2015 IL App (2d) 140488-U
No. 2-14-0488
Order filed August 18, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of DeKalb County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-740
JIMMY REISS,	)	Honorable Robin Stuckert,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: Defense counsel did not render ineffective assistance for failing to call a witness at defendant's second trial; defendant waived argument that the child victim's hearsay statements are inadmissible; and the State proved defendant guilty of the four sex offenses beyond a reasonable doubt.

¶ 2 Defendant, Jimmy Reiss, was charged with two counts of predatory criminal sexual assault of a child (see 720 ILCS 5/11-1.40(a)(1) (West Supp. 2011)) and two counts of aggravated criminal sexual abuse (see 720 ILCS 5/11-1.60(c)(1)(i) (West Supp. 2011)) of G.S., his fiancé's seven-year-old niece. The first trial resulted in a deadlocked jury and a mistrial. A

subsequent jury trial resulted in convictions of all four counts, and the trial court imposed an aggregate prison term of 18 years.

¶ 3 On appeal, defendant argues that (1) defense counsel rendered ineffective assistance for failing to call Jack, his fiancé's nephew, as a witness at the second trial; (2) the trial court erred in admitting the statements of G.S. to a doctor in the emergency room on the morning after the incident; and (3) the State failed to prove defendant guilty beyond a reasonable doubt. The State responds that (1) defense counsel's decision to not call Jack at the second trial was reasonable trial strategy and did not prejudice defendant; (2) defendant forfeited his challenge to the admission of G.S.'s statements at the hospital, and even if the claim is not forfeited, G.S.'s statements were admissible; and (3) defendant was proved guilty. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A grand jury indicted defendant on two counts of predatory criminal sexual assault of a child in that, on September 17, 2011, defendant committed acts of sexual penetration by placing his finger in and placing his mouth on G.S.'s sex organ. See 720 ILCS 5/11-1.40(a)(1) (West Supp. 2011). Defendant was also charged with two counts of aggravated criminal sexual abuse in that, on the same date, he committed acts of sexual conduct for his arousal by fondling G.S's sex organ and rubbing her feet on his penis. See 720 ILCS 5/11-1.60(c)(1) (West Supp. 2011).

¶ 6 G.S. was seven years old on the date of the incident. G.S. lived with her parents Karlene and Brian and her brother, Graham, who was about three at the time. When G.S. was two years old, she was diagnosed with Asperger's syndrome. G.S. had difficulty maintaining eye contact and communicating verbally, so she often communicated with gestures and spelling, including when she made her statements regarding the offenses. G.S. also had difficulty understanding emotions, abstract thoughts, and metaphors.

¶ 7 Karlene has four sisters: Kris, Kim, Kendra, and Katie. Kim's children are Kayla, Chloe, and Jack. Kendra's children are Andrew, Thomas, and Noah. Karlene and Kendra did not have a close relationship, but their birthdays are five days apart in September. On the night of the incident, Karlene, Kendra, and other adult friends and family celebrated the sisters' birthdays by going out for karaoke. Kayla, a teenager, stayed behind at Kendra's house to watch her nine-year-old brother, Jack, and her cousins, Andrew, Thomas, Noah, Graham, and G.S. Defendant had initially planned to join the adults but decided to stay home with the children instead.

¶ 8 Defendant was Kendra's fiancé and Noah's father. Defendant, Kendra, Andrew, Thomas, and Noah lived in a three-story townhouse in Sycamore. Andrew and Thomas spent some nights at Kendra's house, but they also spent time with their father. The top floor had two bedrooms: Thomas and Noah slept in lofted beds in one and Kendra and defendant shared the other. The lofted beds were two feet from the ceiling and required a ladder. Andrew and Thomas claimed that Andrew used the boys' bedroom in September 2011, but Kendra stated that Andrew used the bedroom on the main floor.

¶ 9 A. Section 115-10 Hearings

¶ 10 Before trial, the State sought admission of the out-of-court statements that G.S. had made to Karlene, Dr. Linda Davis, who examined G.S. on the day after the incident, and Child Advocacy Center (CAC) forensic interviewer Monique Heilemeier, who interviewed G.S. two days after the incident.

¶ 11 Karlene testified that, on September 17, 2011, she dropped off G.S. and Graham at Kendra's house. G.S.'s cousins, Kayla, Jack, Andrew, Thomas, and Noah, were there. When Karlene arrived the next morning to pick up her kids, she found G.S. and Andrew, a teenager,

playing video games. Andrew was sucking on G.S.'s toes. Karlene became angry and told Andrew that such conduct was inappropriate. G.S. refused to hug defendant goodbye, but Karlene forced her to do so to avoid appearing rude.

¶ 12 During the drive home, Karlene spoke with G.S. about inappropriate touches and asked what she would do if something happened with an adult. G.S. began crying and acted hysterical and withdrawn. Karlene pulled off the road and asked G.S. what happened, and she answered "Jim touched me." When asked to clarify, G.S. said defendant had sucked her feet, touched and licked her "peeper," and licked her butt. Mimicking the actions with her hands, G.S. said that defendant did these things when he climbed up into a bunk bed while everyone else was asleep. Karlene picked up her husband Brian and took G.S. to Good Shepherd Hospital.

¶ 13 At the hospital, Karlene, Brian, and a sexual assault nurse were present in the emergency room for the conversation between G.S. and Dr. Davis. With Dr. Davis's approval, Karlene video recorded the conversation with her mobile phone. G.S. did not want to speak, so Karlene initiated the conversation. Dr. Davis asked G.S. questions, and G.S. said that "Uncle Jim touched her toes and pulled her jeans down." G.S. said that she was not wearing underwear and that the defendant touched her. G.S. pointed to her genital area, and Dr. Davis confirmed that G.S. meant her private area. G.S. said that defendant touched and licked her "peeper," both front and back, and her toes. G.S. also said that defendant came into the bunk bed with her and used her feet to rub his penis. Dr. Davis conducted a physical examination of G.S.

¶ 14 Karlene made copies of the mobile phone video, and she denied editing the video. Karlene sent one DVD to the Sycamore police, kept the other copy, and deleted the video from her phone and computer.

¶ 15 On September 19, 2011, the day after the hospital visit, Karlene took G.S. to the CAC, where she was interviewed by Heilemeier. Karlene did not discuss the incident with G.S. between the time they left the hospital and the interview at the CAC. Heilemeier assuaged Karlene's fears about G.S. speaking with Heilemeier alone. Heilemeier testified that she conducted the interview in accordance with her forensic interview training, and it was video recorded. Assistant State's Attorney Stephanie Klein, Department of Children and Family Services (DCFS) representative Melissa Garman, and Sycamore police detectives Daniel Hoffman and Rod Swartzendruber observed the 90-minute interview through a one-way mirror.

¶ 16 Defendant objected to Karlene's video of the emergency room visit. Defendant asserted that the video was not reliable because Karlene was an advocate of G.S.'s statements and had control over the video. The objection was limited to the reliability of the video and not the contents of G.S.'s statements. The trial court found that G.S. was substantially consistent in both her behavior and her statements to the three witnesses. The court observed that Karlene had neither prompted G.S.'s initial report nor asked G.S. leading questions. Karlene had told G.S. to explain what happened in her own words. The court concluded that G.S. had initiated the conversation leading to her statements and that there was no motive to fabricate the allegation.

¶ 17 The court also found that G.S.'s statements at the CAC lacked any evidence of adult prompting or manipulation. The court found all the statements reliable and admissible under section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2010)).

¶ 18 The foundation for Karlene's mobile phone video of the emergency room visit was addressed separately from the witnesses' testimony regarding G.S.'s statements. Before the first trial, defendant objected to the video as cumulative evidence and to its chain of custody. The

State conceded that the video would show hearsay statements of Karlene and argued that the statements of Karlene and Dr. Davis were made in the context of G.S.'s medical care. The court excluded the video but permitted Dr. Davis to testify to her observations and G.S.'s statements. The video was not shown to the jury during the first trial.

¶ 19 Before the second trial, the State again sought admission of the mobile phone video, under section 115-10. Defense counsel responded that a proper foundation and the opportunity to cross-examine Karlene should be addressed before showing the video to the jury. The court found the video admissible on the condition that its foundation was laid outside the presence of the jury.

¶ 20 To lay a foundation for the video, Karlene testified that she recorded the video on September 18, 2011, in the emergency room. Karlene explained that she had previously used the video equipment on her phone, and her phone was functioning properly on that date. Viewing the subject matter on the screen, Karlene testified that she had made three recordings in the examination room. Karlene might have accidentally pressed "pause" once, and another time she stopped recording while G.S. changed her clothes. Karlene denied altering the video and explained that she and Brian transferred the video to her computer, burned it to a DVD, reviewed it, and mailed it to Detective Hoffman. The DVD was an exact duplicate of the phone recording.

¶ 21 Defendant argued the video was inaccurate because Karlene stopped recording at least twice. Defendant also argued Karlene must be cross-examined at trial because she was both the editor and proponent. After inquiring about the missing footage, the court found the State had laid an adequate foundation, but ruled that defendant could cross-examine Karlene about the recording. Consistent with the section 115-10 ruling before the first trial, the court also admitted, without objection, G.S.'s statements to Karlene, Dr. Davis, and Heilemeier.

¶ 22 B. First Trial

¶ 23 The first trial commenced on April 8, 2013. G.S. recalled that, two years ago, she had spent one week at Kendra's house while her parents were out of town. G.S. testified that, one night, she, Graham, and some of her cousins were sleeping over at Kendra's house, and she was in a lofted bed upstairs. G.S. was sleeping when defendant climbed into bed with her, pulled her pants down to her ankles, and touched her bare skin on her "china" or "peeper" both inside and outside with his hands. Defendant also touched her "butt" and feet with his "wiener."

¶ 24 On cross-examination, G.S. stated that the boys slept in the other bed in the room. She estimated the beds were five feet apart. She recalled that, on the date of the incident, the kids played outside in the snow, ate dinner, and watched a movie. G.S. was not wearing underwear on that date because they did not fit well. Around midnight, the kids were told to go to bed, so they went upstairs. G.S. agreed that the beds were close enough that someone in one bed could see what was happening on the other. G.S. also stated that Andrew put her feet in his mouth, but she denied that Andrew ever kissed her on the lips. At first, G.S. did not remember whether he ever dared her to undress, but then she denied it. On redirect examination, G.S. clarified that she had spoken to Elba Karim, her counselor, about the incident. Karim helps G.S. "calm down."

¶ 25 Karlene testified that defendant had planned to join the adults for the birthday celebration on the night of the incident, but he called Kendra to say he was not coming. When Karlene arrived the next day at 9 a.m. to pick up her children, she found G.S. and Andrew playing video games. Andrew was sucking on G.S.'s feet. Karlene told them it was inappropriate, and she took G.S. to leave. G.S. refused to hug defendant, and Karlene forced her to do so before they left. On the way home, Karlene scolded G.S. about the contact with Andrew and asked her about good and bad touches. G.S. became hysterical, began crying, and revealed that defendant had

sucked on her feet, rubbed her feet against his penis, licked her anus and vagina, and inserted his fingers into her vagina and anus. Defendant had told G.S. that she was a good girl. G.S.'s statements prompted Karlene to call Kendra and Brian, and to pick up Brian and take G.S. to the hospital.

¶ 26 On cross-examination, Karlene explained that about 1½ hours elapsed between leaving Kendra's house and arriving at the hospital. G.S. did not shower, bathe, or change clothes before going to the hospital. G.S. was wearing shoes, socks, leggings, a top, and underwear. At the hospital, the staff summoned the police and completed a "rape kit." Karlene explained the situation to Melissa Graham of DCFS, but she did not recall saying that she paused to make the phone calls or that G.S. was hysterical.

¶ 27 Dr. Davis testified that she had interviewed sexual abuse victims approximately 30 times, and the court accepted her as an expert. During the interview, G.S. appeared shy and avoided eye contact. Karlene remained in the exam room and was supportive of G.S. Dr. Davis discussed good and bad touches and asked what happened. G.S. acted embarrassed but eventually spelled out "Jim" and "did." G.S. gestured and used words to explain that "Uncle Jim" touched her "peeper" and licked the front and back of her "peeper." Defendant left for a time but returned to use her feet to rub his penis. Based on the described contact, Dr. Davis was unsurprised that the physical exam did not show anything unusual.

¶ 28 On cross-examination, Dr. Davis indicated that Karlene was present throughout the interview and clarified certain statements G.S. made. Dr. Davis felt that Karlene neither led the conversation nor suggested answers. On redirect examination, Dr. Davis stated that physical trauma is not always observed in cases involving penetration, and she would not expect trauma

from licking. Dr. Davis recalled that G.S. was not wearing underwear when she appeared for the examination.

¶ 29 Heilemeier testified that she interviewed G.S. the day after the hospital visit. She met with an interdisciplinary study team to determine the potential effects of G.S.'s special needs. A video recording of the interview was made and published to the jury. Heilemeier testified that she used non-coercive interviewing skills, open-ended questions, and easel paper and markers. Heilemeier allowed G.S. the opportunity to tell her story of abuse.

¶ 30 Heilemeier identified an easel paper G.S. drew on during the interview. Heilemeier described the picture as showing G.S.'s household and Kendra's household. One person who lived with Kendra was a large male figure identified as "Noah's father." The picture had other words including "relitive" and "rubing" which G.S. wrote in response to Heilemeier's questions. The questions concerned a person G.S. called "Big" and how he touched her and who he was.

¶ 31 Two other pictures of a male and a female body showed words indicating G.S.'s terms for body parts. G.S. drew red marks to show that the person touched her with his hand. Heilemeier explained that pictures and drawings are commonly used when interviewing children with Asperger's syndrome.

¶ 32 On cross-examination, Heilemeier indicated that the interview process is designed to allow children to tell their story free of interrogative methods or leading questions. In a 5- to 10-minute meeting before the interview, the police, the assistant State's Attorney, and the DCFS representative informed her of the allegations.

¶ 33 Detective Hoffman testified that he met with defendant for an hour at the police station on September 20, 2011. Defendant said he made physical contact with G.S. while playing games, such as chasing the children around, nibbling on their fingers, and blowing raspberries on

their lower belly. Defendant indicated he was partially in the lofted bed with G.S. when he rubbed lotion on her feet to calm her. Defendant denied any inappropriate contact. Defendant denied his DNA would be found on G.S.'s vaginal area or her underpants. On cross-examination, Detective Hoffman testified that his report indicated that defendant denied making even accidental contact. Defendant went to the police station voluntarily.

¶ 34 Defendant testified that, around 4 p.m. on September 17, 2011, he arrived at the home he shared with Kendra, Andrew, Thomas, and Noah. Four of Kendra's nieces and nephews were there, including G.S. Kendra left at 8:30 p.m., but defendant did not also join the group because he was tired and not feeling well. Defendant watched television in the living room on the main floor and checked the upstairs bedroom that Thomas and Noah shared. The lofted beds in the room were 2- to 2½-feet from the ceiling. Defendant played with Noah and G.S. in the room, tickling them and blowing raspberries on their stomachs. Defendant went back downstairs to watch more television with the other children.

¶ 35 Defendant and Kayla put the children to bed around 9:30 p.m., and defendant sent Andrew downstairs to his room. Defendant told G.S. that she would sleep in one of the two lofted beds and that Noah and Thomas would share the other lofted bed. Defendant went downstairs, and the three children followed him about 30 minutes later. Karlene called and spoke to Kayla, after which defendant took G.S., Graham, and Noah back upstairs and put them to bed. Kayla started a movie for the children.

¶ 36 Defendant admitted he climbed up the ladder and into bed with G.S. while the children watched the movie "Rio." Defendant partially laid back on the mattress with his feet on the ladder, and G.S. kicked him. Defendant denied lying down with G.S.

¶ 37 Noah asked for chocolate milk, and defendant brought him some. Noah also asked defendant to rub his feet. G.S. also asked for her feet to be rubbed, so defendant stood between the lofted beds and rubbed "sleepy time" lotion onto the children's feet. Noah asked to lay with defendant, so defendant allowed him to follow him into the master bedroom. Defendant went to sleep around 11:30 p.m.

¶ 38 Defendant testified that, the next morning, he went to McDonald's and brought back breakfast for everyone. Around 10 a.m., Karlene went upstairs to get her children, and she and G.S. seemed upset when they walked back downstairs. When Karlene told G.S. to give defendant a hug, she did so. Defendant did not see G.S. again. Defendant denied having contact with G.S.'s vaginal area, having contact between his penis and her body, or removing her clothing.

¶ 39 On cross-examination, defendant testified the ceiling light in the room was not on when the children were being put to bed. Defendant stayed home that night to relax, as Kayla was serving as babysitter. Defendant was certain he did not tell the police that he put G.S. to bed while Kayla put the boys to bed.

¶ 40 Andrew, who was 14 years old at the time of the first trial, testified that he remembered neither G.S. nor defendant being in the boys' bedroom on the night of the incident. He did not recall having a conversation with Karlene the next morning about having G.S.'s feet in his mouth. Thomas, who was 11 years old, testified that G.S. was in the bedroom with him, Kayla, Jack, Graham, Noah, and Andrew. Defendant told them it was time for bed, and Thomas did not see defendant in the room again after defendant left to get Noah chocolate milk. Thomas did not observe any unusual contact between defendant and G.S.

¶ 41 Jack was about 9 years old on the date of the incident and 11 years old at the time of the first trial. He testified that he was in the bedroom with G.S., Kayla, his other cousins, and defendant. Jack was in one of the lofted beds with Graham and Noah, and G.S. was in the other lofted bed while the children watched the movie. Jack testified that defendant was lying down in the lofted bed with G.S. for half of the movie. Defendant left the room before the movie ended, and Jack did not recall defendant returning. However, Jack admitted that he fell asleep before the movie ended. Jack observed no contact between defendant and G.S.

¶ 42 Kendra testified that the mattresses of the lofted beds were 1- to 1½-feet from the ceiling. Earlier on the date of the incident, Kendra, Karlene, and their children had been at her mother's house and had been swimming all day. Kendra returned home from her evening out at 1:00 a.m. to find Graham and Jack asleep in one lofted bed and G.S. playing video games on the floor in the bedroom. Andrew was lying on his back, and G.S. was lying on top of him. Kendra said something, Andrew returned to his bedroom on the main floor, and G.S. went into the other lofted bed. Defendant and Noah were asleep in the master bedroom. Kendra testified that she and defendant commonly rubbed lotion on Noah's feet to calm him at bedtime. Kendra further explained that Kayla knew she allowed the children to stay up late on weekends, so it would not be unusual to find Andrew and G.S. still awake when she came home.

¶ 43 Kendra testified that Karlene arrived the next morning around 9:30 a.m. and followed Kendra to the room with lofted beds. Kendra saw G.S. crawling on Andrew, who asked Karlene to tell G.S. not to jump on him. Karlene talked about appropriate behavior. G.S. hugged everyone goodbye and left with Karlene.

¶ 44 The jurors deliberated and became deadlocked. The trial court discharged them and declared a mistrial.

¶ 45 B. Second Trial

¶ 46 On December 20, 2014, the court heard the State's motion to play for the jury Karlene's mobile phone video of Dr. Davis's conversation with G.S. The court ruled the video admissible, subject to the State laying an adequate foundation and chain of custody.

¶ 47 The second jury trial began on January 7, 2014. At that time, G.S. was 10 years old and Graham was 6 years old. Defendant included Jack in his witness list, and the court included him in the list of possible witnesses during *voir dire*. However, defendant neither called Jack to testify nor testified on his own behalf.

¶ 48 After jury selection but before opening statements, the parties questioned Karlene regarding the foundation for the mobile phone video. Karlene testified that she recorded the conversation on her phone and had made "thousands" of other recordings. Karlene created the video because G.S. was gesturing and not answering verbally. Karlene denied altering the content of the video but rather transferred it directly to her computer and then to a DVD, which she delivered to the Sycamore police department. In the room with G.S. were Karlene, Brian, Dr. Davis, and a nurse.

¶ 49 On cross-examination, Karlene indicated she paused the recording once while G.S. was changing clothes. She could not recall whether she paused it again or if she recorded everything in the conversation. On re-cross examination, Karlene stated that she did not recall exactly which articles of clothing G.S. was wearing at the hospital before she changed. Karlene authenticated a document which indicated that she turned over clothing from the hospital visit to the police. The court ruled the foundation complete and the video admissible.

¶ 50 Before Dr. Davis testified, the jury was shown the mobile phone video of her conversation with G.S. in the emergency room. Dr. Davis's testimony was substantially the

same as her testimony at the first trial. She conceded on cross-examination that she does not have specific training in interviewing child victims of sexual assault.

¶ 51 G.S.'s testimony was also similar to her testimony at the first trial. G.S. described the lofted beds and said that she was in one and Graham, Andrew, Thomas, and Noah were in the other. Defendant climbed into bed with her and rubbed his "wiener" with her feet. Defendant licked her feet, touched the top of her vagina with his hand and licked her anus. At this trial, G.S. denied penetration and that defendant tickled her or blew "raspberries" on her belly. On cross-examination, G.S. stated that when her mother picked her up, Andrew was not around.

¶ 52 Karlene's testimony was similar to her testimony at the first trial. When she entered Kendra's home the morning after the incident, Kendra followed Karlene up the stairs to the bedroom. When they entered, G.S. was lying on the floor with Andrew sucking her right foot. G.S. was reluctant to hug defendant when she left.

¶ 53 On the way home, Karlene asked G.S. what she would do if an adult did what Andrew did, and G.S. began to cry. G.S. stated that defendant had climbed into bed with her and touched her feet, butt, and "peeper," and sucked her feet. G.S. told Karlene that defendant touched her with his fingers and tongue and also touched her feet with his penis.

¶ 54 Karlene spoke briefly to Dr. Davis before the interview at the hospital. Karlene denied telling Dr. Davis about the specifics of G.S.'s outcry; rather they discussed G.S.'s diagnosis of Asperger's syndrome. In the weeks following the incident, G.S. exhibited new fearful behavior, such as being afraid of the dark, locking and barricading her door, and withdrawing from activities she had previously enjoyed.

¶ 55 Karlene testified that, before the incident, she had never spoken with G.S. about "stranger danger" or good and bad touches, but it was the first topic of conversation in the car after leaving

Kendra's home. In the car, Karlene concealed how upset she was, and she pulled over and exited the vehicle to call Brian and Kendra. Karlene denied speaking to G.S. about the incident since it occurred.

¶ 56 Elba Karim, who had not testified at the first trial, testified that she is a licensed professional counselor and the clinical director of Stillwater Services. After discussing her credentials, the court accepted Karim as an expert in child psychology with a specialty in trauma.

¶ 57 Karim testified that child victims of trauma could be expected to exhibit anxiety, sleep disturbance, nightmares, difficulty with self-regulation, fear, and depression. Karim defined ruminating thoughts as those a person finds difficult to rid themselves of, and intruding thoughts as the initial recognition of those thoughts. Karim had previously treated children with Asperger's syndrome and had treated G.S. from after the date of the incident through April 2013.

¶ 58 Karim explained that G.S. had been diagnosed with Asperger's syndrome and attention deficit disorder, and her symptoms included difficulty in concentrating, abstract thinking, and reading facial expressions. G.S. exhibited good social cueing and could look as if she was following along, when she was not. During her time in treatment, G.S. exhibited symptoms of trauma, including frequent nightmares, fidgety behavior, facial tics, anxiety, and concerns about how things affected her life. G.S. was diagnosed with post traumatic stress disorder (PTSD). Karlene was involved in some of the sessions, and while G.S. could communicate in Karlene's presence, she withheld information. During the sessions, Karim did not notice Karlene leading G.S. in answering.

¶ 59 On cross-examination, Karim stated G.S. was concerned that Karlene was mad at or disappointed in her. Karim learned of the assault allegations when the treatment began, and she had not met G.S. before the incident. Karim's opinion regarding G.S.'s condition was not based

on a baseline. Karim spoke with Karlene irregularly, when there was a specific concern. Karim further testified that it is important not to ask leading questions to avoid the child attempting to come up with a "correct" answer.

¶ 60 Heilemeier's testimony was similar to her testimony at the first trial. After a foundation was laid, the video of her interview with G.S. was shown to the jury. Heilemeier then described the drawings that G.S. made during the interview. Heilemeier conceded that G.S. wrote certain words in Play-Doh, but those were not preserved.

¶ 61 Andrew and Thomas testified for the defense, and the testimony was similar to their testimony from the first trial. Kendra also testified similarly to the first trial. She added that defendant chose to stay home on the night of the incident before he learned that G.S. and Graham were coming to the house.

¶ 62 The jury found defendant guilty of all four counts, and his motion for a new trial was denied. The trial court sentenced defendant to an aggregate prison term of 18 years, comprised of consecutive terms of 7½ years for each predatory criminal sexual assault and 3 years for one aggravated criminal sexual abuse, to be served concurrently with a 3-year term for the other aggravated criminal sexual abuse. This timely appeal followed.

¶ 63 II. ANALYSIS

¶ 64 On appeal, defendant argues that (1) defense counsel rendered ineffective assistance for failing to call Jack as a witness at the second trial; (2) the trial court erred in admitting G.S.'s statements to Dr. Davis; and (3) the State failed to prove defendant guilty beyond a reasonable doubt. The State responds that (1) defense counsel's decision to not call Jack at the second trial was reasonable trial strategy and not prejudicial; (2) defendant forfeited his challenge to the

admission of Grace's statement, and even if the claim is not forfeited, Grace's statement was admissible; and (3) defendant was proved guilty.

¶ 65 A. Ineffective Assistance

¶ 66 Defendant argues that counsel at his second trial rendered ineffective assistance by failing to call Jack as a witness in his defense. Normally, an allegation regarding an uncalled witness must be supported by affidavit to allow the reviewing court to assess the proposed witness's testimony and its favorableness to the defendant. *People v. Johnson*, 183 Ill. 2d 176, 192 (1998). However, in this case, Jack testified at the first trial, which provides a record of what testimony he would offer at the second trial. *People v. Enis*, 139 Ill. 2d 264, 275-76 (1990). The State concedes that the absence of an affidavit regarding Jack's proposed testimony does not hinder our review.

¶ 67 Both the United States and Illinois Constitutions guarantee a defendant the right to effective assistance of counsel. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, §8. The purpose of this guarantee is to ensure that the defendant receives a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); *People v. Pineda*, 373 Ill. App. 3d 113, 117 (2007). The ultimate focus of the inquiry is on the fundamental fairness of the challenged proceedings. *Strickland*, 466 U.S. at 696; *Pineda*, 373 Ill. App. 3d at 117. "However, there is a strong presumption of outcome reliability, so to prevail, a defendant must show that counsel's conduct 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *Pineda*, 373 Ill. App. 3d at 117 (quoting *Strickland*, 466 U.S. at 686).

¶ 68 Claims of ineffective assistance of counsel are generally evaluated under the two-part test set forth in *Strickland*, 466 U.S. at 687, and adopted by our supreme court in *People v. Albanese*,

104 Ill. 2d 504, 525-26 (1984). *People v. Harris*, 225 Ill. 2d 1, 20 (2007). Under *Strickland*, defense counsel was ineffective only if (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's error prejudiced the defendant. Failure to establish either prong defeats the claim. *Strickland*, 466 U.S. at 687; *Pineda*, 373 Ill. App. 3d at 117.

¶ 69 We assess counsel's performance by using an objective standard of competence under prevailing professional norms. *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *Ramsey*, 239 Ill. 2d at 433. Counsel's strategic choices that are made after investigation of the law and the facts are virtually unassailable. *Ramsey*, 239 Ill. 2d at 433.

¶ 70 Defendant argues that Jack was "convincing" and the "most independent witness present" because, unlike Andrew and Thomas, he was not defendant's stepchild, yet he still was G.S.'s cousin, making him "related to all but presumably beholden to none." Defendant concludes that, because Jack testified at the first trial and the first trial did not result in a conviction, the omission of Jack's testimony from the second trial caused him to be convicted.

¶ 71 We agree with the State that defense counsel's decision not to call Jack at the second trial did not constitute deficient performance, as the decision was a matter of trial strategy. Jack's testimony would have been not exculpatory, cumulative, and potentially harmful to the defense.

¶ 72 Jack testified that, on the night of the incident, he was in the upstairs bedroom with defendant, his sister Kayla, and his cousins G.S., Graham, Andrew, Thomas, and Noah. Jack slept in one lofted bed with Graham and Noah, and G.S. slept in the other lofted bed. Jack testified that defendant was lying in the lofted bed with G.S. during half of the movie. Defendant left the bedroom before the movie ended, and Jack did not recall defendant returning. Jack

testified that he observed no contact between defendant and G.S. However, Kendra testified that Andrew and G.S. were the only children who were awake when she arrived home at 12:20 a.m.

¶ 73 First, it is well settled that trial counsel's decision about presenting the testimony of a particular witness is within the realm of strategic choices that are generally not subject to an attack on grounds of ineffectiveness of counsel. *People v. Grant*, 339 Ill. App. 3d 792, 799-800 (2003). However, tactical decisions made by counsel may be deemed to amount to ineffective assistance when counsel fails to present exculpatory evidence that would corroborate an otherwise uncorroborated defense. *Grant*, 339 Ill. App. 3d at 800. Jack's testimony at the first trial was not unequivocally exculpatory. Jack testified that he did not notice any contact between defendant and G.S., but he admitted that he fell asleep during the movie, awoke for a time, and fell asleep again after it ended. Also, Kendra testified that she found Jack sleeping when she returned home. Although Jack and Graham were in the room with G.S. when the crimes occurred, there was evidence from which the jury could infer that Jack did not witness the contact because he was asleep at the time.

¶ 74 Second, trial counsel is not ineffective for failing to call a witness whose testimony would be cumulative. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 33. Like Jack testified at the first trial, Thomas, Andrew, and Kendra testified at the second trial that they did not witness anything unusual on the night of the incident. Similar testimony from Jack at the second trial would have been cumulative to the other defense witnesses.

¶ 75 Third, Jack's testimony was potentially harmful to the defense, which would further explain trial counsel's strategy of omitting it from the second trial. Defendant argues on appeal that Jack's testimony was necessary to prove that the two-foot space above the lofted bed was too small for defendant to assault G.S. However, Jack's testimony at the first trial corroborated

G.S.'s testimony that defendant climbed the ladder and into the bed with G.S. Thus, Jack was a witness, independent of G.S., who placed defendant at the location of the offenses. To the extent that Jack corroborated G.S., his testimony would have shown that defendant could fit on the bed with G.S., refuting the defense theory that G.S. was inconsistent and not credible. To omit Jack's testimony and not further link defendant to the bed where the offenses occurred, was not unsound strategy at the second trial.

¶ 76 Furthermore, defendant was not prejudiced by counsel's decision to not call Jack. To establish prejudice, the defendant must show that " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Pineda*, 373 Ill. App. 3d at 117 (quoting *Strickland*, 466 U.S. at 694). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Pineda*, 373 Ill. App. 3d at 117 (quoting *Strickland*, 466 U.S. at 694). The prejudice component of *Strickland* entails more than an "outcome-determinative test"; rather, the defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000); *Pineda*, 373 Ill. App. 3d at 117.

¶ 77 Here, defendant concludes that the first jury was deadlocked after hearing Jack's testimony, and therefore, the second jury would not have convicted him if it too had heard the testimony. However, we agree with the State that the absence of Jack's testimony was not the only difference between the two trials. First, defendant testified at the first trial but not at the second. Second, the State called Karim to testify at the second trial about PTSD, while Detective Hoffman testified at the first. Third, the second jury saw the hospital video of G.S.'s statements, while the first jury did not. These variables, alone or in combination, led a different jury to

convict defendant. Under these circumstances, defendant has not shown with a reasonable probability that the outcome of the second trial would have been different if Jack had testified.

¶ 78 B. Admissibility of Hospital Statements

¶ 79 Next, defendant argues that the trial court erred in admitting the statements G.S. made to Dr. Davis at the hospital, because the statements were produced by leading questions. The State responds that defendant has forfeited the issue, and alternatively, the court did not abuse its discretion in admitting the statements and showing the video to the jury. The court admitted the statements under section 115-10 of the Code, which provides, in pertinent part, as follows:

> "(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13 *** the following evidence shall be admitted as an exception to the hearsay rule:
>
> (1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and
>
> (2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.
>
> (b) Such testimony shall only be admitted if:
>
> (1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and
>
> (2) The child *** either:
>
> (A) testifies at the proceeding; or

> (B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement[.]" 725 ILCS 5/115-10 (West Supp. 2011.).

¶ 80 Thus, section 115-10 allows for a child victim's hearsay statement to be admitted under two scenarios: (1) the court deems the statement reliable and the child testifies at trial (subsections (b)(1) and (b)(2)(A)); or (2) the child does not testify, the statement is deemed reliable, and the allegations of sexual abuse are independently corroborated (subsections (b)(1) and (b)(2)(B)). Here, the trial court twice admitted G.S.'s hearsay statements under the first scenario, as she testified at both trials. *People v. Kitch*, 239 Ill.2d 452, 467 (2011).

¶ 81 The State filed motions *in limine* to admit (1) G.S.'s statements to Karlene in the car, (2) G.S.'s statements to Dr. Davis at the hospital and Karlene's recordation of the statements, and (3) G.S.'s statements to Heilemeier at the CAC. At the hearing before the first trial, defense counsel argued that the mobile phone video at the hospital is unreliable because Karlene is the person who reported G.S.'s outcry and Karlene admitted causing gaps in the recording. However, counsel expressly waived any objection to the contents of the statements, shown by the following colloquy:

> "[Defense counsel]: With respect to [Heilemeier's] forensic interview, *** I assume that she made the proper statements with respect to protocol and [the] child advocacy rule. I think on that basis, Judge, I did not at the time see that there was a strong objection to the forensic [interview]. I will go get that hearing just to make absolutely sure that she did make the proper disclosures with respect to her training and background, but I believe she did.

The issue that we have the most problem with, Judge, is [Karlene's] recordation *** on her telephone at the time that these events were occurring, apparently. We have an objection to that Judge, under paragraph 115-10(a)(1) in that what the testimony clearly sets out in that case we believe is the time, content and circumstances of the statement provide sufficient safeguards of reliability.

We would only point out to the Court that [Karlene] had – she was the one who is the advocate for her daughter's statements, the one that brought them to the attention of the authorities for the first time. She's also the first and had control over this recording for a period of time after the events occurred.

We would suggest that under that statement of facts, in fact, the time, content and circumstances of the recordation of that statement do not provide sufficient safeguards of reliability and under [section] 115-10(1)(b)(1) we would suggest that that statement should not be seen by the jury in the case.

We were able to cross-examine [Karlene] with respect to the statements that her daughter allegedly made previous to being taken to the hospital. We have under the circumstances of [section] 115-10 no strong objection to that.

I think pending getting that transcript with respect to [Heilemeier] we would limit our objections in this case at this point for these purposes to simply the fact that the recording done by [Karlene] on her telephone does not provide sufficient safeguards for reliability. We would ask that that be kept out at trial.

THE COURT: *And specifically, just to clarify, are you asking that no one be allowed to testify to the statements that were made in the examining room or only particularly that the jury not be able to view the video?*

> [Defense counsel]: *On the basis as I understand the law, Judge, I can't make at this point a blank objection to the description of the statements made by Dr. Davis or [Karlene], I don't think, but I am objecting to that recordation.*" (Emphasis added.)

¶ 82 Following argument, the trial court found that "the State as the proponent of the out-of-court statements has established that the statements were, in fact, reliable and not the result of adult prompting or manipulations and that the time, content and circumstances of the victim's out-of-court statements provided sufficient safeguards of reliability for admission." Specifically regarding the statements at the hospital, the trial court allowed Dr. Davis to testify to her observations and to G.S.'s statements but excluded the mobile phone video.

¶ 83 Before the second trial, the State again moved to admit the mobile phone video taken in the emergency room. Consistent with the first trial, defense counsel objected only on the ground that the State must lay a proper foundation and that he be allowed to cross-examine the foundational witnesses before the jury was shown the video. At trial, outside the presence of the jury, the court conducted a foundational hearing and, this time, admitted the video.

¶ 84 In the trial court, defense counsel limited his objection to the mobile phone video, based only on foundational grounds. On appeal, defendant does not address the video specifically, but rather argues generally that G.S.'s statements to Dr. Davis are unreliable because they were the result of coaching and leading questions. The State argues that defendant forfeited his claim in the trial court at the section 115-10 hearings.

¶ 85 Courts often use the terms "waive," "forfeit," and "procedural default" interchangeably, but the terms are not synonymous. *People v. Hauschild*, 226 Ill. 2d 63, 72-73 n. 1 (2007). Our supreme court has stated, " '[w]aiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right.' " *Gallagher v. Lenart*, 226 Ill. 2d 208, 229

(2007) (quoting *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 326 (2004)). Forfeiture, strictly defined, is different from waiver, as the supreme court has noted in the criminal context. See *People v. Blair*, 215 Ill. 2d 427, 444 n. 2 (2005). Rather than an intentional relinquishment of a known right, forfeiture is the " 'failure to make the timely assertion of the right.' " *Blair*, 215 Ill. 2d at 444 n. 2, quoting *United States v. Olano*, 507 U.S. 725, 733 (1993).

¶ 86 Before the first trial, defense counsel argued that the video lacked an adequate foundation and should be excluded based on the way it was shot and edited. The trial court specifically asked whether counsel was also objecting to the content of the statements offered for admission under section 115-10. Counsel conceded that he had no legal basis to advocate exclusion of the testimony of Karlene and Dr. Davis regarding G.S.'s statements; he was objecting only to the way the video depicted those statements. Before the second trial, defense counsel again limited his objection to the video's foundation, not challenging the contents of G.S.'s statements. On appeal, defendant does not renew the foundational argument based on the way the video was created.

¶ 87 Under these circumstances, we conclude that, before the first trial, defendant waived any objection to the content of G.S.'s statements; and consistent with the waiver, procedurally defaulted the issue before the second trial. We use the terms to signify that his waiver was the "voluntary relinquishment of a known right," while his subsequent forfeiture was a "procedural default by failing to bring an error to the attention of the trial court." *Hill v. Cowan*, 202 Ill. 2d 151, 158-59 (2002).

¶ 88 Defendant cannot now complain of a purported deprivation of rights which he voluntarily and fully abandoned before the first trial and forfeited before the second trial. Moreover,

defendant does not argue on appeal that the admission of G.S.'s statements should be reviewed as plain error or was the result of ineffective assistance of counsel. In light of defendant's express waiver and subsequent forfeiture of the issue, we need not consider the State's alternative argument that admission of the statements under section 115-10 was not an abuse of discretion.

¶ 89 C. Sufficiency of the Evidence

¶ 90 Finally, defendant argues that the State failed to prove him guilty of the two counts of predatory criminal sexual assault and the two counts of aggravated criminal sexual abuse. When considering a challenge to a criminal conviction based on the sufficiency of the evidence, a reviewing court does not retry the defendant. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). "When reviewing the sufficiency of the evidence, '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.' (Emphasis in original.)" *People v. Bishop*, 218 Ill. 2d 232, 249 (2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). "Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

¶ 91 Our duty is to carefully examine the evidence while giving due consideration to the fact that the court and the jury saw and heard the witnesses. The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict. *Smith*, 185 Ill. 2d at 541. The credibility of a witness is within the province of the trier of fact, and the finding of the jury on such matters is entitled to great weight, but the jury's determination is not conclusive. We will

reverse a conviction where the evidence is unreasonable, improbable, or unsatisfactory so as to create a reasonable doubt of the defendant's guilt. *Smith*, 185 Ill. 2d at 542.

¶ 92 A person commits predatory criminal sexual assault of a child if that person is 17 years of age or older, and commits an act of contact, however slight, between the sex organ or anus of one person and the part of the body of another for the purpose of sexual gratification or arousal of the victim or the accused, or an act of sexual penetration, and the victim is under 13 years of age. See 720 ILCS 5/11-1.40(a)(1) (West Supp. 2011). The indictment alleged that defendant committed acts of sexual penetration by placing his finger in and placing his mouth on G.S.'s sex organ. " 'Sexual penetration' means any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including, but not limited to, cunnilingus, fellatio, or anal penetration." 720 ILCS 5/11-0.1 (West Supp. 2011).

¶ 93 A person commits aggravated criminal sexual abuse if that person is 17 years of age or over and he commits an act of sexual conduct with a victim who is under 13 years of age. The indictment alleged that defendant committed acts of sexual conduct for his arousal by fondling G.S's sex organ and rubbing her feet on his penis. See 720 ILCS 5/11-1.60(c)(1) (West Supp. 2011). " 'Sexual conduct' means any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1 (West Supp. 2011).

¶ 94 In this case, there is no dispute that defendant was more than 17 years old and that G.S. was under 13 years of age on the date of the incident. The State introduced evidence that defendant made contact with G.S. by (1) penetrating her vagina with his fingers, (2) placing his mouth on her vagina and anus, (3) placing his fingers on her vagina, and (4) placing her feet on his penis. From this evidence, the jury could find that defendant committed two acts of sexual conduct for his sexual gratification or arousal and two acts of sexual penetration, sufficient to sustain the four convictions.

¶ 95 Defendant argues that G.S.'s account of events is not to be believed, finding fault in the four iterations of her allegations against defendant. First, defendant argues that G.S.'s initial report to Karlene in the car is not credible because G.S. had a motive to fabricate the allegation. Defendant suggests that Karlene raised her voice and was so upset with G.S. for allowing Andrew to suck her feet that G.S. made up the assault allegation to deflect the negative attention. Defendant also claims that if the allegation against defendant were true, G.S. would have brought it up sooner during the 20 minute conversation with Karlene about good and bad touches.

¶ 96 Second, G.S. restated the allegation to Dr. Davis at the hospital. Dr. Davis testified to G.S.'s statements and the jury viewed Karlene's mobile phone video. Dr. Davis testified that, after discussing good and bad touches and asking G.S. what had happened, G.S. communicated that "Uncle Jim" had touched her vagina, licked her vagina and anus, and sucked her toes. G.S. also communicated that defendant left momentarily and returned to rub his penis with her feet. Defendant now argues that the video tells a different story in that G.S. is mostly nonverbal and communicates with gestures, while Dr. Davis and Karlene are "coaxing" the information with leading questions.

¶ 97 Third, G.S. made the allegation to Heilemeier at the CAC. Defendant again argues that Heilemeier used leading questions and prompted G.S.

¶ 98 Fourth, G.S. testified to defendant's conduct but also said she lived at Kendra's townhouse for a week while her parents were out of town and that each night she slept in a lofted bed on the top floor. Defendant points out that the other witnesses refute this testimony in that Karlene brought G.S. and Graham to the townhouse for one night, while the adults went out. G.S. also mistakenly testified that she had been playing in the snow on the date of the incident.

¶ 99 Defendant contends that G.S.'s inconsistent statements, the testimony of others who said that they witnessed nothing unusual on the night of the incident, and the "impossibility" of defendant committing the offenses in the small space between the lofted bed and the ceiling all show that the State failed to sustain its burden of proof. However, G.S.'s statements were consistent regarding defendant touching her sex organ and anus with his hand and tongue and defendant placing her feet on his penis. At trial, G.S. denied digital penetration, but she confirmed digital penetration during Heilemeier's interview, which was much closer in time to the incident.

¶ 100 The finder of fact assesses the credibility of witnesses, determines the weight given to testimony, and resolves conflicts or inconsistencies in the evidence. *People v. Naylor*, 229 Ill. 2d 584, 614 (2008). It was the jury's duty to resolve inconsistencies in the evidence, and the jury resolved them against defendant.

¶ 101 The State presented competent evidence of every element of the offenses, and the evidence does not compel the conclusion that no reasonable person could accept it beyond a reasonable doubt. See *Cunningham*, 212 Ill. 2d at 280. When considering all of the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have

found the essential elements of predatory criminal sexual assault of a child and aggravated criminal sexual abuse beyond a reasonable doubt. See *Cunningham*, 212 Ill. 2d at 278.

¶ 102 III. CONCLUSION

¶ 103 For the reasons stated, we affirm the judgment of the circuit court of DeKalb County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 104 Affirmed.