SECOND DIVISION
June 23, 2015

No. 1-13-1638

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 274
	)	
HECTOR CASTELAN,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's convictions of predatory criminal sexual assault of a child and aggravated criminal sexual abuse are affirmed where defendant forfeited his claim that the State failed to give timely notice of its intent to elicit trial testimony of other uncharged sex crimes, and where defendant acquiesced in the admission of the testimony as a defense strategy in attempting to show the charges were fabricated.

¶ 2 Following a jury trial, defendant Hector Castelan was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. He was sentenced to consecutive terms of 30 years on the predatory criminal sexual assault

counts and 7 years on the aggravated criminal sexual abuse count, for a total of 67 years in prison. On appeal, defendant argues that the trial court erred in allowing the State to elicit trial testimony of defendant's alleged prior sexual abuse of the victim in Utah. He argues that the State failed to give prior notice of that testimony as required by section 115-7.3(d) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3(d) (West 2012)) and, in fact, asserted before trial that it would not introduce that other-crimes evidence. Defendant also requests that his mittimus be corrected to reflect nine additional days of presentence credit. We affirm defendant's convictions and order correction of the mittimus.

¶ 3 In 2007, defendant met and married Claudia Bernal, the mother of three young girls, in Salt Lake City, Utah. In January 2009, Claudia's oldest daughter, S.B., then eight years old, complained that defendant, her stepfather, had sexually abused her. The Utah police investigated S.B.'s allegation, but decided not to file charges against defendant. In June 2009, the family moved to Chicago.

¶ 4 On November 30, 2009, S.B., then nine years old, complained to her mother that defendant had sexually abused her again. Another of Claudia's daughters, A.L., then six years old, also complained that defendant had sexually abused her. Defendant was arrested and charged in two separate indictments with sex offenses committed against S.B. and A.L. According to the indictment, defendant allegedly committed the offenses in Chicago on various dates between June 15 and November 29, 2009. The State elected to proceed on the indictment naming S.B. as the victim and charging defendant with numerous counts of predatory criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse,

and sexual relations within families. Some of the indictment counts gave notice that the State would seek an extended-term sentence.

¶ 5 Prior to trial, defendant filed written motions to quash arrest and to suppress statements. At a hearing on the motion to quash arrest, defendant called Chicago police detective Emily Bellomy[1] as a witness. Bellomy had been assigned to investigate the sexual assault charges of S.B. and A.L. Defense counsel questioned Bellomy at length about S.B.'s allegations of sexual abuse by defendant in Utah. Bellomy testified that she had received reports from Utah authorities. The reports summarized the allegations S.B. made against defendant and indicated that defendant had been interviewed about the charge. The trial court sustained the State's objections to defense counsel's questions concerning why charges had not been brought against defendant in Utah. Bellomy was permitted to testify that she spoke with Claudia Bernal, the children's mother. Claudia told her that defendant had never been charged with a crime in Utah; that defendant had told her that he had taken a polygraph test and passed; and that the reason the Utah allegations may not have gone anywhere was because of Claudia's failure to believe her own children. Bellomy was present for interviews conducted with S.B. and A.L. in December 2009 regarding the girls' complaints of sexual abuse by defendant in Chicago, which S.B. stated had started in June 2009.

¶ 6 At the close of the hearing, defense counsel argued that S.B's more recent allegations did not provide probable cause for defendant's arrest. He pointed out that S.B. had previously made an allegation of sexual abuse against defendant in Utah that was either unfounded or uncharged,

[1] At the subsequent trial, Detective Bellomy used her married name, Rodriguez. To avoid confusion, we refer to her as Bellomy.

and that even S.B.'s mother had thought at that time the children were lying. The trial court denied the motion to quash arrest and, after a separate hearing, denied defendant's motion to suppress statements as well.

¶ 7 On April 27, 2012, the State filed a motion pursuant to section 115-10 of the Code (725 ILCS 5/115-10 (West 2012)), asking the trial court to admit into evidence the statements S.B. gave to (1) her mother, Claudia, on November 30, 2009; (2) Cinthia Molina on November 30; and (3) Maria Ramirez, a forensic child interviewer at the Children's Advocacy Center (CAC) on December 1. At the hearing on the motion, defense counsel elicited from Claudia that S.B. had made allegations of sexual abuse against defendant in Utah, but that defendant was never arrested or charged with a crime in Utah. The court granted the State's section 115-10 motion.

¶ 8 Subsequently, the State moved *in limine* to admit evidence of other crimes pursuant to section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2012)). The State sought to introduce evidence that defendant committed sexual offenses against A.L. in Chicago during the period from October 1 to November 30, 2009, as well as in Utah in early 2009. The motion did not seek to admit evidence of abuse to S.B. in Utah. During the presentation of the parties' arguments on the motion, defense counsel argued that the prejudicial effect of allowing proof of other crimes as to A.L. would greatly outweigh the probative value. The court allowed the State's motion as to other crimes involving A.L., ruling that the evidence could be offered to show intent, motive, and propensity to commit sex offenses.

¶ 9 On March 6, 2013, the date when defendant's jury trial was scheduled to begin, the State filed a motion *in limine* which sought, *inter alia*, to limit defense counsel's cross-examination. The motion sought to bar defense counsel from asking any questions of witnesses as to the

reasons defendant was not formally charged with an offense after the investigation by Utah police. Defense counsel objected, arguing that he should be allowed to elicit facts as to why no charges were filed in Utah given that Claudia had made a statement that Utah authorities told her S.B and A.L. were fabricating the allegations. The State responded that such impeachment could not be perfected without making the Utah authorities available at defendant's trial. The following exchange occurred:

> "THE COURT: [S.B.] made the allegation out in Utah?
>
> MR. WEISS [defendant's attorney]: Yes. *** [S.B.] made the allegation. She's going to testify that she was touched in Utah, Judge.
>
> MS. SPIZZIRRI [Assistant State's Attorney]: The State did not seek to admit proof of other crimes evidence in Utah with respect to [S.B.]. I only ask that it be considered with respect to [A.L.]. So, we can be clear about that. [S.B.] shouldn't even be asked about with respect to anything that occurred in Utah. I didn't ask for those acts to be admitted.
>
> MR. WEISS: If she goes on the stand, you're not going to ask her about anything in Utah?
>
> MS. SPIZZIRRI: No, I was not going to. It's not relevant to the charges here. I did not file a proof of other crimes as to those events with my victim at bar."

The court ultimately ruled that defense counsel could not elicit testimony regarding the Utah detective's statement that there were credibility issues. However, the court also ruled: "If you want to ask the mother whether or not charges were filed and whether or not she had doubts, if

she believes them or she didn't believe them, *** I'll allow that. I'm going to allow the defendant to present a defense. But, you can't go into this other double hearsay statement from *** other witnesses who commented on the credibility of these young girls."

¶ 10 The case proceeded to a jury trial, and the State advised the court that it was proceeding on three counts charging predatory criminal sexual assault and one count charging aggravated criminal sexual abuse. In opening statements, the State made no reference to Utah. Defense counsel, on the other hand, said the following:

> "You will also hear that these two children also made the same allegations a year ago in Utah and that [S.B.] and [A.L.] had a chance to talk with detectives in Utah and were also brought both to a Victim Sensitive Interview just like they were in this case, and after the Victim Sensitive Interview and after talking to detectives no charges were filed in that case.
>
> Further you will hear from the mother that the reason – you will hear from the mother that she thought the children were fabricating when they brought up the incident in Utah, and now they bring it up again with no surrounding circumstances and all of a sudden she believes them. What changed?"

¶ 11 The State first called S.B., who was 12 years old at the time of trial. S.B. testified that in 2009, she lived with her mother, her younger sisters, and defendant in Chicago, and before that, she and her family lived in Utah. When she was in second grade in Utah, defendant came to live with them and married her mom. S.B. testified that defendant touched her in an inappropriate way. S.B. was asked when that started happening, and she responded that it started in Utah. Defendant would put his penis or his fingers in her vagina, and S.B. told her mother. Defendant

had to leave the house for a while, but he later came back. In 2009, the family moved to Chicago. The defense raised no objection to S.B.'s testimony about what happened in Utah.

¶ 12 S.B. testified that after they moved to Chicago, defendant "sexually abused us" and "touched us in an inappropriate way." S.B.'s mother worked at Wendy's, and when she was at work, defendant would watch S.B. and her sisters. Defendant would bring S.B. into her mother's room and touch her inappropriately. She would lie on the bed on her back, and she or defendant would pull down her pants. Defendant would pull down his pants, take out his penis, and place it in her vagina. This occurred both when they lived on Morgan Street when they first moved to Chicago and later on Aberdeen Street. It happened so many times that S.B. did not remember how often it had occurred. S.B. had a PSP (Play Station Portable) hand-held game that defendant had given to her. Defendant would use it to get her to come into her mother's room. S.B. decided to tell her mother in November 2009, the weekend after Thanksgiving. She and her sisters were talking about whether they should tell their mom, and they did right after she came back from work. S.B. told her mother, "Mom, he's doing it again." Her mother got very angry at defendant, grabbed the PSP, and threw it down; it broke. She told defendant to get out of the house and called the police. Cinthia Molina, one of mom's friends, came to their home, and S.B. spoke with her. S.B. was taken to the hospital to get an examination, and she told the doctor what was going on. They then went to the CAC, and S.B. told the interviewer what was going on. S.B. explained that it took her so long to tell her mother what was happening because she was afraid of defendant.

¶ 13 On cross-examination, defense counsel immediately questioned S.B. about the events in Utah. S.B. did not remember talking with police officers in Utah. She remembered going to a

CAC in Utah for a victim sensitive interview (VSI). She told them what happened to her; she said defendant had put his penis in her vagina. After that, defendant was never charged with a crime in Utah. Defendant left the house, but was subsequently allowed to come back and live with them. He was even allowed to be alone with S.B. Her mom did not tell S.B. that she did not believe what S.B. alleged in Utah.

¶ 14 S.B. testified that she remembered undergoing a VSI in Illinois on December 1, 2009. S.B. told the interviewer that the sexual abuse had happened a year earlier in Utah, and that defendant had started touching her again on the previous Sunday, November 29. Defendant had also touched her when they lived at his cousin's house on Morgan Street; that occurred sometime before Halloween. S.B. told the interviewer that defendant put his finger in her vagina or "pee-pee." When S.B. told her mother that it happened again, her sister [A.L.] told their mother about the PSP and "mom threw it on the ground." S.B. never told her teachers in Illinois that she was being inappropriately touched. She told Cinthia Molina on November 30, the night when the police came.

¶ 15 The next State witness to testify was A.L. Prior to A.L.'s testimony, the trial court instructed the jury that A.L. would testify that defendant had been involved in offenses other than those charged in the indictment. The court instructed the jurors that it was for them to determine whether defendant was involved in those offenses and that they could consider the evidence only on the issues of defendant's intent, motive, and propensity.

¶ 16 A.L. was nine years old at the time of trial and six years old on Thanksgiving 2009. Defendant "was our dad" and lived with them on Aberdeen Street in Chicago at that time. After their mother came home from work one day on Thanksgiving weekend, A.L. told her mother that

defendant had touched her butt and her vagina with his hands and his penis. A.L. testified that defendant always did it in her mom's room when her mom was at work. Defendant got A.L. to come into the room by letting her use his phone or giving her a dollar. He would tell her not to tell her mom, and he would pull down her clothes and put his penis in her butt. A.L. testified that defendant did that "a lot" and that it "felt bad." He touched her like that when they lived on Aberdeen and before that, when they lived on Morgan. When A.L. told her mother that Thanksgiving weekend, her mother called the police, and defendant left and never came back. The police came to the house that night, and A.L. went to the hospital and had her butt and vagina checked. She did not tell the doctor what had happened because she was embarrassed. She then went to the CAC and told people there what was happening. A.L. had an electronic game at home, a PSP that defendant gave to her and her sisters. Her mother broke the PSP when A.L. told her what was going on in the house. A.L. testified that defendant also abused her when they were living in Utah; specifically, she testified that he put his penis in her butt. At that time, she told her mother and her sisters what he had done. Defendant had to leave the house in Utah for a while, but he later came back.

¶ 17 On cross-examination, A.L. testified that she was taken to the hospital in Chicago for a medical exam. Dr. Kim asked her if defendant had touched her, and she told him no. The doctor then asked her if she knew why she was there, and she told him that she did not. At the CAC, she did not tell the interview lady that her mom broke the PSP on the floor. It was in Utah that defendant abused her most of the time, and she told her mother about it while they were there. She told her sisters in Chicago before Thanksgiving, but she did not tell her mother in Chicago until the Thanksgiving weekend.

¶ 18 After A.L. testified, the trial court again gave the jurors a limiting instruction about A.L.'s testimony concerning offenses not charged in the indictment.

¶ 19 The next State witness, Claudia Bernal, testified that she was 34 years old and had five children: S.B., 12 years old at the time of trial; M., 11; A.L., 9; V.S., 4; and R., 2. Claudia met defendant in Salt Lake City in 2007. He was the father of her youngest two children. The couple divorced in 2011. They lived in Utah until the summer of 2009 when they moved to Chicago. Initially, they lived with defendant's cousin. However, in the fall of 2009, they moved to Aberdeen Street. Claudia worked as a restaurant manager 10 hours a day.

¶ 20 On November 30, 2009, Claudia came home late. After dinner, the girls were whispering among themselves, and one of the girls said, "You have to tell mom." Claudia asked them what happened, and S.B., who was crying, told her, "Mom, this is happening again." It came to Claudia's mind that defendant was doing something to the girls because both S.B. and A.L. had told her before—at the beginning of the year in Utah—that defendant was touching their "parts." On the previous occasion, Claudia called the Utah police and took the girls to a hospital. An investigation commenced, but defendant was never charged. For a period of time defendant had to leave her home. Claudia testified that he came back again to their Utah home "[b]ecause there was no case" and defendant was not charged. When Claudia learned in Chicago that it was happening again, she became very angry. The girls told her defendant was using a PSP game in exchange for what they were letting him do. She told the girls to lock themselves in their room, confronted defendant, and threw the game on the floor, breaking it. Defendant left the home, and Claudia phoned the police and a friend, Cinthia Molina. Molina came to the home and spoke

with S.B. alone. After the police arrived, Claudia went to the hospital with the girls. The next day, they went to the CAC where her daughters were interviewed.

¶ 21 On cross-examination, Claudia testified that she believed what the girls told her in Utah was true. She did not remember telling the detectives in the Chicago case that she had not believed the allegations made in Utah. After the detectives in Utah told her there was no case, she let defendant move back in. Defense counsel asked Claudia, "Who decided not to file charges in Utah?" The trial court sustained the State's objection to the question.

¶ 22 Cinthia Molina testified that she knew Claudia Bernal for four or five years and knew Claudia's children. On the evening of November 30, she received a phone call from Claudia, who was crying. She went to Claudia's house and spoke with S.B., who was also crying. S.B. told her, "My dad was touching me. *** My dad put his pee-pee in my pee-pee."

¶ 23 Ronald Kim, M.D., testified that on December 1, 2009, he was working at the University of Chicago Children's Emergency Room. He did a head-to-toe examination of S.B. who was then nine years old. He observed redness in a very small area in the genital area near her vagina and also noticed a thin discharge. He diagnosed vulvovaginitis, an inflammation of the skin of the vulva, the entrance to the vagina. The condition can be caused by poor hygiene, irritating lotions or soaps, or irritation of the skin. However, it also can be caused by sexual abuse or sexual assault. S.B. told Kim that her father had touched her inappropriately. Her exact words, which he documented, were: "Touched me in my pee-pee and butt with his finger and penis." It is possible to be abused and not have any injury to the vagina.

¶ 24 On cross-examination, Kim stated that vaginitis was common in children from normal activity. S.B. told Kim that she was not sure defendant had inserted his penis inside of her. She

had no redness or trauma in her anal area. Kim also did not observe lacerations, cuts or abrasions, or bruising in S.B.'s vagina. The redness in the vulva was an abnormality but was not necessarily a sign of sexual assault. S.B. did not tell Kim the defendant had penetrated her anus with his penis.

¶ 25 The State next called Scott Rochowicz, a forensic scientist for the Illinois State Police. Rochowicz tested the victim's clothing, a sexual assault kit, and a pair of underwear "recovered from the scene" atop "a chest of dresser drawers." He removed hairs and fibers. Also, he received standards from defendant and tested the criminal sexual assault kit. The hairs he found from the victim's clothing and sexual assault kit were dissimilar to those of defendant and may not have originated from defendant. The absence of defendant's hair would not affect a determination of whether or not abuse occurred.

¶ 26 The parties stipulated that if Tara Alexander were called as a witness, she would testify that in 2010 she was a forensic scientist in the Forensic Biology DNA section at the Illinois State Police Forensic Sciences Command. Alexander would testify that she received a criminal sexual assault evidence collection kit that contained, *inter alia*, vaginal and oral swabs collected from S.B.'s body, along with a pair of underwear, a bra, pants, and a shirt. She examined these for semen; no semen was found.

¶ 27 Detective Bellomy testified that on December 1, 2009, she was assigned to investigate the abuse of S.B. Bellomy viewed a VSI of S.B. conducted by forensic interviewer Maria Ramirez at the CAC. S.B. started talking about her father touching her. She stated that he had used his hand and his penis to touch her butt and her pee-pee. S.B. said it started in Utah, then stopped, and started again. S.B. said that, the previous Sunday, she had been cleaning dishes

when defendant came up and started rubbing her buttocks over her clothes. He asked her to come to the room he shared with her mom, then once in the room, defendant offered to get her a PSP if he let her touch him. S.B. described him stroking his penis, and she demonstrated an up-and-down motion with her hand. She said he got on the bed and got her on the bed too. She did not like it, but again, he said he would get her a PSP. He pulled her pants down and then pulled her panties down to her thighs. She said that he put his penis in her pee-pee. She did not like it and it hurt. When he was on top of her she was trying to push him off, but he was too heavy. At some point her sisters A.L. and M. were coming out of the bathroom and that's why S.B. thought defendant stopped. She got up, and he said, "Here is your PSP. Now go." She then pulled up her pants and walked out of the room. Her sisters were outside and asked her what she was doing in daddy's room; she said, "Nothing." She believed that they knew what was going on because of what had happened in Utah.

¶ 28 Defendant was taken into custody on December 3, 2009. Bellomy went to the police station and spoke with him in an interview room. Defendant told Bellomy he could speak only Spanish. Bellomy, fluent in Spanish, spoke with defendant in Spanish. She read the *Miranda* warnings to him in Spanish and then spoke to him about the allegations his stepdaughters had made.

¶ 29 Bellomy phoned for an assistant State's Attorney (ASA) and a short time later ASA Matthew Medina arrived. He introduced himself to defendant and gave him his *Miranda* rights in English; Bellomy translated into Spanish. Defendant began telling Medina what had happened with him and S.B., and he agreed to put what he had said in writing. The ASA typed the

statement, Bellomy translated it, and they went through it line by line. Some corrections were made, some typos were fixed; each change was initialed.

¶ 30 On cross-examination, Bellomy testified that she had spoken to Claudia Bernal briefly "about Utah." Claudia told Bellomy that she did not believe the allegations in Utah. She also told Bellomy that the detectives in Utah left to her the decision whether to prosecute. Claudia did not tell Bellomy that the Utah detectives told her there was no case. Bellomy also witnessed A.L.'s interview at CAC. A.L. did not say that she told her sisters what was going on in Chicago before November 2009. On redirect, Bellomy testified that the report from the Salt Lake City Police Department indicated that the case was declined for prosecution due to evidentiary problems. Nothing in the Salt Lake City reports indicated that the girls were not believed. On re-cross, Bellomy testified that she had written down what Claudia told her: specifically, "that Utah police had told her or Utah detectives had told her that it was her decision [whether to prosecute], and that they [the girls] could be making it up." Bellomy testified that "those were Claudia's words. Those were not in any – I don't remember seeing any of that in a Utah police report."

¶ 31 The State's final witness was former ASA Matthew Medina. On December 3, 2009, he had a conversation with defendant at a police station. Medina spoke in English; Detective Bellomy translated into Spanish. Medina gave defendant his *Miranda* rights and conversed with defendant for about 30 or 40 minutes about S.B. and A.L. Defendant opted to have his statement written down. Medina actually prepared two separate written statements, one regarding S.B., the other regarding A.L. Medina typed the statements on a computer as Bellomy translated.

¶ 32 The S.B. statement was 15 pages long, including exhibits. Defendant, Medina and Bellomy signed the bottom of each page. Defendant was allowed to and did make substantive

changes to the statement. At trial, Medina read defendant's written statement concerning the predatory criminal sexual assault of S.B. between July 1, 2009 and November 29, 2009, at 3237 South Aberdeen and 3443 South Morgan, Chicago.

¶ 33 Defendant stated he was 24 years old, was born in Hidalgo, Mexico, and graduated from high school in Mexico. He had been in the United States seven years. He met his wife, Claudia Bernal, in Utah. She had 3 children – S.B., M.L., and A.L. They lived in Utah three years and moved to Chicago in June or July 2009. Defendant began to touch S.B. when they were living in Utah, when S.B. was eight years old. He touched S.B.'s naked vagina with his hand, about two or three different times. There was an investigation by the police in Utah. After that, he got together with his wife and children again and told them that he was going to change, that things were going to be different, and that they were going to move forward. He said this sometime around March of 2009. He touched S.B. one more time in Utah; on that occasion, he touched her vagina with his fingers.

¶ 34 Defendant moved to Chicago with his wife and children in June or July of 2009. He began to touch S.B. again sometime in late July or a little after July 2009. The first time was at his cousin's house on South Morgan Street. He was in the bedroom with S.B. and the other children. Claudia was working, and he and S.B. were the only ones awake. He placed his hand inside S.B.'s pajamas, touched her vagina, and stuck his finger a little bit inside of her but not all the way inside of her. He asked himself, "Why am I doing this again?" and stopped. The second time he touched S.B. was about one month later. It was in the evening, when Claudia was at work and M.L. and A.L. were sleeping in the same room. S.B. was awake, and he became

aroused and touched S.B.'s breasts and vagina over pajamas. He then stuck his right hand down her pajamas under her panties, and inserted his finger inside her vagina but not all the way.

¶ 35 During the past weekend, Saturday or Sunday, November 28 or 29, he was with the children. A.L., M.L. and V. were taking a bath. S.B. was alone in her bedroom and Claudia was at work. He called S.B. into his room to get something for him out of the dresser. He and S.B. lay on the bed, and he started touching her over her clothes. He inserted his erect penis inside her vagina for about two or three minutes. He did not ejaculate. He felt bad and stopped. He was scared, so he told S.B. not to tell her mother.

¶ 36 Attached to the statement were two color photographs of defendant and Detective Bellomy, as well as color photos of each of the three girls (S.B., A.L., and M.L.)

¶ 37 Before defendant's written statement regarding A.L. was read into the record, the court gave the jury a limiting instruction about offenses other than those charged in the indictment.

¶ 38 The second written statement, the A.L. statement, was eight pages long including a photograph of each of the three girls that had been taken at CAC on December 1, 2009. The statement was identical to the one S.B. gave as far as general information, but also stated the following. Sometime between November 1 and November 25, 2009, defendant touched A.L. He was lying down in his bedroom when V. and A.L. entered and lay down next to him. A.L. was next to him on his left side. He started touching her butt, at first over her clothing. She pulled her pants and panties down to her thighs, at which time he was aroused and erect. He rubbed A.L.'s bare anus with the middle finger of his right hand and inserted only the front pad of his finger into her anus.

¶ 39 The State rested, and the defense presented no testimony. During closing arguments, the State referenced A.L.'s statement but not S.B.'s statement about what occurred in Utah. In response, defense counsel argued:

> "Let's talk about the allegations, same allegations were made in Utah *** Well, they did a VSI in Utah and no charges were filed. He didn't have to go to trial because they never even filed any charges. And why were there no charges filed in Utah? Mother wants to tell you she believed everything and she can't believe they didn't charge him, though deep in her heart she knew it happened in Utah. Really? Really? So then you let the guy move back into your house and when you move to Chicago, I'm gonna let him baby-sit my kids. Deep down in my heart I think he molested him [*sic*], but I'm just going to let him be the baby-sitter. Give me a break.
>
> We know she is lying because you heard the detective say she told you that she thought the kids were fabricating. You also heard the [Utah] detectives left the decision up to her and no charges were filed."

¶ 40 The court read the jury a limiting instruction (Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000)) as to evidence received that defendant was involved in offenses other than those charged in the indictment. The court instructed the jury that "[i]t is for you to determine whether the defendant was involved in those offenses and, if so, what weight should be given to this evidence on the issues of intent, motive, knowledge and propensity."

¶ 41 The jury returned verdicts of guilty on two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. The jury found defendant not guilty of one count of predatory criminal sexual assault of a child.

¶ 42 Defendant's written post-trial "Motion for a New Trial" included the following assertion: "The Court erred in allowing proof of other crimes evidence into the trial even though such evidence was not reliable."

¶ 43 On April 22, 2013, the court sentenced defendant to 30 years on each of the predatory criminal sexual assault counts and 7 years on the aggravated criminal sexual abuse count, all sentences to run consecutively for a total of 67 years in prison. The mittimus awarded defendant 1,227 days of credit.

¶ 44 On appeal, defendant contends that his due process right to a fair trial was impaired when the State failed to provide notice prior to trial of its intent to present other-crimes evidence of sexual abuse of S.B. in Utah, in violation of section 115-7.3 of the Code. Defendant asserts that the State "promised" immediately before trial that it would not present evidence of the molestation of S.B. in Utah. However, it then presented that very evidence through the testimony of its first witness, S.B., and other State witnesses. Defendant argues that the State's duplicity denied the trial court an opportunity to weigh the probative value of the Utah testimony against undue prejudice to him and that the resulting prejudice was never tempered by a limiting jury instruction that such evidence of other crimes should be considered only for specific limited purposes. Defendant contends that if he should be found to have forfeited this issue, this court should review his claim under the plain-error doctrine. The State responds that defendant has forfeited this assignment of error, and, further, that the error was invited and thus not subject to plain error review.

¶ 45 Other-crimes evidence generally is not admissible to show a defendant's propensity to commit a charged offense. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). However, evidence of

other offenses to demonstrate propensity may be admissible under section 115-7.3 of the Code when the defendant is charged with one of the enumerated sex offenses. 725 ILCS 5/115-7.3(a) (West 2012); *Donoho*, 204 Ill. 2d at 176. In the instant case, the State prosecuted defendant at trial on counts charging him with predatory criminal sexual assault of a child and aggravated criminal sexual abuse; both offenses are among the sex crimes specified in section 115-7.3(a).

¶ 46 The admission of other-crimes evidence is reviewed under an abuse of discretion standard and will not be reversed unless the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Donoho*, 204 Ill. 2d at 182. Defendant claims, however, that the appropriate standard of review is *de novo* because the issue here concerns the proper construction of the notice provision in section 115-7.3(d) of the Code. Section 115-7.3(d) states:

> "(d) In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause showing." 725 ILCS 5/115-7.3(d) (West 2012)

¶ 47 Defendant has not raised any issue of statutory construction or challenged any interpretation of the section 115-7.3(d) notice provision that is relevant to this case. Consequently, the discretionary standard of review is applicable here.

¶ 48 Defendant correctly asserts that the State failed to give timely pretrial notice that it would elicit testimony about defendant's abuse of S.B. in Utah. In fact, immediately before the jury was selected, the State represented that it would *not* present such evidence. Despite that

representation, however, the State elicited such testimony from its first witness, S.B., and from later witnesses. We need not decide whether admitting the evidence of defendant's sexual abuse of S.B. in Utah without timely notice denied him a fair trial, as defendant has forfeited the issue for review. His trial counsel knowingly acquiesced in the admission of the evidence complained of and utilized that evidence as a matter of sound trial strategy.

¶ 49 To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). Here, defendant did not object when the State's first witness, S.B., or any subsequent State witness testified about the abuse to which S.B. was subjected in Utah. Defendant's written post-trial motion did allege that the trial court "erred in allowing proof of other crimes evidence into the trial" but only on the basis that "such evidence was not reliable." His failure to object at trial and to raise the error with specificity in his posttrial motion resulted in his forfeiture of the issue on appeal. *People v. Woods*, 214 Ill. 2d 455, 470 (2005).

¶ 50 Defendant complains that the State's failure to give notice denied him "any limiting instructions as to the proper purposes for which the jury could consider the Utah evidence regarding S.B." However, when S.B. and other witnesses testified about defendant's abuse of S.B. in Utah, defendant never requested that their testimony be followed by a limiting instruction and never objected to the lack of such an instruction, either following the testimony of each witness or in his written posttrial motion. A defendant's failure to tender a jury instruction on limited use of other-crimes evidence forfeits any future objection to the absence of such an instruction. *People v. Fontana*, 251 Ill. App. 3d 694, 701 (1993). While the court did give a limiting instruction both before and after A.L.'s testimony concerning the other-crimes evidence

relating to A.L., the court had no obligation to give the jury a *sua sponte* limiting instruction following S.B.'s testimony or any other testimony about S.B.'s complaint of sexual abuse in Utah, given the lack of an objection by the defense. See *People v. Peoples*, 377 Ill. App. 3d 978, 987 (2007). Moreover, at the end of the trial the court did give an other-crimes limiting instruction (IPI Criminal 4th No. 3.14) with the other jury instructions.

¶ 51 Defendant also asserts that where the State interjected testimony about the abuse of S.B. in Utah without prior notice, the trial court was deprived of an opportunity to balance the probative value of that evidence against undue prejudice to defendant. The admission of propensity evidence is limited in section 115-7.3(b) (725 ILCS 5/115-7.3(b) (West 2012)) by the incorporation of the rules of evidence and application of the Rule 403 balancing test.[2] In conducting the balancing test, section 115-7.3 suggests that a court consider: "(1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; or (3) other relevant facts and circumstances." 725 ILCS 5/115-7.3(c) (1)-(3) (West 2012).

¶ 52 Defendant does not argue on appeal that the evidence of S.B.'s abuse in Utah failed to satisfy the requirements of section 115-7.3 regarding relevance and probative value. In the trial court, when the State filed its pretrial section 115-7.3 motion concerning evidence of other crimes in Chicago and Utah as to A.L., defendant objected on the basis that "the prejudicial effect greatly outweighs the probative value." He made no such objection about the abuse of S.B.

[2] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Evid. Rule 403.

in Utah, even after the State introduced testimony about that abuse through several witnesses. In fact, defendant acquiesced in its admission because, as a matter of trial strategy, he sought to convince the jury that, because S.B.'s complaint of abuse in Utah did not result in criminal charges, her complaint of abuse in Chicago was suspect.

¶ 53 Defendant concedes his trial counsel failed to object to the admission of other-crimes evidence in Utah as to S.B., but he asserts that this court should consider the alleged error under the second prong of the plain-error rule. Plain-error analysis applies only to procedural default, however, not affirmative acquiescence. *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011). "When a party procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, the party cannot contest the admission on appeal." *People v. Caffey*, 205 Ill. 2d 52, 114 (2001). Invited errors are not subject to plain error review. *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 20.

¶ 54 We agree with the State that defendant invited evidence of S.B.'s accusations in Utah in order to use to his advantage the fact that no charges were brought against him in Utah because S.B was not believed by Utah authorities or by their own mother. In fact, during argument on the State's pretrial motion *in limine* to bar defense counsel from examining witnesses about the reasons for defendant not being charged in Utah, defense counsel argued that he should be permitted to explore whether or not S.B. was molested in Utah. In response, the court ruled that the defense could ask S.B.'s mother whether or not charges were filed in Utah and also whether she believed her daughters' complaints of abuse in Utah. Defendant contends that in ruling on the motion *in limine*, the court also restricted the State from asking S.B. about the Utah claims. We find no such restriction in the court's ruling.

¶ 55 Defendant denies the State's argument that the defense invited the error of questioning S.B. about being abused in Utah. He contends: "It was only after the State's *volte face*" with its first witness, S.B., that defense counsel "was forced to control the damage and suggest that both A.L. and S.B. were fabricating all of the allegations they made against [defendant]." The record belies defendant's contention.

¶ 56 The fact that S.B.'s allegation of sexual abuse by defendant to police in Utah[3] was not prosecuted in that state was an obvious weakness in the State's prosecution of the instant charges. In presenting argument relative to the State's section 115-10 motion, defense counsel complained to the court that S.B.'s complaint in Utah was a problem for the defense. In ruling on the State's motion, the court responded: "Contrary to defense counsel's argument with regard to the prior allegation that everybody assumes that because it was made before, it must be true now, to the contrary, that's a weakness of the State's case in this case." As early as the hearing on defendant's motion to quash arrest, 28 months before trial, defense counsel had adopted the reasonable strategy of introducing testimony at every opportunity about the uncharged allegations of sex crimes that S.B. previously had brought to the attention of the police in Utah. At that hearing, defense counsel specifically argued that, just as the Utah allegations may not have been prosecuted because they were fabricated, the allegations in the instant case likewise were fabricated. To that end, defense counsel utilized every opportunity both prior to and during defendant's trial to elicit testimony about S.B.'s complaint to police in Utah. This resulted in dueling strategies, as the State strove to keep out of the evidence at trial the fact of S.B.'s

[3] While the trial testimony indicated that both S.B. and A.L. complained to their mother in Utah of being sexually abused, only S.B.'s allegations were brought to the attention of the authorities.

unsuccessful complaint to Utah police while at the same time introducing A.L.'s testimony that defendant had sexually abused her in Utah.

¶ 57 After defense counsel had elicited testimony about the lack of criminal charges in Utah at the hearings on both the motion to quash arrest and the State's section 115-10 motion, the State filed its section 115-7.3 motion to allow testimony about defendant's sexual abuse of A.L. both in Chicago and in Utah. The State did not move to allow evidence about the abuse of S.B. in Utah. The State's section 115-7.3 motion as to A.L. was allowed. To counter attempts by the defense to elicit trial testimony about the fact no charges were filed in Utah on S.B.'s allegations, immediately before trial began the State filed its motion *in limine* to bar defendant "from asking any questions of the witnesses as to what the reasons were for defendant not being charged after an investigation" in Utah and to bar testimony that the victims were not believed or were fabricating the allegations. During argument on the motion, the State reminded the court that it had not asked in its section 115-10 motion to admit proof of other crimes evidence in Utah with respect to S.B. The State contended that S.B. should not be asked about anything that occurred in Utah and represented that it would not question S.B. at trial about abuse in Utah. The State's motion was unsuccessful because the court ruled that Claudia, S.B.'s mother, could be questioned as to whether charges were filed in Utah and whether she believed the complaints by S.B. and A.L. of abuse in Utah.

¶ 58 Defendant countered the State's strategy by informing the jurors in his opening statement that they *would* hear testimony that S.B. complained to police in Utah that defendant had sexually abused her there, but that no criminal charges had resulted. With defendant's written inculpatory statement referencing his abuse of S.B. in Utah, it was inevitable that the lack of

criminal charges against defendant in Utah would be revealed. The State elicited those facts from S.B. in its case in chief, despite its earlier representation it would not do so. At no time during trial did defense counsel object as the testimony was elicited, nor did he request any limiting instruction on such testimony, nor did he include a specific objection in defendant's written posttrial motion.

¶ 59 Defendant made no objection during direct examination of S.B. when the State elicited her testimony that defendant sexually abused her in Utah. In fact, the defense used the opportunity to elicit from her on cross-examination the very fact the State feared would weaken its prosecution: that defendant was not charged with a crime in Utah. Defendant made no objection during Claudia's testimony when the State elicited from her that both S.B. and A.L. had complained in Utah that defendant had molested them, she took them to a hospital, there was an investigation, and as a result of the investigation defendant was never charged in Utah "[b]ecause there was no case." On cross-examination, Claudia testified that she believed the children's allegations in Utah were true. Defendant made no objection when Detective Bellomy testified that S.B. had complained to her that defendant's molestation of her began in Utah. On cross-examination, defense counsel elicited from Bellomy that Claudia had said she did not believe her daughters' allegations in Utah. Claudia also told Bellomy that the Utah police left to her the decision to prosecute defendant and told her that the girls "could be making it up." Defendant made no objection even when the State presented his written confession in which he admitted abusing S.B. both in Utah and in Chicago.

¶ 60 In closing arguments, the State referred to A.L.'s allegation of what occurred in Utah but did not mention S.B.'s Utah allegations. But in his own closing argument, defense counsel not

only brought up S.B.'s Utah allegations and the fact that they had not resulted in criminal charges against defendant, he also invited the jury to speculate that the reason no charges were brought was because S.B. had fabricated the allegations.

¶ 61 The record reflects that defense counsel's election not to object to S.B.'s testimony on direct examination about events in Utah was reasonable trial strategy. The defense was not in the least hampered by the State's failure to give pretrial notice under section 115-7.3(d) that S.B. would not testify on direct examination about uncharged crimes in Utah. The defense was able to elicit from both Claudia and Bellomy that Utah authorities did not charge defendant for sexual abuse, and to elicit from Bellomy that Claudia had not believed the children's allegations in Utah and that the decision not to press charges in Utah was hers. We conclude defendant was not denied a fair trial by the State's failure to give pretrial notice of S.B.'s testimony about Utah.

¶ 62 Defendant also argues, and the State concurs, that he is entitled to nine days of additional credit for time spent in presentence custody. Defendant was arrested on December 3, 2009, and he was sentenced on April 22, 2013. He was awarded 1,227 days of credit for time served in custody. We agree with defendant's calculation that he spent 1,236 days in custody excluding the sentencing date. Therefore, pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. July 15, 2013) to modify a judgment, this court directs the clerk of the circuit court to correct the mittimus to reflect an additional 9 days of presentence credit, for a total credit of 1,236 days. We affirm the judgment of the circuit court in all other respects.

¶ 63 Affirmed; mittimus corrected.