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2013 IL App (3d) 100927-U

Order filed January 24, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Whiteside County, Illinois,
)	
v.)	Appeal No. 3-10-0927
)	Circuit No. 08-CF-527
)	
DANIEL L. COOK,)	Honorable
)	Stanley B. Steines,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Holdridge specially concurred.
Presiding Justice Wright dissented.

ORDER

¶ 1 *Held:* (1) The trial court's failure to consider the prejudicial nature of bad-acts evidence was not plain error; and (2) trial counsel's failure to object to the lack of a limiting instruction concerning the bad-acts evidence was not ineffective assistance of counsel.

¶ 2 Defendant, Daniel L. Cook, was convicted at jury trial of one count of sexual exploitation of a child (720 ILCS 5/11-9.1(a-5) (West 2008)) and sentenced to three years in prison.

Defendant appeals, raising the following challenges to his conviction: (1) the trial court

erroneously admitted prejudicial evidence of defendant's prior bad acts; and (2) trial counsel's failure to object to the lack of a limiting jury instruction resulted in ineffective assistance of counsel. We affirm.

¶ 3

FACTS

¶ 4 When defendant was 18 years old, he was involved in a car accident that rendered him an incomplete quadriplegic. After the accident, he required the use of a wheelchair and retained only gross movement in his arms. As a result of his condition, defendant moved into a young-adult rehabilitation center in Prophetstown, Illinois, called Winning Wheels. At Winning Wheels, defendant developed a close relationship with the director of nursing, Sue J. Sue described their relationship as motherly, and she took a strong interest in defendant's rehabilitation.

¶ 5 Defendant eventually moved out of Winning Wheels and into his own apartment in Decatur, Illinois, where he received daily services from aides who assisted him with basic living skills. A few weeks after the move, Sue came to visit defendant and was alarmed by the quality of his care, which she considered severely inadequate. As a result, Sue requested that defendant move into an apartment closer to her so that she could monitor his care. Defendant moved into an apartment in Rock Falls, Illinois, four doors down from where Sue's daughter, Libby, lived with her minor daughters, A.J. and B.J. Sue helped arrange for new aides, including Libby, to provide services for defendant. When the aides were unavailable, Sue would sometimes step in to care for defendant. Sue eventually moved into defendant's apartment for a period of eight months, and even considered adopting him.

¶ 6 While defendant was living in Rock Falls, Libby's daughters would often stop by his

apartment when their mom was working with defendant or when Sue was visiting. Sue trusted defendant and would often leave the children alone with him in the apartment. Eventually, the children came forward with claims that defendant had been abusing them when Sue and Libby were not around.

¶ 7 The children's claims formed the basis for the State charging defendant with a single count of sexual exploitation of a child. 720 ILCS 5/11-9.1(a-5) (West 2008). A person commits sexual exploitation of a child under section 11-9.1(a-5) when the person "knowingly entices, coerces, or persuades a child to remove the child's clothing for the purpose of sexual arousal or gratification of the person or the child, or both." 720 ILCS 5/11-9.1(a-5) (West 2008). At trial, A.J. testified about the incident that formed the factual basis of the sexual exploitation charge. She testified that in August 2008, when A.J. was nine years old, defendant told her to lie down on defendant's bed and pull away her boxer shorts in a way that exposed her genitals to defendant. He then told A.J. to touch her genitals with a plastic vibrator he had given her. A.J. testified that she did not want to do these things, but followed defendant's instructions because she thought that her mother knew what was happening and had permitted it to occur.

¶ 8 Along with A.J.'s testimony, a videotaped interview with A.J. was also entered into evidence. The videotape contained A.J.'s description of several other occasions in which defendant had acted in a sexually inappropriate manner that may or may not have risen to the level of criminal activity. In the interview, A.J. claimed that defendant: (1) often tried to watch A.J. and B.J. while they were showering; (2) asked A.J. to videotape herself using the restroom; (3) showed A.J. various photos of nude women; (4) showed A.J. photos of her mother with an unidentified naked man; (5) often talked to A.J. about getting her period; (6) once instructed B.J.

to take off her shirt and jump on A.J.; (7) told A.J. that she should not wear underwear; and (8) told A.J. that her mother and grandmother did not always wear underwear. The interview also included questions from the interviewer to A.J. asking whether defendant had ever shown her child pornography and whether defendant had acted improperly when he allowed the children to ride on his lap in his motorized wheelchair. The contents of the videotaped interview were admitted in their entirety.

¶ 9 At a pretrial hearing outside the presence of the jury, defendant objected to the introduction of the interview because it contained evidence of defendant's prior bad acts that could be improperly used to establish his propensity to commit crime. The trial court decided that the interview was admissible in its entirety, not for the purpose of establishing propensity, but to show that defendant acted with the intent to create sexual arousal or gratification, an element of the crime of sexual exploitation of a child. In admitting the evidence, the trial court did not explicitly address the probative value or prejudicial effect of the bad-acts evidence. The interview was eventually shown in its entirety to the jury at trial, at which time defendant failed to renew his objection to the evidence. Nor did defendant request that a limiting instruction be given to the jury explaining that the bad-acts evidence should not be used to establish defendant's propensity to commit crime, and no such limiting instruction was given to the jury independently by the trial court.

¶ 10 In addition to A.J.'s testimony, Sue also testified at trial. She testified that after hearing the children's accusations, she confronted defendant, and he admitted that the allegations were true. Defendant, for his part, testified and denied committing the offense. He also denied committing a number of the acts alleged in the videotaped interview. At the close of trial, the

jury convicted defendant, and the court sentenced him to three years in prison.

¶ 11 In his motion for a new trial, defendant failed to preserve his objection to the bad-acts evidence. He now appeals.

¶ 12 ANALYSIS

¶ 13 I. Admission of Bad-Acts Evidence

¶ 14 A trial court's decision to admit or deny bad-acts evidence will not be disturbed absent an abuse of discretion. *People v. Ross*, 395 Ill. App. 3d 660 (2009). A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Smith*, 406 Ill. App. 3d 747 (2010).

¶ 15 Defendant argues that the trial court's decision to admit the bad-acts evidence was an abuse of discretion. Defendant concedes that the nonpropensity purpose for the evidence—to establish defendant's intent to act for his own sexual arousal or that of the victim's—was valid. However, defendant claims that the evidence was improperly admitted because the trial court failed to first engage in a mandatory balancing of the evidence's probative value against its prejudicial effect.

¶ 16 Defendant's objection to the evidence was not properly renewed at trial or in his motion for a new trial. As a result, we analyze the trial court's decision for plain error. The plain error doctrine allows an appellate court to review unpreserved errors when: (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167 (2005). Defendant asks us to evaluate this issue under the closely-balanced prong of plain error. However, to implicate the

plain error analysis, the defendant must first show that an error actually occurred. *People v. Walker*, 232 Ill. 2d 113 (2009).

¶ 17 Bad-acts evidence is admissible if it is relevant for any purpose other than to establish the defendant's propensity to commit crime. *People v. Bedoya*, 325 Ill. App. 3d 926 (2001). Such purposes include establishing motive, intent, identity, absence of mistake, or *modus operandi*. *People v. Lindgren*, 79 Ill. 2d 129 (1980). However, even when bad-acts evidence is to be used for a nonpropensity purpose, it is inadmissible if its prejudicial effect substantially outweighs its probative value. *People v. Robinson*, 167 Ill. 2d 53 (1995). The risk of prejudice occurs when the bad-acts evidence becomes a focal point of the trial. *People v. Thigpen*, 306 Ill. App. 3d 29 (1999). Such a " 'mini-trial' " creates an unacceptable distraction from the issue to be decided—whether the defendant committed the criminal act with which he is currently charged. *Bedoya*, 325 Ill. App. 3d at 938 (quoting *People v. Nunley*, 271 Ill. App. 3d 427, 432 (1995)). In order to avoid the risk of unnecessary distraction, the trial court must weigh the probative value of the bad-acts evidence against its prejudicial effect when determining whether the evidence should be admitted. *Robinson*, 167 Ill. 2d 53.

¶ 18 In the present case, the court admitted evidence of several other bad acts committed by defendant without considering the prejudicial effect of that evidence. The trial court should have weighed the probative value and prejudicial effect of each act individually to determine its admissibility. Nowhere in the record does the court mention the risk of prejudice created by the introduction of the bad-acts evidence. It was an abuse of discretion to allow the introduction of this potentially prejudicial evidence without first weighing the risk of prejudice against the probative value of the evidence.

¶ 19 However, under the closely-balanced prong of plain error, even where a court has committed error, reversal is not warranted unless the defendant can establish that the error prejudiced the defendant. *People v. White*, 2011 IL 109689. A defendant can establish prejudice by showing that the evidence was closely balanced, creating a risk that an innocent defendant was found guilty. *Herron*, 215 Ill. 2d 167. In deciding whether the closely-balanced prong has been met, a reviewing court must make a "commonsense assessment" of the evidence within the context of the individual case. *People v. Adams*, 2012 IL 111168, ¶ 22 (quoting *White*, 2011 IL 109689, ¶ 139).

¶ 20 In the present case, the court's error was not prejudicial because the evidence was not closely balanced. The evidence relied upon by the jury was the testimony of A.J. and Sue, which the jury found more credible than the testimony of defendant. The jury's decision to find A.J. and Sue's testimony credible was not the result of improper consideration of the bad-acts evidence. Instead, the jury relied on the fact that A.J.'s testimony was detailed and consistent. At sentencing, the trial court opined that "the evidence in this case was quite strong. You had the very believable testimony of a little girl who could set out the detailed nature of this crime. It wasn't little evidence. It was big evidence that was able to convict you or that a jury could easily find you guilty of this offense[.]" In addition, Sue testified that defendant had admitted his guilt to her when she had approached him about the accusations.

¶ 21 The bad-acts evidence did not result in a "mini-trial" that distracted the jury from determining whether defendant was guilty of the crime charged. Instead, the jury relied on strong testimonial evidence relating to the charged crime. The testimony of A.J. and Sue gave the jury ample evidence to find defendant guilty. The evidence was not closely balanced, and therefore,

defendant suffered no prejudice resulting from the trial court's admission of the bad-acts evidence.

¶ 22 Defendant also argues that trial counsel's failure to renew the objection to the bad-acts evidence at trial denied defendant the effective assistance of counsel. Whether counsel provided ineffective assistance is reviewed *de novo*. *People v. Berrier*, 362 Ill. App. 3d 1153 (2006). In order to succeed on an ineffective assistance of counsel claim, the defendant must establish: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 23 We consider the prejudice prong first. Counsel's actions did not prejudice defendant. As explained, *supra*, there was sufficient evidence to convict defendant without the introduction of the bad-acts evidence. The testimony of A.J. and Sue was detailed, consistent, and effective. There is not a reasonable probability that, but for the introduction of the bad-acts evidence, the result of the proceeding would have been different.

¶ 24 II. Jury Instruction

¶ 25 Defendant also raises a challenge concerning the lack of a jury instruction explaining the limited use of the bad-acts evidence. Illinois Pattern Jury Instruction No. 3.14 instructs the jury that bad-acts evidence may only be considered for its limited purpose and not for the purpose of establishing the defendant's propensity to commit crime. Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000). At trial, no limiting instruction was given to the jury, and defendant did not object to the lack of an instruction. Defendant now claims that his counsel's failure to object to the lack of an instruction constituted ineffective assistance of counsel.

¶ 26 As explained, *supra*, in order to establish ineffective assistance of counsel, defendant must show that counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. 668. We consider the prejudice prong first. Even if the failure of defendant's counsel to object was unreasonable, ineffective assistance did not occur because defendant was not prejudiced. There is not a reasonable probability that, but for the absence of the limiting instruction, defendant would not have been found guilty.

¶ 27 The evidence relied upon by the jury—the testimony of A.J. and Sue—would have resulted in a conviction despite the presence of the limiting instruction. There is nothing in the record to suggest that the bad-acts evidence was used by the jury to establish defendant's propensity to commit crime. The jury's verdict was based on weighing the testimony of A.J. and Sue as more credible than that of defendant. The jury had a sufficient basis to find defendant guilty without relying on the bad-acts evidence to establish defendant's propensity to commit crime. As a result, we find that defendant did not establish prejudice.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed.

¶ 30 Affirmed.

¶ 31 JUSTICE HOLDRIDGE, specially concurring.

¶ 32 I agree that the defendant's conviction should be upheld. I write separately to clarify what I believe to be the proper analysis of the issues raised in this appeal. As Justice O'Brien notes, when analyzing a trial court's ruling for plain error, the first question is whether the trial court

committed error. If no error occurred, the "plain error" inquiry ends, and there is no need to address the question whether the evidence presented in the case was closely balanced.

¶ 33 In my view, the trial court did not err in admitting evidence of prior instances of inappropriate sexual conduct and sexually-suggestive comments that the defendant made to A.J. and her sister. As the defendant concedes, evidence of this type is generally admissible to establish the defendant's intent to commit the charged offense "for the purpose of sexual arousal or gratification." 720 ILCS 5/11-9.1(a-5) (West 2008). "It is well established that in sexual offense cases evidence of a defendant's prior sexual activity with the same child is admissible to show the defendant's intent, design or course of conduct and to corroborate the victim's testimony concerning the charged offense." *People v. Anderson*, 225 Ill. App. 3d 636, 647 (1992). We have recognized that, where evidence of such prior misconduct exists, "limiting the complainant's testimony to a single incident would make the incident appear isolated and would place an unfair strain on the credibility of the complainant's testimony." *Id.* at 647-48. Accordingly, the probative value of this evidence was considerable, and it would not be an abuse of discretion (*i.e.*, arbitrary, fanciful, or unreasonable) to conclude that its probative value was not substantially outweighed by any danger of unfair prejudice.

¶ 34 I agree with Justice O'Brien that the trial court should have explicitly balanced the probative value of the evidence against its tendency to cause unfair prejudice. However, the trial court's failure to do so, standing alone, did not constitute error under the plain error doctrine. The relevant inquiry is whether the trial court's *ruling* admitting the evidence was erroneous, not whether the trial court applied the proper reasoning in reaching that ruling. See, *e.g.*, *People v. Reed*, 361 Ill. App. 3d 995, 1000 (2005) ("[w]e review the trial court's judgment, not its

rationale"); see also *People v. Smith*, 406 Ill. App. 3d 747, 752 (2010) (ruling that "regardless of the reasoning employed by the trial court, the ultimate issue is whether it would be an abuse of discretion to conclude that the unduly prejudicial effect of defendant's alleged prior sexual offenses outweighed their probative value").¹

¶ 35 Because I believe that the trial court did not err in admitting the evidence at issue, I would affirm. There is no need to consider whether the evidence was closely balanced.

¶ 36 I agree with Justice O'Brien that the defendant's claim for ineffective assistance of counsel fails because the defendant cannot establish that he was prejudiced by his counsel's alleged errors. As noted above, the evidence was properly admitted, so defense counsel's failure to preserve his objection to the evidence at trial could not have effected the fairness or the

¹ Contrary to the defendant's suggestion, *People v. Donoho*, 204 Ill. 2d 159 (2003), does not hold otherwise. *Donoho* addressed the statutory requirements governing the admission of other crimes evidence to show a defendant's propensity to commit sex offenses under 725 ILCS 5/115-7.3 (West 1998). It did not address the issue presented here, *i.e.*, the common-law standards for admitting prior bad act evidence for a nonpropensity purpose. Moreover, although the supreme court "urge[d] trial judges to be cautious in considering the admissibility of other-crimes evidence to show propensity by engaging in a meaningful assessment of the probative value versus the prejudicial impact of the evidence" (*Donoho*, 159 Ill. 2d at 186), it did not require trial judges to make that assessment *explicit*. Nor did it hold or imply that a trial court's failure to include such an explicit analysis in its order amounted to error *per se*. I disagree with decisions of our appellate court that suggest otherwise. See, *e.g.*, *People v. Johnson*, 406 Ill. App. 3d 805, 812 (2010); *People v. Boyd*, 366 Ill. App. 3d 84, 93-95 (2006).

outcome of the trial. Moreover, assuming *arguendo* that defense counsel's failure to move for a limiting instruction fell below an objective standard of reasonableness, the defendant cannot establish that he was prejudiced by this error. As Justice O'Brien notes, A.J.'s trial testimony, which the trial court found highly credible, was sufficient to convict the defendant even without the prior bad act evidence. In addition, although it is not conclusive, A.J.'s grandmother's testimony supported a reasonable inference that the defendant admitted his guilt (or at least displayed a consciousness of guilt) when A.J.'s grandmother confronted him about the charged offense. Thus, A.J.'s trial testimony was arguably corroborated by her grandmother's testimony.

¶ 37 In her dissent, Justice Wright notes that "[t]he erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal." *Infra* at ¶ 47, quoting *People v. Moore*, 2012 IL App (1st) 100857, ¶ 46. However, our supreme court has made clear that reversal is warranted only if the evidence was "a material factor in the defendant's conviction such that, without the evidence, the verdict likely would have been different." *People v. Hall*, 194 Ill. 2d 305, 339 (2000). In light of the other evidence presented against him, I do not believe that the defendant can make this showing.²

² Justice Wright also notes that, because the videotape was presented to the jury after A.J. had left the stand, the defendant could not cross-examine A.J. or her sister concerning the alleged prior bad acts at issue. However, the defendant does not argue that the admission of the evidence violated the hearsay rule or deprived him of his right to confront the witnesses against him. He argues only that the trial court abused its discretion by admitting the evidence at issue because the unfairly prejudicial impact of the evidence substantially outweighed its probative value, and because the trial court admitted the evidence without considering that fact. As

¶ 38 PRESIDING JUSTICE WRIGHT, dissenting.

¶ 39 In this case, defendant's brief does not make it clear that the trial court allowed the State's request to admit A.J.'s out of court statement to the forensic interviewer as an exception to the hearsay rule based on the statutory provisions set out in the Code of Criminal Procedure of 1963. 725 ILCS 5/115-10 (West 2008). According to this statute, the trial court was required to determine whether the child's previous complaint was generated as a result of circumstances providing sufficient safeguards of reliability. 725 ILCS 5/115-10(b)(1) (West 2008). In this case, defendant does not contest that the child's out of court complaint regarding the vibrator was properly introduced as an exception to the hearsay rule, pursuant to statute, because the circumstances surrounding the child's complaint to the forensic interviewer provided sufficient safeguards to ensure the reliability of the statement. 725 ILCS 5/115-10(b)(1) (West 2008).

¶ 40 Rather, on appeal, defendant only challenges the trial court's decision to overrule defense counsel's pretrial objection to the admission of the unedited DVD which included the child's complaints about other uncharged misconduct involving the victim and her young sister. Specifically, defendant contends that, before the court could allow the jury to hear the child's out of court statements regarding other *uncharged* misconduct, the court was required to balance the probative value of the prior bad acts against the potentially unfair prejudice before deciding whether the entire hour-long DVD should be published to this jury.

¶ 41 In this case, during the pretrial hearing on the State's "Notice of Intent to Use Hearsay Statements Pursuant to 725 ILCS 5/115-10," defense counsel requested the court to exclude the child's out of court responses to certain interview questions regarding uncharged conduct

noted above, I do not believe that these arguments succeed.

occurring on unrelated dates. See 725 ILCS 5/115-10(a)(2) (West 2008). Defense counsel argued that the child's out of court description of defendant's purported request for A.J. to take pictures of herself while urinating, attempts to observe both sisters in the shower, pictures of A.J.'s mother with a naked man, and alleged conversations with the child initiated by defendant about her impending periods and tampons focused on prior, uncharged, bad acts that were unduly prejudicial and irrelevant to the elements of the charged offense.

¶ 42 The court noted A.J.'s complaints detailed acts that tended to prove defendant acted for his own sexual arousal or gratification when he provided the child with a vibrator. Therefore, the court overruled defendant's objection after finding the various prior bad acts were relevant to intent. However, as the majority notes, the court did not balance the prejudice to defendant against probative value before admitting those portions of the DVD related to uncharged conduct. It is this ruling, related to the substantive admission of the child's complaint about prior bad acts that is the subject of this appeal.

¶ 43 The difficulty in this case arises because defense counsel did not renew his objection during trial when the State offered to publish the entire DVD of the child's statement, including details of uncharged, prior bad acts. Therefore, the DVD was admitted into evidence and published to the jury without objection from defense counsel. Significantly, defense counsel also failed to include the issue related to uncharged bad acts in a post-trial motion. Finally, defense counsel failed to request a limiting instruction prohibiting the jury from considering this evidence of prior bad acts for any purpose unrelated to the limited issue of intent. Illinois Pattern Instructions, Criminal, No. 3.14 (4th ed. 2000).

¶ 44 Consequently, defendant contends counsel's failure to object to the other crimes evidence during trial amounted to ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that his counsel's performance was objectively unreasonable, and, but for this deficient performance, there is a reasonable probability the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687. A reasonable probability does not mean that defendant must prove that he would have been acquitted, but only that defendant did not receive a verdict worthy of confidence. *People v. Lefler*, 294 Ill. App. 3d 305, 311-12 (1998).

¶ 45 The case law recognizes that introducing evidence of other crimes can overly persuade the jury to believe defendant is a bad person worthy of punishment for some bad act. See, e.g., *People v. Taylor*, 244 Ill. App. 3d 806, 818-19 (1993). In this case, it is significant to remember that the prior misdeeds discussed by the child during her interview were *not* offered by the State as propensity evidence pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963. 725 ILCS 5/115-7.3 (West 2008). Yet, some of the prior misdeeds discussed by the child involved another child, the victim's sibling, and could be viewed as unfairly prejudicial propensity evidence for this reason.

¶ 46 Although defendant chose to testify, he had one opportunity to address the jury. The record reflects that the DVD of the child's out of court statement was between an "hour [and] an hour and a half" long. Consequently, the jury heard the victim's version in her own words twice, before defendant testified. First, the child appeared before the jury and described the episode with a vibrator. Second, the jury heard another lengthy, recorded DVD where the child not only described the charged conduct but also described additional uncharged and disturbing behavior

by defendant. Finally, the jury learned of the prior bad acts while viewing the DVD, after the child left the witness stand. Therefore, defense counsel could not cross examine the victim, or her sister, concerning the various bad acts in order to test the credibility of A.J.'s out of court statements.

¶ 47 In *People v. Moore*, 2012 IL App (1st) 100857, the court stated, "[t]he erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal." *Id.* at ¶ 46 (quoting *People v. Lindgren*, 79 Ill. 2d 129, 140 (1980)). In *Moore*, the court found defense counsel rendered ineffective assistance of counsel in a sexual assault and murder case for failing to object to the admission of an interrogation video that included other crimes evidence, specifically defendant's prior conviction for domestic violence. *Moore*, 2012 IL App (1st) 100857, ¶ 49, 53-57.

¶ 48 The State argues that, even if defense counsel had objected during trial, the outcome of the trial was unaffected because the other crimes evidence would have been admissible as part of the continuing narrative of events. See *People v. Thompson*, 359 Ill. App. 3d 947, 951 (2005). I agree that B.J.'s report informing her mother that defendant watched the girls in the shower prompted her mother to ask additional questions triggering further complaints from the children. While the shower allegations may have been part of the narrative in this case, the other alleged bad acts such as asking A.J. to videotape herself using the restroom, and persuading B.J. to take her shirt off and jump on A.J., were not part of the narrative for the criminal charge, appeared unrelated to defendant's intent, and certainly could have unfairly prejudiced the jury in this case.

¶ 49 Moreover, the State did not introduce any physical evidence, such as the vibrator itself, or exhibits corroborating the other uncharged bad acts described by the child, such as a video of

A.J. using the restroom or other images defendant allegedly displayed to the victim with his computer. Without any corroborating physical evidence such as the vibrator itself, the jury was called upon to resolve the credibility of defendant and the victim, who both testified before the jury. Trials that are determined based on the credibility of witnesses are typically considered closely balanced in plain error cases. *People v. Vesey*, 2011 IL App (3d) 090570, ¶ 17 (2011). Consequently, I respectfully suggest this case was closely balanced and boiled down to the credibility of the child and the credibility of defendant.

¶ 50 I agree with the majority's conclusion that the trial court erroneously failed to balance the probative value against the prejudice of the prior bad act before agreeing to admit the entire DVD as an exception to the hearsay rule. However, it becomes unnecessary to determine whether the court's pretrial error rose to the level of plain error because the ineffective assistance of defense counsel warrants a new trial in my view.

¶ 51 Due to the admission of other crimes evidence in this case, as an exception to the hearsay rule, I respectfully submit we cannot have confidence that the other crimes evidence contained in the child's out of court statement did not *unfairly* tip the scales of justice in favor of the prosecution. For the foregoing reasons, I would reverse the conviction and remand for a new trial based on the ineffective assistance of trial counsel alone.