



the Department of Children and Family Services received a report of alleged abuse of the then five-year-old victim. An investigation followed, and B.T. was taken into protective custody. The investigation revealed that B.T. told several people on several different occasions that defendant had put his finger inside her "to the bone" while pointing to her vaginal area. Several of these same witnesses observed, after B.T. complained to them of being raw between her legs, having pain while going to the bathroom, and being unable to ride her bike, that B.T.'s vaginal area was red. Two of the witnesses also testified to having observed dried blood on the bottom of her shorts. Other family members reported, however, in an effort to explain the victim's red and raw vaginal area, that B.T. was prone to yeast infections and often wet herself. Her family physician, in treating the victim for these yeast infections, found no evidence of sexual abuse. On the other hand, the State's expert witness, the medical director for the Children's Medical Resource Network, testified that after viewing a video recording of B.T.'s sexual abuse examination, she concluded that B.T. had undergone some sort of blunt penetrating trauma indicative of sexual abuse. She pointed out that B.T. had notching on the bottom half of her hymen and that her behavior upon being examined was indicative of abuse. Defendant's daughter also testified that, from the time she was 5 until she was 12, defendant regularly touched her vagina and made her touch him sexually. The jury ultimately found defendant guilty of three counts of predatory criminal sexual assault of a child.

¶ 4 Defendant raises numerous issues on appeal contending that he was denied a fair trial as a result of prosecutorial misconduct and ineffective assistance of trial counsel. As the State correctly points out, however, the majority of these alleged errors were not objected to at trial nor included in defendant's posttrial motions. In order to preserve an issue regarding prosecutorial misconduct for review, a defendant must object to the offending comments both at trial and in a written posttrial motion. See *People v. Jackson*, 391 Ill. App. 3d 11, 37-

38, 908 N.E.2d 72, 96 (2009). Accordingly, most of defendant's complaints on appeal are waived and do not constitute reversible error. Moreover, most of the prosecutor's questions which defendant claims denied him a fair trial were proper under the circumstances presented at trial, and those that were not did not rise to the level of plain error. Plain error is a narrow and limited exception to the general waiver rule. *People v. Pastorino*, 91 Ill. 2d 178, 188, 435 N.E.2d 1144, 1149 (1982). In order for defendant to succeed on appeal, he must show that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him or that the error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479-80 (2005). Under the circumstances presented here, defendant cannot establish plain error.

¶ 5 Defendant begins his complaints by attacking the prosecutor's questioning of him about the veracity of the testimony of several of the State's witnesses. At trial the State presented the testimony of the six-year-old victim as well as that of several people to whom the victim had reported that defendant had hurt her. The victim's testimony was clear and consistent throughout. Defendant, on the other hand, claimed not only that he never touched the victim, but also that he did not even live with her or her mother as of January of 2008. Ordinarily it is improper for the prosecutor to question a defendant about his or her opinion as to the veracity or credibility of other witnesses. When a defendant testifies on direct examination, however, that he was in no way involved in the commission of the crime, questions as to whether other witnesses lied in testifying are within the scope of the subject matter inquired into on direct examination. See *People v. Piscotti*, 136 Ill. App. 3d 420, 440, 483 N.E.2d 363, 377 (1985). Additionally, the court reminded the prosecutor at one point during her questioning that the time for such comments was during closing argument. Given that defendant did not raise this issue in his posttrial motion, and that the questions posed and

answered did not constitute a material factor in his conviction, we conclude that any possible prejudice does not justify disturbing the jury's verdict in this instance. Improper cross-examination is not reversible error when it amounts to nothing more than harmless error. *People v. Boand*, 362 Ill. App. 3d 106, 132, 838 N.E.2d 367, 392 (2005). In order for the statements or questions of a prosecutor to be considered plain error they must be either so inflammatory that defendant could not have received a fair trial or so flagrant as to threaten deterioration of the judicial process. *People v. Phillips*, 127 Ill. 2d 499, 524, 538 N.E.2d 500, 509 (1989). Neither occurred here.

¶ 6 Defendant next points to several prosecutorial comments or questions, which rightfully so may be viewed as insinuating or sarcastic in nature. For instance, defendant testified that the victim sometimes, upon coming out of the bathroom, would lay naked on the living room floor in front of him. He claimed that when the victim did so he always told her to get dressed. This was in direct contradiction to other testimony that B.T. was frightened of taking off her clothes or going into the bathroom. The prosecutor asked defendant if he did not, in fact, want the victim to be naked. While we question the wisdom of such a question, we do agree, under the circumstances, that the prosecutor's question was provoked by defendant's testimony on direct examination and did not deny him a fair trial. Again, even if the prosecutor's comments exceeded the bounds of proper comment, we still would not disturb the jury's verdict unless it can be said that the remarks resulted in substantial prejudice. See *People v. Barnes*, 117 Ill. App. 3d 965, 976, 453 N.E.2d 1371, 1381 (1983). The question here, sarcastic as it may have been, did not rise to that level. We similarly find no reversible error with respect to the prosecutor's comment pertaining to the 17-year-old daughter of the victim's mother being a little too old for his taste, based on the testimony of defendant's daughter that her father stopped sexually assaulting her when she turned 12 and started to develop. Again, it is true that the prosecutor's questions could have

been more properly phrased, and the sarcasm removed, but such comments did not deny defendant a fair trial. See *Piscotti*, 136 Ill. App. 3d at 440-41, 483 N.E.2d at 378; see also *People v. Smith*, 209 Ill. App. 3d 1043, 1052, 568 N.E.2d 482, 488 (1991). Defendant did not and cannot establish plain error under the circumstances presented.

¶ 7 Defendant next challenges the prosecutor's questions pertaining to his alcohol use, unemployment, and other bad acts. Many of the questions were admitted by the trial court over defense counsel's objections and therefore could not constitute prosecutorial misconduct or ineffective assistance of counsel. While not raised by defendant, we further find no abuse of the court's discretion in overruling the objections. With respect to those questions which were not objected to, we find them to be either proper on their face or nothing more than harmless error. For example, on the issue of defendant's alcohol consumption, defendant's cousin commented on direct examination that as long as defendant "was sobered up" he was fine. Given such a comment, it was entirely proper and relevant for the prosecutor to question how often defendant was sober. Similarly, the fact of defendant's unemployment was relevant in that it helped explain why defendant had time alone with the victim while her mother was at work. As for defendant's disorderly conduct charge, defendant again opened the door for such testimony and cannot now be heard to complain on appeal. See *People v. Wright*, 261 Ill. App. 3d 772, 776, 632 N.E.2d 706, 710 (1994).

¶ 8 We need not go into any further detail for each alleged instance of prosecutorial misconduct defendant raises. Suffice it to say that all of defendant's complaints were either waived or properly allowed over objection, and those that were waived did not rise to the level of plain error.

¶ 9 For his next point on appeal, defendant argues that the prosecutor called the victim's mother to the stand to force her to invoke her right not to testify. Again, defendant failed to object at trial, therefore the issue is waived. Moreover, suspicion that a witness might invoke

his or her rights against self-incrimination is not sufficient to establish any misconduct by a prosecutor. See *People v. Crawford Distributing Co.*, 78 Ill. 2d 70, 74-75, 397 N.E.2d 1362, 1365 (1979).

¶ 10 Defendant also finds fault with the admission of several instances of hearsay testimony of the victim under the age of 13 admitted pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2008)). Section 115-10 allows out-of-court statements made by the victim "describing any complaint of such act or 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." 725 ILCS 5/115-10(a)(2) (West 2008). Because all of the complained-of statements here fall under this exception, there was no error. Additionally, corroborative testimony may necessarily include some detail to effectively corroborate the fact that a complaint was made and to identify the incident as the one before the court. See *People v. Branch*, 158 Ill. App. 3d 338, 341, 511 N.E.2d 872, 874 (1987). We also note that section 115-10 contains no limits on the number of witnesses who may testify. *People v. Lofton*, 303 Ill. App. 3d 501, 508, 708 N.E.2d 569, 574 (1999), *aff'd*, 194 Ill. 2d 40, 740 N.E.2d 782 (2000). Witnesses who are close to a child victim should not be curtailed from testifying simply because of their numbers. *Lofton*, 303 Ill. App. 3d at 508, 708 N.E.2d at 574; *Branch*, 158 Ill. App. 3d at 341, 511 N.E.2d at 874.

¶ 11 Defendant also argues that the court improperly admitted evidence of an examining doctor's report through the testimony of the State's expert witness. Whether the court's decision in initially ruling that the State's expert could not rely on the examining doctor's report in testifying as to her conclusions was erroneous, we note that an expert may give opinion testimony based on facts not in evidence provided they are of the type reasonably relied upon by experts in that particular field. See *People v. Sutherland*, 223 Ill. 2d 187, 281, 860 N.E.2d 178, 238 (2006). We find no reversible error under the circumstances presented.

¶ 12 Defendant also complains on appeal that the investigator for the Department of Children and Family Services (DCFS) violated his motion *in limine* pertaining to the use of the word "risk" in connection with "assessment" as used in the DCFS report labeling defendant as "an indicated sex offender" based on the alleged sexual abuse of his daughter. At trial, the DCFS investigator testified that she began an investigation of defendant because of the risk of sexual harm to the victim. Defendant objected to such testimony, but the trial court ruled that the reference to "risk of harm" was proper as the motion *in limine* applied only to "risk assessment." The court's ruling certainly did not constitute prosecutorial misconduct or ineffective assistance of counsel, nor did it rise to the level of abuse of the court's discretion, an issue defendant did not raise. Moreover, defendant's daughter was allowed to testify that defendant had sexually abused her when she was young. If a defendant is accused of predatory criminal sexual assault, evidence of the commission of another offense is admissible and may be considered for its bearing on any matter to which it is relevant. 725 ILCS 5/115-7.3(b) (West 2008). It was therefore proper for the DCFS investigator to state that she put a safety plan in place for the victim as a result of the investigation into the allegations of defendant's daughter.

¶ 13 For his last claim of prosecutorial misconduct, defendant argues the prosecutor improperly elicited hearsay evidence from several of the State's witnesses. Defendant again failed to raise the issue in his posttrial motion, thereby waiving this issue as well. Additionally, much of the complained-of testimony was cumulative to evidence otherwise properly admitted, some of which was actually helpful to defendant's claim of innocence, and the rest of which, at best, constituted nothing more than harmless error. We further note that defendant does not explain how proper questions asked by the prosecutor which evoked hearsay testimony on the part of a witness is prosecutorial misconduct.

¶ 14 Defendant also claims on appeal that the separate instances of alleged error were

cumulatively reversible error. Again, many of the complained-of comments and questions by the prosecutor were not improper. Those that were questionable could have been corrected by objection if properly objected to at trial as were those that were cured by the sustaining of an objection or the giving of a jury instruction to disregard the comment or question. The remaining comments did not amount to plain error. Accordingly, we find no cumulative error. See *People v. Evans*, 186 Ill. 2d 83, 103, 708 N.E.2d 1158, 1168 (1999). Similarly we find no instance of ineffective assistance of counsel justifying reversal of defendant's convictions. First, defense counsel did object to many of the alleged errors, thereby negating claims of his ineffectiveness. Second, in light of the overwhelming evidence of defendant's guilt, there was no prejudice to defendant from the prosecutor's alleged misconduct. With no prejudice and no deficient representation, defendant cannot establish ineffective assistance of counsel. See *People v. Enis*, 194 Ill. 2d 361, 377, 743 N.E.2d 1, 11 (2000).

¶ 15 Finally, defendant contends on appeal that there was insufficient evidence to establish three counts of predatory criminal sexual assault. We disagree. When reviewing a challenge to the sufficiency of the evidence, we consider, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004); *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985). It is the trier of fact's responsibility, not ours, to resolve any conflicts or inconsistencies in the evidence, to assess the credibility of the witnesses, and to weigh the evidence. *People v. Graham*, 392 Ill. App. 3d 1001, 1009, 910 N.E.2d 1263, 1271 (2009). Consequently, a criminal conviction will not be set aside on appeal unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330, 743 N.E.2d 521, 536 (2000). We see

no reason to overturn defendant's conviction here. The victim testified that defendant, in three separate rooms in the house and on at least three different occasions, stuck his finger in her private parts, both in her vaginal and anal areas. Other evidence revealed that defendant assaulted the victim in at least one other location in the house, in the bathroom, and that he assaulted her in the time periods both before he was imprisoned and after he got out of prison. There was sufficient evidence presented for the jury to conclude that defendant committed at least three incidents of sexual assault on the victim. The jury's verdict finding defendant guilty of three counts of predatory criminal sexual assault, therefore, is neither inherently impossible nor unreasonable.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court of Saline County.

¶ 17 Affirmed.