FIRST DIVISION
FEBRUARY 1, 2016

No. 1-13-2579

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. 09 CR 10895
	)	
RICHARD MILLER,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Liu and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not abuse its discretion in admitting hearsay statements of a minor to a social worker as evidence in defendant's trial where the time, content and circumstances of the statements provided sufficient safeguards of reliability.

¶ 2 Following a bench trial, the trial court found defendant Richard Miller guilty of one count each of predatory criminal sexual assault and aggravated criminal sexual abuse for his conduct toward M.B., the five-year-old daughter of his former live-in girlfriend. Based on his criminal background, the court sentenced defendant to concurrent sentences of natural life in prison and 20 years in prison, respectively. On appeal, defendant contends that the trial court abused its

discretion when it admitted the victim's out-of-court statements to a social worker into evidence in his trial. For the reasons that follow, we affirm.

¶ 3 The State charged defendant with two counts of predatory criminal sexual assault (penetration of defendant's penis to M.B.'s vagina and penetration of defendant's penis to M.B.'s mouth) and one count of aggravated criminal sexual abuse (defendant's penis to M.B.'s hand), for conduct occurring between May 30, 2008 and November 30, 2008.

¶ 4 Prior to trial, the State requested a hearing pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2010)), in order to admit certain statements made by M.B. to her mother, Elisheba B., and a Children's Advocacy Center (Center) social worker, Raziya Lumpkin-Webster, into evidence at defendant's trial.

¶ 5 At the hearing, Elisheba stated she had a relationship with defendant and lived with him, along with his family, from May 30, 2008 to November 9, 2008. On December 7, 2008, Elisheba dropped M.B., who was five years old at the time, off at her cousin Natasha Lake's house. When Elisheba returned to pick up M.B., Lake told Elisheba that M.B. told Lake's daughter that defendant "tried to penetrate her from behind." Elisheba tried to talk with M.B. who began "crying uncontrollably" in Lake's living room. Lake's daughter then told Elisheba what M.B. told her. With a "serious look on her face," M.B. nodded her head to confirm. Promptly, Elisheba took M.B. to the University of Chicago's Comer Children's Hospital.

¶ 6 On the train ride to the hospital, with the train car empty, M.B. "open[ed] up" to her mother. She told Elisheba that defendant "tried to put his private area in her behind," he "put his privates in [her] mouth" and "some stuff came out that was nasty." M.B. also said that when defendant took showers, he would put soap on M.B.'s hands so she could "wipe his private part

off." M.B. did not give a specific date of the various acts or say how many times they happened, but she told Elisheba that they occurred "the whole time" they were living at defendant's house. Elisheba was unsure what precipitated M.B.'s statements to Lake's daughter.

¶ 7 Detective Michael Nolan of the Chicago police department testified that on December 10, 2008, he observed Lumpkin-Webster interview M.B. in a "child oriented" room at the Center. The interview took approximately 50 minutes. The room had a one-way mirror, and on the other side of the mirror was Nolan, an assistant State's Attorney, and an investigator from the Department of Children and Family Services. Nolan was the only one to take notes of the interview. M.B. was "quiet" but "alert." Lumpkin-Webster did not use leading questions. Initially, Lumpkin-Webster asked M.B. questions to discern if she could tell the difference between the truth and a lie, which M.B. could, in Nolan's opinion. M.B. "promise[d]" to tell the truth during the entire interview.

¶ 8 Lumpkin-Webster asked questions about M.B.'s home life and her body parts, which she was able to accurately describe. Lumpkin-Webster asked M.B. if anything happened to her "groin" area and pointed to her own groin area. M.B. was "too shy" to say the body part's name, but told Lumpkin-Webster that she "uses that part to pee from." She said that no one had touched her there. Next, Lumpkin-Webster asked M.B. about her "buttocks," and M.B. told her that defendant "touches it." M.B. further said that defendant "has a part different from a girl," and he put that part in her butt. M.B. demonstrated the act by "moving back and forth, up and down, and around." M.B. described that defendant placed her on her stomach and "put his part in her butt." M.B. stated that it happened "every day." Lumpkin-Webster then asked M.B. if he had put "it" anywhere else, and M.B. told her that defendant "put it in her mouth and made her suck it." M.B.

also "pantomimed a motion demonstrating masturbation," and said that "snot came out of it," which was "white." Defendant also put a "sucker" in M.B.'s butt and made her put the sucker in her mouth, which she described as "nasty."

¶ 9 Nolan admitted that his testimony was a summary of the 50-minute conversation between M.B. and Lumpkin-Webster, and he reviewed his notes prior to testifying, which was some two years after the interview. He did not write down the exact questions Lumpkin-Webster asked M.B. He also admitted the interview was not video or audio recorded. Nolan explained that the Center was not equipped with video cameras at the time, and he could not bring his own video camera. Nolan conceded that the interview occurred three days after M.B.'s initial outcry about defendant and at least a month after the alleged acts took place. Nolan did not know how many people M.B. had talked to about defendant's alleged acts prior to Lumpkin-Webster.

¶ 10 Following arguments of the parties, the trial court noted that Nolan took contemporaneous notes during M.B.'s interview. It also highlighted the fact that the interview was not video recorded, noting it was "certainly an appropriate thing to take into consideration." The court recognized that the Center had since changed its procedure, requiring interviews to be video recorded. Nevertheless, the court found Nolan "credible" and "reliable" as to the contents of M.B.'s interview, and found his testimony as to M.B.'s statements about the alleged acts admissible pursuant to section 115-10 of the Code. The court, however, found M.B.'s statements to Elisheba inadmissible because Elisheba found out about defendant's alleged acts from other people, not M.B., and she had to "encourage" M.B. to talk with her about them.

¶ 11 Defendant filed a motion to reconsider, specifically arguing that because the interview was not video or audio recorded, there were insufficient safeguards of reliability. The court

observed that the failure to record an interview with a minor victim does not, in and of itself, render the statements made during the interview inadmissible, but merely is one factor in determining the reliability of the statements. The court noted it considered the failure to record, but still found the statements made to Lumpkin-Webster were sufficiently reliable and denied defendant's motion.

¶ 12 The case continued to trial where defendant elected to proceed *pro se*. At trial, Elisheba testified that from the end of May 2008 through November 9, 2008, she and M.B. lived with defendant and his family. Because Elisheba worked and attended school during this time, defendant oftentimes watched M.B. Elisheba and M.B. eventually moved out of defendant's house because of "[m]onetary situations" with defendant's mother. In early December 2008, Elisheba picked M.B. up from her cousin's house and took her to the University of Chicago's Comer Children's Hospital because M.B. alleged that defendant sexually assaulted her. The following day, Elisheba took M.B. to the Center where she was interviewed.

¶ 13 M.B., then nine years old, testified that when she was five years old, she and her mom lived with defendant. She said that defendant used his "private part" to touch her hands, mouth and butt. Defendant touched his private part to her butt once in the basement of the house, which made her feel "nasty." Defendant put his private part in her mouth two or three times, also in the basement of the house. These acts would happen when defendant watched her and her mother was not home. M.B. eventually told her cousins what defendant did. She did not remember telling a doctor that defendant touched his private part to her mouth every day.

¶ 14 Dr. Nuha Shair, a pediatrician, was qualified as an expert in the area of child abuse. On December 12, 2008, she conducted a sexual abuse evaluation on M.B. at the Center. Shair

initially spoke to Elisheba to obtain background information on M.B. Then, Shair spoke to M.B in private. Shair asked M.B. if she knew the difference between "good touching" and "bad touching," which she did. Shair pointed to various body parts and asked M.B. if she could identify them, which she did. Shair asked M.B. if anyone had touched her in "a bad way," to which she responded defendant did. M.B. described that defendant took her clothes off and "put his private in her butt" one time. M.B. said it hurt, and defendant told her to "hold still." M.B. whispered in Shair's ear that defendant "made her suck on his private," and when he did this, M.B. could not breathe. These acts happened every day when her mother was not home. Sometimes, defendant would put soap on "his private and made [M.B.] rub it back and forth until snot came out."

¶ 15 Next, Shair physically examined M.B., and based on the examination, she could neither confirm nor deny a history of sexual abuse. Shair stated that 95 percent of physical examinations of children who have been sexually abused reveal no physical signs of abuse. She explained that the passage of time often allows physical evidence to heal, and children's perceptions of the level of penetration are "pretty iffy."

¶ 16 Detective Nolan testified consistently with his testimony at the hearing to determine whether certain out-of-court statements made by M.B. to Lumpkin-Webster were admissible at defendant's trial.

¶ 17 Assistant State's Attorney Thor Martin interviewed defendant on May 28, 2009. Defendant agreed to speak with Martin, and made an oral statement, which was then memorialized in writing and signed by defendant. The statement was read in open court. In it, defendant admitted that in the bathroom one night, he told M.B. to "open her mouth and placed

his penis in her mouth" for about one minute. While M.B. was still in the bathroom, defendant put soap on his penis, began "to masturbate" and "finished" into toilet paper. Defendant stated this was the only sexual interaction he had with M.B.

¶ 18 The State rested. The defendant was proceeding *pro se*. Thus, the court appointed a public defender, who had previously withdrawn from defendant's case, for the limited purpose of conducting a direct examination of defendant.

¶ 19 Defendant testified that in November 2008, he was arrested by the police, questioned regarding the allegations made by M.B. and eventually released. On May 27, 2009, the police again arrested defendant and brought him to the police station. Several times, he requested an attorney and remained silent after his request. The detectives threatened defendant, and he eventually had an altercation where one detective "choked" him. One of the detectives promised defendant that if he cooperated, he would face less severe charges. After the altercation, defendant requested medical attention and was taken to the hospital. The two detectives that threatened defendant came to the hospital and began to interrogate him. He denied M.B.'s allegations, and again multiple times, he requested an attorney and told the detectives he wanted to remain silent. The detectives once more threatened defendant, telling him they would make the charges worse if he told anyone what they did to him.

¶ 20 Eventually, defendant saw a doctor at the hospital, but he told the doctor that he did not want medical attention anymore. He explained in court that he did not want his charges to be increased. After leaving the hospital, he went back to the police station. At this point, defendant had been in custody for 13 or 14 hours without any food or drink. In an interview room, defendant told another detective that he was threatened, but this detective told him not to discuss

what happened the previous day. The detective promised defendant if he agreed to what happened, he would make the charges less severe. The detective told defendant that when he speaks to an assistant State's Attorney, he should admit to the allegations made by M.B. Defendant subsequently made an inculpatory statement to the assistant State's Attorney. In court, defendant denied that he put his penis in M.B.'s mouth, anus or vagina. He also denied putting soap on her hands and placing them on his penis. Defendant rested.

¶ 21 In rebuttal, the State admitted a certified copy of a previous conviction of defendant's for unlawful possession of a firearm by a felon for impeachment purposes.

¶ 22 After argument, the trial court found defendant guilty of one count each of predatory criminal sexual assault (penetration of defendant's penis to M.B.'s mouth) and aggravated criminal sexual abuse (defendant's penis to M.B.'s hand). The court noted that it scrutinized M.B.'s testimony, but ultimately found that defendant's voluntary confession corroborated her allegations. The court further observed that no evidence was presented that M.B. had a motive to fabricate her allegations. The court, however, found defendant not guilty of the other count of predatory criminal sexual assault (penetration of defendant's penis to M.B.'s vagina). The trial court denied defendant's motion for a new trial. Based on a previous conviction of defendant's from 1994, in which he pled guilty to aggravated criminal sexual assault, the trial court found it was required to sentence defendant to natural life in prison for predatory criminal sexual assault. See 720 ILCS 5/12-14.1(b)(2) (West 2008) (renumbered as 720 ILCS 5/11-1.40(b)(2) (eff. July 1, 2011)). Concurrent to his natural life sentence, the court sentenced defendant to 20 years in prison for aggravated criminal sexual abuse. This appeal followed.

¶ 23 On appeal, defendant contends that the trial court abused its discretion by admitting M.B.'s out-of-court statements to Lumpkin-Webster into evidence at his trial where the State failed to prove there were sufficient safeguards of reliability concerning the statements. Specifically, he argues that the interview between M.B. and Lumpkin-Webster was not video recorded, Detective Nolan could not recall the exact details of the interview, the interview was conducted a month after M.B. and her mother moved out of defendant's house, and M.B.'s family may have tainted her account of the events.

¶ 24 Initially, we note that defendant concedes on appeal that he failed to preserve his claim for review but asserts that we may address it as plain error. Generally, an issue is preserved for appeal, or rather not forfeited, if it is raised both at trial and in a posttrial motion. *People v. Leach*, 2012 IL 111534, ¶ 60. However, the plain error doctrine allows us to bypass a party's forfeiture if the error is clear or obvious, and either (1) the evidence at trial was "so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or (2) when the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The defendant bears the burden of persuasion on both prongs of plain error. *People v. Eppinger*, 2013 IL 114121, ¶ 19. The first step in a plain-error analysis is to determine whether any error occurred. *Id.*

¶ 25 Generally, hearsay, an out-of-court statement offered to prove the truth of the matter asserted, is inadmissible at trial as substantive evidence. Ill. R. Evid. 801; 802 (eff. Jan. 1, 2011). Section 115-10 of the Code (725 ILCS 5/115-10 (West 2010)), however, provides an exception

to the general rule in a prosecution against a defendant for sexual acts committed against a child under the age of 13 years old. Under the exception, if the victim testifies at trial, hearsay statements made by the victim concerning the sexual acts perpetrated against her by a defendant may be admissible if the trial court determines that the "time, content, and circumstances of the statement provide sufficient safeguards of reliability." 725 ILCS 5/115-10(b)(1) (West 2010); see also *People v. Guajardo*, 262 Ill. App. 3d 747, 757 (1994).

¶ 26 In assessing the reliability of a victim's hearsay statements, the court must evaluate the statements under the totality of the circumstances. *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 95. Relevant factors include, but are not limited to, the repetition and spontaneity of the statements, the mental state of the child when she gives the statement, whether the child used words unexpected of a child of similar age, and whether the child had a motive to fabricate the statements. *Id.* Additionally relevant is the time between the alleged acts and the victim's statements describing the acts. *People v. Zwart*, 151 Ill. 2d 37, 45 (1992). When there is no audio or video recording of an interview that produces such statements, as is the case here, we must review the trial court's determination with "great scrutiny." *People v. Oats*, 2013 IL App (5th) 110556, ¶ 24. The State bears the burden of demonstrating the statements' reliability. *Garcia*, 2012 IL App (1st) 103590, ¶ 96. We review the trial court's determination to allow the statements into evidence for an abuse of discretion (*id.*), which occurs when the court's decision "is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 27 In the instant case, we cannot say that the trial court abused its discretion when admitting M.B.'s hearsay statements to Lumpkin-Webster into evidence at defendant's trial. First, the

timing of M.B.'s statements to Lumpkin-Webster compared to when the acts occurred does not indicate their unreliability. The incidents occurred as late as November 9, 2008, after which M.B. and her mother moved out of defendant's home. However, Lumpkin-Webster did not interview M.B. about the acts until December 10, 2008, which was three days after M.B.'s initial outcry to her mother. Thus, there was approximately a one-month delay from the time M.B. and her mother moved out of defendant's home, and when M.B. ultimately discussed the acts with Lumpkin-Webster. While these statements were not made contemporaneously with the offenses, we cannot say that this approximately one-month delay renders M.B.'s statements to Lumpkin-Webster unreliable. See, *e.g.*, *People v. Jahn*, 246 Ill. App. 3d 689, 704 (1993) (statements made nearly eight months after incident still reliable); *People v. Anderson*, 225 Ill. App. 3d 636, 649 (1992) (statements made a month after victim left home of his abusers and after denying sexual abuse more than 20 times still reliable).

¶ 28 Additionally, the content of M.B.'s statements does not suggest their unreliability. When Lumpkin-Webster asked M.B. to name the body part in her groin area, M.B. said she was too shy to name it, but said she "uses that part to pee from." When M.B. described defendant's penis, she told Lumpkin-Webster that defendant had a "part different from a girl." When M.B. described the result of one such sexual assault, she described fluid discharged from defendant's penis as "snot." Thus, M.B. did not use terminology unexpected of a child of similar age to describe the events in question. See *Garcia*, 2012 IL App (1st) 103590, ¶ 95.

¶ 29 Finally, nothing about the circumstances of the interview demonstrate the statements were unreliable. The room in which Lumpkin-Webster interviewed M.B. was "child oriented." Nolan stated that Lumpkin-Webster did not use leading questions, and she tested M.B.'s ability

to differentiate the truth from a lie, which M.B. was able to do. Nothing in the record suggests the interview was threatening or coercive. And no evidence was presented at any time that would have given M.B. a motive to fabricate a story about defendant sexually assaulting her. Therefore, the trial court's determination that M.B.'s statements to Lumpkin-Webster were reliable is neither unreasonable nor arbitrary (*Caffey*, 205 Ill. 2d at 89), and they were properly admitted into evidence at defendant's trial.

¶ 30 Nevertheless, defendant raises several arguments why the statements were unreliable. First, defendant places much emphasis on the fact that the interview was not video recorded. While it is true our supreme court has "strongly admonished" law enforcement and social workers to video record interviews with child victims whenever possible (see *People v. Cookson*, 215 Ill. 2d 194, 211 (2005)), there is no requirement in section 115-10 of the Code that in order for a victim's hearsay statements to be found reliable, the statements must be video recorded. See 725 ILCS 5/115-10 (West 2010). The failure to video record the interview merely is a factor the trial court may consider in determining the reliability of the victim's statements, but it does not, in and of itself, render the statements unreliable. See *Cookson*, 215 Ill. 2d at 211; *Garcia*, 2012 IL App (1st) 103590, ¶ 105; *People v. Major-Flisk*, 398 Ill. App. 3d 491, 510 (2010). Here, the trial court, in both its initial ruling and during defendant's motion to reconsider, expressly noted that it considered the lack of a recorded interview in determining the statements made by M.B. to Lumpkin-Webster were reliable. Additionally, this was not a case where Lumpkin-Webster could have recorded the interview, but chose not to; instead, Nolan said Lumpkin-Webster was unable to record the interview because the Center did not have the capability at the time of the interview. See *Garcia*, 2012 IL App (1st) 103590, ¶ 105.

¶ 31 Moreover, defendant's reading of *People v. Miles*, 351 Ill. App. 3d 857 (2004) for the proposition that under section 115-10, interviews "were required to be recorded in order to be admissible" is incorrect. In *Miles*, the court only "recommend[ed] the recording of interviews" because recording bolsters reliability. *Id.* at 866. But nowhere in *Miles* does it require video recording of an interview to be admissible under section 115-10. See *Oats*, 2013 IL App (5th) 110556, ¶ 30 ("We stand by *Miles*'s prudent *recommendation* to record interviews of minors.") (Emphasis added.) And, as discussed above, our supreme court in *Cookson*, 215 Ill. 2d at 211, a case decided *after Miles*, has said the "lack of a contemporaneous video recording does not render the interview unreliable."

¶ 32 We likewise find defendant's reliance on *Miles* as a factually similar case unpersuasive. In *Miles*, the appellate court found that a victim's hearsay statements to her mother and a sheriff's detective were not sufficiently reliable to be admissible under section 115-10. *Miles*, 351 Ill. App. 3d at 865. In so finding, the court noted that the detective's questions to the victim were leading, and it was impossible to know if such questions "crossed the line into improper suggestion." *Id.* at 866 (stating the detective asked the victim "if [the defendant] had done anything to her" and "if [the defendant] had touched her"). Here, however, Nolan specifically said that Lumpkin-Webster did not use leading questions, and it was M.B. who spontaneously told Lumpkin-Webster that defendant had touched her butt with his penis.

¶ 33 Next, defendant argues that at the section 115-10 hearing, Nolan admitted he could not recall the "exact details" of the interview, characterized his notes as a "summary" and failed to record all the questions asked by Lumpkin-Webster. Essentially, defendant is restating the same argument regarding the lack of a video recorded interview. Because Nolan did not transcribe

verbatim the entire 50-minute interview between M.B. and Lumpkin-Webster, naturally his end work product would be a summary of the interview. However, given the totality of the evidence presented at the hearing, we cannot say the trial court abused its discretion.

¶ 34 Finally, defendant asserts that the potential influence of M.B.'s mother, Elisheba, and other family members tainted the reliability of M.B.'s statements to Lumpkin-Webster. Specifically, he posits that Elisheba was a "corrupting influence" to the reliability of M.B.'s statements. There is nothing in the record to substantiate this bald claim by defendant. In fact, in ruling M.B.'s statements to Elisheba inadmissible at defendant's trial, the court noted that Elisheba learned of defendant's acts against M.B. from her cousin and her cousin's daughter, not M.B. herself. It further observed that Elisheba had to "encourage" some information out of M.B. The trial court was plainly aware of how Elisheba learned of defendant's sexual assault and how she broached the topic with M.B., all of which occurred prior to M.B.'s interview with Lumpkin-Webster. Clearly, the trial court did not "wholly ignore" these facts, as defendant argues, when finding the statements made to Lumpkin-Webster reliable.

¶ 35 Because the trial court did not abuse its discretion in finding M.B.'s hearsay statements to Lumpkin-Webster were admissible at defendant's trial, no error occurred. Therefore, defendant cannot demonstrate plain error. See *Eppinger*, 2013 IL 114121, ¶¶ 18-19. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 36 Affirmed.