2016 IL App (2d) 141129-U
No. 2-14-1129
Order filed May 16, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 07-CF-2546
FRANCISCO ROJAS-RUIZ,	)	Honorable Mark Levitt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was proved guilty beyond a reasonable doubt of two counts of aggravated criminal sexual assault and one count of aggravated criminal sexual abuse; the convictions do not violate one-act, one crime principles; the jury rendered a unanimous verdict; defendant was not denied his sixth amendment right to counsel; defendant's due process rights were not violated by the State's nondisclosure of information regarding the investigating officer; an incomplete jury instruction did not prejudice defendant; and the trial court did not err in admitting evidence of defendant's other crimes against the victim.

¶ 2 Defendant, Francisco Rojas-Ruiz, was charged with 24 sex offenses against V.G., who was 13 years old at the time of the offenses. Defendant was 41 years old and in a sexual relationship with V.G.'s mother, Rosa, while also married to a woman who lived nearby.

¶ 3 Defendant was tried on 10 of the charges, a jury found him guilty of all of them, and the trial court imposed sentences on 3, resulting in a 39-year aggregate prison term. Defendant was sentenced to consecutive terms of 17 years for each of 2 counts of aggravated criminal sexual assault (counts 1 and 2) (720 ILCS 5/12-14(a)(3) (West 2006)) and 5 years for 1 count of aggravated criminal sexual abuse (count 21) (720 ILCS 5/12-16(c)(1)(ii) (West 2006)), with the sentences for aggravated criminal sexual assault to be served at 85%.

¶ 4 On appeal, defendant raises several arguments that trial counsel failed to raise in the posttrial motion or the motion to reduce sentence. Appellate counsel argues that trial counsel should have preserved these issues and that they are subject to plain error review. Defendant contends that (1) the convictions must be reversed because the State did not prove defendant guilty beyond a reasonable doubt; (2) his convictions of aggravated criminal sexual assault (count 1) and aggravated criminal sexual abuse (count 21) violate the one-act, one-crime rule, and therefore we must vacate the conviction and sentence on count 21; (3) all of the convictions must be reversed and the cause remanded for a new trial because only 11 jurors signed the guilty verdict form on the charge of criminal sexual assault (count 7), even though he was not sentenced on that count; (4) defendant is entitled to a new trial because he was denied his sixth amendment right to counsel when he was questioned by the police on the day after the information was filed and bond was set; (5) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a detective's prior involvement with multiple cases of "false confessions" and "episodes of brutality"; (6) defendant is entitled to a new trial because the jury was incorrectly instructed on the definition of "sexual conduct"; and (7) defendant is entitled to a new trial because the court erred in allowing the State to show *modus operandi*, intent, and

absence of mistake by introducing the victim's statement that defendant placed his mouth on her vagina. We affirm.

¶ 5 I. BACKGROUND

¶ 6 Defendant was arrested on July 11, 2007, and was appointed counsel the next day. Defendant successfully moved to reduce bail, he posted the required amount, and he was released from the Lake County jail on August 22, 2007. Matthew Junkin, the pretrial bond supervision officer assigned to defendant's case, lost contact with defendant and an arrest warrant was issued following defendant's failure to appear in court. Defendant was arrested five years later on August 6, 2012, and the public defender was appointed. Defendant hired private counsel, G. Douglas Grimes, who filed an appearance on November 27, 2012, and tried the case.

¶ 7 Defendant appeals from his convictions of aggravated criminal sexual assault (counts 1 and 2) and aggravated criminal sexual abuse (count 21). Counts 1 and 2 each alleged that, on or about November 1, 2006, through November 30, 2006, defendant committed aggravated criminal sexual assault in that he knowingly committed a criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)) against V.G. in that, by use of force, he placed his finger in her vagina, and in so doing, acted in a manner that threatened the life of V.G.'s mother by telling V.G. that he would kill her mother. See 720 ILCS 5/12-14(a)(3) (West 2006). Counts 1 and 2 alleged that defendant committed the offense twice, in separate and distinct acts. Count 21 alleged that, on or about November 1, 2006, through November 30, 2006, defendant committed aggravated criminal sexual abuse in that he, who was 17 years old or older, committed an act of sexual conduct with V.G., who was at least 13 years old but under 17 years old when the act was committed, in that defendant knowingly and by the use of force touched V.G.'s vagina for the purpose of sexual arousal of defendant. See 720 ILCS 5/12-16(c)(1)(ii) (West 2006).

¶ 8 A. Motion to Suppress Statement

¶ 9 Before trial, defendant moved to suppress his confession that he made on the day he was arrested. At the hearing, Detective Domenic Cappelluti testified that he had been a Waukegan police officer for 18 years, had interviewed thousands of suspects, and conducted hundreds of those interviews in Spanish. Cappelluti was fluent in Spanish and was the only Spanish-speaking detective on duty that day. At 4 p.m. on July 11, 2007, Cappelluti began his shift and was assigned to interview defendant, who was in the booking room cell.

¶ 10 Cappelluti began the interview at 9 p.m. in the detective bureau interview room. Cappelluti explained that the individual job responsibilities of detectives made such delays in starting interviews normal. He conducted the entire interview in Spanish because defendant preferred it over English. Cappelluti obtained a preprinted Spanish waiver form, advised defendant of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and asked him to sign the form. Defendant responded that he could not read or write in English or Spanish, so Cappelluti went over each right and wrote "Si," which means "yes," next to each one when defendant stated that he understood the right. Defendant signed the form.

¶ 11 Cappelluti explained the allegation, and defendant said he did not know what he was talking about. After a few minutes, defendant told Cappelluti that, in November 2006, he committed two episodes of penetration of V.G.'s vagina with his finger. Defendant used the word "penetrate" in describing the act. Defendant stated that he used only one finger to commit the act and denied using his penis or that he "had sex" with V.G. Defendant also admitted that he touched V.G.'s groin area once while they were wrestling in the living room. Defendant provided details about the penetration that V.G. was sleeping when he walked into the room, but he denied threatening her. Defendant confessed within 10 or 15 minutes and said he was sorry.

Cappelluti denied raising his voice, threatening or physically attacking defendant, or making any promises of leniency.

¶ 12 Cappelluti asked defendant for a written statement, but defendant said he could not read or write in either English or Spanish. Cappelluti asked defendant to repeat his confession on a video recording, and defendant agreed. Cappelluti held up the signed waiver form, and defendant agreed it was the form he had signed. Defendant restated his confession. Cappelluti testified that, during the unrecorded portion of the interview, defendant admitted digital penetration of V.G.'s vagina but, in the recording, defendant denied the penetration and said he only made skin-to-skin contact. The trial court reviewed the recording and a translated transcript.

¶ 13 Cappelluti explained that making video or audio recordings of interrogations was not the policy of the Waukegan police department, except in homicide cases. Cappelluti resorted to video recording in this case because defendant could not provide a written statement to memorialize his confession. Cappelluti did not record the first portion of the interview because he was concerned that defendant would be embarrassed and not cooperate. Cappelluti testified that, at various points during the interview, he paused to confirm that defendant understood what he was saying. Defendant gave verbal cues and nonverbal cues, such as nodding his head, to show that he understood. The detective had no problem communicating with defendant, and defendant never indicated that he wished to stop the interview or consult an attorney. Cappelluti denied doing anything wrong during the interrogation. The entire interview took less than one hour.

¶ 14 Defendant testified that he was arrested at 2 p.m. on July 11, 2007. He had nothing to eat or drink, and he was not advised of his rights. He spoke with Cappelluti much later that evening.

Defendant described Cappelluti's fluency in Spanish as "perfect." Defendant claimed that Cappelluti only showed him the Spanish *Miranda* waiver form after the interview.

¶ 15 Defendant denied to Cappelluti that he knew V.G. He also denied telling Cappelluti that he did anything wrong. Cappelluti swore at defendant and spoke in a strong tone, ordering him, "tell me!" Cappelluti ordered defendant to put on his shoes, and he opened the door to the interview room and told two officers to "take him where he is never going to see his family again." Defendant feared he would be struck by the officers. Defendant told Cappelluti to wait because he did not want to leave. He continued his denials and asked Cappelluti why he wanted defendant to lie. Cappelluti ordered defendant to confess to penetrating V.G. with his penis, but defendant refused. After Cappelluti promised defendant that he could go free, defendant admitted to touching V.G.'s vagina with his fingers.

¶ 16 Defendant also testified that, before making his recorded statement, Cappelluti told him what to say. Defendant gave his video-recorded statement, and Cappelluti said he could leave. Cappelluti left the cell, and another officer entered. The second officer told defendant that Cappelluti had lied to him and that defendant could not leave. Defendant admitted that he signed the *Miranda* waiver form, but explained that he signed it after the interview and that his name was misspelled.

¶ 17 Defense counsel argued that defendant's statement was involuntary and that he was not properly admonished under *Miranda*. The court disagreed, noting that Cappelluti was more credible than defendant. The court observed that, when defendant was giving his testimony, he occasionally answered questions before they were translated to Spanish, which belied his claim that he could not speak English. The court found that Cappelluti's interaction with defendant was not intimidating and that no statute or police department policy mandated that the entire

interview be recorded. The court found that defendant's waiver was voluntary and knowing and deemed the statement admissible.

¶ 18 B. The Trial

¶ 19 V.G. was born on May 19, 1993, so she was 13 years old at the time of the offenses and 21 years old at the time of the trial. V.G. identified defendant as her "step dad" and stated that her biological father and mother were separated. While she was in grades six, seven, and eight, V.G. lived with her mother and defendant on Glen Flora Avenue in Waukegan. Defendant and V.G.'s mother worked during the day. Her mother worked as a nanny for a family in Lake Forest, and three to four times per week she would work late. V.G. and her mother had separate bedrooms. Sometimes, on nights when her mother worked late, V.G. would sleep in her mother's bed so she would know when her mother returned home.

¶ 20 V.G. testified that, on several occasions, defendant entered the room in which she was sleeping and put his fingers in her vagina. Defendant would hold V.G.'s arms together with one hand to restrain her. Defendant put saliva on his fingers before placing them in her vagina. Sometimes he would lick her vagina. V.G. was wearing her pajamas and defendant usually wore his work clothes. The acts occurred when V.G. was in her mother's bed or in her own bed, trying to fall asleep. The first time defendant assaulted V.G., she was sleeping in her mother's bed. V.G. told defendant to stop, and he said "no" and told her to shut up. The incident lasted 10 to 15 minutes. V.G. testified that defendant placed his fingers in her vagina more than once, but not when anyone else was around.

¶ 21 The trial court instructed the jury that V.G.'s testimony about defendant licking V.G.'s vagina should be considered only on the issues of "*modus operandi*, intent, and lack of mistake." V.G. testified again that defendant licked her vagina with his tongue. V.G. told defendant to

stop, and he responded by threatening to kill her mother if V.G. told anyone what he was doing. Defendant made these threats "repeatedly," including those times when he placed his finger in her vagina. V.G. believed the threats and was afraid to tell her mother.

¶ 22 V.G. testified that defendant once put her hands on his penis over his clothes. Another time, when V.G.'s mother was home, defendant put his hand on her vagina over her clothes. Defendant pleaded to V.G., "Please, please don't tell your mom, don't tell your mom." V.G. told her mother, and defendant claimed that they were just playing. V.G. did not recall the exact date the assaults began, but she was 13 years old and in eighth grade.

¶ 23 At the time of trial, V.G. was living with her biological father, with whom she had a good relationship. V.G. told a friend at school that defendant had abused her. Defendant moved out of the home, and V.G. reported the offenses to her mother and then the police. From 2003 to 2006, before the abuse began, V.G. had a good relationship with defendant. Defendant had clothes in a closet that he shared with V.G.'s mother.

¶ 24 Rosa testified that she lived with defendant for five years. When V.G. was in middle school, Rosa worked from 8 a.m. to 5 or 6 p.m. Two or three times a month, Rosa babysat for her employers at night. Defendant stayed overnight at the home five days a week, and he said he was at work the other two nights. On nights when Rosa was babysitting, defendant was home with V.G.

¶ 25 Rosa recalled one occasion when she heard V.G. scream in the home. V.G. told her that defendant had touched her "parts." Rosa ordered defendant to leave the house. Defendant asked for forgiveness, saying that he and V.G. were just playing around. Rosa allowed defendant back into the home.

¶ 26 In June 2007, Rosa discovered that defendant was married to another woman. Rosa went to the woman's home and learned the details. Rosa kicked defendant out of the house and told V.G. that defendant was gone for good. V.G. then reported what defendant had done to her. Rosa took V.G. to the police to report the incidents.

¶ 27 On cross-examination, Rosa testified to how she found out about defendant's marriage and what she did when she went to his wife's home. Rosa confronted defendant over the telephone, after which he never returned to the home, even to retrieve his clothing. Rosa admitted knowing defendant's sister, Theresa, but Rosa denied going to see her to get defendant to come back to her. Rosa denied telling Theresa that, if defendant did not leave his wife, "you and your family will be sorry."

¶ 28 Cappelluti testified to the interrogation on July 11, 2007, and his testimony was similar to his testimony at the hearing on defendant's motion to suppress. Defendant told Cappelluti that he committed two episodes of penetration of V.G.'s vagina with his finger. Defendant stated that he used only one finger to commit the act and denied using his penis or that he "had sex" with V.G. Defendant confessed within 10 or 15 minutes. Cappelluti denied raising his voice, threatening or physically attacking defendant, or making any promises of leniency.

¶ 29 Cappelluti asked defendant for a written statement, but because defendant said he could not read or write, Cappelluti asked defendant to repeat his confession on a video recording, and defendant complied. The recording and a translation and transcript of the video was admitted. The jury viewed the recording while reading the transcript.

¶ 30 Cappelluti testified that, during the unrecorded portion of the interview, defendant admitted digital penetration of V.G.'s vagina but that, in the recording, defendant denied the penetration and said he only touched it. The entire interview took less than one hour.

¶ 31 On cross-examination, Cappelluti admitted that defendant's signature on the *Miranda* waiver form was misspelled as "Roja-Roiz." Cappelluti denied doing anything wrong during the interrogation.

¶ 32 Defendant and his sister, Theresa, testified for the defense. Through a Spanish translator, defendant testified that he met Rosa in 2003 when he was still married to a woman named Secorro. Defendant has two children with Secorro, who currently resides in Mexico. Defendant stated that, in 2007, he resided with Secorro and not Rosa, but he had a sexual relationship with Rosa at the time. Defendant denied ever spending the night at Rosa's home or keeping any clothes there besides two pair of pants and two pair of underwear.

¶ 33 Defendant testified that Rosa would yell at V.G. and call her vulgar names. In March or April 2007, Rosa called him and asked "where are you, motherfucker?" Defendant replied that he was working, and Rosa accused him of being with another woman. When he went to the house, Rosa repeated the accusation and threatened to call the police and tell them that he had raped V.G. Defendant was interviewed by the police later that day.

¶ 34 Defendant denied having any sexual contact with V.G. He testified there was a lock on V.G.'s bedroom door and that he did not have a key.

¶ 35 Defendant also testified about his arrest and interview with Cappelluti on July 11, 2007, and his testimony was similar to his testimony at the suppression hearing. Defendant denied telling Cappelluti that he did anything wrong. Cappelluti swore at defendant and spoke in a strong tone. Cappelluti threatened to send defendant "where he is never going to see his family again." In the interview, defendant admitted touching V.G.'s vagina with his fingers, but only after Cappelluti promised defendant that he could go free if he made the admission. Defendant

denied signing the *Miranda* waiver form, saying the signature was misspelled and in someone else's handwriting.

¶ 36 On cross-examination, defendant admitted lying to Secorro and Rosa about his relationships with them. He also admitted that he never made a complaint to the Waukegan police department about Cappelluti mistreating him. Defendant stated that he made the recorded statement only because he feared Cappelluti. Defendant also conceded that, during the hearing on the suppression motion, he admitted signing the waiver form.

¶ 37 Theresa testified that Rosa was defendant's girlfriend, whom she knew. Theresa testified that defendant resided with Secorro in 2004 to 2007, when Theresa would visit them weekly. On cross-examination, Theresa admitted that she would visit Secorro's house in the evening and sometimes defendant was not there.

¶ 38 The foreperson informed the trial court that the jury had reached a verdict on all 10 counts on which defendant was tried. However, only 11 jurors signed the verdict form finding defendant guilty of criminal sexual assault (count 7) because the foreperson did not sign the form. The clerk recited each guilty verdict in open court. The jury was polled, and the transcript shows that each juror stated "yes" when asked "were and are these now your verdicts." The jury was discharged and judgment was entered on the verdicts. On September 15, 2014, defendant filed a posttrial motion, which was denied on September 22, 2014.

¶ 39 The trial court sentenced defendant to consecutive terms of 17 years each for two counts of aggravated criminal sexual assault (counts 1 and 2) and five years for one count of aggravated criminal sexual abuse (count 21), with the sentences for aggravated criminal sexual assault to be served at 85%. Following the denial of his motion to reduce sentence, defendant filed a timely notice of appeal.

¶ 40 II. ANALYSIS

¶ 41 Appellate counsel argues that trial counsel should have raised several issues in the trial court and that they are subject to plain error review. Defendant contends that (1) the convictions must be reversed because the State did not prove defendant guilty beyond a reasonable doubt; (2) his convictions of aggravated criminal sexual assault (count 1) and aggravated criminal sexual abuse (count 21) violate the one-act, one-crime rule, and therefore we must vacate the conviction and sentence on count 21; (3) all of the convictions must be reversed and the cause remanded for a new trial because only 11 jurors signed the guilty verdict form on the charge of criminal sexual assault (count 7), even though he was not sentenced on that count; (4) defendant is entitled to a new trial because he was denied his sixth amendment right to counsel when he was questioned by the police on the day after the information was filed and bond was set; (5) the State violated *Brady* by failing to disclose Cappelluti's prior involvement with multiple cases of "false confessions" and "episodes of brutality"; (6) defendant is entitled to a new trial because the jury was incorrectly instructed on the definition of "sexual conduct"; and (7) defendant is entitled to a new trial because the court erred in allowing the State to show *modus operandi*, intent, and absence of mistake by introducing the victim's statement that defendant placed his mouth on her vagina. For the following reasons, we conclude that defendant is not entitled to relief on appeal because either no error occurred or the plain error rule does not compel reversal.

¶ 42 A. Plain Error

¶ 43 To preserve an issue for review, a defendant must both raise an objection at trial and raise the issue in a posttrial motion, and his failure to do so results in forfeiture of the claim. *People v. Herron*, 215 Ill. 2d 167, 175 (2005); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Acknowledging trial counsel's forfeiture, appellate counsel argues that several issues should be

considered because the motion for a new trial and motion to reduce sentence filed by trial counsel were "clearly deficient." In the motion for a new trial, defendant argued that the court mishandled questions submitted by the jury, and in the motion to reduce sentence, he argued that the sentence was excessive.

¶ 44 Appellate counsel alludes to trial counsel's alleged ineffectiveness but stops short of making an explicit claim. On the one hand, appellate counsel states that trial counsel was "clearly deficient" and "ineffective," and therefore, this court "should consider defendant's allegations of substantial error." On the other hand, he does not elaborate on the law governing ineffective assistance claims or even cite to the rule of *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, he states that "defendant is not making any general argument of ineffective assistance of counsel at this point [in that] it is inappropriate to argue ineffective assistance on direct appeal because the record is insufficient for such an argument to be made [and] bringing up the issue of ineffective assistance of counsel on direct appeal will also preclude [] defendant from bringing up the issue in any postconviction proceedings, where an appropriate record can be developed." A point not argued or supported by citation to relevant authority fails to satisfy the requirements of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010) ("Both argument and citation to relevant authority are required. An issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule").

¶ 45 Rather than developing an ineffective assistance argument, appellate counsel contends that we should review the allegations of error under the plain error doctrine, which permits a court of review to consider error that has been forfeited when either:

> "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. [Citation.] Prejudice to the defendant is presumed because of the importance of the right involved, '*regardless* of the strength of the evidence.' (Emphasis in original.) [Citation.] In both instances, the burden of persuasion remains with the defendant." *Herron*, 215 Ill. 2d at 187.

¶ 46 "The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*." *People v. Johnson*, 238 Ill. 2d 478, 485 (2010). Where there is no error, there can be no plain error. See *People v. Johnson*, 218 Ill. 2d 125, 139 (2005).

¶ 47 In this case, defendant advocates reversal under both prongs of the plain error rule. First, he claims that the evidence was closely balanced because there was no physical evidence to support the convictions. For the reasons set forth in our analysis of the sufficiency of the evidence, we disagree. Cappelluti made a video recording of defendant's confession, and V.G. testified unequivocally and consistently to the acts supporting the convictions. The evidence was not closely balanced, despite defendant's protestations to the lack of physical evidence, which is unnecessary to sustain the convictions.

¶ 48 Defendant alternatively contends that, even if there was strong evidence of his guilt, he is entitled to a new trial because several fundamental errors affected his substantial rights. As to each of these claims, we determine that no plain error occurred because either defendant's underlying claims lack merit or the doctrine does not compel reversal. See *Johnson*, 218 Ill. 2d at 139.

¶ 49 B. Sufficiency of the Evidence

¶ 50 Defendant claims that the evidence does not support his convictions because the State's case was based only on his confession and V.G.'s testimony. Defendant contends that the convictions require some combination of greater detail in the confession, corroborating physical evidence, eyewitness testimony, and contemporary outcry witness testimony.

¶ 51 When a defendant challenges a criminal conviction based on 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). 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 so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Smith*, 185 Ill. 2d at 542.

¶ 52 A person commits aggravated criminal sexual assault if he commits criminal sexual assault, and as part of the same course of conduct, acted in such a manner as to threaten or endanger the life of the victim or any other person. 720 ILCS 5/12-14(a)(3) (West 2006). In turn, a person commits criminal sexual assault if he commits an act of sexual penetration by the use of force or threat of force. 720 ILCS 5/12-13(a)(1) (West 2006). " '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. Evidence of emission of semen is not required to prove sexual penetration." 720 ILCS 5/11-0.1 (West 2006).

¶ 53 A person commits aggravated criminal sexual abuse if the accused was 17 years of age or over and he commits an act of sexual conduct with a victim who was least 13 years of age but under 17 years of age when the act was committed and the accused used force or threat of force to commit the act. 720 ILCS 5/12-16(c)(1)(ii) (West 2006). " '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 2006).

¶ 54 There was overwhelming evidence of all three offenses. When the offenses occurred in November 2006, V.G. was 13 years old and defendant was 41 years old. V.G. called defendant her "step-dad" and said that he lived with her and Rosa, with whom defendant was in a sexual relationship. V.G. had her own room in the family's two-bedroom house. On the nights when Rosa worked late, V.G. occasionally would sleep in Rosa's bed.

¶ 55 V.G. testified that, on more than one occasion, defendant penetrated her vagina with his fingers and sometimes he would lick her vagina. Defendant would grab her arms with his free hand so she could not move. Defendant also touched V.G.'s vagina over her clothes and put her hand on his penis over his clothes. During the assaults, defendant "repeatedly" threatened to kill Rosa if V.G. told anyone, and she believed him.

¶ 56 During the first encounter, which lasted 10 to 15 minutes, V.G. asked defendant to stop, but he told her to shut up and that she was going to like it. V.G. reported that defendant committed the acts when no one else was around. V.G. did not tell her mother about the assaults until defendant moved out.

¶ 57 Cappelluti gave detailed testimony of defendant's confession, which was video recorded and shown to the jury. Defendant admitted to Cappelluti that he touched V.G.'s vagina with his finger, even though he recanted that confession at trial. The jury was free to credit the testimony of V.G. and Cappelluti.

¶ 58 Moreover, defendant gave the jury significant reasons to disbelieve his defense. First, as soon as defendant's bond was reduced, he fled the jurisdiction, only to be arrested five years later. Second, between the hearing on the suppression motion and the trial, defendant changed his story about whether he signed the *Miranda* waiver form. Third, defendant engaged in a long-

term sexual relationship with Rosa while concealing his marriage to another woman, demonstrating deceit.

¶ 59 The State presented evidence of each of the elements of the two counts of aggravated criminal sexual assault and one count of aggravated criminal sexual abuse. 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 the offenses beyond a reasonable doubt. See *Cunningham*, 212 Ill. 2d at 278.

¶ 60 C. One-Act, One-Crime

¶ 61 Defendant argues that his convictions of aggravated criminal sexual assault (count 1) and aggravated criminal sexual abuse (count 21) violate the one-act, one-crime rule, and therefore we must vacate the conviction and sentence on count 21. Under the one-act, one-crime doctrine, a criminal defendant may not be convicted of more than one offense "carved from the same physical act." *People v. King*, 66 Ill. 2d 551, 566 (1977); *People v. Hampton*, 406 Ill. App. 3d 925, 943 (2010). For purposes of one-act, one-crime analysis, an act has been defined as " 'any overt or outward manifestation that will support a different offense.' " *People v. Rodriguez*, 169 Ill. 2d 183, 188 (1996) (quoting *King*, 66 Ill. 2d at 566). If the defendant committed multiple acts, then multiple convictions lie even though a relationship exists between the acts. *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 83. To sustain multiple convictions where a common act is part of both offenses, the charging instrument must indicate the State's intent to treat the defendant's conduct as multiple separate acts. *People v. Crespo*, 203 Ill. 2d 335, 345 (2001); *Rodriguez*, 169 Ill. 2d at 188. Whether multiple convictions violate the one-act, one-crime doctrine presents a question of law and receives this court's *de novo* review. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 62 To determine whether a violation of the one-act, one-crime doctrine has occurred, the court performs a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, the court determines whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper where they are based on precisely the same act. *Miller*, 238 Ill. 2d at 165. Second, if the conduct involved multiple acts, then the court must determine if any of the offenses are lesser-included offenses. If so, multiple convictions are improper. *Miller*, 238 Ill. 2d at 165. " '[W]hen more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser[-]included offenses, convictions with concurrent sentences can be entered.' " *People v. Artis*, 232 Ill. 2d 156, 161 (2009) (quoting *King*, 66 Ill. 2d at 566). Challenges to alleged violations of the one-act, one-crime rule are subject to review under the second prong of the plain error rule because such errors are so serious that they affect the fairness of the trial and challenge the integrity of the judicial process. *Artis*, 232 Ill. 2d. at 165-66.

¶ 63 Defendant argues that, under the first-step of the one-act, one-crime analysis, the aggravated criminal sexual assault and aggravated criminal sexual abuse arose from the same act. He contends that "to penetrate a victim's vagina, a perpetrator must also touch it" and therefore, regardless of "whether the first separate and distinct act [he] was found guilty of was touching the victim's vagina (count 21) or penetrating it (count 1), it was just one (1) physical act." The State responds that, although the offenses occurred close in time, they were charged and proven to be separate acts. We agree with the State.

¶ 64 The charging instrument put defendant on notice that the State intended to treat his conduct as multiple separate acts. See *Crespo*, 203 Ill. 2d at 345. Count 1 alleged that "in a first separate and distinct act *** by the use of force defendant placed his finger into the vagina of

[V.G.]." Count 2 alleged the same conduct "in a second separate and distinct act." Count 21 alleged that defendant "in a first separate and distinct act *** by the use of force, touched the vagina of [V.G.]."

¶ 65 Counts 1 and 21 each alleged a "first separate and distinct act" to distinguish them from counts 2 and 22. The jury heard evidence that, although the acts relevant to counts 1 and 21 took place during a single incident, there was an act of touching V.G.'s vagina over her clothing, which would support the charge of sexual conduct in count 21, and an act of penetration supporting count 1.

¶ 66 Consistent with the charging instrument, the State's argument to the jury also indicated an intent to treat defendant's conduct as multiple separate acts. The State argued that defendant was charged with twice penetrating V.G.'s vagina with his finger and also touching her vagina with his finger, which conforms to the convictions of counts 1, 2, and 21.

¶ 67 During closing argument, the prosecutor went over the instructions for aggravated criminal sexual assault and aggravated criminal sexual abuse. He also distinguished sexual penetration and sexual conduct and made the following comments:

> "Now, what that says is did he touch her vagina? This definition [of sexual conduct] doesn't call for us to show an intrusion. But, ladies and gentlemen, the evidence shows that he did both, sexual conduct and sexual penetration. He touched her vagina, but then he exceeded that and went into sexual penetration and certainly put his finger inside [V.G.'s] vagina.
>
> You can find the defendant guilty of every charge you're shown here today. You can find him guilty of the aggravated criminal sexual abuse based on his conduct of putting his finger on her vagina, and you can find him guilty of the aggravated criminal

sexual assault and criminal sexual assault for actually penetrating and intruding ever so slight [*sic*] in her vagina, even though he did much more than that.

* * *

You heard compelling testimony from the State's case. [V.G.'s] impassioned, unimpeached testimony regarding her year being abused by this defendant. The two – at least two times he put his finger in her vagina and the times he put his mouth on her vagina.

¶ 68 In rebuttal, the prosecutor argued the following:

"Was she embellishing how many times this happened? He's charged with two times. We're not charging him with three times a week putting his finger into her vagina, and that is not what [V.G.] said yesterday was it?

* * *

What does [defendant's relationship with Rosa] have to do with [V.G.] telling you that, 'I felt it inside of me. I told him to stop. He told me shut up, you'll like it.' And he was holding [her] hand with his one strong hand and the other hand was in her pajamas, in her underwear, not just on. It did start on, and that's the conduct stuff that we're asking you to find him guilty on, but then it went in.

* * *

Did he penetrate her? Did he touch her? He did both. That's what you guys are going to go back and consider. He absolutely touched her and he also penetrated her.

Go back and talk about the testimony. You heard the evidence. What's absolutely plausible and what's ridiculous? Was it more than once? We're alleging twice, finger in vagina twice."

¶ 69 Defendant claims that he was charged with only two separate and distinct acts of *either* touching or penetration. In support, he takes out of context the prosecutor's phrases that "He's charged with two times" and "We're alleging twice." Our comprehensive review of the record shows that these comments refer to the two instances of penetration charged in counts 1 and 2. The prosecutor was explaining to the jury that V.G.'s testimony about the year-long abuse could have supported additional charges but the State was alleging only two instances of penetration and two instances of sexual conduct.

¶ 70 Our conclusion is supported by *Crespo*, where the issue was whether the defendant's conviction of aggravated battery must be vacated because it stemmed from the same physical act as his conviction of armed violence. *Crespo*, 203 Ill. 2d at 340. There, the defendant stabbed the victim "three times in rapid succession," once in the right arm and twice in the left thigh. *Crespo*, 203 Ill. 2d at 338. The court acknowledged that each of the victim's three separate stab wounds could support a separate offense. *Crespo*, 203 Ill. 2d at 342. However, the court noted that, in the indictment, the State had not apportioned the two offenses among the various stab wounds and that it had presented its case under a theory that the defendant's conduct, though consisting of three separate stab wounds, constituted but a single attack on the victim. *Crespo*, 203 Ill. 2d at 343-44. Under those facts, the court held that it would be "profoundly unfair" to allow the State to change its theory on appeal. *Crespo*, 203 Ill. 2d at 343. In contrast, the State apportioned the offenses in count 1 and count 21 in this case and presented its theory that defendant's conduct constituted separate offenses in that he touched V.G.'s vagina over her clothes for his sexual arousal and subsequently committed digital penetration.

¶ 71 Defendant alternatively argues, for the first time in his reply brief, that the aggravated criminal sexual abuse is a lesser-included offense of aggravated criminal sexual assault. Because

defendant failed to make the argument in his opening brief, we deem the issue forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing").

¶ 72 D. Verdict Form

¶ 73 Defendant next contends that the jury's verdict and the resulting judgment are invalid because the jury failed to return a unanimous verdict on criminal sexual assault (count 7), a charge for which defendant was not sentenced. Defendant concludes that we must treat the verdict on count 7 as an acquittal, which would be inconsistent with the guilty verdicts on other charges, and therefore he is entitled to a reversal of the judgment and a new trial on all the charges.

¶ 74 The record shows that the foreperson informed the trial court that the jury had reached a verdict on all the charges. The clerk recited the verdicts, stating that the jury had found defendant guilty on each. The foreperson did not sign the verdict form for count 7, but she signed all the other verdict forms. The transcript shows that the jury was polled, and each juror, including the foreperson, said "yes" when asked "were and are these now your verdicts?"

¶ 75 In every criminal trial, the defendant has the absolute right to poll the jury after it returns its verdict to ensure that the verdict is in fact unanimous. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 15. Two points underlie the right to poll the jury. "First, '[t]he finding of a jury does not become a verdict until it has been received, accepted by the court and recorded of record. [Citations.] In other words, a verdict is not final until pronounced and recorded in open court.' " *McGhee*, 2012 IL App (1st) 93404, ¶ 15 (quoting *People v. Rehberger*, 73 Ill. App. 3d 964, 968 (1979)). "Second, '[t]he opportunity for jurors to show their assent or dissent to a verdict is basic to our system which requires unanimity among the jurors since if any of the jurors dissents

from the verdict, it cannot be recorded.' " *McGhee*, 2012 IL App (1st) 93404, ¶ 15 (quoting *Rehberger*, 73 Ill. App. 3d at 968.

¶ 76 A defendant's substantive right to a unanimous verdict is so basic to our legal system that a nonunanimous verdict cannot be recorded and is among the most fundamental of rights in Illinois. *McGhee*, 2012 IL App (1st) 93404, ¶ 24. One could argue that a conviction based on a nonunanimous verdict is an error that would require automatic reversal under the second prong of the plain-error doctrine. However, we reject defendant's claim that the verdict returned on count 7 was not unanimous.

¶ 77 The totality of the circumstances shows that the omission of the foreperson's signature from the verdict form was akin to a scrivener's error and not the result of a nonunanimous verdict. The jurors were instructed that all verdicts must be unanimous, and the foreperson told the court that the jury had reached verdicts on all the charges. The guilty verdict on count 7 was read in open court, and the foreperson acknowledged during polling that these were her verdicts.

¶ 78 During deliberations, the jury sent three notes to the trial judge, including one that sought guidance for a juror who said she wanted to change her verdict on an unspecified charge. The trial court provided the jurors with a complete set of new verdict forms, asked them to cross out the signed verdict forms, and directed them to continue deliberating. The jury eventually returned a guilty verdict on all 10 charges. Perhaps the foreperson's omission in not signing the verdict form for count 7 was an oversight resulting from the court providing the new forms. Regardless of the cause of the omission, the remainder of the record shows that no plain error occurred because the verdict on count 7 was unanimous.

¶ 79 E. Sixth Amendment Right To Counsel

¶ 80 Defendant contends that he is entitled to a new trial because he was denied his sixth amendment right to counsel when he was questioned by Cappelluti. The original charging instrument was filed on July 10, 2007, alleging four sex offenses. The information stated "*Ex parte* Hearing Held and Probable Cause Found. Warrant Issued – Bond set in the amount of: $350,000." An arrest warrant was also issued on that date. The next day, on July 11, 2007, defendant was arrested, transported to the Waukegan police department, and questioned by Cappelluti. Defendant appeared in court for the first time the day after that, on July 12, 2007, when the public defender was appointed, the court conducted a bond hearing and imposed conditions for bond, counsel filed a speedy trial demand, and the court set a date for a preliminary hearing.

¶ 81 Defendant argues that his sixth amendment right to counsel attached on July 10, 2007, when the information was filed, bond was set, and the arrest warrant was issued. Defendant concludes that he is entitled to a new trial with his statement excluded because his sixth amendment right to counsel was violated when he was not appointed counsel before the police interview. In support, defendant cites *People v. Ballard*, 206 Ill. 2d 151 (2002), which set forth the "prosecutorial awareness" rule. The court held that "[t]he sixth amendment right to counsel attaches at or after the initiation of adversarial judicial proceedings – whether by way of a formal charge, preliminary hearing, indictment, information, or arraignment." *Ballard*, 206 Ill. 2d at 171.

¶ 82 The sixth amendment right to counsel was more recently revisited in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), where the Supreme Court discarded the prosecutorial awareness rule, stating that the right to counsel attaches when the accused is brought before a judicial officer and is told of the formal accusation against him and his liberty is subject to

restriction. *Rothgery*, 554 U.S. at 202. The Court observed that "by the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial." *Rothgery*, 554 U.S. at 202. The Court emphasized that "[t]he rule is not mere formalism, but a recognition of the point at which the government has committed itself to prosecute, the adverse positions of government and defendant have solidified, and the accused finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." (Internal quotations omitted.) *Rothgery*, 554 U.S. at 198. The *Rothgery* court specifically rejected the argument that the right to counsel attaches upon the filing of formal documents or upon the direct involvement of a prosecutor. *Rothgery*, 554 U.S. at 209-10. *Rothgery* controls under the facts of this case, and we reject defendant's argument accordingly.

¶ 83 Since *Rothgery* and consistent with it, the appellate court has determined that the sixth amendment right to counsel does not attach at a lineup conducted prior to the initial appearance before a judge. *People v. White*, 395 Ill. App. 3d 797, 822 (2009). In arguing that the State had committed itself to prosecution with the filing of the information, setting of bond, and issuing of the arrest warrant, defendant cites a passage from *White* where the court stated " 'it would defy common sense to say that a criminal prosecution has not commenced against a defendant who, perhaps incarcerated and unable to afford judicially imposed bail, awaits preliminary examination on the authority of a charging document filed by the prosecutor.' " *White*, 395 Ill. App. 3d at 823 (quoting *Rothgery*, 554 U.S. at 208). Appellate counsel ignores the *White* court's holding that, although "the Supreme Court in *Rothgery* has dispensed with the 'prosecutorial awareness' standard that was previously applied in Illinois and other jurisdictions, it did not

obviate presentment before a judicial officer as a trigger to attachment of the sixth amendment right to counsel." *White*, 395 Ill. App. 3d at 823.

¶ 84 In agreement with *Rothgery* and *White*, we conclude that defendant's sixth amendment right to counsel did not attach until July 12, 2007, when he appeared in court for the first time. Because we conclude that defendant's sixth amendment right to counsel had not attached before he was interviewed, we need not consider defendant's alternative argument that he did not waive the right under Illinois Supreme Court Rule 401(a) (eff. July 1, 1984).

¶ 85 F. Cappelluti's Prior Investigations

¶ 86 Defendant claims that the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose Cappelluti's involvement in cases of false confessions, false arrests, and brutality. Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001) is a codification of the due process requirements espoused in *Brady* (see *People v. Simon*, 2011 IL App (1st) 091197, ¶ 99) and provides in part as follows:

> "Except as is otherwise provided in these rules as to protective orders, the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor. The State shall make a good-faith effort to specifically identify by description or otherwise any material disclosed pursuant to this section based upon the information available to the State at the time the material is disclosed to the defense. At trial, the defendant may not offer evidence or otherwise communicate to the trier of fact the State's identification of any material or information as tending to negate the guilt of the accused or reduce his punishment." Ill. S. Ct. R. 412(c) (eff. Mar. 1, 2001).

¶ 87 To establish a *Brady* violation, a defendant must show that: "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008). In addition, "defendant must establish that he requested the evidence in question, and that the State in fact possessed it and failed to disclose it." *People v. House*, 141 Ill. 2d 323, 387 (1990).

¶ 88 Defendant asserts that the State violated *Brady* by failing to "disclose matters regarding Detective Cappelluti's involvement with multiple false confessions and episodes of brutality." Appellate counsel cites several federal civil rights actions involving Cappelluti (see, *e.g.*, *Hobbs v. Cappelluti*, 899 F. Supp. 2d 738 (N.D. Ill. 2012) and *Strong v. Butler*, 07 CV 435 (N.D. Ill.)), but he does not allege that any involve defendant or resulted in a judicial finding of misconduct or disciplinary action against Cappelluti. "[M]ere evidence of a civil suit against an officer charging some breach of duty unrelated to the defendant's case is not admissible to impeach the officer." *People v. Colemen*, 206 Ill. 2d 261, 279 (2002) (citing *People v. Davis*, 193 Ill. App. 3d 1001, 1005 (1990); *Cf. People v. Adams*, 259 Ill. App. 3d 995, 1004 (1993) (defendant should have been allowed to impeach police officer with evidence of his suspension based on positive test for cocaine).

¶ 89 The evidence of civil suits filed against Cappelluti, without more, would not have been admissible to impeach the officer. Defendant's *Brady* claim lacks merit because the undisclosed evidence would not have been favorable to defendant if it had been disclosed. We need not decide whether the evidence was suppressed by the State either willfully or inadvertently or whether the evidence was material to guilt or punishment. See *Beaman*, 229 Ill. 2d at 73-74.

¶ 90 We note that, in arguing that the legal actions involving Cappelluti are not "mere allegations," appellate counsel states in his reply brief that the alleged misconduct involving the confession in *Strong* is "public record." He also claims that "[t]he *Hobbs* case is very well known in Lake County, having derived out of the wrongful prosecution" and "that Jerry Hobbs was paid several millions of dollars as a result of this section 1983 civil rights lawsuit is also well known in Lake County." If the allegations against Cappelluti are public record and as notorious as counsel attests, one can hardly consider them to be suppressed by the State, either willfully or inadvertently. With no evidence of a *Brady* violation, no error occurred, and thus, no plain error occurred.

¶ 91 G. Jury Instruction

¶ 92 Defendant argues that the trial court gave a defective jury instruction regarding counts 23 and 24, two offenses for which he was not sentenced. The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence. *People v. Parker*, 223 Ill. 2d 494, 501 (2006); *People v. Ramey*, 151 Ill. 2d 498, 535 (1992). Jury instructions should not be misleading or confusing. Their correctness depends not on whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them. *Herron*, 215 Ill. 2d at 187-88. If the Illinois Jury Pattern Instructions contain an applicable instruction on a subject about which the trial court determines the jury should be instructed, the trial court must use that instruction, unless the court determines that the instruction does not accurately state the law. Ill. S. Ct. R. 451(a) (eff. April 8, 2013). Where a pattern instruction does not accurately state the law, Illinois Supreme Court Rule 451(a)

authorizes the trial court to modify it. Ill. S. Ct. R. 451(a) (eff. April 8, 2013); *People v. Harris*, 225 Ill. 2d 1, 43 (2007).

¶ 93 Counts 21, 22, 23, and 24 charged defendant with aggravated criminal sexual abuse for touching V.G.'s vagina. Counts 21 and 22 alleged that defendant committed separate and distinct acts of the sexual conduct "for the purpose of the sexual *arousal* of the defendant." (Emphasis added.) See 720 ILCS 5/12-16(c)(1)(ii) (West 2006). Counts 23 and 24 similarly alleged that defendant committed separate and distinct acts of the sexual conduct "for the purpose of the sexual *gratification* of the defendant." (Emphasis added.) See 720 ILCS 5/12-16(f) (West 2006). The jury found defendant guilty of all four counts, but he was sentenced only on count 21.

¶ 94 The Illinois Jury Pattern Instructions, Criminal, No. 11.65D (4th ed. 2000) (hereinafter IPI Criminal 4th No. 11.65D) defines "sexual conduct" as "any intentional or knowing touching or fondling by [(the victim) (the accused)], either directly or through the clothing, of [(the sex organ) (anus) (breast)] of [(the victim) (the accused)] [any part of the body of a child under 13 years of age], for the purpose of sexual gratification or arousal of the victim or the accused."

¶ 95 Although IPI Criminal 4th No. 11.65D and section 12-16 of the Criminal Code each refer to sexual arousal and gratification, the jury instruction for counts 23 and 24 only referred to sexual arousal and not gratification. Defendant is correct that an error occurred. He argues that the mistake compels reversal of all of his convictions and remand for a new trial because the jury was not instructed on the element of a charged offense.

¶ 96 Defendant claims that we may reverse under both prongs of the plain error doctrine, but a court of review will not correct an unpreserved error unless the defendant demonstrates prejudice. *People v. Thurow*, 203 Ill. 2d 352, 362 (2003). The State correctly points out that

defendant was not sentenced on counts 23 or 24. Defendant was sentenced on count 21, which alleged sexual arousal. Thus, the instruction that was given was correct as to the relevant charge. Defendant was not prejudiced and is not entitled to a new trial based on the error.

¶ 97 H. Other Crimes Evidence

¶ 98 Defendant argues that he is entitled to a new trial because the trial court erred in admitting V.G.'s testimony that defendant placed his mouth on her vagina. The trial court instructed the jury that the testimony could be considered only on the issues of *modus operandi*, intent, and absence of mistake.

¶ 99 The trial court has discretion to determine whether evidence is relevant and admissible, and therefore, an evidentiary ruling will not be overturned unless it is arbitrary, fanciful, or unreasonable. *People v. Hanson*, 238 Ill. 2d 74, 101 (2010). Evidence is relevant if it has " 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *People v. Monroe*, 66 Ill. 2d 317, 322 (1977) (quoting Fed. R. Evid. 401). A court may exercise its discretion and exclude evidence, even if it is relevant, if the danger of unfair prejudice substantially outweighs its probative value. *Hanson*, 238 Ill. 2d at 102.

¶ 100 Generally, evidence of other crimes is inadmissible to show the defendant's propensity to commit a crime. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit a crime, such as *modus operandi*, intent, motive, identity, or absence of mistake. *People v. Pikes*, 2013 IL 115171, ¶ 11. Subsequent bad acts may be used as other-crimes evidence. See *People v. Bartall*, 98 Ill. 2d 294, 312-13 (1983).

¶ 101 The Illinois General Assembly, however, has created a limited exception to this general rule of inadmissibility for other-crimes evidence intended to show the defendant's propensity to commit crimes. *People v. Ward*, 2011 IL 108690, ¶ 25. If a defendant is tried on one of the enumerated sex offenses, section 115-7.3(b) of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-7.3(b) (West 2006)) allows the State to introduce evidence that the defendant also committed another of the specified sex offenses. The statute expressly permits this other-crimes evidence to be admitted for any relevant purpose. 725 ILCS 5/115-7.3(b) (West 2006). As the Supreme Court recognized in *Michelson v. United States*, 335 U.S. 469, 475-76 (1948), propensity evidence is often highly relevant, making other-crimes evidence admissible under section 115-7.3(b) to show a defendant's propensity to commit sex crimes. *Ward*, 2011 IL 108690, ¶ 25. Before the other-crimes evidence may be used, however, the trial court must apply a balancing test, weighing the probative value of the evidence against the undue prejudice it might cause to the defendant. 725 ILCS 5/115-7.3(c) (West 2006). The admissibility of evidence rests within the discretion of the trial court, and its decision will not be disturbed absent an abuse of discretion. *Pikes*, 2013 IL 115171, ¶ 12.

¶ 102 In this case, the State sought to admit the challenged testimony under section 115-7.3 to show defendant's propensity to commit the charged offenses. The trial court determined that the prejudicial effect of the evidence outweighed its probative value and barred the State from using the testimony to show propensity. However, the court allowed it for other limited purposes and instructed the jury that the testimony could be considered on the issues of *modus operandi*, intent, and absence of mistake.

¶ 103 Defendant argues that V.G.'s testimony that he placed his mouth on her vagina was inadmissible for any purpose because any evidence of *modus operandi*, intent, and absence of

mistake is irrelevant. Defendant points out that he did not raise the defense of mistake and that other-crimes evidence may not be admitted to prove intent where the defendant's intent is not contested at trial (see *People v. Clark*, 2015 IL App (1st) 131678, ¶ 32). These points do not affect the admissibility of the evidence for purposes of showing intent or absence of mistake. The State charged defendant with certain offenses involving sexual touching over V.G.'s clothing, and in one instance, defendant told Rosa that he accidentally made contact with V.G.'s vagina over her clothes while "playing." The charges and defendant's statement make relevant the evidence that the contact was not innocent or accidental. The testimony of mouth-to-vagina touching also shows intent for sexual arousal or gratification. The court did not abuse its discretion in admitting the evidence to show intent and absence of mistake.

¶ 104 "The *modus operandi* exception has been described as circumstantial evidence of identity on the basis that crimes committed in a similar manner suggest a common author and strengthens the identification of the defendant." *People v. Shief*, 312 Ill. App. 3d 673, 681 (2000). Defendant persuasively argues that the identity of the perpetrator was not at issue at the trial, and therefore *modus operandi* was not necessary to show that defendant, and not someone else, committed the offenses. However, we reiterate the principle that a reviewing court will not correct an unpreserved error unless the defendant demonstrates prejudice. *Thurow*, 203 Ill. 2d at 362. Defendant was not prejudiced by the admission of the challenged testimony to show *modus operandi* where the evidence was properly admitted for the other purposes. The plain error doctrine does not compel reversal.

¶ 105 III. CONCLUSION

¶ 106 For the reasons stated, defendant's convictions of aggravated criminal sexual assault and aggravated criminal sexual abuse are affirmed. As part of our judgment, we grant the State's

request that defendant be assessed the State's attorney fee of $50 under section 4-2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2014)) for the cost of this appeal. See *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 107 Affirmed.