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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of McHenry County.
)	
Plaintiff-Appellee,)	
)	No. 11-CF-745
v.)	
)	
MOHAMMAD A. SALAM,)	Honorable
)	Sharon L. Prather,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Hudson and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in admitting the victim's out-of-court statements; the State proved the elements of the offense of aggravated criminal sexual abuse beyond a reasonable doubt; giving the nonpattern jury instruction was harmless; giving of IPI Criminal 11.66 did not constitute plain error; and defense counsel was not ineffective for further exploring the financial motive to lie; affirmed.

¶ 2 Following a jury trial, defendant, Mohammad A. Salam, was found guilty of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)), for knowingly engaging in sexual conduct with G.C., a minor. The court sentenced defendant to two years' probation. Defendant contends: (1) the trial court improperly exercised its discretion in admitting the

victim's out-of-court statements pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2010)); (2) the State failed to prove defendant guilty beyond a reasonable doubt; (3) the trial court abused its discretion in giving the jury a nonpattern jury instruction; (4) instructing the jury under the Illinois Pattern Jury Instruction, Criminal, No. 11.66 (4th ed. 2000) (IPI Criminal No. 11.66), regarding section 115-10 constituted reversible error; and (5) he received ineffective assistance of trial counsel. We affirm.

¶ 3

I. BACKGROUND

¶ 4

A. Section 115-10 Hearing

¶ 5 Defendant was charged by indictment with aggravated criminal sexual abuse on September 15, 2011, and the State filed a notice of intent to offer the victim's statements. A hearing was held on the motion in which the following evidence was introduced.

¶ 6 Pauline C., the mother of the victim, testified that she has two children: the victim, G.C., who was born on January 18, 2005, and G.C.'s younger sister. On January 12, 2011, at about 7:30 p.m., Pauline was home and her daughters were taking a bath. Standing outside of the bathroom, Pauline overheard G.C. ask her sister whether she "wanted to touch her butt." Pauline walked into the bathroom when she heard this and told the girls that this would be inappropriate and to not do it again.

¶ 7 About 15 minutes later, after the girls were out of the bath, Pauline and the girls talked about inappropriate touching. During the conversation, G.C., who was then almost six years old, told Pauline that "Mo touched her in her butt." "Mo" is a nickname for defendant.

¶ 8 Defendant and his wife, Atiya, ran a daycare center that the children attended. The daycare was located in a home in the same neighborhood where G.C. lived. G.C. told Pauline that defendant would pick her up, put her in his bed, put his hand inside her underwear, and "rub

her butt.” She told Pauline that it happened “often.” G.C. also told Pauline that defendant would show her items on an Ipad or computer, and he would put his hand inside her clothing and rub her butt in front of his wife in the kitchen of their home.

¶ 9 During cross-examination, defense counsel attempted to elicit testimony concerning a dispute between Pauline and Atiya regarding vacation time pay. The contract between Pauline and the daycare called for Atiya to get two weeks of vacation, including one week of paid vacation. Pauline denied being upset with Atiya on the day of the discussion with the girls, and denied wanting to end daycare before that date. She also denied that she did not want to pay Atiya for her vacation.

¶ 10 Amy Bucci, a police officer from the Village of Algonquin, testified that she interviewed G.C. at the McHenry County Child Advocacy Center in Woodstock on January 18, 2011. She explained the specialized training she had received in forensic interviewing, which emphasized asking open ended questions rather than leading ones. The interview lasted around 15 to 20 minutes and was recorded on a DVD.

¶ 11 In the interview, G.C. first brought up the subject of defendant touching her and then stated: “He’s trying to make me trust him.” Later, G.C. explained that defendant made her trust him “so he’ll do a lot more bad stuff to teach me how, so I can be a bad kid.”

¶ 12 G.C. also told Bucci that defendant used to kiss her on the lips “for a couple of minutes,” but then he “started a new thing” of touching her “butt” after her parents told defendant to stop the kissing. G.C. said her parents’ complaints were based on a “letter” they wrote to defendant and his wife. G.C. also claimed that Atiya used to kiss her but she stopped when G.C.’s parents told her to stop the kissing. G.C. told Bucci that Atiya did not know about defendant touching G.C.’s butt and that defendant did not touch her sister in an inappropriate manner.

¶ 13 During cross-examination, Bucci said that G.C. did not want to name two body parts at first, but she eventually said that she did want to. She did not recall discussing the issue of trust with G.C., and, due to the passage of time, she did not recall if she spoke with G.C.'s mother about the allegations. Bucci stated that she heard G.C. mention Atiya and defendant kissing her, but she did not follow up with those allegations. Bucci also did not question G.C. about the letter that her parents wrote to Atiya and defendant concerning the inappropriate kissing.

¶ 14 Bucci opined that, based on her training and experience, it was not unusual for a child of that age to point to anatomical drawings, as it is often hard for the child to talk about the private parts of a body. She noted that G.C. made it clear that it was difficult because she did not want to answer at first, which is why Bucci did not press her in the beginning of the interview.

¶ 15 The trial court reserved arguments until it had reviewed the recording of the interview. When the hearing resumed, the prosecutor argued that the circumstances surrounding G.C.'s statements were reliable based on factors such as her consistent repetition of the complaint, lack of motive to fabricate, and the officer's non-leading questions.

¶ 16 Defense counsel argued that the DVD showed statements that were tainted and not reliable, and that the statements were made six days after the initial statements. Counsel argued that a six-year-old would not know or think about statements that her babysitter was nice, but her husband was not, and he was "trying to get me to trust him," and therefore, counsel contended that the statements were not spontaneous. Counsel further observed that the circumstances behind the interview were unknown, which also made the statements during the interview unreliable.

¶ 17 Following argument, the court granted the State's motion, ruling that all of the statements G.C. made to her mother and all of the statements G.C. made to Bucci on the DVD would be

admitted at trial provided that the child testified. The trial court agreed with the State that the issues raised by the defense went more to the weight of the statements rather than their admissibility, and would be appropriate areas for cross-examination at trial. The court specifically found that G.C.'s statements to her mother were made spontaneously, and that G.C. made the same statements during the interview at the Child Advocacy Center. The court further noted that there had been no evidence that the child would have had a motive to fabricate her statements.

¶ 18 Prior to trial, the State filed a motion *in limine* requesting that the court bar evidence that the sexual abuse allegation against defendant was determined by DCFS to be “unfounded.” The court granted the motion.

¶ 19 B. Trial

¶ 20 At trial, Pauline testified that she lived in Algonquin with her husband, Phillip C., and their two children, G.C., and G.C.'s younger sister. At the time of trial, G.C. was seven years old. In February 2009, G.C. was four years old when Pauline enrolled her in Rise & Shine Daycare. The daycare is located on the first floor of a two-story home located in the same neighborhood as G.C.'s.

¶ 21 Pauline testified that, on January 12, 2011, while the children were bathing together, she overheard G.C. ask her younger sister if she “wanted to touch her in her butt area.” G.C. was just shy of 6 years at the time. Pauline walked into the bathroom and told the girls that this was inappropriate and that they should not do that. As Pauline was preparing the girls for bed, she talked to them about inappropriate touching. During this conversation, G.C. told Pauline that “Mo touched her.” Pauline asked G.C. for details and G.C. told her there were certain times that she was asked to go into the bedroom to wake up defendant. G.C. would run upstairs to wake

defendant. Defendant would pick her up from the side of the bed, put his hand under her underwear, and rub her butt. G.C. also told Pauline that, on other occasions, while they were in the kitchen, defendant would put on “funny videos” for her to watch on his computer and have her sit on his lap. While she was on his lap, defendant would put his hands under her clothes, would rub her upper and lower back, and rub her upper butt area.

¶ 22 Pauline called her husband, who was out of town on business, and notified him about what G.C. had told her. The following day, Pauline went to the daycare and told Atiya that her children would not be attending the daycare anymore. She also told Atiya about G.C.’s allegations. That same day, Pauline notified the Algonquin police department about the allegations. Approximately one week later, G.C. was interviewed by Bucci.

¶ 23 On cross-examination, Pauline denied being upset about having to pay Atiya one week of vacation.

¶ 24 Pauline further testified that, before the incident with G.C., she had taught G.C. the difference between the “butt” and the “pee pee.” Pauline admitted giving a signed, written statement to the police, but she denied that she wrote the statement on the date G.C. told her defendant touched her “pee pee.” When counsel confronted her with her statement, she admitted that she wrote “my daughter [G.C.] and her sister was [*sic*] taking a bath, I overheard [G.C.] ask [her sister] if she wanted to touch her pee-pee.”

¶ 25 Pauline stated that, prior to the incident, she never had any “concerns” regarding Atiya kissing the girls. Pauline acknowledged having a conversation with her girls about the inappropriateness of kissing, in general, after they had received a newsletter about the subject from the kids’ school. Pauline read this letter to both children. Pauline never sent a letter to Atiya regarding this issue.

¶ 26 G.C. testified that she was now seven years old and in the second grade. She testified about her family members and two pet dogs, and that she knew the difference between the truth and a lie. The prosecutor asked if someone said that the prosecutor's hair was blue, would they be telling the truth or a lie, and G.C. responded that it would be a lie because the prosecutor's hair was light brown. The following colloquy then occurred:

“MR. ZALUD [prosecutor]: Okay, did anybody—do you know what good touches and bad touches are?

G.C.: Yes.

MS. WORTH [defense attorney]: Objection, foundation.

THE COURT: Overruled.

ZALUD: What's a good touch?

G.C.: To tell the truth.”

¶ 27 G.C. then testified that she went to daycare at “Lisa's” at the time of trial. She stated that Lisa lives near her house. The prosecutor asked whether G.C. used to go to a different daycare and G.C. responded that she went to Atiya's. G.C. further testified that she went to that daycare for two years, but something happened and she stopped going there.

¶ 28 G.C. testified that “Mo” lived with Atiya, and sometimes he was at daycare, and sometimes at work. G.C. identified defendant in court. G.C. testified that she did not go to that daycare anymore because “[defendant] used to touch my butt, *** [I]ike three times a week.” She could not remember when she started going to the daycare, when she stopped, or when defendant started touching her butt. When asked where this took place, G.C. stated “upstairs in his—in the bedroom.” G.C. stated that the other children at the daycare were never upstairs in

the bedroom with her. G.C. then testified that sometimes her sister was with her when defendant would touch her. G.C. denied defendant ever kissed her in the bedroom.

¶ 29 The prosecutor then asked:

“When he would touch your butt, did he do it underneath your clothes?”

C.G.: (Indicating).

MS. WORTH: Your Honor—

THE COURT: Overruled.

C.G.: Yes.”

¶ 30 G.C. denied that defendant said anything to her while he was touching her and could not remember what time of day it happened. G.C. stated that defendant was wearing pajamas when he touched her butt. G.C. stated that she would go upstairs because defendant called “us.” G.C. remembered talking to her mother about this. G.C. knew that defendant touched her butt “soon before [she] told [her] mom that he did it.” G.C. remembered that he touched her butt for five minutes or less. She did not tell him to stop because she was young and “didn’t know any better.” G.C. did not remember talking to a lady at the Child Advocacy Center.

¶ 31 G.C. remembered talking to her mother about this a year earlier, but she could not remember how near to that point Mo had last touched her. She did not remember if it had been around Thanksgiving, but she indicated that it was not long before she had told her mother.

¶ 32 During cross-examination, G.C. denied that she gave Atiya kisses, and she could not remember whether she ever hugged Atiya or defendant.

¶ 33 Bucci testified about her interview with G.C. that took place on January 18, 2011, when G.C. was six years old. The interview had lasted about 30 minutes. Bucci did not speak to G.C.

about the incident or coach G.C before the interview was taped. Bucci claimed that she did not use leading questions either. The DVD then was published to the jury.

¶ 34 During cross-examination, Bucci stated that she was trained not to ask leading questions because children are susceptible to suggestion. Bucci explained that, if a child does not bring up the touching first and the investigator is the first person to mention it, this could be considered engaging in leading questioning. Bucci opined that children who are five or six years old are easily led by leading questions. Bucci admitted to not following up on G.C.'s statements that her parents wrote a letter to defendant and his wife about inappropriate kissing.

¶ 35 The defense called Robin Minaglia, a nurse, who testified that she has three children, all of whom went to the daycare run by Atiya. Minaglia testified that she knew that Pauline sent her children to the same daycare. In December 2010, Minaglia had a conversation with Pauline in which they both complained about the contract provision that called for two weeks of vacation. Atiya took her vacation, Minaglia believed, in December 2010. The contract, which was admitted into evidence, states that Atiya's vacation was to occur in the last two weeks of December. Pauline was upset about the contract provision and Minaglia agreed with her.

¶ 36 Following closing argument and deliberation, the jury found defendant guilty. The court denied posttrial motions and subsequently sentenced defendant to two years' probation, ordered him to pay fines, and to undergo counseling. Defendant timely appeals.

¶ 37

II. ANALYSIS

¶ 38 A. Admissibility of G.C.'s Hearsay Statements Under Section 115-10

¶ 39 Defendant first contends that G.C.'s out-of-court statements to Pauline and Bucci were improperly admitted into evidence because they did not possess sufficient indicia of reliability or trustworthiness required by section 115-10 of the Code.

¶ 40 Section 115-10 provides, in relevant part, that hearsay statements made by a victim less than 13 years of age are admissible only if the time, content, and circumstances of the statements provide sufficient safeguards of reliability. 725 ILCS 5/115-10(b)(1) (West 2010); *People v. Zwart*, 151 Ill. 2d 37, 44 (1992). There are no precise tests for evaluating trustworthiness or reliability, but rather particularized guarantees of trustworthiness must be drawn from the totality of the circumstances surrounding the victim's statements. *People v. West*, 158 Ill. 2d 155, 164 (1994); *People v. Back*, 239 Ill. App. 3d 44, 57 (1992); *People v. McMillan*, 231 Ill. App. 3d 1022, 1025 (1992).

¶ 41 Important factors in making the determination of reliability include the child's spontaneous and consistent repetition of the incident, the child's mental state, the use of terminology unexpected of a child of a similar age, and the lack of a motive to fabricate. *People v. Bowen*, 183 Ill. 2d 103, 120 (1998); *West*, 158 Ill. 2d at 164. A trial court has considerable discretion in admitting hearsay statements. Thus, a reviewing court will not disturb a trial court's decision absent an abuse of discretion. *Zwart*, 151 Ill. 2d at 44.

¶ 42 The trial court held that the time and circumstances surrounding the statements made by G.C. provided sufficient safeguards of reliability for admission when considering the totality of the circumstances. The court noted that G.C.'s statements to her mother after her mother overheard G.C. asking her sister if she wanted to touch G.C.'s butt were made spontaneously. The court further pointed out that G.C. made the identical statements during the course of the interview at the Child Advocacy Center; "[t]hey were repeated and were consistent to the testimony of the mother presented during the course of the hearing." The court did not hear any evidence that the child would have any motive to fabricate her statements.

¶ 43 Defendant maintains that G.C.'s statements were not spontaneous, consistent, or reliable because (1) there was a delayed outcry; (2) there was no evidence of the child being emotionally upset by the incident; (3) there was a financial motive for fabrication; and (4) the statements (such as the prior kissing and the letter) simply made no sense.

¶ 44 The record before us indicates that the trial court did not abuse its discretion in determining that G.C.'s statements were reliable. We first consider the timing of the statements, and their spontaneity and consistency. According to Pauline, she first heard of the abuse on the evening of January 12, 2011, when she overheard G.C. ask her younger sister if she wanted to touch her butt. When Pauline talked to the girls about inappropriate touching and the private parts of their bodies, and that no one should touch them in these areas, G.C. told her mother that "Mo" touched her in the butt. G.C. then told her mother that he placed his hand inside her underwear and rubbed her butt, that this happened in his bedroom, and that it happened all the time. These statements arose spontaneously, in an entirely natural setting. Moreover, when Bucci interviewed G.C. on February 18, six days later, G.C. remained consistent with her depiction of the events. Defendant's complaint that Pauline gave an inconsistent version of G.C.'s comments in her written statement to the police was properly addressed as impeachment at trial. Based on the circumstances, G.C. recounted the incident repeatedly, and to a certain extent, without delay when asked, thus rendering the statements sufficiently reliable to satisfy section 115-10 of the Code.

¶ 45 We next consider the content of G.C.'s statements. Her statements consistently identified defendant as the only person who abused her, and G.C.'s description of the abuse was consistent throughout the interview. Defendant argues that, during the interview at the Child Advocacy

Center, G.C. talked about defendant kissing her. However, these statements did not form the basis of the charged conduct and were properly addressed as impeachment at trial.

¶ 46 Other circumstances support the trial court's ruling. The questions asked of G.C. by her mother and Bucci were not unduly suggestive or coercive. See *People v. C.H.*, 237 Ill. App. 3d 462, 469 (1992). Moreover, based on our review of the DVD, it does not appear that the environment of the interview was unduly coercive. Bucci was the only person in the room with G.C. and she did not ask leading questions.

¶ 47 Defendant argues that a child in kindergarten would not understand such a complicated, sophisticated concept of the word "trust." Defendant asserts that this implies that the child was coached. However, the record indicates that Pauline mentioned an earlier discussion about a newsletter sent home from the school when G.C. started kindergarten which spoke of "Stranger Danger" where new adults would be in the children's lives that they do not know and should not trust. Given her exposure to these discussions, and based on our observation of G.C. on the DVD, she appeared to have understood the meaning of trust when she stated that defendant wanted her to trust him "so he'll do a lot more bad stuff to teach me how, so I can be a bad kid."

¶ 48 Defendant also argues a motive to fabricate based on the notion that Pauline had a financial dispute with Atiya. In this case, there is no evidence that G.C. had any reason, apart from the alleged abuse itself, to be angry with defendant. If it was true that Pauline had a financial dispute with Atiya, there is simply no evidence that G.C. was similarly motivated to lie or that Pauline manipulated G.C. to make false allegations. There is no evidence that Pauline encouraged G.C., either before the interview or before trial, to fabricate allegations of sexual abuse. The DVD does not support defendant's argument that G.C. was led to provide incriminating statements about him. Also, G.C. used language consistent with that of a six-year-

old child, and the record reflects no evidence of a motive to fabricate the allegations. We conclude that the time, content, and circumstances surrounding the hearsay statements provided sufficient safeguards of reliability and hold that the trial court did not abuse its discretion in determining their admissibility for trial.

¶ 49

B. Sufficiency of the Evidence

¶ 50 Defendant next contends that he was not proven guilty beyond a reasonable doubt. A reviewing court will not set aside a conviction on the basis of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is the jury's function to determine the guilt or innocence of defendant. *People v. Eyler*, 133 Ill. 2d 173, 191 (1989). " '[The] relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' *** 'Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.' " (Emphases in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 51 Defendant contends that there was insufficient evidence presented to demonstrate that he touched G.C.'s buttocks for the purpose of sexual gratification or for his own arousal. In order to sustain a charge of aggravated criminal sexual abuse, the State must prove that defendant committed an act of "sexual conduct" against the victim *People v. Burman*, 2013 IL App (2d) 110807, ¶ 35; 720 ILCS 5/12-16(c)(1)(i) (West 2010). Such conduct includes "any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of *** any part of a child under 13 years of age *** for the purpose of sexual gratification or

arousal of the victim or the accused.” *Burman*, 2013 IL App (2d) 110807, ¶ 35; 720 ILCS 5/12-12(e) (West 2010).

¶ 52 The intent to arouse or to satisfy sexual desires may be shown by circumstantial evidence, which the jury may consider in inferring the defendant’s intent from his conduct. *Burman*, 2013 IL App (2d) 110807, ¶ 36 (citing *In re D.H.*, 381 Ill. App. 3d 737, 741 (2008)). The issue of whether an accused intended sexual gratification must be determined on a case-by-case basis, but when the accused is an adult, a fact finder can infer that the accused intended sexual gratification. *D.H.*, 381 Ill. App. 3d at 741. In this case, defendant’s conduct consisted of placing his hand under G.C.’s underwear and rubbing her buttocks. This touching took place in defendant’s bedroom and he was wearing his pajamas at the time.

¶ 53 Defendant relies on *People v. Ostrowski*, 394 Ill. App. 3d 82 (2009), to support his argument. We find his reliance on *Ostrowski* baseless. In *Ostrowski*, the defendant kissed his five-year-old granddaughter on the lips at an outdoor festival, for four to five seconds at a time, while lying on the grass beside her. We found that no rational trier of fact “could conclude that such kisses between a grandfather and granddaughter at a public festival while playing on the ground were given for the purpose of sexual gratification or sexual arousal.” *Id.* at 95. A man kissing his granddaughter in a public park is much different from a non-relative while in his bedroom fondling a child’s buttocks under her clothing. In this case, it is reasonable to infer that the fondling of G.C.’s buttocks under her clothing in the bedroom justified a finding of sexual gratification.

¶ 54 Defendant also questions G.C.’s credibility, focusing on the inconsistencies in her statements. However, it is the jury’s function to weigh the credibility of the witness and to resolve conflicts or inconsistencies in her testimony. *People v. Enis*, 163 Ill. 2d 367, 393 (1994).

A reviewing court will not reweigh the evidence or substitute its judgment on these matters for that of the trier of fact who heard the evidence and had the opportunity to observe the demeanor of the witness unless the evidence is so palpably contrary to the verdict or so unreasonable, improbable, or unsatisfactory as to cause a reasonable doubt of defendant's guilt. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002); *People v. Gill*, 264 Ill. App. 3d 451, 459 (1992). Because it is the function of the trier of fact, and not the court of review, to determine the credibility of the witnesses, where evidence is merely conflicting, the trier of fact's judgment will stand. *People v. Cooper*, 164 Ill. App. 3d 734, 737 (1987). It is for the trier of fact to determine how flaws in parts of the testimony affect the credibility of the testimony as a whole. *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004). In sum, a rational jury could find that the State proved all the elements of the offense of aggravated criminal sexual abuse beyond a reasonable doubt.

¶ 55

C. Nonpattern Jury Instruction

¶ 56 Defendant next argues that the trial court committed reversible error when it allowed the jury to be instructed with a nonpattern jury instruction. Over defendant's objection, the State tendered People's Instruction No. 15A, based on this court's opinion in *People v. Burton*, 399 Ill. App. 3d 809 (2010), which the trial court gave. The court gave the instruction because defendant had argued in his defense that the touching of C.G.'s buttocks was not done for sexual gratification. The instruction read: "A defendant's intent to arouse or gratify himself sexually can be inferred solely from the nature of the act."

¶ 57 A trial court may, in the exercise of its discretion, draft and give nonpattern instructions. *People v. Simms*, 192 Ill. 2d 348, 412 (2000). The decision to instruct a jury using nonpattern instructions is reviewed for an abuse of discretion. *People v. Pollock*, 202 Ill. 2d 189, 211 (2002). Whether a court has abused its discretion will depend on whether the nonpattern

instruction tendered is an accurate, simple, brief, impartial, and nonargumentative statement of the law. Supreme Court Rule 451(a) (eff. July 1, 2006); *Pollock*, 202 Ill. 2d at 211-12. As a general rule, where an appropriate Illinois Pattern Jury Instruction (IPI) exists on a subject upon which the trial court has determined the jury should be instructed, the IPI must be used. *Id.* at 212. Illinois pattern jury instructions were “painstakingly drafted with the use of simple, brief and unslanted language so as to clearly and concisely state the law,” and, for that reason, “the use of additional instructions on a subject already covered by IPI would defeat the goal that all instructions be simple, brief, impartial and free from argument.” *People v. Haywood*, 82 Ill. 2d 540, 545 (1980). Thus, while nonpattern instructions may be given, the instructions, as a whole, must not be misleading or confusing. *People v. Bush*, 157 Ill. 2d 248, 254-55 (1993). Moreover, if conflicting instructions are given, one being a correct statement of law and the other an incorrect statement of law, the error cannot be deemed harmless. *Bush*, 157 Ill. 2d at 254; *People v. Haywood*, 82 Ill. 2d 540, 545 (1980). This is because a jury instructed with contradictory instructions is not given proper guidance and, therefore, cannot perform its constitutional function. *Pollock*, 202 Ill. 2d at 212 (citing *People v. Jenkins*, 69 Ill. 2d 61, 67 (1977)).

¶ 58 We held in *Ostrowski*, 394 Ill. App. 3d at 92, that the “[i]ntent to arouse or satisfy sexual desires may be established by circumstantial evidence, which the trier of fact may consider by inferring defendant’s intent from his conduct.” In *Burton*, we cited similar language but further explained that “[a] defendant’s intent to arouse or gratify himself sexually can be inferred *solely* from the nature of the act.” (Emphasis added.) *Id.* at 813 (citing *People v. Bailey*, 311 Ill. App. 3d 265, 267 (2000)). Defendant asserts that the *Burton* statement regarding the State’s ability to infer sexual gratification *solely* from the nature of the act allowed the State to obtain a conviction

even in the absence of any tangible evidence of defendant's intent; that this statement of law focuses exclusively on the act itself rather than the entirety of the facts in evidence.

¶ 59 In this case, the other instructions tendered to the jury accurately stated the law for the offense of aggravated criminal assault (IPI Criminal No. 2.03 (4th ed. 2000) (explaining the presumption of innocence and burden of proof)); (IPI Criminal No. 3.02 (4th ed. 2000) (defining circumstantial evidence)); (IPI Criminal No.11.65D (4th ed. 2000) (indicating that touching or fondling must be “intentional or knowing” and “for the purpose of sexual gratification or arousal of the victim or the accused”)). We note that the State does not argue to the contrary. Accordingly, it appears that the supplemental instruction was unnecessary and arguably improper.

¶ 60 However, even if the trial court abused its discretion in giving the supplemental instruction, any error would be harmless in light of (1) the consistent testimony that defendant touched the victim inappropriately; (2) the strong inference of sexual gratification based on the nature of the touching and where the offense occurred; and (3) the fact that the instruction did not misstate the law. See *People v. Pomykala*, 203 Ill. 2d 198, 210 (2003) (“An error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed”). Although the instruction could have contained a more complete statement of the law from *Burton*, what was given was brief, simple, impartial, and non-argumentative.

¶ 61 D. IPI Criminal No. 11.66

¶ 62 Section 115-10 provides that, if the trial court admits a hearsay statement pursuant to this exception, the trial court must specifically instruct the jury that:

“[I]t is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, *** the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.” 725 ILCS 5/115-10(c) (West 2010).

IPI Criminal No. 11.66 was designed to implement the above statutory requirement, and the State’s Instruction No. 16, which is based on IPI Criminal No. 11.66, states:

“You have before you evidence that G.C. made statements concerning the offense charged in this case. It is for you to determine whether the statements were made, and, if so, what weight should be given to the statements. In making the determination, you should consider the age and maturity of G.C., the nature of the statements, and the circumstances under which the statements were made.”

¶ 63 Defendant argues that the trial court abused its discretion in giving the State’s instruction because it misstates the law in that the instruction only states the jury is to determine the “weight” to be given the victim’s out-of-court statements but omits that the jury should also determine the “credibility” of the out-of-court statements, as stated in section 110-15 of the Code. Defendant further points out the instruction omits that, in making that determination, the jury should also consider “any other relevant factor,” as stated in section 110-15.

¶ 64 Defendant failed to raise this argument below and claims that the giving of the instruction constituted plain error. Substantial defects in criminal jury instructions may be addressed on appeal where either (a) the evidence is closely balanced, or (b) regardless of the strength of the evidence, where the error was “so serious that the defendant was denied a substantial right, and thus a fair trial.” *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005); see also *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 57.

¶ 65 Defendant concedes that his argument cannot meet the second prong of the rule but asserts that the evidence was closely balanced. We note that *Marcos* considered the victim's hearsay statements "on the prosecution side of the scale" when weighing whether the evidence was closely balanced. *Marcos*, 2013 IL App (1st) 111040, ¶¶ 62-67, 71 (discussing *Sargent*, 239 Ill. 2d at 190). In accordance with *Marcos*, considering the victim made a spontaneous statement to her mother and consistently repeated the allegations to the police and at trial, we find the evidence was not closely balanced.

¶ 66 Even though the State's instruction, which was based on IPI Criminal No. 11.66, omitted the language regarding "credibility" and "any other factor," the omissions can only rise to the level of plain error if they created a real risk that the jurors incorrectly found the defendant guilty because they misunderstood the applicable law. However, as in *Sargent*, 239 Ill. 2d at 191, this risk will be allayed when the jury is given guidance on how to consider the child's out-of-court statements. When we evaluate the effect of a jury instruction error, we consider the jury instructions "as a whole," rather than considering the error "in isolation." *People v. Parker*, 223 Ill. 2d 494, 501 (2006). We will find the instructions sufficient, if as a whole, the series of instructions fully and fairly provided the applicable law. *Id.*

¶ 67 In the present case, as in *Sargent*, in addition to giving IPI Criminal No. 11.66, the court gave IPI Criminal No. 1.02 (4th ed. 2000) to the jury, which instructed them that they are the only judges of the witnesses' credibility. This instruction alleviates defendant's concern regarding the omission of the word "credibility."

¶ 68 Additionally, the omitted language that the jurors were to consider "any other relevant factor" would have no prejudicial effect when the jury was instructed to consider "all the circumstances under which the hearsay statement was made." Thus, we find the instructions,

viewed as a whole, fully, fairly, and completely advised the jurors of the law relevant to this case.

¶ 69 E. Ineffective Assistance of Counsel

¶ 70 Defendant argues that his defense counsel was ineffective for not impeaching the victim's mother, Pauline, at the section 115-10 hearing with the financial motive to lie and that Pauline told the police that the conversation in the bathtub between G.C. and her sister concerned the touching of G.C.'s "pee pee" and not her "butt." Defendant also argues that counsel was ineffective for failing to call Atiya as a favorable witness at trial about the alleged motive.

¶ 71 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. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to establish deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness. To show substantial prejudice, the defendant must demonstrate a reasonable probability that, absent counsel's unprofessional errors, the result of the proceedings would have been different. *Marcos*, 2013 IL App (1st) 111040, ¶ 76 (citing *People v. Henderson*, 2013 IL 114040, ¶ 11).

¶ 72 Decisions concerning which witnesses to call at trial and what evidence to present are for defense counsel to make and, as matters of trial strategy, are generally immune from ineffective assistance of counsel claims. *People v. Deloney*, 341 Ill. App. 3d 621, 634 (2003). Counsel's representation is not rendered incompetent even where a mistake in trial strategy or in judgment is made by counsel. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). "In fact, counsel's strategic choices are virtually unchallengeable." *Palmer*, 162 Ill. 2d at 476. "The only exception to this

rule is where counsel's chosen trial strategy is so unsound that counsel fails to conduct any meaningful adversarial testing." *Deloney*, 341 Ill. App. 3d at 634.

¶ 73 At the section 115-10 hearing, defense counsel did attempt, without much success, to introduce evidence regarding Pauline's financial motive to lie. Counsel may have decided it was best to prove up the financial motive through another parent, as opposed to defendant's wife, who would be seen as a much more biased witness. In fact, counsel did call another parent, Minaglia, at trial and questioned her about Pauline's complaints regarding Atiya's vacation time. Regardless, such decisions fall squarely within the realm of trial strategy. Counsel also questioned Pauline at trial about her statement to the police that the conversation in the bathtub between G.C. and her sister concerned the touching of G.C.'s "pee pee" and not her "butt." This was a matter for the jury to weigh.

¶ 74 Moreover, because the evidence was not closely balanced, even if counsel had been ineffective for not further exploring Pauline's financial motive to lie or calling Atiya as a favorable witness, the outcome of the trial would not have been different. Thus, defendant cannot establish the required prejudice to sustain his ineffective assistance of counsel claim. See *Marcos*, 2013 IL App (1st) 111040, ¶ 77 (failure to establish either prong of *Strickland* test will doom an ineffectiveness claim); see generally *People v. White*, 2011 IL 109689, ¶ 133 (holding that prejudice prong for ineffective assistance of counsel is similar to closely balanced evidence prong of plain error review).

¶ 75

III. CONCLUSION

¶ 76 For the preceding reasons, we affirm the judgment of the circuit court of McHenry County.

¶ 77 Affirmed.