FIFTH DIVISION
June 3, 2011

No. 1-07-3413

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois,
	)	County Department,
	)	Criminal Division.
	)	
	)	No. 00 CR 2448501
v.	)	
	)	
SERGIO DURON,	)	Honorable
	)	Evelyn Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court. Justices Howse and Epstein concurred in the judgment.

ORDER

HELD: Because the State failed to prove defendant committed an act of sexual penetration, there was insufficient evidence to convict him of predatory criminal sexual assault, warranting the reversal of his conviction and remand for sentencing on the lesser offense of aggravated criminal sexual abuse.

I. BACKGROUND

Defendant Sergio Duron was indicted and charged in October, 2000 with one count of predatory criminal sexual assault, three counts of criminal sexual assault, and one count of aggravated criminal sexual abuse after being arrested for touching the vagina of D.L., a nine year old girl (the victim) on multiple occasions, beginning in October, 1998 and continuing through late May, 2000. The indictment for predatory criminal sexual assault read, in pertinent part, "he *** committed an act of sexual penetration upon [the victim], to wit: contact between [defendant's] fingers and [the victim's] vagina, and [the victim] was under thirteen years of age when the act was committed.

The record indicates that defendant was notified of his trial date, but did not appear when it began on June 13, 2002. Prior to opening statements and before the jury was sworn in, the State *nolle prossed* 4 counts against defendant and opted to proceed to trial only on the predatory criminal sexual assault count. Defendant was then tried *in absentia*.

The victim testified first on behalf of the State. She stated that on the evening of September 15, 2000, her mother informed her that defendant, a friend of her parents, would be her babysitter. Defendant had babysat for her multiple times in the past. Upon hearing that defendant would again be her babysitter, the victim began to cry. She testified that she told her mother that on Halloween of 1998, defendant "unzipped [her] pants and touched [her]." He then "rubbed [her]" under her underwear, on her "private area" for one minute. She testified that defendant did this to her about four or five times, but she did not tell anyone because she was scared. When asked whether defendant ever "[stuck] his fingers inside of [her]," she replied

"No." On cross-examination, the victim indicated that she recalled being taken to a hospital on September 15, 2000 and speaking to a nurse there. Defense counsel then asked the victim whether she recalled telling the nurse that defendant "turned [her] around and put [her] face up and put his finger inside of [her]," to which she replied that she did not recall making that statement.

The State next called the victim's mother, Wendie, to testify. She stated that defendant and her husband were best friends and that she had trusted him with her children. She had asked defendant to watch her children eight to ten times prior to September, 2000. Wendie recalled that on September 15, 2000, she told the victim that defendant would again be her babysitter soon. Upon hearing this, the victim became "really upset" and looked scared. She told Wendie that she did not want defendant to babysit her because defendant had touched her "private area," which Wendie understood to be the victim's vagina. The victim told Wendie that she didn't tell her sooner because she was scared to do so. After hearing this, Wendie contacted the police and then took the victim to Resurrection Hospital, where she was examined by Dr. Rachel Burke.

Dr. Burke testified next for the State. She stated that she interviewed the victim on September 15, 2000 at Resurrection Hospital, after the victim came in complaining of having been fondled multiple times by her babysitter. The first such instance occurred on Halloween of 1998 and, again, most recently, between June and July 2000. The victim told her than on each occasion, defendant touched her vaginal area but did not insert any part of his body into her vagina. Dr. Burke performed an examination upon the victim and found no bruising, scratching, or any other physical evidence consistent with recent fondling. On cross-examination, Burke

testified that at the time of the examination, the victim's hymen was intact.

Emmanuel Delatorre, an investigator with the Chicago Police Department, testified next for the State. Delatorre was assigned to a unit responsible for investigating sexual offenses against children. Delatorre stated that on September 26, 2000, he and his partner met with defendant at his workplace in Wheeling, Illinois, and asked him to accompany the officers back to Area Five police headquarters in Chicago, which he did. Upon their arrival, defendant was advised of his *Miranda* rights and of the allegations made against him by the victim. Delatorre testified that when asked about those allegations, defendant responded "if [the victim] said I did this then I did it. [I don't] know [the victim] to be a liar." Defendant then told the officers that "he had stuck his hand inside of [the victim's] pants and he rubbed her vagina." Immediately following this statement, Delatorre's partner contacted Sandra Blake of the Cook County State's Attorney's felony review office.

Blake testified that she was summoned to Area Five Police Headquarters at approximately 2:15 A.M. on September 27, 2000 in response to a call in the victim's investigation. Upon her arrival, she spoke with Delatorre and his partner, and learned that defendant was already in custody in the building. She introduced herself to defendant and informed him of his *Miranda* rights. Blake testified that she spoke with defendant for approximately 45 minutes regarding the victim's allegations, and afterward she asked defendant if he would give a handwritten statement about those allegations. Defendant agreed, and Blake prepared a statement. She then read the statement to defendant, allowing him to make corrections as they went. Defendant then signed the statement.

Following her examination, Blake read defendant's statement to the jury. That statement read, in pertinent part:

> "[Defendant] states that he is 48 years old and that his date of birth is February 25, 1952. *** [Defendant] states that he remembers one occasion when he was at [the victim's] house between Halloween 1998 and May 2000 when he was in the childrens' room. *** [Defendant] states that he put his hand inside [the victim's] pants and under her panties and began rubbing her vagina. *** [Defendant] states that this is the only time he remembers touching [the victim] like this.*** [Defendant] states that if [the victim] says it happened, it did. [Defendant] states [the victim] is not a liar. *** [Defendant] states that he may have been drunk on those occasions but drinking is not an excuse."

In that statement, defendant also asserted that "he rubs his girlfriend exactly the same way when he wants to get her aroused so she will have sex with him."

After the State rested, defendant moved for a directed finding, which the court denied. Defendant then proceeded with his case-in-chief, first calling Lisa Caputo, a nurse at Resurrection Hospital. Caputo testified that she was working in the emergency room at that hospital on the evening of September 15, 2000, at which time she interviewed the victim in the emergency room. Caputo, reading directly from her notes from that interview, stated that the victim told her:

> "[defendant] unzipped my pants on Halloween 1998 the first time and he put his hand in my pants. And he went to *** get a drink of water. Then he came back and did it again. *** [H]e did it another time when he lived with us. *** The last time was two or three months ago and he came in and laid [in] bed next to me and he turned me around and put my face up and put his finger inside of me. Then he turned and again he said let's try it again. He did it again and got up and left."

The defense then rested and the parties gave closing arguments. During its closing argument, the State twice argued to the jury that defendant's actions, namely rubbing the victim's vagina, were sufficient to convict him of predatory criminal sexual assault. Specifically, the State's attorney argued:

> "'sexual penetration means any contact, however slight, between the sex organ or anus of one person and an object of another or any other instruments (sic), however slight, of any part of the body of one person into the sex organ of another.' And I want to stress to you that the legal definition of penetration which might be contrary to your own common sense is however slight. And we have met that burden. His fingers on her vagina. Whether he put them all the way in, a little in, does not matter. He put his fingers on her

> vagina and rubbed it. We don't make legal technicalities where guys get to walk away because all they did was rub a vagina. The law recognizes common sense and says you don't get a free go home pass just because you rub the vagina. The law is recognizing common sense as it says hey, that is bad too. And if you do that, you are guilty. So we have met proposition number one that the defendant knowingly committed an act of sexual penetration."

During their rebuttal closing argument, the State further argued,

> "Penetration *** is defined by the law as any contact, however slight. His fingers do not have to go inside of her privates or her vagina. Any contact, however slight, between these sex organs."

Following jury instruction, the jury deliberated and returned a verdict of guilty on the charge of predatory criminal sexual assault on the victim. The trial court then sentenced defendant to 20 years' imprisonment. This appeal followed.

II. ANALYSIS

Defendant raises seven issues on appeal: (1) that the prosecution failed to prove his guilt beyond a reasonable doubt because he did not commit an act of sexual penetration on the victim, (2) that the jury was incorrectly instructed on the elements of predatory criminal sexual assault,

(3) that the prosecution misstated the law regarding sexual penetration and presumptions of innocent in closing arguments, (4) that his conviction should be vacated because it is based on a void indictment, (5) that he received ineffective assistance of counsel, (6) that the cumulative effect of these errors deprived him of his right to a fair trial, and (7) that he should be given 124 days credit for time spent in custody before he was released on bail.

As shall be discussed below, we vacate defendant's conviction for predatory criminal sexual assault, reduce that conviction to a conviction for aggravated criminal sexual abuse, and remand the case for sentencing on that conviction.

A. Failure to Prove Defendant's Guilt Beyond a Reasonable Doubt

Defendant first contends that the State failed to prove him guilty beyond a reasonable doubt of predatory criminal sexual assault because it did not present evidence that he committed an act of sexual penetration upon the victim. He argues that while the evidence showed that he rubbed the victim's vagina, there was no evidence that he actually penetrated it, and thus should not have been found guilty. We agree.

When considering a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. Instead, the relevant question on appeal 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. *People v. Hall*, 194 Ill. 2d 305, 329-330 (2000). The weight to be given the testimony, the credibility of the witnesses, the resolution of conflicting testimony, and the reasonable inferences to be drawn

from the evidence are the responsibility of the trier of fact. *People v. Walenksy*, 286 Ill. App. 3d 82, 97 (1996); *People v. Milka*, 211 Ill. 2d 150, 178 (2004). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify reasonable doubt of the defendant's guilt. *Hall*, 194 Ill. 2d at 330.

While the evidence adduced at defendant's trial overwhelmingly indicated that he, on multiple occasions, *rubbed* the victim's vagina, it is insufficient to support a finding that he committed an act of sexual penetration upon the victim. According to the Criminal Code of 1961, a defendant "commits predatory criminal sexual assault of a child if [the defendant] was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed." (720 ILCS 5/12-14.1(a)(1) (West 2008)). The code defines "sexual penetration" as "any *contact*, however slight, between the sex organ or anus of one person by an object, 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 720 5/12-12(f) (West 2008) (emphasis supplied)). Our supreme court has indicated that "the word 'object' in the 'contact' clause of [*section 12-12(f)*] was not intended to include parts of the body" such as a defendant's hands or fingers. *People v. Maggette*, 195 Ill. 2d 336, 350 (2001). In that case, our supreme court went on to hold that where there is no evidence of any intrusion into a victim's vagina, "mere touching or rubbing of a victim's sex organ *** with a hand or finger does not prove sexual penetration and cannot, therefore, constitute criminal sexual assault." *Maggette*, 195 Ill. 2d at 352.

Here, 5 witnesses testified that defendant rubbed, but did not penetrate, the victim's vagina. First, the victim herself explicitly denied that he ever inserted his fingers inside her vagina, testifying instead that he only rubbed her. Wendie, the victim's mother, testified that the victim only told her that defendant rubbed her vagina, but did not penetrate it. Dr. Burke, who interviewed the victim at the hospital, also stated that the victim denied that defendant had inserted any part of his body into her vaginal area or that any penetration took place. The results of Burke's examination of the victim were consistent with what the victim told her. Furthermore, Delatorre and Blake, both of whom spoke to defendant on September 15, 2000, testified that defendant told them that he rubbed, but did not penetrate, the victim's vagina. Defendant's signed statement is consistent with this version of the events.

The State, however, urges us to rely solely on the testimony of Nurse Caputo, who, on direct examination by the defense, read from notes she made after interviewing the victim which indicated that the victim stated defendant placed his fingers "inside" of her vagina. The victim, however, had testified that she did not recall making this statement to Caputo. Moreover, evidence of a witness's prior inconsistent statement, such as the victim's statement in Caputo's notes, cannot be admitted as direct evidence of a defendant's guilt, but rather only to impeach her credibility when she does not acknowledge making that statement. See *People v. Marino*, 44 Ill. 2d 562 (1970), *People v. Paradise*, 30 Ill. 2d 381 (1964). See also 725 ILCS 5/115-10.1 (West 2008) (evidence of a prior inconsistent statement is inadmissible as substantive evidence unless the witness acknowledged making the statement while under oath). While this evidence could, conceivably, have been independently admitted as substantive evidence under the "Statements

for Purposes of Medical Diagnosis or Treatment" exception to hearsay (see Ill. R. Evid. 803(4)), the State does not raise the issue and it is therefore forfeited. See *People v. M.T.*, 221 Ill. 2d 517, 536 (2006), citing *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005).

As stated above, while the jury is permitted to draw inferences from the evidence, those inferences must be reasonable. Here, the inference that penetration occurred was not reasonable when the victim explicitly denied that it occurred. See *People v. Bell*, 234 Ill. App. 3d 631,637 (1992) (a jury cannot reasonably infer sexual penetration when the victim implicitly denied that any such penetration took place). Therefore, in light of the victim's testimony that defendant never penetrated her vagina, and the corroborative testimony of all of the State's witnesses, we find that there was no admissible evidence of sexual penetration to find defendant guilty beyond a reasonable doubt of predatory criminal sexual assault upon the victim and vacate that conviction.

The State, however, arguing in the alternative, next urges us to reduce the degree of the offense and find that the evidence was sufficient to convict defendant of the lesser included offense of aggravated criminal sexual abuse based on sexual conduct pursuant to Supreme Court Rule 615(b). That rule permits a reviewing court to "[r]educe the degree of the offense of which the appellant was convicted." Ill. S. Ct. R. 615(b)(3) (eff. Feb. 26, 2010).

Our supreme court has held that a criminal defendant has a fundamental due process right to notice of the charges being brought against him, and may not be convicted of an offense for which he has not been charged. See *People v. DiLorenzo*, 169 Ill. 2d 318, 321 (1996); *People v. Baldwin*, 199 Ill. 2d 1, 6 (2002). "A defendant may, however, be convicted of an uncharged

offense if it is a lesser-included offense of a crime expressly charged in the charging instrument [Citation], and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense. *People v. Kolton*, 219 Ill. 2d 353, 360 (2006). Under the "charging instrument approach," "whether a particular offense is 'lesser included'is a decision which must be made on a case-by-case basis using the factual description of the charged offense in the indictment. A lesser offense will be 'included'in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred."*Kolton*, 219 Ill. 2d at 367.

A defendant commits the crime of aggravated criminal sexual abuse if he is over 17 and he "intentional[ly] or knowing[ly] touch[es] or fondl[es] *** 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 [himself]." (720 ILCS 5/12-16(c)(1)(i), 720 ILCS 5-12/12(e) (West 2008)).

In *Kolton*, our supreme court was faced with a situation similar to case at bar. There the defendant was charged with predatory criminal sexual assault after he fondled the victim's vagina. The trial court, however, found that no act of sexual penetration occurred, and defendant was convicted of the lesser offense of aggravated criminal sexual abuse. The defendant appealed, contending that aggravated criminal sexual abuse was not a lesser included offense of predatory criminal sexual assault. *Kolton*, 219 Ill. 2d at 356. The appellate court affirmed the defendant's conviction and the supreme court agreed, holding that aggravated criminal sexual abuse was, in fact, a lesser included offense of predatory criminal sexual assault because an allegation of

predatory criminal sexual assault provided a broad foundation or main outline of the offense of aggravated criminal sexual abuse, which requires an act of sexual conduct, because both crimes describe intentional acts of a sexual nature. *Kolton*, 219 Ill. 2d at 368-69. The court further held that the evidence adduced at trial, namely that the defendant touched the victim intentionally and for the purposes of his sexual gratification or arousal, supported a conviction for that offense. *Kolton*, 219 Ill. 2d at 371-72.

Here, the record reflects that defendant was over 17 and the victim was under 13 when the acts in question took place. While the State presented no evidence of sexual penetration, defendant's handwritten sworn statement, as well as the testimony of 5 witnesses, indicated that defendant rubbed the victim's vagina on multiple occasions. Defendant, in his statement, admitted that "he rubs his girlfriend exactly the same way when he wants to get her aroused so she will have sex with him." As our supreme court held in *Kolton*, it is permissible to infer that these acts were done with the purpose of sexual gratification or arousal. *Kolton*, 219 Ill. 2d at 370. Therefore, based on this evidence, we find a sufficient basis for a conviction on the offense of aggravated criminal sexual abuse.

Defendant, however, while not disputing the fact that aggravated criminal sexual abuse is a lesser included offense of predatory criminal sexual assault, instead contends that principles of double jeopardy bar this court from reducing his conviction to aggravated criminal sexual abuse because, he argues, the State *nolle prossed* these charges "after the jury had been empaneled and sworn." However, defendant misstates the record as the State *nolle prossed* the remaining charges against defendant (Trial Tr. vol 2, D-20) *before* the jury was sworn in (Trial Tr. vol. 2, D-24).

Accordingly, while defendant is correct that double jeopardy would attach if the jury was sworn in before the State *nolle prossed* the remaining charges (see *People v. Bellmyer*, 199 Ill. 2d 529, 538 (2002), *Crist v. Bretz*, 437 U.S. 28, 35, 98 S. Ct. 2156, 2160, 57 L. Ed. 2d 24, 31 (1978)), this rule has no application here because the jury was sworn in only after the *nolle prosse* occurred. Therefore, we find that jeopardy did not attach to the *nolle prossed* charges and that a substitute judgment of guilt on the lesser included offense of aggravated criminal sexual abuse would be appropriate in this case.

B. Incorrect Jury Instruction

Defendant next contends that his due process rights were violated when, despite being indicted under the contact theory of sexual penetration, his jury was instructed on both the contact theory and intrusion theory of sexual penetration. Specifically, defendant contends that while his indictment for predatory criminal sexual assault alleged that he, "being 17 years of age or over committed an act of sexual penetration upon [the victim], to wit: *contact* between [defendant's] fingers and [the victim's] vagina," his jury was instructed with Illinois Pattern Jury Instructions, Criminal (IPI Criminal) 11.65E, that the term "sexual penetration" could mean *either* "*contact* *** between the sex organ of one person and an object of another person" or "*intrusion* *** of any part of the body of one person into the sex organ of another person." (emphasis supplied). Defendant does not attack the instruction *per se*, but instead argues that the use of such an instruction permitted the jury to consider an uncharged theory of penetration. We disagree.

We first note that any alleged error with respect to these instructions would only affect

defendant's conviction for predatory criminal sexual assault predatory criminal sexual assault, which we have already vacated, and need not be considered further. However, even if we were to consider the merits of this contention, we would find no error. Supreme Court Rule 451(a) provides that juries in criminal cases must be instructed pursuant to the IPI Criminal, unless they do not accurately state the law. Ill. S. Ct. R. 451(1) (eff. Feb. 26, 2010), *People v. Nutall*, 312 Ill. App. 3d 620, 633 (2000). Here, defendant's jury was read IPI Criminal 11.65E, which properly apprised them of the statutory definition of sexual penetration, an element of the offense of predatory criminal sexual assault. (720 ILCS 720 5/12-12(f)) While defendant's indictment specifically cited sexual penetration in the form of "contact," our courts have explicitly held that such an indictment does not narrow the scope of the offense charged because "the type of sexual penetration is not an element of the offense, and its inclusion in the indictment is merely surplusage." *People v. Ross*, 395 Ill. App. 3d 660, 670 (2009), quoting *People v. Carter*, 244 Ill. App. 3d 792, 803-04 (1993). Therefore, we find that because defendant's indictment for predatory criminal sexual assault placed him on notice of the offense charged, and that his jury instruction properly apprised the jury of the definition of that offense, we find no error with respect to defendant's jury instruction.

C. Prosecution's Misstatement of the Law

Defendant further contends that his due process rights were violated when the prosecution, in closing argument, misstated the law by first informing the jury that defendant's acts of rubbing the victim's vagina constituted sexual penetration, and then arguing that defendant was no longer

presumed innocent. We disagree with both contentions.

Defendant first contends that the prosecution misstated the law regarding sexual penetration during its closing argument. Specifically, the State's attorney said:

> "Let's talk about another instruction that will help you with that, one that defines what sexual penetration means. That instruction says the term 'sexual penetration means any contact, however slight, between the sex organ or anus of one person and an object of another or any other instruments (sic), however slight, of any part of the body of one person into the sex organ of another.' And I want to stress to you that the legal definition of penetration which might be contrary to your own common sense is however slight. And we have met that burden. His fingers on her vagina. Whether he put them all the way in, a little in, does not matter. He put his fingers on her vagina and rubbed it. *We don't make legal technicalities where guys get to walk away because all they did was rub a vagina. The law recognizes common sense and says you don't get a free go home pass just because you rub the vagina.* The law is recognizing common sense as it says hey, that is bad too. And if you do that, you are guilty. So we have met proposition number one that the defendant knowingly committed an act of sexual penetration." (Emphasis supplied)

During their rebuttal closing argument, the State further argued that "[p]enetration *** is definied by the law as any contact, however slight. *His fingers do not have to go inside of her privates or*

her vagina. Any contact, however slight, between these sex organs." (Emphasis supplied).

Defendant contends that these incorrect statements of the law prejudiced him so severely as to deprive him of his right to a fair trial. The State, however, contends that defendant failed to preserve this challenge by not objecting to the allegedly improper statements at trial or including them in a post trial motion. Defendant concedes this point, but nevertheless asks us to take cognizance of this issue under the plain error doctrine, which bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error where either the evidence is close, or the error affects substantial rights. *People v. Herron*, 215 Ill. 2d 167,186-87 (2005). In the first instance, defendant must prove "prejudicial error," *i.e.* that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *Herron*, 215 Ill. 2d at 187. In the second instance, defendant must prove that the error was structural, or so serious that it affected the fairness of his proceeding and challenged the integrity of the judicial process. See *People v. Davis*, 233 Ill. 2d 244, 273-75 (2009); *Herron*, 215 Ill. 2d at 187. In either event, defendant bears the burden of first establishing that there was error. *Herron*, 215 Ill. 2d at 187.

While it appears that the prosecution incorrectly stated the law when it twice argued to the jury that contact, in the form of rubbing, between defendant's fingers and the victim's vagina constituted sexual penetration (See *People v. Maggette*, 195 Ill. 2d 336, 347 (2001)), these misstatements did not result in substantial prejudice to defendant and would not have caused the jury to reach a different verdict in this case.

As discussed above, we have already vacated defendant's conviction for predatory

criminal sexual assault because of insufficient evidence of sexual penetration. We must therefore determine whether the prosecution's misstatements of law would have caused the jury to acquit him of the lesser offense of aggravated criminal sexual abuse. We find that they would not.

As thoroughly discussed above, the evidence at trial overwhelmingly indicated that defendant, on numerous occasions, rubbed the victim's vagina. These facts were not in dispute and nothing in the prosecution's closing argument would have prejudiced this factual finding that rubbing occurred. The misstatements of law regarding sexual penetration would only have led the jury to carry the factual finding that defendant rubbed the victim's vagina beyond the legal definition of penetration, but could not have affected the sufficiency of the underlying finding that this conduct did occur. Therefore, we cannot say that the misstatements of law by the prosecution regarding sexual penetration "constituted a material factor in the conviction, without which the jury might have reached a different verdict," and consequently find that no error occurred with respect to these statements. *Wales*, 357 Ill. App. 3d at 159.

Defendant also contends that he was prejudiced when the prosecution misstated the law regarding the presumption of innocence, telling the jury that:

> "You were asked to come here with a fair and open mind. And [defendant] is innocent until proven guilty. And guess what? You now heard the evidence. He is no longer presumed innocent because he is guilty of predatory criminal sexual assault . I agree with [defense] counsel. Don't prejudge. Use your common sense as my partner told you."

In rebuttal, the prosecution further argued, "[w]e do have an obligation to prove [defendant]

guilty beyond a reasonable doubt. We welcome that obligation."

Even if we were to assume that these statements amounted to error, we do not believe these comments rise to the level of reversible plain error. First, as outlined thoroughly above, the evidence in this case was not closely balanced. The testimony adduced at trial overwhelmingly supports a finding of guilt on the offense of aggravated criminal sexual abuse, and these statements do not threaten to tip the scales of justice against him. *Herron*, 215 Ill. 2d at 187. Neither would they amount to so serious that they would affect the fairness of defendant's proceeding and challenge the integrity of the judicial process.

An error in a prosecutor's closing argument may be cured by a proper explanation of law by the trial court. *People v. Grava*, 220 Ill. App. 3d 214. 222 (1999). Here, the trial court did just that, admonishing the jury before closing arguments that "what the attorneys say *** in closing arguments are not evidence. Those statements are not evidence. Their statements merely represent what they believe has been shown to you, their version of the evidence that came out," and after, reading them instructions, stating

> "The defendant is presumed to be innocent of the charge against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty. The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence."

In light of this curative instruction, we cannot say that the prosecution's misstatements here resulted in substantial prejudice to defendant and we therefore decline to find plain error here.

D. Void Indictment

Defendant next argues that his indictment was void and his conviction should be vacated because his actions did not constitute sexual penetration and because it failed to state a cause of action because the charge of predatory criminal sexual assault did not exist in the 1992 Illinois Complied Statutes. We disagree.

Defendant first argues that his indictment was void because he was indicted under a contact theory of sexual penetration and, under *Maggette*, his actions were insufficient to establish this as a matter of law. This indictment stated that defendant, "being 17 years of age or over committed an act of sexual penetration upon [the victim], to wit: *contact* between [defendant's] fingers and [the victim's] vagina, *** in violation of chapter 720 act 5 section 12-14." We need not again discuss defendant's first contention regarding the insufficiency of the evidence establishing sexual penetration because we have already vacated his conviction for predatory criminal sexual assault.

While defendant is correct in asserting that the crime of predatory criminal sexual assault did not exist in the 1992 Compiled Statutes, defendant seemingly ignored the words "as amended" in his indictment. The Statute was amended in 1996 and defendant was indicted in 2000 for acts that occurred after that amendment was enacted, and therefore we find defendant's indictment validly stated a cause of action.

E. Ineffective Assistance of Counsel

Defendant next claims that he received ineffective assistance of counsel when his attorney (1) failed to file a motion to dismiss the indictment, (2) failed to object to a defective jury instruction, (3) failed to argue her motion for a directed verdict, (4) failed to object to improper closing arguments, and (5) failed to file a motion for new trial.

In order to prevail on a claim of ineffective assistance of counsel under *Strickland*, a defendant must prove both (1) his attorney's actions constituted errors so serious, as to fall below an objective standard of reasonableness; and (2) absent these errors, there was a reasonable probability that his trial would have resulted in a different outcome. *People v. Ward*, 371 Ill.App.3d 382, 434 (2007), citing *Strickland*, 466 U.S. at 687-94, 80 L.Ed.2d at 693-98, 104 S.Ct. at 2064-68.

Under the first prong of the *Strickland* test, a defendant must prove that his counsel's performance fell below an objective standard of reasonableness under "prevailing professional norms." *People v. Colon*, 225 Ill.2d 125, 135 (2007); *People v. Evans*, 209 Ill.2d 194, 220 (2004). In assessing an attorney's performance, we "indulge a strong presumption that counsel's conduct [in trial] falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, 80 L.Ed.2d at 694-95, 104 S. Ct. at 2065, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 100 L. Ed. 83, 93, 765 S. Ct. 158, 164 (1955). "In determining the adequacy of counsel's representation, a reviewing court will not consider isolated instances of misconduct, but rather the totality of the circumstances." *People v. Lopez*, 371 Ill. App. 3d 920, 929 (2007), citing *People v. Long*, 208 Ill. App. 3d 627, 640 (1990).

Under the second prong, the defendant must show that, "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been

different. *Colon*, 225 Ill.2d at 135; *Evans*, 209 Ill.2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome – or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill.2d at 220; *Colon*, 225 Ill.2d at 135.

A defendant's failure to satisfy either prong of the *Strickland* test will defeat an ineffective assistance of counsel claim; therefore we are not required to "address both components of the inquiry if defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697, 80 L.Ed.2d at 699, 104 S. Ct. at 2069.

We have already discussed defendant's first claim relating to the validity of his indictment above, and have determined that it was not erroneous. As a general rule, trial counsel's failure to file a motion that would be futile does not establish incompetent representation. See *People v. Davis*, 236 Ill. App. 3d 233 (1992). Moreover, at best, a successful challenge to the validity of defendant's indictment would have provided a basis for a reduction of the charges against him, which we have already done. Therefore defense counsel's failure to move to dismiss defendant's indictment did not constitute ineffective assistance of counsel.

We have also discussed defendant's second contention, relating to his jury instructions. As discussed above, a trial court is required to give pattern jury instructions when they accurately state the law, which they did in this case. We have already determined that these instructions were not erroneous and, moreover, have already vacated defendant's conviction for predatory criminal sexual assault. Thus, no prejudice could result from defense counsel's failure to object to them. Furthermore, decisions regarding jury instructions are seen as a matter of trial strategy and are generally immune from ineffective assistance claims. *People v. Douglas*, 362 Ill. App. 3d 65, 75 (2005). Therefore, we find that defense counsel's failure to object to the pattern jury instructions in this case did not constitute ineffective assistance of counsel.

Defendant's third claim under this section is that his trial counsel was deficient for not arguing her motion for a directed verdict based upon the failure of the State to present any evidence of sexual penetration, a necessary element of predatory criminal sexual assault. Defense counsel moved for a directed verdict after the State rested, but did not argue its motion. The trial court denied that motion, stating that it "[would] not take the facts from the jury to make the ultimate decision."

Arguably, the decision of whether to argue a motion can be attributed to trial strategy (See *People v. Nunez*, 263 Ill. App. 3d 740, 753 (1994) (the decision whether or not to argue a motion is a matter of trial strategy)). However, our decision does not depend upon that. Even if counsel's failure to argue this motion could not be attributable [was not a matter of] trial strategy and therefore satisfied the first prong of *Strickland*, it would not be prejudicial so as to satisfy the second prong. Our courts have held that where a trial court grants a defendant's motion for directed verdict on a charged offense, the trial court nevertheless has the discretion to "instruct [the] jury *sua sponte* on lesser included (and uncharged) offenses, even when the State does not request the instruction." *People v. Knaff*, 314 Ill. App. 3d 676, 681 (2000), citing *People v. Garcia*, 188 Ill. 2d 265, 281 (1999).

Here, even if defense counsel successfully argued her motion for directed verdict on the offense of predatory criminal sexual assault, there can be little doubt that the trial court would have nevertheless instructed the jury on the lesser included offense of aggravated criminal sexual abuse. This would have been the likely outcome had defense counsel argued her motion that the evidence was insufficient, as a matter of law, to establish defendant's guilt on the greater offense, since it would have most likely alerted the court that the evidence, while insufficient to establish sexual penetration, was sufficient to sustain a conviction on the lesser included offense of aggravated criminal sexual abuse. As previously discussed, the evidence of the lesser included

offense was overwhelming, leaving little doubt that, if instructed, the jury would have returned a guilty verdict on that lesser offense. Since we have already vacated defendant's conviction on the greater offense of predatory criminal sexual assault, and reduced his conviction to one for aggravated criminal sexual abuse, pursuant to Supreme Court Rule 615(b), there would be no resulting prejudice to defendant stemming from defense counsel's failure to argue her motion for directed verdict.

Defendant's fourth claim of ineffective assistance of counsel stems from his attorney's failure to object to improper closing arguments by the State. As discussed above, neither of the misstatements of law cited by defendant constituted so significant an error as to affect the jury's verdict. Any objection to these statements, therefore, would not have altered the outcome of defendant's trial, and thus, defendant is unable to satisfy the second prong of *Strickland*.

Defendant finally claims that his defense counsel was ineffective for failing to file a post trial motion, and thus placing him "in danger of waiving the issues of improper argument and improper jury instructions" on appeal. In order to succeed on such a claim, defendant must establish that the claims forfeited by not filing a motion for new trial "would otherwise have been found to be meritorious on appeal." *People v. Segoviano*, 189 Ill. 2d 228, 246 (2000). As previously discussed, defendant's claims regarding the State's arguments in closing and his allegedly improper jury instructions were without merit and did not amount to reversible error. Therefore, whether those issues were properly preserved by defense counsel in a post-trial motion would not have effected the outcome of defendant's trial. See *People v. Enoch*, 122 Ill. 2d 276, 202 (1988) (rejecting claim that trial counsel was ineffective for failing to preserve trial errors for appellate review because "it cannot be reasonably contended that the results would possibly have been different but for the alleged substandard representation by counsel"). Moreover, we note that the decision of whether to file a motion is a matter of trial strategy. See *Davis*, 236 Ill. App. 3d

233. Here, since the errors alleged by defendant would not warrant reversal, defense counsel could have reasonably concluded that filing a post trial motion would have been fruitless. For the aforementioned reasons, we therefore find that defendant did not receive ineffective assistance of counsel at trial.

F. Cumulative Error

Defendant next claims that the cumulative effect of the errors he alleged with respect to his indictment, his jury instructions, the prosecution's closing argument, and his assistance of counsel deprived him of his right to a fair trial. As we have thoroughly discussed at length above, there was no error with respect to any of these contentions. Defendant's indictment was legally valid, his jury instructions proper, the prosecution's statements non-prejudicial, and his assistance of counsel effective. We therefore cannot say that the cumulative effect of these alleged errors denied defendant a fair trial.

G. Credit for Time Served

Defendant finally contends that he should be given credit for the 120 days credit for the time he spent in jail before he posted bond, as well as for the 4 days he spent in jail following his arrest for failure to appear in court. We disagree.

The record indicated that defendant was arrested on September 26, 2000 and taken into custody on October 31, 2000, a period of 36 days. It further shows that defendant was out on bond on December 1, 2000, indicating that he was released at some point in November 2000. The record does not provide the exact date for defendant's release on bond. The record also indicates that defendant spent 3 days in custody after being taken in on a warrant executed after he was arrested.

Defendant has provided no support for his contention that he is entitled to 124 days credit in either his appellate brief or his reply brief. Without any other evidence, we are unwilling to

accept defendant's contention that he is entitled to anything more than 39 days credit for time spent in custody.

III. CONCLUSION

For the foregoing reasons, we find that the State presented insufficient evidence to establish defendant's guilt on the offense of predatory criminal sexual assault. Accordingly, we vacate defendant's conviction for predatory criminal sexual assault, reduce that conviction to one for aggravated criminal sexual abuse, and remand the case for sentencing on the new conviction, with direction to award defendant 39 day's credit for time spent in custody. See *People v. Lara*, 2011 Ill. App. LEXIS 289 (Mar. 31, 2011).

REVERSED AND REMANDED with directions.