

State improperly elicited opinion testimony from a witness that the victim's allegation against the defendant "was the truth." For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3

BACKGROUND

¶ 4 On May 13, 2009, the defendant was charged with four counts of predatory criminal sexual assault (counts 1 to 4) and one count of violation of the Sex Offender Registration Act (count 5). The State elected to proceed against the defendant on one count of predatory criminal sexual assault (count 2), and *nolle prossed* all other counts.

¶ 5 On March 9, 2010, the State filed a pretrial motion for a hearing pursuant to section 115-10 of the Code of Criminal Procedure (the Code) (725 ILCS 5/115-10 (West 2010)) (motion for a section 115-10 hearing), which the State later amended and supplemented, requesting that certain hearsay statements made by the victim to a victim-sensitive interviewer, her parents, and her treating physician about the alleged crime, be admissible at trial. On May 25, 2011, following a section 115-10 hearing, the trial court ruled that the victim's hearsay statements regarding the alleged crime be admissible as evidence at trial.

¶ 6 On April 11, 2011, the State filed a pretrial "motion to admit proof of other-crimes evidence" (motion to admit other-crimes evidence), requesting that the testimony by two other individual complainants, D.W.L.¹ and E.S., be admitted as propensity evidence against the defendant under section 155-7.3 of the Code (725 ILCS 5/155-7.3 (West 2010)). On June 29, 2011, following a hearing, the trial court granted the State's motion to admit other-crimes evidence.

¹Although this individual was referred to as D.W. throughout the parties' pleadings, trial transcripts reveal that she was adopted in 2011 by someone with a last name beginning with the letter "L."

¶ 7 On March 21, 2012, a three-day jury trial commenced. The State presented the testimony of the victim, G.S., who was then six years old and testified that between September 1, 2008 and November 30, 2008, when she was three years old, she sometimes stayed at the home of her grandmother, Virginia Dillard (Virginia). G.S. testified that, while at her grandmother's house, "Uncle Ed," whom she identified as the defendant at trial, would also be at the grandmother's home. G.S. recalled a specific sexual encounter in which the defendant held her hand, led her upstairs, placed her on his bed, and pulled down her clothes and underwear. The defendant then put his finger in her vagina for about a minute, which G.S. described as a little bit painful. When the prosecutor asked whether the defendant's finger "actually [went] in [her] vagina," G.S. answered "yes." G.S. testified that no one else was present in the room at the time of the incident, and that, after the defendant removed his finger from inside her vagina, he took her back downstairs. When G.S. returned downstairs, she did not inform her grandmother of what had occurred, but later told her parents and a doctor about the incident. At trial, G.S. stood up in front of the jury and pointed to the area where the defendant had touched her, and also described her vagina as her "coo coo." On cross-examination, when defense counsel asked G.S. if she knew what month it was, G.S. answered "2012." G.S. also did not know on what day of the week she was testifying at trial. G.S. testified that she lived in Indiana, but answered "yes" when defense counsel asked whether Indiana was a city. G.S. testified that she lived at home with her mother, father and older brother "Adwon."² Defense counsel then asked whether "Adwon" had ever hurt her, to which G.S. replied that he had put his finger in her vagina. G.S. also testified that she told "Miss Emily" that the defendant had put his finger inside her vagina. G.S. stated

²At trial, G.S. pronounced her brother's name as "Adwon," but G.S.' mother testified that his name is actually "Edwond."

that no blood came out of her vagina, and the defendant did not make her touch him. On redirect examination, G.S. clarified that the only person who ever put his finger in her "coo coo" was the defendant.

¶ 8 Cherrita Sanders (Cherrita), who is G.S.' mother, testified on behalf of the State that she and her husband, Derrel Sanders (Derrel), lived in Indiana with their two children—G.S. and Edwond. Cherrita testified that Virginia was her mother and G.S.' grandmother, while the defendant was Cherrita's brother and G.S.' uncle. Cherrita testified that, between September 1, 2008 and November 30, 2008, Virginia and the defendant lived in the same home in Chicago. During that time, Cherrita and Derrel occasionally allowed their children to spend nights at Virginia's home. On separate occasions between September 2008 and March 2009, G.S. informed Cherrita that her "coo coo" hurt. Between November 2008 and March 2009, on separate occasions, G.S. cried and said that she did not want to go to Virginia's house. In April 2009, Cherrita received information concerning an investigation involving her cousin, D.W.L., and the defendant. At that time, Cherrita worked in a private daycare center which G.S. attended. On April 13, 2009, during naptime at the daycare center, Cherrita, who was trained to talk to children about "good touches and bad touches," spoke with G.S., who informed Cherrita that the defendant did a "bad touch" on G.S. at Virginia's house. G.S. then explained the "bad touch" in detail to Cherrita, and demonstrated by pulling down her own pants and underwear, opening her legs, and putting her finger inside her vagina. Cherrita then stopped G.S. and immediately called to inform her husband, Derrel. Later that evening at home, Derrel asked G.S. about the incident, and G.S. again described what the defendant had done to her, started to cry when she stated that it really hurt when the defendant put his finger in her "coo coo," and tried to demonstrate what happened. However, Cherrita stopped G.S. before G.S. could pull down her

underwear. Thereafter, Cherrita contacted Detective Jeannie Vogel (Detective Vogel) and visited the Children's Advocacy Center in Chicago with G.S.

¶ 9 Derrel testified on behalf of the State and described his April 13, 2009 conversation with G.S. and Cherrita. Although G.S. had already spoken with Cherrita earlier that day, Derrel wanted to hear about what happened directly from G.S. Derrel testified that G.S. described to him that the defendant put his finger in her "coo coo," and that G.S. cried when she tried to demonstrate the act over her clothing. At trial, the prosecutor asked Derrel if "after you talked to [G.S.] yourself with your wife Cherrita, you were sure that what [G.S.] told you was the truth, correct?" Derrel then responded, "yeah, I was sure. I just couldn't imagine that somebody – somebody her age could make up something like that."

¶ 10 Dr. Emily Siffermann (Dr. Siffermann), who specialized in child sex abuse pediatrics, testified that she was employed as a pediatrician at John Stroger Hospital of Cook County, which was an affiliated clinic of the Children's Advocacy Center. On April 16, 2009, she met Cherrita and G.S. at the Children's Advocacy Center. Dr. Siffermann first spoke privately with Cherrita and then spoke with G.S. privately. During the interview with G.S., Dr. Siffermann asked whether anyone had touched her vagina, to which G.S. said "no." However, when Dr. Siffermann asked whether anyone touched her "coo coo," G.S. responded that the defendant did. Dr. Siffermann then asked what a "coo coo" was, which G.S. clarified that it was her vagina. G.S. then described to Dr. Siffermann how, on three separate occasions, the defendant took G.S. upstairs, touched her, and put his finger in her "coo coo." G.S. recalled that it hurt and blood came out of her vagina. G.S. also informed Dr. Siffermann that G.S. had touched the defendant's "privacy" or "vagina peter," which had a bump on it. When asked what a "peter" was, G.S. stated that it was "what Daddy has." Dr. Siffermann then conducted a physical examination of

G.S., including her genital area, and the result of the examination was normal. Dr. Siffermann testified that she expected a normal examination based upon the finger penetration that G.S. described. Dr. Siffermann explained that, in her medical practice, "most of the time, even with a history of contact with a finger or penetration from a finger, [she] finds a normal exam."

¶ 11 Chicago Police Detective Vogel testified that on April 16, 2009, she observed an interview of G.S. by a victim-sensitive interviewer, Raziya Webster-Lumpkins (VSI Webster-Lumpkins) at the Children's Advocacy Center. Detective Vogel, along with assistant State's Attorney Carey Mason (ASA Mason), observed the interview through a one-way mirror in an adjoining room. VSI Webster-Lumpkins asked G.S. to name her body parts and asked if anything happened to each one. When VSI Webster-Lumpkins pointed to her own vaginal area, G.S. said she called it a "coo coo." When asked whether something happened to her "coo coo," G.S. stated that the defendant touched her "coo coo" with his hand and G.S. then touched her own vagina over her clothing. VSI Webster-Lumpkins then asked if anyone saw him do that, to which G.S. replied that her mother did. Upon further questioning, G.S. informed VSI Webster-Lumpkins that she was lying on the bed and the defendant was standing over her during the incident. G.S. also stated during the interview that the defendant's finger hurt her "coo coo" and that she saw blood, but denied that the defendant made her do anything to him. After a break in the interview during which G.S. was left alone in the room, VSI Webster-Lumpkins returned and asked G.S. whether the defendant touched inside or outside her "coo coo," to which G.S. responded "outside." However, after VSI Webster-Lumpkins demonstrated with her own hands the difference between placing a hand "on top" or "underneath" her clothes, G.S. stated that the defendant's hand was under her panties. G.S. reiterated to VSI Webster-Lumpkins that the defendant's finger hurt her and that she felt as though she needed to see a doctor. On cross-

examination, Detective Vogel testified that when VSI Webster-Lumpkins asked G.S. whether "anything [had] happened" to her vaginal area, G.S. initially said no. However, when VSI Webster-Lumpkins rephrased the question by asking whether "somebody [did] something to [her] coo coo," G.S. responded in the affirmative that the defendant touched her with his hand. On redirect examination, Detective Vogel stated that, during the interview, G.S. specified that the defendant's finger went inside her "coo coo."

¶ 12 The State also presented other-crimes evidence by the testimony of two witnesses, E.S. and D.W.L. E.S. testified that he was the defendant's son and that he was 18 years old at the time of trial. Between January 1998 and January 2001, when E.S. was five to seven years old, he lived with his parents in Chicago. E.S. testified that, during that time, the defendant would put his penis in E.S.' anus while the defendant was alone with E.S. at home. E.S. testified that, in April 2009, the defendant apologized to him for his past actions. D.W.L. also testified on behalf of the State that she was thirteen years old at the time of the trial and that, when she was eight or nine years old, she sometimes stayed with her "Auntie" Virginia and cousin Ed, whom she identified in court as the defendant. On numerous occasions, the defendant forced D.W.L. to perform fellatio on him. D.W.L. testified that, at one point, the defendant told her that she was his girlfriend.

¶ 13 Defense presented the testimony of Virginia, the defendant's mother, who testified that at no time during G.S. or D.W.L.'s visits to her home, did she allow either girl to be left alone with the defendant. Virginia testified that neither G.S. nor D.W.L. ever complained about anything. Virginia testified that she never saw the defendant take G.S. upstairs to his bedroom.

¶ 14 Prior to closing arguments, the trial court held a jury instruction conference and reviewed each jury instruction with the defendant, defense counsel, and the State. With regard to Jury

Instruction No. 17, which pertained to the definition of sexual penetration, defense counsel affirmatively stated "no objection."

¶ 15 During closing arguments, the State referenced Jury Instruction No. 17, by stating that the trial court would instruct the jury on the definition of sexual penetration, which "means, any contact, however slight, between the sex organ or anus of one person and an object of another person." Following closing arguments, the trial court provided instructions to the jury, including Jury Instruction No. 17. After deliberations, the jury found the defendant guilty of predatory criminal sexual assault.

¶ 16 On May 7, 2012, the defendant filed a motion for a new trial, which the trial court denied on the same day and sentenced him to 45 years of imprisonment. On May 24, 2012, the defendant filed a motion to reconsider sentence, which the trial court also denied.³

¶ 17 On May 24, 2012, the defendant filed a notice of appeal.

¶ 18 ANALYSIS

¶ 19 We determine the following issues on appeal: (1) whether the defendant was entitled to a new trial on the basis that the trial court erroneously instructed the jury on an incomplete definition of "sexual penetration"; and (2) whether the defendant was entitled to a new trial on the basis that the State improperly elicited opinion testimony from Derrel that G.S.' allegation against the defendant "was the truth."

¶ 20 We first determine whether the trial court erroneously instructed the jury on an incomplete definition of "sexual penetration" so as to warrant a new trial.

³At the May 24, 2012 hearing, the State noted that it would *nolle pros* the pending cases against the defendant with regard to his alleged criminal sexual assaults against D.W.L. and E.S.

¶ 21 The defendant argues that the trial court erred in providing the jury with an incomplete instruction of the definition of "sexual penetration," which improperly lowered the bar for finding him guilty of the charged offense. Specifically, he contends that because G.S.' testimony was unclear as to whether he had actually inserted his finger into her vagina, and the incorrect definition of "sexual penetration" was given to the jury and utilized by the State during closing arguments, the outcome of his trial could have been affected by this error because the jury had a free license to find him guilty even if it did not believe that his finger intruded into G.S.' vagina. The defendant acknowledges that he did not properly preserve this issue for appellate review, but urges this court to review the issue under the plain error doctrine.

¶ 22 The State counters that the plain error doctrine does not apply to circumvent forfeiture of this issue. Specifically, the State argues that the evidence at trial—including G.S.' own testimony, the testimony of four witnesses who had heard G.S.' outcry statements, and propensity evidence through E.S. and D.W.L.'s testimony—was not closely balanced. Nor did the jury instruction on the definition of "sexual penetration" as provided by the trial court, the State contends, fundamentally threaten the fairness of the defendant's trial.

¶ 23 Section 12-14.1(a)(1) of the Criminal Code of 1961 (the Criminal Code), at the time of the offense in 2008, provided that "[a] person commits predatory criminal sexual assault of a child if *** the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed." 720 ILCS 5/12-14.1(a)(1) (West 2008).⁴ The parties do not dispute that the trial court correctly instructed the jury at trial that a conviction for predatory criminal sexual assault could be sustained only if it

⁴The statute for predatory criminal sexual assault of a child was renumbered and amended as 720 ILCS 5/11-1.40 by P.A. 96-1551, Art. 2, § 5 (eff. July 1, 2011).

found that the defendant knowingly committed "an act of sexual penetration with [G.S.]; *** [t]hat the defendant was 17 years of age or older when the act was committed; and *** [t]hat [G.S.] was under 13 years old when this act was committed." (Jury Instruction Nos. 15 and 16). However, the defendant now challenges on appeal that the trial court incorrectly instructed the jury that "sexual penetration" was defined as "any contact, however slight, between the sex organ or anus of one person and an object of another person." (Jury Instruction No. 17).

¶ 24 Illinois Pattern Jury Instructions, Criminal, No. 11.65E (4th ed. 2000) provides the following definition of "sexual penetration":

"[1] [any] *contact*, however, slight, between the sex organ or anus of one person and [(an object) (the [(sex organ) (mouth) (anus)] of another person)].

[or]

[2] [any] *intrusion*, however, slight, of any part of [(the body of one person) (any animal) (any object)] into the [(sex organ) (anus)] of another person [, including but not limited to [(cunnilingus) (fellatio) (anal penetration)]]. [Evidence of emission of semen is not required to prove sexual penetration.]" (Emphases added.) Illinois Pattern Jury Instructions, Criminal, No. 11.65E (4th ed. 2000) (the IPI 11.65E instruction).

¶ 25 The State admits that the second clause—the "intrusion clause"—of the IPI 11.65E instruction was omitted from Jury Instruction No. 17 that was provided to the jury at trial, which only included the first clause—the "contact clause." Our supreme court has held that "the word 'object' in the 'contact' clause of the statutory definition of sexual penetration was not intended to

include parts of the body." *People v. Maggette*, 195 Ill. 2d 336, 350 (2001). Rather, "sexual penetration" involving parts of the body means "any *intrusion*, however slight, of any part of the body of one person *** *into* the sex organ or anus of another person." (Emphases added.) *People v. McNeal*, 405 Ill. App. 3d 647, 674 (2010). The defendant argues that the trial court erred in giving the incomplete Jury Instruction No. 17, which included the "contact" clause but did not include the "intrusion" clause.

¶ 26 In the case at bar, prior to closing arguments at trial, the trial court held a jury instruction conference and reviewed each proposed jury instruction with the defendant, defense counsel, and the State. With regard to Jury Instruction No. 17, which pertained to the definition of sexual penetration and included only the contact clause of the IPI 11.65E instruction, defense counsel affirmatively stated that she had "no objection." Following closing arguments, the trial court provided instructions, including Jury Instruction No. 17, to the jury for deliberations. We find that the defendant cannot maintain his claim that the trial court erred in providing the jury with an incomplete instruction of the definition of sexual penetration under Jury Instruction No. 17, because he has affirmatively waived this contention. Waiver is the voluntary relinquishment or intentional abandonment of a known right, whereas forfeiture is the failure to make a timely assertion of a known right. *People v. Phipps*, 238 Ill. 2d 54, 62 (2010). In the course of representing their clients, "trial attorneys may (1) make a tactical decision not to object to otherwise objectionable matters, which thereby *waives* appeal of such matters, or (2) fail to recognize the objectionable nature of the matter at issue, which results in procedural *forfeiture*." (Emphases added.) *People v. Bowens*, 407 Ill. App. 3d 1094, 1098 (2011). Despite the defendant's contention on appeal, the plain error analysis does not apply to the facts of this case. "Plain-error analysis applies to cases involving procedural default, *** not affirmative

acquiescence." *Id.* at 1101. Here, as noted, at trial, defense counsel affirmatively acquiesced to instructing the jury on the definition of sexual penetration as proposed in Jury Instruction No. 17 and, thus, affirmatively acquiesced to the actions taken by the trial court. See *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004) ("a party cannot complain of error which that party induced the court to make or to which that party consented"; "[t]he rationale behind this well-established rule is that it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings"). Thus, we conclude that the defendant has affirmatively waived review of this claim on appeal.

¶ 27 Even assuming, *arguendo*, that this issue was procedurally forfeited on the basis that defense counsel failed to object at trial and include the issue in a posttrial motion, rather than affirmatively waived at trial, we find that the defendant cannot satisfy the requirements of the plain error doctrine. Under the plain error doctrine, a reviewing court may consider unpreserved issues when either: (1) the evidence is so closely balanced, regardless of the seriousness of the error, that the jury's verdict may have resulted from the error and not the evidence; or (2) the error is so serious, regardless of the closeness of the evidence, as to affect the fairness of the defendant's trial. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). The first step in a plain error analysis is to determine whether an error occurred at all. *Id.*

¶ 28 As discussed, Jury Instruction No. 17 contained only the contact clause, but not the intrusion clause, of IPI 11.65E. The State elected to proceed against the defendant on one count of predatory criminal sexual assault (count 2), which required the State to prove that he committed an act of sexual penetration by "an intrusion in that [he] inserted his finger into [G.S.] vagina, and [G.S.] was under thirteen years of age when the act was committed." Because the "object" referenced in the contact clause of the statutory definition of sexual penetration was not

intended to include parts of the body, and the defendant in the case at bar was charged with using his finger in committing criminal sexual assault on G.S., the State was required to prove that the defendant's finger had intruded into G.S.' vagina. See *Maggette*, 195 Ill. 2d at 350 ("the word 'object' in the 'contact' clause of the statutory definition of sexual penetration was not intended to include parts of the body"); *McNeal*, 405 Ill. App. 3d at 674 ("sexual penetration" involving parts of the body means "any *intrusion*, however slight, of any part of the body of one person *** *into* the sex organ or anus of another person"). Thus, we find that the trial court erred in not instructing the jury with the second clause—the intrusion clause—of the IPI 11.65E instruction.

¶ 29 However, we find that the defendant cannot establish that the evidence was closely balanced. At trial, the jury repeatedly heard testimony from G.S. that, while she stayed at Virginia's house, the defendant put his finger inside her vagina—which G.S. described as her "coo coo." When the prosecutor specifically asked whether the defendant's finger actually went inside her vagina, G.S. answered "yes." G.S. also testified that she told "Miss Emily"⁵ that the defendant had put his finger inside her vagina. Cherrita and Derrel each testified at trial that their daughter, G.S., informed them that the defendant had put his finger in her "coo coo," and G.S. had also demonstrated the act for Cherrita by pulling down her own pants and underwear, opening her legs, and putting her finger inside her vagina. The jury also heard the testimony of Dr. Siffermann, whose interview with G.S. revealed that, on three separate occasions, the defendant took G.S. upstairs, touched her, and put his finger in her "coo coo." Dr. Siffermann also testified that G.S. informed her that the defendant's finger hurt G.S.' "coo coo" and blood came out of her vagina. At trial, Detective Vogel testified that, during a victim-sensitive

⁵"Miss Emily" is presumably Dr. Emily Siffermann.

interview, she observed G.S. tell VSI Webster-Lumpkins that the defendant's finger went inside her "coo coo," that the defendant's finger hurt her under her panties, and that she felt as though she needed to see a doctor. The State also presented propensity evidence to the jury through the testimony of E.S. and D.W.L., who were both the defendant's relatives and minors at the time he allegedly performed sexual acts upon them. E.S. testified that when he was five to seven years old, the defendant anally raped him. D.W.L. testified that when she was eight or nine years old, the defendant forced her to perform fellatio on him, also at Virginia's house. Based on the evidence presented to the jury, we find that the evidence against the defendant was not closely balanced.

¶ 30 Nonetheless, the defendant points to various parts of the record in an attempt to argue that the evidence was closely balanced. Specifically, he contends that evidence of "intrusion" was not clear, because it was unclear whether, in testifying that the defendant put his finger inside her vagina, G.S. was describing her "external genital organ or her internal genitalia." He further attempts to bolster this point by arguing that G.S. had informed VSI Webster-Lumpkins that the defendant's hand was "outside of her vagina." We reject the defendant's contention. At trial, G.S. clearly and repeatedly testified that the defendant's finger was *inside* her "coo coo," which she described had occurred for about a minute and which she described as painful. As discussed, G.S. also demonstrated the sexual act to Cherrita, by undressing herself and placing her own finger *inside* her vagina. While G.S. mistakenly stated at one point during her testimony that "Adwon" had put his finger in her vagina, she was rehabilitated on redirect examination when she clarified that the only person who ever put his finger in her "coo coo" was the defendant. Although G.S. responded "outside" when VSI Webster-Lumpkins asked during the victim-sensitive interview whether the defendant touched her inside or outside her "coo coo," G.S. later

corrected herself and said that the defendant's hand was actually under her panties after VSI Webster-Lumpkins demonstrated with her own hands the difference between placing a hand "on top" or "underneath" her clothes. The defendant further points to certain inconsistencies such as G.S. telling Dr. Siffermann and VSI Webster-Lumpkins that she saw blood, but then testifying at trial that no blood came out of her vagina. We find such inconsistencies to be immaterial to the issue of whether the defendant had actually placed his finger inside her vagina. Likewise, we reject the defendant's arguments that G.S.' testimony that the month was "2012," her confusion about the day of the week, or her belief that Indiana was a city, was proof that the evidence was closely balanced. We further find the defendant's cited cases, *People v. Lloyd*, 2014 IL App (4th) 100094 and *People v. James*, 331 Ill. App. 3d 1064 (2002), to be misplaced. In *Lloyd*, the reviewing court held that plain error was established, and reversed and remanded one of the defendant's multiple criminal sexual assault convictions, by finding the victim's testimony that the defendant touched "the part that has the hole" and her "privates" left open the question as to whether an intrusion actually took place with regard to that specific count, and finding that the erroneous jury instruction which omitted the requirement of "intrusion" could have affected the outcome of the trial. *Lloyd*, 2011 IL App (4th) 10094, ¶ 45. Unlike *Lloyd*, in the case at bar, G.S. clearly testified at trial that the defendant inserted his finger into her vagina. We note that the appellate court's decision in *Lloyd* was also reversed in part by our supreme court (*People v. Lloyd*, 2013 IL 113510), which reversed the defendant's convictions on all seven counts of criminal sexual assault and vacated his sentences on the basis that the evidence was insufficient to convict him. We also find *James* to be distinguishable. In *James*, the trial court instructed the jury on an erroneous definition of sexual penetration, and the defendant forfeited the issue for review on appeal. *James*, 331 Ill. App. 3d at 1067-68. On appeal, the *James* court found that the

evidence was closely balanced and concluded that the improper instruction amounted to plain error, where the victim testified that the defendant touched her in her "private part," but her indication of what exactly constituted her "private part" was "not clearer than simply somewhere below her waist and between her legs." *Id.* at 1068. Unlike *James*, in the case at bar, G.S. explicitly testified that the defendant put his finger inside her vagina or "coo coo," and four other witnesses testified that G.S. had made the same statements against the defendant in 2009. Further, unlike *James* in which no propensity evidence was presented, the State in the instant case presented E.S. and D.W.L.'s testimony, as evidence of the defendant's propensity to sexually assault his minor relatives. Accordingly, we find that the evidence was not closely balanced and the first prong of the plain error doctrine is not satisfied.

¶ 31 Nor do we find the trial court's error to be so serious as to affect the fairness of the defendant's trial and thus, the second prong of the plain error doctrine is not satisfied. The function of jury instructions is to convey to the jury the law that applies to the evidence presented. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). "Jury instructions should not be misleading or confusing, but their correctness depends upon not whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them." *Id.* at 187-88. "A jury instruction error rises to the level of plain error only when it 'creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of trial.'" *Id.* at 193 (quoting *People v. Hopp*, 209 Ill. 2d 1, 8 (2004)).

¶ 32 The defendant surmises that because the evidence was inconclusive as to whether an "intrusion" of the defendant's finger occurred, it was reasonable that the incorrect definition of sexual penetration—which he claims gave the jury free license to find him guilty even if it did

not believe his finger intruded into G.S.' vagina—could have affected the outcome of his trial. He contends that this possibility was compounded by the fact that the State's closing arguments mentioned the language of the contact clause, rather than the intrusion clause, in explaining the definition of sexual penetration. The defendant further argues that the erroneous jury instruction incompletely defined the elements of the offense, which denied him a fair trial. The State counters that the omission of the intrusion clause of the IPI 11.65E did not fundamentally threaten the fairness of the defendant's trial. The State argues that the language of the indictment, overwhelming evidence establishing the element of sexual penetration, and the State's repeated references during closing arguments regarding the intrusion of the defendant's finger into G.S.' vagina, showed that the defendant suffered no prejudice and no threat to the fairness of his trial existed with the omission of the intrusion clause of the IPI 11.65E instruction.

¶ 33 Our supreme court has held that neither the omission of the definition of a term used to instruct the jury on the essential issue in the case, nor an incorrect instruction on an element of the offense is necessarily reversible error. *Hopp*, 209 Ill. 2d at 10. In *Hopp*, our supreme court found that the defendant's speculation about what the jury may have thought—that the State did not prove the defendant intended that the victim be killed—was insufficient to show that the omission of the instruction defining first-degree murder severely threatened the fairness of her trial so as to constitute plain error. *Id.* at 17. Likewise, in *McNeal*, this court recently affirmed a conviction for aggravated criminal sexual assault under circumstances similar to those in the case at bar. *McNeal*, 405 Ill. App. 3d at 675-76. In *McNeal*, the reviewing court found that error in instructing the jury on the definition of sexual penetration, which omitted the intrusion clause of the IPI 11.65E instruction, did not constitute plain error. *Id.* at 677. The *McNeal* court found that the evidence was not closely balanced under the first prong of the plain error doctrine, and

that the instruction error did not severely threaten the fairness of the defendant's trial so as to satisfy the second prong of the doctrine. *Id.* Specifically, the *McNeal* court found, with regard to the second prong of the plain error doctrine, that the result of the trial would not have been different had the proper instruction been given because the jury was "properly informed at the start of the trial by the indictment that [the] defendant was charged with an act of sexual penetration in that he 'forced the intrusion of [the victim's] finger into [the victim's] vagina by the use of force or by the threat of force' "; the evidence established that the victim was forced to put her finger into her vagina; and the defendant admitted to making the victim touch herself. *Id.* at 676.

¶ 34 Like *McNeal*, here, the trial court read the indictment to the jury at the start of trial, which informed the jurors that the State was required to prove that the defendant committed predatory criminal sexual assault in that he intentionally and knowingly committed an act of sexual penetration upon G.S. by "[a]n intrusion in that [he] inserted his finger into [G.S.]' vagina, and [G.S.] was under thirteen years of age when the act was committed." Thus, it was clear to the jury at the outset of the trial that the evidence must establish that the defendant inserted his finger *into* G.S.' vagina. Further, as we have already determined, the testimonial evidence at trial established that the defendant did in fact put his finger into G.S.' vagina, and we reject the defendant's characterization that the evidence was "inconclusive." While the State's closing argument alluded to the language of the contact clause in explaining the definition of sexual penetration, the State also made repeated references during closing arguments regarding the intrusion of the defendant's finger into G.S.' vagina. Moreover, we reject the defendant's speculation that the erroneous instruction gave the jury free license to find him guilty even if it did not believe his finger intruded into G.S.' vagina. Speculation that the jury may have thought

the defendant's finger did not actually intrude into G.S.' vagina is insufficient to show that the omission of the intrusion clause severely threatened the fairness of the defendant's trial. See generally *Hopp*, 209 Ill. 2d at 17 (speculation about what the jury may have thought is insufficient to show that the omission of the instruction severely threatened the fairness of defendant's trial under plain error). We find that, given the overwhelming testimonial evidence establishing the insertion of the defendant's finger into G.S.' vagina, the language of the indictment requiring intrusion which was read to the jury, and the State's repeated references in closing that the defendant's finger intruded into G.S.' vagina, the result of the trial would not have been different had the omitted intrusion clause of the IPI 11.65E instruction been provided to the jury. Thus, we cannot conclude that the jury instruction error severely threatened the fairness of the defendant's trial so as to satisfy the second prong of the plain error doctrine. Accordingly, the defendant failed to establish the requirements of the plain error doctrine.

¶ 35 We next determine whether the State improperly elicited opinion testimony from Derrel that G.S.' allegation against the defendant "was the truth."

¶ 36 The defendant argues that the State elicited impermissible opinion testimony from Derrel at trial regarding the veracity of G.S.' credibility which, he claims, was also "the equivalent" of Derrel opining that the defendant was in fact guilty of the charged offense. He argues that because G.S.' credibility was crucial to the State's case, the admission of this testimony was prejudicial error, by surmising that the jury was likely to heavily credit a parent's testimony about the veracity of his own child's statement. By eliciting Derrel's testimony about the truth of G.S.' allegations, he maintains, the State not only improperly bolstered G.S.' testimony, which was a key component of the State's case, but also improperly discredited the defense theory that the defendant was the subject of a witch hunt. The defendant acknowledges that defense counsel

failed to object to this improper testimony at trial, which resulted in procedural forfeiture, but he argues that this court may nonetheless review the claim under the plain error doctrine.

¶ 37 The State counters that Derrel properly answered the prosecutor's question at trial that he believed G.S. when she explained to Derrel the manner in which the defendant sexually assaulted her. The State argues that Derrel did not opine that he believed the defendant was guilty of the charged offense, but that his answer was both admissible and appropriate. The State argues that the defendant forfeited review of this claim on appeal, and contends that the plain error doctrine does not apply to reach the forfeited issue.

¶ 38 We find that the defendant has forfeited review of this issue on appeal because he failed to object at trial and include the issue in his posttrial motion. See *Herron*, 215 Ill. 2d at 175 (a defendant who either fails to make a timely trial objection and include the issue in a posttrial motion forfeits review of the issue). As discussed, in determining whether the plain error doctrine applies to reach the forfeited issue, we must first determine whether an error occurred at all. See *McLaurin*, 235 Ill. 2d at 489.

¶ 39 Under Illinois law, "the testimony of a lay witness must be confined to statements of fact of which the witness has personal knowledge." *People v. McCarter*, 385 Ill. App. 3d 919, 934 (2008) (quoting *People v. Brown*, 200 Ill. App. 3d 566, 578 (1990)). A witness is not permitted to comment on the veracity of another witness' credibility. *People v. Munoz*, 398 Ill. App. 3d 455, 487 (2010). It is the function of the trier of fact to assess the credibility of the witnesses, to determine the appropriate weight of the testimony, and to resolve conflicts or inconsistencies in the evidence. *People v. Evans*, 209 Ill. 2d 194, 211 (2004).

¶ 40 During Derrel's testimony at trial, the State asked Derrel if "after you talked to [G.S.] yourself with your wife Cherrita, you were sure that what [G.S.] told you was the truth, correct?"

Derrell then responded, "yeah, I was sure. I just couldn't imagine that somebody – somebody her age could make up something like that." It is this single inquiry and response that the defendant now challenges on appeal as improper opinion testimony.

¶ 41 In *People v. Hanson*, an investigating detective testified that, after speaking with the defendant's sister, he confronted the defendant by stating "[your sister] thinks you did this." *Hansen*, 238 Ill. 2d 74, 88 (2010). The defendant's sister confirmed this statement during her testimony. *Id.* at 101. On appeal, the defendant argued that this statement constituted improper opinion evidence. *Id.* at 99. Our supreme court noted that neither the detective nor the defendant's sister testified that he or she believed the defendant was guilty. *Id.* at 101. Rather, the testimony indicated that, *at the time the statement was made*, the sister believed the defendant had caused the deaths in that case. *Id.* At no time was any testimony offered as to the sister's *present* opinion of the defendant's guilt or innocence. *Id.*

¶ 42 Likewise, this court recently relied on *Hanson* in deciding *People v. Chaban*, 2013 IL App (1st) 112588. In *Chaban*, the State elicited the defendant's wife's testimony that, *at the time of the offense*, she believed her husband had committed the act, but no longer harbored that belief at the time of trial. *Chaban*, 2013 IL App (1st) 112588, ¶ 35. On appeal, the defendant argued that this constituted improper opinion testimony. *Id.* ¶ 43. The *Chaban* court disagreed and applied *Hanson*, finding that his wife's statements were not opinion testimony, but rather a statement about her belief at the time of the offense. *Id.* ¶ 48.

¶ 43 Here, Derrel testified at trial that, when G.S. described the defendant's sexual acts to Derrel on April 13, 2009, Derrel believed then that G.S. was telling the truth. Like *Hanson* and *Chaban*, at no time did Derrel testify at trial as to his *present* opinion of the defendant's guilt or innocence, nor did he testify at trial as to whether he believed G.S.' trial testimony was credible.

¶ 44 The defendant, in an attempt to establish error, relies primarily on *Munoz*, 398 Ill. App. 3d 487. In *Munoz*, the interrogating detective testified that he told the defendant that "he did not believe that the defendant ever told him the truth." *Id.* at 465-66. The reviewing court held that this statement invaded the province of the jury by telling it whom to believe, and that it was an impermissible comment on the ultimate issue of the defendant's credibility. *Id.* at 488. We find *Munoz* distinguishable from the facts of this case. As discussed, Derrel's response at trial regarding G.S.' statement to him during their 2009 conversation in no way invaded the province of the jury, where it was solely restricted to his previous opinion regarding G.S.' statement in 2009 and did not make a present opinion as to G.S.' veracity at trial or as to the defendant's guilt or innocence. Moreover, this court in *People v. Degorski* has recently noted that the *Munoz* decision, issued less than six months before *Hanson*, anticipated the distinction between present and previous opinion testimony drawn by the *Hanson* court and, thus, determined that "*Munoz* drew nearly the same line as the *Hanson* court: present opinion testimony is improper; previous opinion testimony is permissible." *People v. Degorski*, 2013 IL App (1st) 100580, ¶ 84. The defendant also cites *People v. Crump*, 319 Ill. App. 3d 538 (2001), in support of his argument that "the jury is likely to credit heavily a parent's testimony about the veracity of their own child's statement." We reject this argument as speculation. *Crump*, which predates *Hanson*, involved a police officer who answered affirmatively when the State asked at trial: "Through the course of your investigation, Officer, did you have reason to believe that the defendant in this case committed this offense?" *Id.* at 540. The *Crump* court held that this constituted improper lay opinion testimony, noting that a police officer is an authority figure "whose testimony may be prejudicial if the officer informs the jurors that they should believe a portion of the prosecution's case." *Id.* at 542. We find nothing in *Crump*, and the defendant has cited no other

authority, to support the defendant's speculative argument that the jury was "likely to credit heavily" Derrel's testimony because G.S. is his daughter. In fact, it is just as reasonable for a jury to put less weight on a parent's testimony regarding the veracity of his or her child's statement, for the reason that a parent may be biased in favor of that child. Thus, we find that the defendant has not established that any error had occurred at all. See *McLaurin*, 235 Ill. 2d at 489 (in determining whether the plain error doctrine applies to reach the forfeited issue, we must first determine whether an error occurred at all).

¶ 45 Even assuming, *arguendo*, that the State erred in eliciting impermissible opinion testimony from Derrel, we find that the defendant cannot establish either prong of the plain error doctrine. As discussed, the evidence was not closely balanced. We find that, even without the admission of Derrel's elicited response regarding the veracity of G.S.' 2009 statement, the result of the trial would not have been different and, thus, the fairness of the defendant's trial was not affected. Here, even without the offending testimony, Derrel's impression about the veracity of G.S.' 2009 statement would have been obvious to the jury because it could reasonably be inferred that Derrel would not have contacted the police about the crime had he not believed G.S.' statement in 2009. Therefore, the plain error doctrine does not apply to reach this forfeited issue.

¶ 46 The defendant argues in the alternative that defense counsel was ineffective for failing to object to Derrel's trial testimony at issue. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (a defendant establishes ineffective assistance of counsel by showing (1) his counsel's representation fell below an objective standard of reasonableness; and (2) there exists a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different). Because we have already determined that Derrel's response at trial was not plain error, it necessarily follows that the defendant's ineffective assistance of counsel claim must also

fail. See *People v. Williams*, 391 Ill. App. 3d 257, 271 (2009). As discussed, even without Derrel's statement at trial, the outcome of the trial would not have been different. Thus, the defendant cannot establish the required prejudice to sustain his ineffective assistance of counsel claim. See *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 77 (a failure to establish either prong of the *Strickland* test will doom an ineffectiveness claim); see generally *People v. White*, 2011 IL 109689 (holding that the prejudice prong for ineffective assistance of counsel is similar to the closely balanced evidence prong of the plain error review).

¶ 47 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 48 Affirmed.