FIRST DIVISION
March 30, 2018

No. 1-15-0847

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 13 CR 18844
	)	
EDWARD MILLER,	)	The Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not proven guilty of aggravated criminal sexual assault beyond a reasonable doubt. The trial court did not abuse its discretion in admitting other crimes evidence. Trial counsel was not ineffective. We vacate defendant's conviction for aggravated criminal sexual assault and remand for resentencing on the lesser offense of criminal sexual assault.

¶ 2 Following a bench trial, defendant Edward Miller was found guilty of aggravated criminal sexual assault and was sentenced to 15 years' imprisonment. Defendant now appeals and argues that (1) the State failed to prove him guilty of aggravated criminal sexual assault beyond a reasonable doubt; (2) the trial court erred in admitting other crimes evidence involving an incident, where 25 years prior, a judge entered a finding of no probable cause; (3) trial counsel was ineffective for failing to object to the admission of the DNA evidence and for failing to further question the DNA expert; and (4) his fines and fees should be reduced by $40. For the

following reasons, we vacate defendant's conviction for aggravated criminal sexual assault, enter judgment on the lesser offense of criminal sexual assault and remand for resentencing.

¶ 3 BACKGROUND

¶ 4 Defendant was indicted with two counts of aggravated criminal sexual assault and three counts of aggravate kidnapping of his ex-girlfriend's 13-year old sister, S.M.

¶ 5 Prior to trial, the State filed a motion to admit other-crimes evidence based on defendant's prior sexual abuse of L.I. in 1989. Defendant was charged with this offense but the charges were eventually dismissed following a finding of no probable cause at a preliminary hearing in 1990. Records from the Chicago police department regarding this offense were subpoenaed by both parties but only an arrest report was returned. Any other records had been purged. Defendant argued against the admission of the other crimes-evidence on the basis that without further information, he could not prepare a defense against the allegations.

¶ 6 At a hearing on the motion, the trial court noted that while other crimes evidence is generally admissible, it must first be determined to be reliable, and the finding of no probable cause "raise[d] some questions" about the reliability of the allegations. The prosecutor responded that she spoke with L.I. and her statements were consistent with the arrest report. The trial court entered and continued the motion for the parties to obtain transcripts of the preliminary hearing and tender additional discovery.

¶ 7 The State obtained and tendered the arrest report, preliminary hearing transcript, notes from an interview between L.I. and an investigator, and a redacted file from the felony review unit. The court reviewed the preliminary hearing transcript and concluded that the record seemed to provide probable cause and determined that the previous judge's finding of no probable cause must have been based on L.I.'s credibility. The State argued that the finding of

no probable cause should not bear on admissibility because uncharged and acquitted conduct is admissible. The defense argued that the preliminary hearing judge clearly found that L.I. was not credible and that the age and dissimilarity of the case should lead to a finding of inadmissibility. Following these arguments, the court granted the State's motion to admit other crimes stating:

> "Anytime other crimes evidence of his nature comes in as very prejudicial. My concern earlier was based on the finding of no probable cause because that goes to the issue of reliability and whether its probative value justified the prejudicial effect. But since I had received a copy of the Preliminary Hearing transcript and I can't see anything on the written pages, themselves, which would preclude a finding of probable cause. I can tell that the finding of no probable cause must have been based on the demeanor of the witnesses at the time."

¶ 8 Defense counsel moved to reconsider and the court denied the motion. However, the court decided, *sua sponte*, to "hold a pretrial hearing concerning this witness, [L.I.]. The Defense at that time will be given an opportunity to assess their credibility then." The court stated that this ruling was based on the age of the case and the finding of no probable cause. On the next court date, the State made an oral motion to reconsider holding an evidentiary hearing. Defendant, "ask[ed] that we go forward" with the hearing, but noted his objection to the other-crimes evidence being admissible. The court denied the State's motion to reconsider holding an evidentiary hearing because based on the "age of it, because of the original finding of no probable cause, and because there are no police reports or anything to give the defense an opportunity to rebut this evidence, I think that in the interest of fairness and justice, that this hearing should be held prior to trial."

¶ 9 At the evidentiary hearing, L.I. testified that in 1989 she was eight years old and lived in her apartment with her mother, her younger brother and her uncle. Shameel, her best friend, lived with her mother and defendant in the same apartment building. L.I.'s mother knew defendant and Shameel's mother.

¶ 10 In early 1989, L.I. was in the courtyard of the apartment building when defendant called out to her and asked her to come up and help him with something. L.I. did not know where Shameel was at the time but went upstairs to Shameel's apartment. When she arrived, defendant was sitting in a chair in the living room and told L.I. that he was sick and needed her help with something. Defendant then pulled down his pants and coached her how to masturbate him to ejaculation. No one else was home at the time. Sometime after this incident, defendant called L.I. to the apartment again and again instructed her to masturbate him to ejaculation. This happened about six times.

¶ 11 On another occasion, when defendant was in the living room with L.I., he turned her around, pulled her clothes down and sat her on his lap. His penis contacted her vagina but he was unable to penetrate her so he told her to masturbate him instead. This happened again on a second occasion. Defendant told L.I. that he would hurt her mother if she told anyone what he had done.

¶ 12 L.I. did not tell her mother until April 1990, after her aunt had come to live with them and she felt safer. She told her mother and her aunt that defendant told her to masturbate him one time. She never told anyone that defendant had done it more than one time or that he tried to have sex with her. The police were called. She testified in a preliminary hearing and only testified about the first masturbation incident because she was afraid to say that there were other instances.

¶ 13 After hearing L.I. testify at the hearing, the trial court found her to be credible and found that her testimony would be admissible at trial, but only testimony regarding the first masturbation incident that she testified to at the preliminary hearing.

¶ 14 At trial, the evidence established that in July 2012, S.M., was 13-years old and lived with her mother, Lisa, two brothers, and two younger twin siblings. S.M. also had an older sister who dated defendant for about a year in 2004. Although defendant was no longer in a relationship with S.M.'s sister, he continued to visit, attend family events and occasionally spent the night. S.M. considered defendant "[l]ike a big brother."

¶ 15 On July 17, 2012, S.M. called defendant and asked him to take her and her brothers to the park. Defendant arrived at about 6 p.m. and took S.M. and her brothers to the park. S.M. played basketball with her brothers for about 20 minutes and then went to play in the sprinklers by herself. Defendant stayed in the van.

¶ 16 Defendant approached S.M. by the sprinklers and told her he was going to the store to buy popsicles. Although she initially did not want to go, she ultimately agreed to go to the store because she wanted to get chips. Defendant grabbed her "forcefully" by her arm and forced her into the front passenger seat of his van. Defendant then drove to the other side of the park and parked in a wooded area. Defendant told S.M. to get into the back of the van but she said no. Defendant then made a fist with his hand and cocked it back as if he were going to hit her. Defendant told her he would hit her if she did not get into the back so she complied.

¶ 17 In the back of the van on the long bench seat, defendant kissed her and touched her breasts and vagina over her clothes. He then turned her on her stomach, pulled down her pants, pulled his pants down and "[t]hen put [his] penis into [her] anus." Defendant was rocking back and forth. S.M. did not remember how long defendant did this to her or whether he ejaculated.

When questioned about it, S.M. explained that by "anus" she meant "butt." Defendant threatened S.M. that if she told anyone what he had done that he would kill her. Defendant then drove back to the park and picked up S.M.'s brothers and took them to McDonalds. When she arrived home at about 8 p.m., she took a shower and washed her clothes.

¶ 18 The next day, S.M. told her mother and her older brother about what happened. They called the police. S.M.'s mother took her to the hospital where S.M. told registered nurse Cynthia Riemer, that defendant "put his privates inside of her." A sexual assault kit was prepared and vaginal and anal swabs were taken from S.M. Nurse Nelson, who collected S.M.'s underwear, noted what appeared to be discharge and placed the underwear in an evidence bag.

¶ 19 S.M. identified photographs of the van defendant drove, as well as the underwear that she wore on the date of the incident, which was later washed and then worn to the hospital the following day. Nurse Nelson also identified S.M.'s underwear and the sexual assault kit she performed on S.M.

¶ 20 On July 20, 2012, S.M.'s mother woke up and found defendant sleeping in her son's bed. He had not been invited into her home. Her son called the police and defendant was arrested.

¶ 21 Ruben Ramos, a forensic scientist working with the Illinois State Police crime lab and an expert in the field of forensic DNA analysis, conducted DNA analysis from S.M.'s blood standard, defendant's buccal swab, and a cutting of S.M.'s underwear which revealed a mixture of one male and one female human DNA profiles. The male DNA profile from the underwear was incomplete, containing 12 locations, which he compared to 15 locations from defendant's buccal swab. He concluded from the profile that defendant could not be excluded from having contributed to the male DNA profile identified in S.M.'s underwear. He estimated that approximately one in 11 billion Black, one in 2.9 trillion White, or one in 540 billion Hispanic

unrelated individuals cannot be excluded as having contributed to that profile. Ramos clarified on cross-examination that while he could only say that defendant could not be excluded from the profile, he could not say that defendant was a match.

¶ 22 The parties stipulated that if called to testify, L.I. would testify as she did at the evidentiary hearing. The transcript of that hearing was admitted into evidence. Other witnesses testified as to the chain of custody of the sexual assault kit obtained from S.M. at the hospital. The State rested.

¶ 23 Defendant called Chicago police Detective Sullivan who testified that she interviewed S.M. after defendant was arrested. S.M. told her that on July 17, 2012, she and defendant first went to Old Country Buffet, that everyone was running through the sprinklers, that she kicked defendant in the stomach while in the van and he said if she did it again he would punch her, that she wore capris and a white top that night and that defendant never slept over at her house. S.M. also stated that defendant stuck his penis in her butt and fluid came out but she didn't think it was inside.

¶ 24 The parties then stipulated that if called to testify, "Tracy" would state that she works at U.S. Cellular and would identify a list of phone records as an accurate report of the telephone calls between two numbers listed on the report between July 12, 2012, and July 17, 2012.

¶ 25 After hearing all of the evidence, the court found defendant guilty of one count of aggravated sexual assault and sentenced him to 15 years' imprisonment. This appeal followed.

¶ 26 ANALYSIS

¶ 27 Defendant first argues that the State failed to prove him guilty of aggravated criminal sexual abuse beyond a reasonable doubt where it failed to prove both the aggravating factors of

an act that threatened S.M.'s life and the act of penetration necessary to elevate the offense from abuse to assault.

¶ 28 In assessing the sufficiency of evidence on appeal, a reviewing court considers whether, after viewing the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The reviewing court "determine[s] whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 280 (emphasis added) (quoting *Jackson*, 443 U.S. at 318). The court's function is not to retry the defendant. *Collins*, 106 Ill. 2d at 261. For a reviewing court to reverse a criminal conviction due to insufficient evidence, the evidence presented must be "so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98 (2008).

¶ 29 A person commits criminal sexual assault when, as charged here, the person commits an act of "sexual penetration" and "uses force or the threat of force." 720 ILCS 5/11-1.20(a)(1) (West 2014). As charged here, a person commits the offense of aggravated criminal sexual assault when he commits criminal sexual assault and acts in a manner that threatens or endangers the life of the victim or any other person. 720 ILCS 5/11-1.30(a)(3) (West 2014).

¶ 30 Defendant argues that the State failed to prove the act of penetration. " 'Sexual penetration' " is defined as "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 2014). Defendant claims that because when S.M. was asked if she knew what her "anus" was and she answered her "butt," the State failed to prove penetration because S.M.'s anatomical concept of her "anus" is her entire "buttocks." We disagree.

¶ 31 S.M. testified that defendant forced his penis "into" her anus. When asked on cross-examination if she knew "what [her] anus is?" she replied "my butt." When asked if she felt something "in her butt," she said yes. When asked if it hurt she said "yes." S.M. clearly knew what "anus" meant, and this testimony was sufficient to establish penetration. See *People v. Atherton*, 406 Ill. App. 3d 598, 610 (2010). It is well-settled that the trier of fact is in the best position to view and judge the credibility of witnesses, and "due consideration" must be given to the fact that it was the trier of fact that saw and heard the witnesses while they were being questioned. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). A trier of fact's credibility determinations are entitled to significant weight. *Id.* at 115. Viewing the evidence in the light most favorable to the State, we find that the State proved the act of penetration beyond a reasonable doubt.

¶ 32 Defendant also asserts that the evidence was insufficient to convict him of aggravated criminal sexual assault where "the only evidence that the State presented in an attempt to prove the aggravating factor that it charged, an act that threatened S.M.'s life, was S.M.'s testimony that Miller told her, after the alleged assault, that 'if [she] told anyone, he would kill [her]." In short, defendant claims that the State did not prove the aggravating factor that defendant threatened S.M.'s life. Defendant asks us to reduce his aggravated criminal sexual assault conviction to criminal sexual assault and remand for resentencing.

¶ 33 Defendant relies on *People v. Giraud*, 2012 IL 113116, to support his argument that there

was insufficient evidence that he committed an act that actually threatened S.M.'s life. In *Giraud*, the defendant was convicted of aggravated criminal sexual assault for raping his teenage daughter while having human immunodeficiency virus (HIV). *Id.* ¶ 1. The State alleged the aggravating factor that defendant threatened or endangered the life of the victim by exposing her to the risk of contracting HIV. *Id.* ¶ 6. The court held that the word "threat" in the context of the statutory phrase "threaten or endanger the life of the victim or any other person" may be communicated by either "word or deed. *Id.* ¶ 15. The *Giraud* court held that, because the danger posed to the victim's life - possibly contracting life-threatening HIV - would occur in the future, if at all, it did not endanger the victim's life during the assault. *Id.* ¶¶ 33-39. "If the circumstance alleged by the State to be a threat or endangerment of the victim did not exist during the commission of the offense, it cannot, as a matter of law, be used to elevate the crime from criminal sexual assault to aggravated criminal sexual assault." *Id.* ¶ 11.

¶ 34 The facts here are similar to *Giraud*, where defendant did not commit an overt act that would establish that he threatened S.M.'s life while committing the offense of criminal sexual assault. See *People v. Singleton*, 217 Ill. App. 3d 675, 687 (The State must show that it was the "overt acts by the defendant, and not verbal threats, which endanger[ed] or threaten[ed] a victim's life, and that the life-threatening acts *** occur[red] during the commission of the offense.) S.M. testified that defendant "forcefully" grabbed her and pulled her into the front seat of his van. He then drove her away from her brothers to the other side of the park and ordered her to get into the back seat of the van. When S.M. refused to get into the back seat of the van, defendant made a fist with his right hand, cocked it back and told S.M. that he would hit her if she did not get into the back of the van. After S.M. got into the back of the van and defendant kissed her and touched her breasts and vagina over her clothes, defendant turned her on her

stomach, pulled down her pants and penetrated her anus. After he was done, defendant threatened to kill S.M. if she told anyone what he had done.

¶ 35 We agree with defendant that the State did not prove that he engaged in an overt act that threatened S.M. during the commission of the offense. Instead, defendant verbally communicated to S.M., after the assault was completed, that he would kill her if she told anyone what he did. Without proof of an overt act that threatened S.M.'s life, the State did not establish the aggravating factor of acting in a way that threatened the life of another while committing the offense of criminal sexual assault. Because an overt act was not proven beyond a reasonable doubt, his conviction for aggravated criminal sexual assault must be reduced to criminal sexual assault. Pursuant to Illinois Supreme Court Rule 615(b)(3) (eff.1963), this court has the authority to "reduce the degree of the offense of which the appellant was convicted" and we therefore reduce defendant's aggravated criminal sexual assault conviction, a Class X offense, to criminal sexual assault, a Class 1 felony. 720 ILCS 5/11-1.30(a)(3) (West 2012); 720 ILCS 5/11-1.20(a)(1) (West 2012). Accordingly, we must remand to the trial court for resentencing on the reduced degree of the offense.

¶ 36 Defendant argues that the trial court erred in admitting other crimes evidence involving an incident where, 25 years prior to trial, another judge had already made a finding that there was no probable cause to believe that defendant engaged in the alleged other crimes conduct and therefore, the trial court abused its discretion in admitting such evidence. Defendant claims that such evidence is *per se* unreliable and thus inadmissible under section 115-7.3 (725 ILCS 5/115-7.3 (West 2014). Furthermore, defendant argues that the trial court's evidentiary hearing to determine the reliability of the prior crimes witness was unconstitutional under collateral

estoppel principles of uncharged offenses for the purpose of establishing identity, when identity was not an issue in the case.

¶ 37 Generally, other crimes evidence is admissible if relevant for any purpose other than to show propensity to commit crime. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). Other crimes evidence may be admitted to show *modus operandi*, intent, motive, identity, or the absence of mistake. *People v. Pikes*, 2013 IL 115171, ¶ 11; see also Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). In cases involving allegations of aggravated criminal sexual assault, such as this case, evidence of the defendant's commission of another offense or offenses set forth in paragraph (1), (2), or (3) of subsection (a) [predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, child pornography, aggravated child pornography, criminal transmission of HIV, or child abduction], or evidence to rebut that proof or an inference from that proof, may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant.

¶ 38 Initially, we note that we are unpersuaded by defendant's argument that the incident involving L.I. was inadmissible as other crimes evidence because there had been a finding of no probable cause. "Other-crimes" evidence does not pertain solely to prior convictions; the term encompasses bad acts. *People v. Colin*, 344 Ill. App. 3d 119, 126 (2003). There are many instances in Illinois of non-charged conduct being used as other-crimes evidence, where the existence of probable cause was not determined. We decline defendant's invitation to create a bright line rule holding that other crimes evidence is always inadmissible where there was a finding of no probable cause. The admissibility of other crimes evidence should instead be determined by whether the prejudicial effect of the evidence substantially outweighs its probative

value. *Pikes*, 2013 IL 115171, ¶ 11; see also Ill. R. Evid. 403 (eff. Jan. 1, 2011) (relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"). Here, the trial court held an extensive hearing on the admissibility of the other crimes evidence in which the court took care in weighing the probative value against the danger of unfair prejudice to defendant, while considering the fact that there had been a previous finding of no probable cause as to L.I.'s allegations.

¶ 39 In weighing the probative value of the evidence against undue prejudice to the defendant the court may consider: (1) the proximity in time to the charge; (2) the degree of factual similarity to the charged offense; and (3) other relevant facts and circumstances. 725 ILCS 5/115-7.3 (c) (West 2014). The determination of whether the probative value of other crimes evidence outweighs its prejudicial effect rests within the sound discretion of the trial court (*People v. Hale*, 2012 IL App (1st) 103537, ¶ 24), and the court's ruling will not be disturbed absent an abuse of that discretion (*People v. Ward*, 2011 IL 108690, ¶ 21). An abuse of discretion "occurs when the court's decision is arbitrary, fanciful, or unreasonable." *People v. Gwinn*, 366 Ill. App. 3d 501, 515 (2006).

¶ 40 We consider the first factor in balancing the probative and prejudicial value, proximity in time of the offenses. The offense involving L.I. occurred 23 years prior to the charged offense and 25 years prior to trial. There is no bright-line rule about when a crime is too distant in time to be admitted. *People v. Donoho*, 204 Ill. 2d 159, 183-84 (2003). Instead, the proximity in time must be evaluated on a case-by-case basis and is a factor in determining the other crime's probative value. *Id*. A time lapse of 20 years or 12 to 15 years has not barred such evidence where other factors support its admission. *Id*. (12 to 15 years); *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994) (over 20 years). We do not find the lapse in time in this case to be too remote.

¶ 41 We next consider the degree of factual similarity between the two crimes. See 725 ILCS 5/115-7.3(c) (West 2012). In order for other-crimes evidence to be admissible, there must be some "threshold similarity" to the charged crime. *Donoho*, 204 Ill. 2d at 184. The use of other-crimes evidence to show propensity allowed by section 115-7.3 requires only "mere general areas of similarity" between the past offense and the charged offense to be admissible. *Id*. at 184. However, an increase in factual similarity leads to an increase in the probative value of the other-crimes evidence. *Id*. at 184.

¶ 42 Defendant argues that the degree of similarity between the crimes is almost non-existent other than both were sexual in nature. Defendant cites several differences between the alleged sexual assault of L.I. and the alleged sexual assault of S.M., such as the relationship between the parties, the difference in sexual conduct, and the location of the incidents. Defendant points out that S.M. and defendant had known each other for a long time as defendant had dated S.M.'s sister in 2004. Once that relationship ended, S.M. saw defendant about once a month up until the incident. By contrast, L.I. knew defendant because they lived in the same apartment building and defendant lived with L.I.'s friend's mother. Defendant had no direct connection to L.I.

¶ 43 The State responds that L.I. testified that her mother "knew defendant and his girlfriend and he was living with her best friend in the same apartment building," and therefore defendant had the same "quasi-familial" relationship with L.I. as he did with S.M. Furthermore, the State argues that regardless of his relationship with the victims, defendant abused a position of trust.

¶ 44 In addition, defendant argues that the incidents with L.I. and S.M. involve allegations of sexual conduct that are completely different in kind. L.I. alleged that defendant had her masturbate him until he ejaculated. There was no allegation that defendant touched L.I. in any way. In this case, it was alleged that after defendant kissed her and touched her breasts and

vagina through her clothes, defendant flipped her over on her stomach, removed her pants, penetrated S.M.'s anus and "rocked back and forth." The State counters that in both instances defendant committed a crime of opportunity for his sexual gratification.

¶ 45 Defendant also asserts other minor differences that weigh in favor of excluding the evidence. L.I. alleged that the incident with defendant took place in the apartment where defendant was staying. S.M. alleged that the incident in this case took place in defendant's van which was parked on a residential street. Defendant also notes the difference in age of the victims and the type of threats made.

¶ 46 We agree with the State that the incident involving L.I. was similar enough to the sexual assault of S.M. to allow the other crimes evidence to be admissible. While the manner in which defendant knew his victims differs slightly, in both instances defendant used his position as a trusted adult (L.I.'s friend's mother's boyfriend and S.M.'s sister's ex-boyfriend) to exert his authority to coerce or force his young female victims into engaging in sexual acts for his sexual gratification. It makes no difference here that one instance of abuse happened in an apartment, while the other occurred in the back of defendant's van. This is a crime of opportunity. Furthermore, because "no two independent crimes are identical," the presence of some differences does not defeat admissibility. *Donoho*, 204 Ill. 2d at 185. This was a bench trial where the trial court heard all of the evidence and was able to assess the credibility of the witnesses. The record discloses that the court considered the appropriate factors in ruling on the State's motion to admit proof of other crimes, and we cannot say, as a matter of law, that the court abused its discretion in ruling as it did. *People v. Illgen*, 145 Ill. 2d 353, 375-76 (1991). Accordingly, we find that the trial court did not err in admitting this other crimes evidence against defendant.

¶ 47 Even if we were to assume *arguendo*, that the trial court erred in admitting L.I.'s testimony at trial, we find such error to be harmless. "Improper introduction of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial based upon its admission." *People v. Johnson*, 406 Ill.App.3d at 818 (finding trial court's error in admitting other-crimes evidence as harmless, where the outcome of the trial would not have been different in the absence of the other-crimes evidence). Here, S.M. testified credibly that defendant, whom she had known for years, forced her into his van by grabbing her arm and then drove to a secluded location. He then threatened to hit her if she did not get into the back of his van. After kissing her and fondling her over her clothes, he forced her on her stomach, pulled down her pants and penetrated her anus. After it was over, he threatened to kill her if she told anyone what he did. We find that, even without other crimes evidence, the outcome of the trial would not have been different.

¶ 48 Defendant devotes much of his argument to attempting to persuade this court that the finding of no probable cause as to the offense L.I. testified to, that occurred 23 years earlier, precluded the trial court from admitting the other-crimes evidence on collateral estoppel principles. Defendant claims that "the issue of L.I.'s reliability" had already been litigated at the preliminary hearing and it was determined that no probable cause existed. Therefore, defendant claims, the trial court was not within its rights to relitigate the issue of L.I.'s credibility in an other-crimes evidentiary hearing. The State has responded that defendant not only acquiesced to the hearing on the other crimes evidence, but failed to raise the issue of collateral estoppel at trial or in a posttrial motion and therefore has forfeited the issue.

¶ 49 A review of the record shows that defendant did acquiesce to the hearing asking to "go forward with this," although he maintained his objection to the other-crimes evidence being

admitted. With respect to defendant's forfeiture of his collateral estoppel argument, defendant forfeited the issue for review by failing to object at trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 50 Defendant cannot establish plain error, even if we were to assume that error occurred. *People v. Sebby*, 2017 IL 119445, ¶ 49; *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (before we can determine whether plain error occurred in this case, we must determine whether a clear or obvious error occurred). The plain error doctrine allows a court of review to consider an unpreserved error when (1) a clear or obvious error occurred and the evidence is 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) a clear or obvious error occurred and that 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. Sebby*, 2017 IL 119445, ¶ 48.

¶ 51 In this case, the evidence was not closely balanced. There is little doubt that S.M. accurately identified defendant, whom she had known for years. S.M. testified credibly that defendant forced her into his van, threatened her to get her into the back seat, and then forced his penis into her anus. Furthermore, the claimed error was not so serious that it affected the fairness of defendant's trial or challenged the integrity of the judicial process. The evidentiary hearing was a mechanism for the trial court to allow the parties to argue their position on the admission of the other-crimes evidence given the age and the circumstances surrounding the other-crimes evidence. This pretrial evidentiary hearing did not result in an error at defendant's subsequent trial. Defendant forfeited this issue and cannot establish plain error.

¶ 52 Defendant argues that trial counsel was ineffective for failing to object to the admission of DNA evidence where the DNA expert was only able to isolate 12 loci, and of the 12 loci, some were incomplete. In the alternative, defendant argues that counsel was ineffective for failing to fully impeach the DNA expert as to his incomplete analysis.

¶ 53 In determining whether a defendant was denied the effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland*, 466 U.S. at 687; *People v. Patterson*, 217 Ill. 2d 407 (2005). To establish prejudice, the defendant must show a reasonable probability that, absent counsel's alleged error, the trial's outcome would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). "A reasonable probability of a different result is not merely a possibility of a different result." *Id*. If the defendant fails to establish either prong, his ineffective assistance claim must fail. *Strickland*, 466 U.S. 668.

¶ 54 In this case, Ramos explained that he only had 12 locations taken from S.M.'s underwear to compare with 15 locations taken from defendatn's buccal swab. He likened matching 12 of the 15 DNA locations with matching three digit license plates when only the first two numbers are known. He stated that when someone cannot be excluded, it is due to the fact that the whole profile is not present. Ramos explained that the whole profile isn't present in this case for a variety of reasons: degradation or not enough male DNA present. He testified that although defendant could not be excluded as a contributor, he could not say that defendant was a match.

¶ 55 We find that defendant was not prejudiced by defense counsel's failure to object to Ramos' testimony. Even if defense counsel would have moved to exclude DNA evidence in its entirety, defendant cannot show that such a motion would have been granted by the trial court. See *People v. Mitchell*, 2011 IL App (1st) 083143, ¶ 35.

> "There is no Illinois authority to support the proposition that DNA evidence is excludable as a matter of law based on the evidence being too inconclusive. *People v. Mitchell*, 2011 IL App (1st) 083143, ¶ 35, 353 Ill.Dec. 369, 955 N.E.2d 1180. This is true of DNA evidence conclusions based upon only four or six loci. *Id.*; *People v. Smith*, 2012 IL App (1st) 102354, ¶ 75, 365 Ill.Dec. 302, 978 N.E.2d 324. Furthermore, DNA probability calculations have long been generally accepted and admissible, and any challenge to their reliability usually goes only to the weight to be given to the evidence. *People v. Pike*, 2016 IL App (1st) 122626, ¶ 48, 403 Ill.Dec. 93, 53 N.E.3d 147." *People v. Brown*, 2017 IL App (1st) 142197.

¶ 56 This was not a case in which identity was an issue. Trial counsel's decision whether to object to testimony is generally a matter of trial strategy that is entitled to great deference and does not amount to ineffective assistance. *People v. Fender*, 325 Ill. App. 3d 168, 177 (2001). In this case, defense counsel's decision not to object to Ramos' testimony was a matter of trial strategy. S.M. identified defendant as the person who sexually assaulted her. Defense counsel extensively cross-examined S.M., and attacked her credibility. Likewise, defense counsel attempted to impeach S.M. by calling Detective Sullivan as a witness and highlighting the inconsistencies in her accounts of the events in question. Defense counsel also thoroughly cross-examined Ramos stressing that Ramos could not make a complete DNA comparison based on

the absence of several loci and that although defendant could not be excluded as a contributor, he was not a match. Defendant suffered no prejudice.

¶ 57 We similarly reject defendant's alternative argument that counsel was ineffective for failing to question Ramos as to the incomplete 12 loci that Ramos tested. Defendant claims that it was impossible to tell how many of the 12 loci obtained from the DNA sample taken from S.M.'s underwear were complete and thus consistent with defendant's profile. We cannot say that defendant suffered prejudice as a result of counsel's failure to pursue this line of questioning.

¶ 58 A review of the record shows that the trier of fact was well aware that some of the 12 loci were incomplete but that defendant was included in "the ones that were complete." Furthermore, partial-profile DNA matches go to the weight of the evidence rather than its admissibility and, given that S.M. knew defendant and identified him as the person who inserted his penis into her anus, any less weight attributed to the partial profile match would not have changed the outcome of the trial. Therefore, defendant suffered no prejudice.

¶ 59 Finally, defendant argues and the State argues that defendant was assessed a $20 Probable Cause Hearing fee and a $5 Electronic Citation Fee in error and that his $15 State Police Operations Fee should be reduced based on his presentence credit. See *People v. Smith*, 236 Ill. App. 3d 162, 170 (2010) (Probable Cause Hearing fee was intended to be imposed only when a probable cause hearing was held); *People v. Moore*, 2014 IL App (1st) 112592-B ($5 Electronic Citation Fee only applies ot a defenatn in traffic, misdemeanor, municipal ordiance or conseravatino case); 725 ILCS 5/11-14(a) (West 2014) (defendant entitled to a $5 per day presentence credit for 548 days in presentence custody). As defendant will be resentenced, we need not address this argument.

¶ 60 CONCLUSION

¶ 61 For the foregoing reasons, we vacate defendant's conviction for aggravated criminal sexual assault and enter judgment on the offense of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2012)) and remand for resentencing.

¶ 62 Judgment vacated; conviction reduced; remanded for resentencing.