N.'s recitation of the events. In returning a guilty verdict, the jury obviously decided that D.N. was a sufficiently credible witness in light of all the other evidence.

¶ 29 The defendant strenuously argues that the inconsistent versions of events that D.N. told at different times raise reasonable doubt and require reversal. We disagree. All the inconsistencies

were before the jury. The jury also had before it an admission by the defendant that he engaged in inappropriate touching with D.N., albeit an admission he retracted during his testimony. To reverse the jury's decision on the record before us would amount to nothing more than substituting our own judgment for the jury's, which we cannot do. *Meador*, 210 Ill. App. 3d at 830.

¶ 30 Nor can we say that the jury's verdict was "so unreasonable, improbable or unsatisfactory" that the defendant's conviction must be reversed. *Rowell*, 229 Ill. 2d at 98. It is undeniable that D.N. told different versions of her story at different times; the differences, however, were not as monumental as the defendant contends. Most important, D.N. was consistent in her claims that the defendant touched her inappropriately. Her initial outcry to her mother was spontaneous and unprompted. The defendant admitted sleeping in bed with D.N., corroborating that aspect of her story. Finally, the pictures D.N. drew laid out her accusation accurately and added credence to her words, given her age.

¶ 31 The defendant points to D.N.'s admissions on cross-examination regarding the phone call to P.N. and telling the defendant to stop, which she had never mentioned before. The defendant notes that D.N. contradicted her earlier accounts of where her brothers were during the incidents, of what happened afterwards, and regarding what she was wearing. The defendant also contends D.N. gave improbable accounts of what time of day it was and whether it was dark or light in the room. All these observations, the defendant argues, are supported by the record.

¶ 32 Children are undoubtedly more susceptible than adults to leading questions. The jury was well aware of the contradictions and gaps in D.N.'s testimony brought out during cross-

examination. Nonetheless, D.N. never wavered from her claim that the defendant touched her "no-no." We cannot say the jury was unreasonable to believe her. Viewing the evidence in the light most favorable to the prosecution, we cannot say that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *DeFilippo*, 235 Ill. 2d at 384-85. By its verdict, the jury was convinced by the evidence of the defendant's guilt beyond a reasonable doubt.

¶ 33 The defendant contends that because D.N.'s testimony was inconsistent, the State was required to offer corroborating evidence to support a conviction. The State did that. Evidence that the defendant confessed provided such corroboration. Even if the State presented no other evidence, corroboration of the testimony of the victim is not a legal requirement. *People v. McKinley*, 242 Ill. App. 3d 124, 130 (1992). The evidence, corroborated or not, was sufficient to allow the jury to make its own assessment. "The fact minor discrepancies existed as to the precise time of the offense and the location of everyone during the offense does not render the victim's testimony incredible. Such discrepancies affect only the weight of her testimony and are to be evaluated by the trier of fact." *Meador*, 210 Ill. App. 3d at 832. " '[C]ontradictory testimony of a witness does not *per se* destroy' " her credibility. *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004) (quoting *Sparling v. Peabody Coal Co.*, 59 Ill. 2d 491, 498-99 (1974)).

¶ 34 Other courts have refused to overturn convictions on facts similar to those before us. In *Meador*, the child-victim's testimony regarding the abuse contained inconsistencies of the time of the incident and the location of people during the incident. *Meador*, 210 Ill. App. 3d at 832. The defendant gave statements that corroborated some aspects of the victim's story, but refuted

others. *Id.* The court held that the victim's testimony was sufficient to sustain the conviction, even though it contained inconsistencies. *Id.* The court noted that the defendant had the opportunity to commit the crime and had corroborated some aspects of the victim's testimony. *Id.* In *People v. Cannon*, 358 Ill. App. 3d 313 (2005), the court affirmed the conviction based on similar facts.

¶ 35 Here, as in *Cannon* and *Meador*, the victim gave incriminating testimony. It is true, as the defendant asserts, that D.N.'s testimony contained more serious inconsistencies than in the other cases. The defendant particularly relies upon D.N.'s claim that she yelled stop to the defendant and that her brother soon thereafter called their mom, a call which P.N. denied receiving. Once again, the inconsistencies were for the jury to assess. We cannot say, that as a matter of law, the noted inconsistencies were so severe that they rendered all the incriminating evidence unreliable. Also, other statements by the defendant tended to corroborate some of D.N.'s account, just as in *Cannon* and *Meador*. The defendant admitted at trial that D.N. slept in his bed with him and not in her sleeping bag; D.N. wore a t-shirt and panties to sleep; there was a ceiling fan over the bed as D.N. depicted in the drawing showing the inappropriate touching by the defendant. It cannot be denied that the defendant had opportunity to commit the crime. Much as the defendant's own admission, it fell to the jury to determine what weight, if any, to give to all of the testimony it heard. We disagree with the defendant that "[t]he whole of the State's case is simply inadequate to support a valid conviction."

¶ 36 The defendant cites *People v. Herman*, 407 Ill. App. 3d 688 (2011), in support of his argument that the inconsistency of D.N.'s testimony requires reversal. In *Herman*, our decision

to overturn the conviction turned on the circumstances of the victim. She was a crack cocaine addict, who had been using on the night of the alleged assault. *Id.* at 705. " '[The] testimony of a narcotics addict is subject to suspicion due to the fact that habitual users of narcotics become notorious liars.' " *Id.* (quoting *People v. Strother*, 53 Ill. 2d 95, 99 (1972)). *Herman* has no application to the facts before us.

¶ 37 Given the deference owed to a jury's verdict, we find no basis to overturn the defendant's conviction that he inappropriately touched D.N.'s vagina.

¶ 38 Admission of Hearsay Statements

¶ 39 The defendant challenges the admission of some of the statements D.N. made to P.N., Dr. Siffermann, and Levi, which they all testified to at the section 115-10 hearing and repeated at trial. Specifically, the defendant argues that statements relating to incidents for which the defendant was not charged should have been excluded as they were essentially evidence of "other crimes." The State claims that the defendant forfeited this argument and forfeited review of this claim under plain error. Aside from forfeiture, the State argues that the statements were properly admissible as evidence intrinsic to the crimes charged and as statements made to medical personnel. Finally, the State argues that any error in admitting the statements was not serious enough to constitute plain error.

¶ 40 We first address whether the issue was forfeited. Before trial, the State moved for a hearing to determine the admissibility of D.N.'s statements under 725 ILCS 5/115-10 (West 2006). The defendant examined the witnesses at this hearing and generally objected to the admission of any hearsay statements. The trial court determined that the statements were

admissible. Prior to trial, the defendant did not move to limit the admission of D.N.'s statements to only those directly related to the pending charges.

¶ 41 At trial, P.N. testified to D.N.'s statement that "red juice" came out of her vaginal area and how D.N. demonstrated mouth to vagina contact on dolls as she claimed her father did to her. Dr. Siffermann testified that D.N. told her about the defendant touching her chest, touching her anus, touching her vaginal area with a belt, and touching her vagina and anus with his penis. Levi testified that D.N. told her about the defendant putting a stick inside her. During the testimony, the defendant did not object to any of the specific hearsay statements of each of the witnesses. We also note that the defense elicited testimony from D.N. about how she told Levi the defendant put a "stick" in her.

¶ 42 We conclude no objections were raised for good reason: many of D.N.'s statements, introduced through the testimony of others, were used to challenge D.N.'s believability before the jury. Defense counsel's failure to object, which the defendant now claims he should have done, was likely a tactical decision.

¶ 43 Tactical or not, for purposes of our review, the issue of the admission of this so-called "other crimes" evidence was forfeited. Objections were never made, nor did the defendant raise the issue in his post-trial motion. See *People v. Schmitt*, 204 Ill. App. 3d 820, 828 (1990) (issues not preserved when defendant failed to object at trial, he cross-examined on the challenged subject, and he failed to raise the issue in his posttrial motion).

¶ 44 This leaves only a claim of plain error. The State asserts a plain error claim is foreclosed to the defendant because he did not assert plain error in his opening brief, although the defendant

requested *de novo* review of the "other crimes" evidence issue. In his reply brief, the defendant asserted the issue was reviewable under plain error.

¶ 45 We reject the State's contention that the defendant's omission to seek review of the issue raised in his opening brief under plain error bars us from considering the issue completely. It appears the State relies on the rule that a reply brief may not be used to raise a new issue. The instant defendant, however, did not first raise the "other crimes" issue in his reply brief; he merely raised plain error if we ruled the issue was not otherwise reviewable. Thus, it was precisely in the reply brief where the defendant had to respond to the State's claim of forfeiture. "[I]n order to obtain review of an argument that a defendant waived an issue for review, the State must raise this argument in its appellee's brief. [Citation.] Accordingly, we believe it would be unfair to require a defendant to assert plain error in his or her opening brief." *People v. Williams*, 193 Ill. 2d 306, 348 (2000).

¶ 46 The cases cited by the State for its contention that plain error review is foreclosed in the instant case are distinguishable. In each case, the defendant did not raise the issue sought to be reviewed under plain error in his opening brief. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); *People v. Taylor*, 409 Ill. App. 3d 881, 912-13 (2011). The courts held that to render an issue reviewable under plain error, the alleged error must have been raised in the opening brief. In the case before us, the defendant did precisely that. The defendant raised the issue of evidence of other crimes in his opening brief. The defendant asserted plain error only in response to the State's claim of forfeiture. We decline to apply forfeiture to the defendant's claim that "other crimes" evidence was improperly admitted.

¶ 47 "The plain error doctrine permits a reviewing court to address an unpreserved error when (1) the evidence is so closely balanced that a clear and obvious error alone threatened to tip the scales of justice against the defendant, or (2) an error so serious occurred that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Weston*, 2011 IL App (1st) 092432, ¶ 47. Though not explicit in his brief, we understand the defendant to claim plain error under the first prong.

¶ 48 Evidence of crimes not charged is generally inadmissible if its only relevance is to "establish the defendant's propensity to commit crimes." *People v. Lindgren*, 79 Ill. 2d 129, 137 (1980). In child sexual abuse cases, evidence of prior sexual contact between the defendant and the same child is admissible to show course of conduct or to corroborate the victim's testimony. *People v. Jahn*, 246 Ill. App. 3d 689, 705-06 (1993). Evidence of other crimes is also admissible if it is tends to prove the defendant's intent, plan, motive, or *modus operandi*. *Id.* at 705.

¶ 49 The other crimes testimony in this case came in only through the adult witnesses that interviewed D.N. and related her out-of-court statements. The testimony the defendant contends was evidence of other crimes concerned D.N.'s statements that the defendant hit her vagina with a belt, that he put a "stick" in her, that he touched her chest, and that he touched "her part with his part" vaginally and anally. D.N. herself never testified to these acts. Thus, in this case, the testimony was admitted only through witnesses that interviewed D.N., which the trial court ruled admissible following the section 115-10 pretrial hearing.

¶ 50 The defendant argues that the admission of this testimony constituted error because section 115-10 only allows admission of a "matter or detail *pertaining to any act which is an*

element of an offense which is the subject of a prosecution for a sexual or physical act against that victim." (Emphasis added.) 725 ILCS 5/115-10 (West 2006). Because the evidence of uncharged abuse did not concern an act that was the subject of the prosecution, the defendant argues, the testimony was inadmissible under section 115-10.

¶ 51 Courts have addressed the admissibility of such testimony that is unrelated to the pending sexual conduct offenses. See *People v. Johnson*, 296 Ill. App. 3d 53, 56 (1998); *People v. Kinnett*, 287 Ill. App. 3d 709, 711 (1997); *People v. Anderson*, 225 Ill. App. 3d 636, 650 (1992).

¶ 52 We see no reason to address the issue directly because assuming the testimony was admitted in error, no plausible argument can be made that the admission of such testimony threatened to tip the scales of justice against the defendant to trigger plain error. Rather, the defense counsel at trial wisely used that testimony to call into question the believability of D.N.'s testimony as to the charged offenses. The testimony the defendant now objects to, rather than threatening to tip the scales against him, bolstered his defense, which the jury accepted at least as to one charge. The so-called other crimes evidence strengthened the defendant's position; it did not cast further aspersion upon him.

¶ 53 We note that appellate counsel on behalf of the defendant relies on much of that same testimony to challenge the defendant's conviction, much as trial counsel urged before the jury. We reject the defendant's claim of plain error that is grounded on the admission of conduct attributed to the defendant for which he was not charged when the testimony was used to bolster his challenge of D.N.'s believability before the jury and, in this court, to support his claim that reasonable doubt remains. Assuming the admission of the extraneous testimony was error, it was

not error prejudicial to the defendant.

¶ 54 Errors in Sentencing

¶ 55 The defendant challenges the sentence of seven years because, he claims, the sentence was based on a mistaken belief that he was eligible for an extended sentence. The State concedes that the trial judge was mistaken about the sentencing range. It nonetheless asserts that the ultimate sentence imposed was within the permissible range and no affirmative evidence exists in the record to demonstrate the court acted in reliance on its mistaken statements.

¶ 56 During the sentencing hearing, the State claimed that the sentencing range for the crime was two to five years. The court interjected, stating that the correct sentencing range was three to seven years. The court added that in light of the age of the victim, the defendant was eligible for an extended sentence, which placed the maximum sentence at 14 years. The court imposed a sentence of seven years. The court told the defendant it was a "mid range" sentence and called it a "50%" sentence. Both parties agree that the defendant was not eligible for an extended sentence.

¶ 57 The defendant did not object to the sentence at the time the court imposed it; nor did he file a motion to reconsider his sentence. Once again, the defendant has forfeited the issue. The plain error rule, however, applies to a sentencing issue when the error is so fundamental that the defendant may have been deprived of a fair sentencing hearing. *People v. Hausman*, 287 Ill. App. 3d 1069, 1071 (1997). A trial court's misinterpretation of the proper sentencing range is such a fundamental error. *Id.* at 1071-72. A new sentencing hearing is mandated " 'when it appears that the mistaken belief of the judge *arguably* influenced the sentencing decision.' "

(Emphasis in original.) *Id*. at 1072 (quoting *People v. Eddington*, 77 Ill. 2d 41, 48 (1979)). To uphold a sentence, "the record must establish the sentence is based upon a proper understanding of applicable law." *Id.*

¶ 58 This case is similar to *Hausman*. In *Hausman*, the defendant was convicted of a Class 3 felony, which was punishable by two to five years' imprisonment. *Id.* At the sentencing hearing, the court correctly identified the crime as a Class 3 felony, but stated that the maximum prison sentence was seven years. *Id.* In imposing the sentence, the court told the defendant it was giving him "the minimum sentence of three (3) years." *Id.* Applying plain error review, the appellate court remanded for a new sentencing hearing. *Id.* Even though the sentence imposed was within the proper range, the trial court's statements regarding what it believed to be the minimum and maximum sentences showed that it was at least arguable that the court's incorrect statement of law influenced the sentencing decision. *Id.*

¶ 59 In this case, the court likewise had an incorrect understanding of the law, and it verbalized that mistaken understanding in imposing the sentence. The trial judge twice mentioned that he believed he was giving the defendant a sentence that was half of the maximum. Given these statements grounded on the court's mistaken belief, we think it is at least arguable that the court's misunderstanding of the sentencing range influenced its decision.

¶ 60 In an effort to stave off a new sentencing hearing, the State argues the mere mention that the seven-year sentence was in the middle of the range does not necessarily mean that the trial judge looked to what that mid range sentence was before he imposed it. According to the State, it was nothing more than an observation by the judge. Because it is rare to have a definite

statement from a judge as to his sentencing decision, a new sentencing hearing should be ordered whenever it is "arguable" that a mistaken sentencing range was relied upon. *Id.* Because that standard was unquestionably met here, we remand for a new sentencing hearing. While a new sentencing hearing makes it unnecessary to address the defendant's argument that his sentence was unfair, we remind the sentencing court that the defendant was eligible for probation and that the State's only request was for a penitentiary sentence above the minimum.

¶ 61 The defendant also challenges the trial court's calculation of how many days' credit he earned for time served prior to his sentencing. At the sentencing hearing, the court and both parties agreed that the defendant had served 84 days in jail prior to sentencing. The defendant now contends that the court overlooked four days the defendant was in custody and the correct amount of credit is 88 days. The State does not dispute this assertion.

¶ 62 The defendant is entitled to credit for any day he was in custody. 730 ILCS 5/5-4.5-100(b) (West 2006). Credit is given when the defendant was in custody for any part of the day. *People v. Curtis*, 233 Ill. App. 3d 416, 419 (1992).

¶ 63 In addition to the 84 days the defendant served between December 10, 2009, and March 3, 2010, the defendant was also entitled to credit for December 9, 2009, the day his bond was revoked, and the time in custody on May 9, May 10, and May 11, 2009. He was released on bond May 11. The defendant is therefore entitled to credit for 88 days of time served in custody prior to sentencing.

¶ 64 CONCLUSION

¶ 65 The evidence presented at trial was sufficient for the jury to convict the defendant of

criminal sexual abuse. The trial court did not commit plain error by admitting hearsay statements concerning uncharged conduct where no plausible argument could be made that the testimony threatened to tip the scales of justice against the defendant. The trial court was mistaken as to the proper sentencing range, which arguably influenced the court's sentencing decision. We remand for a new sentencing hearing, with a notation that the defendant was entitled to 88 days' credit prior to the day of his sentencing.

¶ 66 Affirmed in part and remanded for a new sentencing hearing.