

FIFTH DIVISION
August 1, 2014

Nos. 1-12-2620 and 1-12-2621 (Consolidated)

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 18211
	)	
MIGUEL CASTILLO,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant's conviction for criminal sexual assault is vacated; (2) defendant was found guilty beyond a reasonable doubt of the predatory criminal sexual assault of A.C.; (3) the trial court did not err in denying defendant's motion to suppress statements; and (4) the trial court did not improperly influence defendant's right to a jury trial.

¶ 2 Following a bench trial, defendant Miguel Castillo was convicted of one count of predatory criminal sexual assault and one count of criminal sexual assault against A.C. and two counts of predatory criminal sexual assault against N.C. The trial court subsequently sentenced

defendant to consecutive terms of natural life for the predatory criminal sexual assault convictions and a consecutive term of 14 years for the criminal sexual assault conviction.

¶ 3 Defendant appeals, arguing that: (1) his conviction for criminal sexual assault must be reversed because the State failed to prove an element of the charged offense; (2) the State failed to prove defendant guilty beyond a reasonable doubt of the predatory criminal sexual assault of A.C.; (3) the trial court erred in denying his motion to suppress his custodial statements; and (4) the trial court erred in ruling that it would only grant defendant's joinder motion if he elected to proceed with a bench trial.

¶ 4 Defendant was arrested in September 2009 and charged under two indictments for multiple sex crimes committed against A.C. and N.C., including predatory criminal sexual assault and criminal sexual assault.

¶ 5 Prior to trial, defendant filed a motion to suppress his oral and written statements because the statements were involuntary. In the motion, he alleged that he had "no significant involvement with the criminal justice system" and during questioning the detective "called him a liar" and "told [defendant] that he would help him if he talked to him and told them what he did." Defendant asserted that he was threatened and told he must talk to the detectives. The motion also stated that defendant "was not advised of his constitutional rights prior to giving statements to the detectives" and should be barred under *Miranda v. Arizona*.

¶ 6 At the suppression hearing, Detective Tonya Franchini testified that on September 15, 2009, she interviewed defendant at approximately 9:35 p.m. in an interview room at Area 5 with Detective Moreen O'Connell. Defendant had been taken into custody at approximately 5:10 p.m. and was initially held in the lock-up. Defendant informed the detective that he spoke Spanish and understood about 85% of English. Detective Franchini elected to speak to defendant in

Spanish. She stated that she is fluent in Spanish, it was her first language. Detective O'Connell did not speak Spanish.

¶ 7 Detective Franchini testified that prior to speaking with defendant, she advised him of his *Miranda* rights. Defendant told the detective that he earned a high school degree in Mexico with a specialty in accounting. He worked as a welder, but had held some accounting jobs in the past. During the interview, defendant made statements regarding his contact with A.C. and N.C. The first interview lasted approximately two hours. After the interview, Detective Franchini contacted the felony review unit. Defendant remained in the interview room and was given a soda and crackers.

¶ 8 At approximately 12:30 a.m., assistant State's Attorney (ASA) Allison Ackerman arrived at Area 5. Detective Franchini reviewed her notes and other case documents with ASA Ackerman. At about 1:15 a.m., they began to interview defendant a second time. ASA Ackerman did not speak Spanish so Detective Franchini acted as a translator between the ASA and defendant. Detective O'Connell was also present.

¶ 9 Following the second interview, defendant's statements were memorialized. ASA Ackerman typed separate statements for A.C. and N.C. Detective Franchini testified that they reviewed the statements together. ASA Ackerman read the statement out loud in English and then Detective Franchini translated each sentence into Spanish for defendant. She would relay any questions or comments from defendant to the ASA. They concluded the statements at approximately 6:30 a.m.

¶ 10 Detective Franchini denied telling defendant that she would help him if he talked to her or that she would help him get out of jail if he told the police what happened with A.C. and N.C. She also denied threatening defendant.

¶ 11 On cross-examination, Detective Franchini admitted that the interviews were not audio or video recorded. She also admitted that she did not test defendant's ability to understand English and did not know what his stated knowledge of 85% of English meant. She denied calling defendant a liar. Detective Franchini testified that she knew defendant had prior contact with the American criminal justice system. Detective Franchini stated that she read defendant each *Miranda* right individually and then asked defendant if he understood. She said that at the beginning of the interview, she explained to defendant that if at any point he did not understand any word, to let her know and she would explain it in a different manner. She said defendant did not say anything during the *Miranda* warnings and it appeared that he understood them.

¶ 12 Defendant testified¹ that he was arrested at his home at approximately 5:10 p.m. on September 15, 2009, and taken to Area 5. He said he was not told why he was under arrest. He was originally placed in "a big, cold room" and later taken to a smaller room with a detective. He stated that the detective spoke to him in Spanish and asked him if he was guilty, but did not tell him why he was there.

¶ 13 Defendant testified that the detective asked him if he knew N.C. and told him that N.C. had said he raped her when she was 9 years old. Defendant said he told the detective it was not true. Defendant stated that the detective continued to tell him it was true, but he denied it. He denied that he admitted to sexually assaulting A.C. or N.C. during the first interview.

¶ 14 Later, the detectives returned with the ASA. Defendant testified that he said what the detective told him to say. Defendant said that the detective "promised [him] that if [he] would say the truth, she would let [him] go home." Defendant testified that it was not the truth, but "it was in exchange for my being set free."

¹ Defendant testified at the suppression hearing through an interpreter.

¶ 15 Defendant said the detectives did not tell him it was a statement, but they told him they "were only doing a document and instructed [him] to put [his] initials down and said the State's Attorney would do the same." Defendant stated that the detective "read only a few things" to him and he did not know what was in the statement. Defendant then testified that he told the detective to add that he "was making this statement against [his] will because [he] wanted this to be over." Defendant explained that he thought it would be over because he "was saying the truth" and he was "doing it against [his] will." He said the detective would not put in defendant's comment that he was giving a statement against his will. Defendant denied having been questioned by detectives before this instance.

¶ 16 On cross-examination, defendant testified that he completed the 8th grade in Mexico, but admitted he took courses in accounting and computer programming without receiving a diploma. He stated that he "hardly" speaks English despite having been in the United States since 1989. Defendant admitted that he had been arrested for an accident, but denied it was for driving under the influence. He was also arrested for retail theft in 2007. Defendant denied that he was ever questioned by detectives in those cases and he does not have a good understanding of the American criminal justice system. Following arguments by both sides, the trial court denied the motion to suppress.

¶ 17 Also prior to trial, the trial court granted the State's motion to admit other crimes evidence, which would permit N.C. to testify at defendant's trial for the crimes against A.C. Following this ruling, defendant made an oral motion for joinder of the two cases. The State did not object to joining the cases. The trial court expressed concern for defendant's due process and stated "if it's going to be a jury trial your request for joinder is denied. If it's going to be a bench trial then your request is granted, but I'm not going to allow a jury to hear two criminal sexual

assault cases at the same time." Defense counsel then indicated that defendant had not made his final decision on whether he wanted a jury or bench trial. Later, defense counsel stated that defendant chose a bench trial because the trial court "granted proof of other crimes." The trial court then admonished defendant about his right to a jury trial and defendant signed a jury waiver.

¶ 18 The following evidence was admitted at trial.

¶ 19 A.C., born September 23, 1994, testified that in 2004, she was living in an apartment located at 1851 North Kimball in Chicago with her mother, two brothers, sister N.C., and defendant, who was her mother's boyfriend. She stated that her mother became involved with defendant when A.C. was 6 or 7 years old. She had a good relationship with defendant and he was like a father to her.

¶ 20 Her relationship with defendant changed when he started to look at her in a "weird way." She testified that the first time defendant did anything of a sexual nature with her was when she was 9 or 10 years old. She stated that the first time occurred in the summer in their apartment. A.C. was lying face down on the sofa when she felt "a heavy weight" on her back and she heard defendant whisper "saying be quiet." She then "felt cold on [her] butt and [her] pants came down." Defendant pulled her pants down and A.C. said she tried to push him off, but he would not. He had A.C. "wrapped around with his arms on [her] side and [she] couldn't move." A.C. then felt something hard "toward [her] butt and [her] vagina" and "it was tearing." She testified that she started crying and defendant then "put his penis in [her] vagina and [she] screamed and he yelled and he told [her] to be quiet and he told [her], be hush [*sic*], he was hushing [her] and he was just, [she] was crying. He wouldn't move."

¶ 21 A.C. stated that the landlord heard her scream and came downstairs. He was banging on the door and defendant got off of her. Defendant told her to go to the bathroom and clean herself up. A.C. said she was crying and she ran to the bathroom. After she came out of the bathroom, defendant told her not say anything and not to tell her mother.

¶ 22 A.C. testified about another contact that occurred in late September or early October 2006, when she was 11 years old. A.C. stated that she had her period and was sick. Defendant gave her some pills and she was falling asleep when she felt him on top of her. She said that defendant started to touch her breasts, her buttocks, and "just around [her] whole body." She tried to push defendant off of her and eventually he got up.

¶ 23 A.C. also testified about another sexual assault that occurred in the summer or fall shortly before she turned 14. Her family was now living at 2846 West Augusta in Chicago. Her mother was at work and her sister was sleeping on the floor. A.C. and defendant were lying in the same bed. Defendant touched her and pulled her pants down. Defendant then put his penis in her vagina and defendant also put his mouth on her vagina. When defendant removed his penis from her vagina, A.C. stated that she did not see anything come out of defendant's penis. A.C. said that during the sexual assault, she told defendant to get off of her and she was scared because her sister was in the room. A.C. said that was the last incident with defendant.

¶ 24 In late 2008, A.C. told her aunt about defendant. She later spoke with the Chicago police department in February 2009.

¶ 25 On cross-examination, A.C. testified that her mother and defendant started getting into physical altercations when A.C. was around 11 or 12 years old. The fights occurred when defendant was intoxicated and it happened once or twice a month. In October 2008, A.C. broke

her arm in a car accident and her mother and sister were also injured. Her mother was driving and defendant, who had been drinking, was in the passenger seat.

¶ 26 A.C. testified that she could not remember if she told Detective Franchini that the first sexual assault occurred after her 10th birthday in September or October 2004 when she had her period and did not feel well. She admitted that when the landlord came to the door, she was in the bathroom. A.C. denied having any contact with Simon Castillo, defendant's brother. On redirect, A.C. denied telling her aunt about the sexual assault because of the car accident or because she was mad at defendant.

¶ 27 N.C., born September 25, 1995, testified that in late summer 2005, she was living in an apartment located at 1851 North Kimball with her mother, defendant, her sister A.C., and her two brothers. Initially, her relationship with defendant was good and he treated her mother well. N.C. stated that defendant told her he had a present for her in his bedroom. No one else was home at the time. N.C. said they went into defendant's room. Defendant then locked the door, took off his clothes and N.C.'s clothes, and then he "started putting his finger in [her] vagina" while N.C. was sitting on the bed. Defendant then put his penis in her vagina. When defendant removed his penis, N.C. stated that she saw "sperm." Defendant put his clothes back on and told N.C. to go clean up in the bathroom. When she exited the bathroom, defendant had sheets in his hand and he told her not to say anything. N.C. testified that she felt "scared" of defendant.

¶ 28 N.C. also testified about a sexual assault that occurred in late May or June 2007, when she was 11 years old. The family was living at 1832 North Kimball. She said defendant took her out of school and brought her to the house. They went to defendant's room. N.C. stated that defendant pushed her onto the bed, took both of their clothes off, and put his penis in her vagina.

N.C. said that defendant also tried to push her head down towards his penis and she "bit a part of his penis." Defendant then slapped her across the face.

¶ 29 N.C. further testified about a sexual assault that took place in late October or November 2008, when she was 13 years old. The family lived at 2846 West Augusta at that time. In October 2008, the family had been involved in car accident and N.C. had injured her left leg. She stated that she had bruises "all around it." Approximately a week after the accident, N.C. left school early because her leg hurt and defendant picked her up. They went back to the house as her mother was leaving for work. Defendant put "Icy Hot" on her leg. Afterward, defendant removed their clothes and put his penis in her vagina. When he removed his penis, N.C. said she saw "sperm." Defendant told her not to say anything.

¶ 30 In late November or December 2008, N.C. spoke with her aunt and later a social worker at school. In February 2009, she spoke with Chicago police officers about defendant.

¶ 31 On cross-examination, N.C. testified that she could not remember if she told Detective Franchini that defendant put his finger in her vagina in the summer 2005 incident. She also could not remember if she told the detective about the 2008 incident that occurred at the Augusta apartment or if she told the detective about the penis to vagina contact when they lived at 1832 North Kimball. N.C. stated that defendant became physically abusive toward her mother on a regular basis, about once a week when defendant had been drinking. N.C. also testified about the October 2008 car accident. Her mother was driving and defendant, who had been drinking, was in the passenger seat when he pulled the steering wheel, causing the accident. A.C. broke her arm and N.C. injured her leg.

¶ 32 Detective Franchini testified that she interviewed A.C. and N.C. in early February 2009. She issued an investigative alert for defendant in August 2009 and he was arrested in September

2009. Detective Franchini testified consistently with her previous testimony at the suppression hearing regarding the interrogation process with defendant. She stated that defendant initially denied having any sexual contact with the girls. Eventually, he admitted to sexual contact with N.C., but said it was consensual and he did not force her. He told the detective that he "would play a tickling game and that he touched her breasts with his hands." He admitted to putting his mouth on N.C.'s vagina and putting his penis in her vagina when they lived at 1851 North Kimball. He also admitted to sexual contact with N.C. when they lived at 2846 West Augusta. Defendant further admitted to sexual contact with A.C. He told of one occasion when he put his penis in A.C.'s vagina, but she was on her period and the smell was too strong so he stopped. A.C. was 11 or 12 years old at the time and they lived at 1851 North Kimball. The State moved to admit the statements typed by ASA Ackerman. Defense counsel renewed his motion to suppress the statements, which the trial court overruled.

¶ 33 Detective Franchini then read portions of the statements into the record. She first read portions of the statements regarding the sexual assaults against A.C.

"[Defendant] states that the first time he had sex with [A.C.] was when they lived at 1851 North Kimball, basement apartment, Chicago, Illinois. [Defendant] states that he believes [A.C.] was 11 or 12 at the time. [Defendant] believes it was when [A.C.] was 11 or 12, because after this, he started touching [N.C.] who was 10 or 11.

[Defendant] states one morning [A.C.] came into his room to get the remote control to the TV. *** [Defendant] states that

[A.C.] laid on the bed next to him and hugged him. He hugged her back and began caressing her like [N.C.]

[Defendant] stated he began to feel sensations throughout his body. [Defendant] states that he then pulled down [A.C.'s] pajama bottoms and left her underwear on. [Defendant] states he was just wearing boxers. [Defendant] states he began touching [A.C.] all over her body including her breasts. [Defendant] states at this point he was only rubbing her breasts over [A.C.'s] shirt. [Defendant] states [A.C.] then suggested they go into the living room. [Defendant] states that he and [A.C.] then went to the living room.

[Defendant] states when they got to the living room, [A.C.] laid down on the carpet and [defendant] took off [A.C.'s] underwear, and at that point, he saw she had her period. [Defendant] states at this time his penis was erect and he put his penis inside [A.C.'s] vagina three or four times. [Defendant] states he stopped having sex with [A.C.] because the smell of her period was too strong and he lost his erection because of that.

[Defendant] states the next time he had sex with [A.C.] was when they lived at 1832 North Kimball, second floor, Chicago, Illinois. [Defendant] states that he believes [A.C.] was 14 years old at the time.

[Defendant] states that [A.C.] came into his room and sat on his bed and asked [defendant] if she could use the laptop. ***

[Defendant] states that [A.C.] then began to watch MTV videos on the laptop. [Defendant] states that he was lying down and then [A.C.] laid down next to him and they began rubbing and hugging each other. [Defendant] states that [A.C.] then took off her shirt, [defendant] states that he then pulled [A.C.'s] pants and underwear down. [Defendant] states that he was kneeling on the bed and [A.C.] had her legs open on the bed. [Defendant] states that he then went down and put his mouth on her vagina and began to perform oral sex.

[Defendant] states that [A.C.] had her hands on his head while [defendant] was giving oral sex. [Defendant] states his mouth was on her vagina and his tongue was licking the lips of [A.C.'s] vagina. [Defendant] states that his tongue never went to the hole of [A.C.'s] vagina. [Defendant] states that he continued to lick [A.C.'s] vagina for about five or six minutes when his penis became erect so he stopped.

[Defendant] states that he then went to the bathroom and poured water on his penis until it was no longer erect. [Defendant] states that he then came out of the bathroom and went back to his bedroom. [Defendant] states that when he got to his bedroom, [A.C.] was clothed and talking to her sister [N.C.]"

¶ 34 Detective Franchini then read portions of defendant's statement regarding the sexual assaults against N.C.

"[Defendant] states that the first time was when [N.C.] was 10 or 11 years old and they were living in the basement apartment at 1851 North Kimball, Chicago, Illinois. [Defendant] states it was during the day and he was in the living room watching TV with [N.C.] ***

[Defendant] states that he and [N.C.] were playing around with each other by tickling and touching each other. [Defendant] states that he and [N.C.] hugged and he was touching her breasts with his hands and he began to get sexually aroused in his mind. [Defendant] states his penis did not get hard, but he felt sensations throughout his body.

[Defendant] states that the back of his hands were touching her breasts while they were hugging. [Defendant] states that they then let go of each other and he told [N.C.] to go away because he knew her mother was in the home.

[Defendant] states that the second time occurred maybe 10 to 15 days later when [N.C.] was still either 10 or 11 years old. [Defendant] states that he and [N.C.] were alone in the basement apartment at 1851 North Kimball, Chicago, Illinois. ***

[Defendant] states that he was in the room playing with [N.C.] [Defendant] states at first they were on the floor playing, and then he put [N.C.] on the bed. [Defendant] states when he put her on the bed and he was rubbing her all over and she was rubbing him all over [] when the clothes were on. [Defendant] states that [N.C.] then took off her pants and then [defendant] took off [N.C.'s] shirt and bra. [Defendant] states she then sat on top of him. [Defendant] states that at first he still had all of his clothes on.

[Defendant] states that when [N.C.] was sitting on him, they were facing each other and her legs were outstretched on both sides of him. [Defendant] states that at this point, they were just rubbing each other's backs. [Defendant] states that [N.C.] then took off her underwear and [defendant] took off his pants and underwear. [Defendant] states [N.C.] sat back down on him in the same position facing each other with her legs outstretched on the sides. [Defendant] states that he was holding [N.C.] by her buttocks with one hand on each butt cheek.

[Defendant] states that [N.C.'s] hands were around his neck and they began moving in a motion where his bare penis was rubbing against [N.C.'s] bare vagina. [Defendant] states his penis was hard, which to [defendant] means his penis was erect. [Defendant] states after two or three minutes, he moved [N.C.] off

of him and [defendant] states he went to the bathroom and finished himself off.

[Defendant] states that by finishing himself off, he means that he masturbated himself until he ejaculated. [Defendant] states when he went back to his bedroom, [N.C.] had put her clothes back on and was watching TV.

[Defendant] states the next time it happened he and [N.C.] were at 1851 North Kimball, Chicago, Illinois in the basement apartment and they were alone. [Defendant] states that [N.C.] was still 10 or 11. ***

[Defendant] states that him and [N.C.] were in the living room hugging and touching each other when they moved to the bedroom together. [Defendant] states that they were both standing and he took off [N.C.'s] shirt. [Defendant] states that [N.C.] then laid down on her back on the bed and [defendant] took off [N.C.'s] pants and underwear.

[Defendant] states he pulled his pants and underwear down to his ankles. He then kneeled on the bed and began to rub [N.C.'s] vagina with his left hand. [Defendant] states he then put his left middle finger into her vagina hole. [Defendant] state he only put the tip of his finger in there. [Defendant] states he was then fully erect so he put his penis into [N.C.'s] vagina two or three times.

[Defendant] states that he then pulled his penis out of her vagina and he ejaculated on the bed sheets next to [N.C.]

[Defendant] states the last time he had sex with [N.C.] in the basement apartment at 1851 North Kimball, Chicago, Illinois, was on a day when he picked [N.C.] up from school to take her to the eye doctor. ***

[Defendant] states that he suggested they go back to the house to get something to eat before they went to the doctor. [Defendant] states they ate food and then he put dishes away and went to his bedroom. [Defendant] states that [N.C.] was already on his bed lying down watching TV. [Defendant] states that he then took off his shoes and got onto the bed and laid down next to [N.C.]

[Defendant] states that they began hugging each other and rubbing each other again. [Defendant] states that they then pulled [N.C.'s] pants and underwear down to her knees. [Defendant] states he then held her legs up in the air and her leg made the shape of butterfly wings. [Defendant] states he was kneeling and then he put his penis in [N.C.'s] vagina two or three times and then he stopped. ***

[Defendant] states he did not ejaculate. [Defendant] states he then pulled up his pants and so did [N.C.]

[Defendant] states that the last time he had sex with [N.C.] was at the apartment located at 2846 West Augusta, No. 1, Chicago, Illinois. [Defendant] states that it was around October or November 2008 when [N.C.] was 13. [Defendant] states that it was seven or eight days after the car accident, which happened in October of 2008.

[Defendant] states a few hours later [N.C.] came back into the room to [ask defendant] to turn on the Internet again because she lost the Internet connection. [Defendant] states that he was sitting on the edge of the bed and told [N.C.] to come sit on the edge of the bed with him.

[Defendant] states that [N.C.] told him her leg was hurting from the car accident. [Defendant] states that he told [N.C.] to take off her pants and [defendant] states he rubbed Icy Hot on her bruise. [Defendant] states he then told [N.C.] to put on pajama pants, which she did. [Defendant] states when [N.C.] came back into the room they began to hug.

[Defendant] states that [N.C.] then laid down on the bed facing up and he pulled down her pajama pants and underwear. [Defendant] states that he then pulled down his pants and underwear. [Defendant] states that he then held [N.C.'s] leg over

his shoulder. [Defendant] states that he then put his penis in [N.C.'s] vagina two to three times and then he stopped.

[Defendant] states that he did not ejaculate. [Defendant] states that he told [N.C.] he was going to leave and she asked him to leave the computer on for her. [Defendant] states he then left the house."

¶ 35 Defense counsel was permitted to cross-examine Detective Franchini for the purpose of impeaching A.C. and N.C. The detective admitted that A.C. told her that the first sexual encounter occurred a couple weeks after her 10th birthday in September or October 2004. A.C. also told the detective that the first time was when she was on her period and did not feel well. A.C. also said that someone came to the door, but the detective could not recall if A.C. said it was the landlord. Detective Franchini admitted that she did not verify N.C.'s school records to corroborate her account that defendant took her from school.

¶ 36 Following the detective's testimony, the State introduced certified copies of both A.C.'s and N.C.'s birth certificates. The parties also stipulated that defendant was 17 years old or older at the time of the offenses. The State then rested. Defendant moved for directed finding, which the trial court denied.

¶ 37 Orlando Rivera testified for the defense. He stated that he was the landlord at 1851 North Kimball and he previously had rented a unit to A.C. and N.C.'s mother. The family lived there almost five or six years. He knew the mother's boyfriend as Angel and identified Angel as defendant. He denied ever hearing either of the girls screaming and coming downstairs to bang on the door. Rivera stated that his only problem with the family was failure to pay rent. He told them to move for failure to pay rent. Rivera said he did not keep in contact with defendant, but came forward when he read about the case in the newspaper.

¶ 38 Simon Castillo, defendant's brother, also testified for the defense. Castillo stated that he lived with defendant and the rest of the family, including A.C. and N.C., for six years. He testified that in June 2011, he had a missed call from the phone number he had saved for the girls' mother. When he called back, he spoke with N.C. He said he recognized her voice. He stated that N.C. told him "that she felt bad that she had lied; that she wanted to go speak to the detectives." Castillo said he told her not to be scared and to talk to the detectives. The conversation lasted 15 to 20 minutes and then Castillo went to defense counsel's office to show the lawyer the phone.

¶ 39 On cross-examination, Castillo testified that he visited defendant in prison every week, but that he did not tell defendant about his conversation with N.C. He admitted that there were multiple calls to the mother's number because N.C. told him if she did not answer, then she was busy and to call again.

¶ 40 In rebuttal, the State recalled N.C. N.C. testified that she knew Castillo as defendant's brother. She denied that he ever lived with them, but he would sleep over. She denied using her mother's cell phone to call Castillo. She further denied telling Castillo that she felt bad because she had lied about what defendant did to her. She denied saying that she wanted to speak with the detectives. She testified that she did not speak with Castillo for 15 to 20 minutes in June 2011. N.C. stated that the last time she saw Castillo was a few days after defendant was arrested in September 2009. N.C. testified that her mother has maintained contact with Castillo.

¶ 41 Following closing arguments, the trial court found defendant guilty of one count of predatory criminal sexual assault and one count of criminal sexual assault against A.C. and two counts of predatory criminal sexual assault against N.C. At sentencing, the trial court imposed a sentence of natural life based on his convictions of predatory criminal sexual assault against two

victims. The trial court also sentenced defendant to a consecutive term of 14 years for the criminal sexual assault.

¶ 42 This appeal followed.

¶ 43 Defendant first argues that his conviction for the criminal sexual assault of A.C. must be vacated under the supreme court's decision in *People v. Lloyd*, 2013 IL 113510. The State concedes this issue.

¶ 44 In Count 20 of the indictment, the State charged defendant under section 12-13(a)(2) of the Criminal Code of 1961 (720 ILCS 5/12-13(a)(2) (West 2008) (now codified at 720 ILCS 5/11-1.20(a)(2) (West 2012)). Under section 12-13(a)(2), a person commits criminal sexual assault if the person commits an act of sexual penetration and "knows that the victim is unable to understand the nature of the act or is unable to give knowing consent." 720 ILCS 5/12-13(a)(2) (West 2008). Count 20 alleged that defendant knew that A.C. "was unable to give knowing consent." The trial court found defendant guilty of this count.

¶ 45 Subsequently, in *Lloyd*, the supreme court held that "in order to meet its burden under section 12-13(a)(2), the State is required to show that the defendant knew that some fact prevented the victim's ability to understand the act, or give knowing consent to it, other than evidence that he knew of the victim's young age." *Lloyd*, 2013 IL 113510, ¶ 40. The State failed to present any evidence other than A.C.'s age to establish that she was unable to give knowing consent, and, therefore, defendant's conviction for criminal sexual assault must be vacated.

¶ 46 Next, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of the predatory criminal sexual assault of A.C. Specifically, defendant argues that A.C.'s trial testimony was uncorroborated and significantly impeached by Detective Franchini and

Rivera. The State maintains that the evidence overwhelmingly proved his guilt for predatory criminal sexual assault.

¶ 47 When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, our inquiry is limited to “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.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001). It is the responsibility of the trier of fact to “fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Jackson*, 443 U.S. at 319.

¶ 48 The reviewing court must carefully examine the record evidence while bearing in mind that it was the fact finder who saw and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). 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. *Cunningham*, 212 Ill. 2d at 280. However, the fact a judge or jury did accept testimony does not guarantee it was reasonable to do so. Reasonable people may on occasion act unreasonably. Therefore, the fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court. *Cunningham*, 212 Ill. 2d at 280. Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330.

¶ 49 Here, defendant was found guilty of predatory criminal sexual assault under Count 2 of the indictment. Count 2 alleged that on or about September 23, 1994, and continuing through

September 22, 2006, defendant committed the offense of predatory criminal sexual assault under section 12-14.1(a)(1), by committing an act of sexual penetration between defendant's penis and A.C.'s vagina when A.C. was under 13 years of age. 720 ILCS 5/12-14.1(a)(1) (West 2008) (now codified at 720 ILCS 5/11-1.40(a)(1) (West 2012)).

¶ 50 At trial, A.C. testified that a sexual assault occurred when she was 9 or 10 years old on a summer day when she was home alone with defendant. She stated that she was lying on the sofa on her stomach when she felt defendant's weight on her back. He then pulled her pants off. When she tried to roll to push defendant off of her, he held her arms to her side so she could not move. A.C. testified that she felt something hard near her buttocks and vagina and "it was tearing." She stated that defendant then put his penis into her vagina. She was screaming and crying and defendant told her to be quiet. She said defendant stopped when she heard the landlord bang on the door. Defendant told her to go to the bathroom and clean up, which she did. She did not see who was at the door because she was in the bathroom.

¶ 51 In his statement, defendant did not admit to this act of sexual assault, but he did admit to sexually assaulting her on two other occasions. The first was when A.C. was 11 or 12 years old and he noticed that A.C. had her period. He put his penis in her vagina, but stopped because the smell of her menstrual blood was too strong. The second time was when A.C. was 14 years old. A.C. was watching music videos on a laptop when they began hugging each other. Defendant admitted to putting his mouth on A.C.'s vagina and performing oral sex on her.

¶ 52 Defendant asserts that A.C.'s testimony was significantly impeached by Detective Franchini and Rivera. Detective Franchini testified that A.C. told her that the first sexual incident with defendant occurred when she was 10. Defendant came to her in bed while she was on her period. A.C. said that incident ended when someone banged on the door. Rivera testified

that he was the landlord for that residence and he never heard a girl scream or that he banged on the door of the apartment.

¶ 53 While A.C.'s testimony varied from her initial statement to Detective Franchini, the inconsistency goes to the weight of her testimony, not the sufficiency of the evidence.

" '[D]iscrepancies in testimony *** do not necessarily destroy the credibility of a witness, but go only to the weight to be afforded his testimony.' " *People v. Garcia*, 2013 IL App (1st) 103590,

¶ 85 (quoting *People v. Ranola*, 153 Ill. App. 3d 92, 98 (1987)).

" '[A] complainant's testimony need not be unimpeached, uncontradicted, crystal clear, or perfect in order to sustain a conviction for sexual abuse. [Citations.] Where minor inconsistencies or discrepancies exist in a complainant's testimony but do not detract from the reasonableness of her story as a whole, the complainant's testimony may be found to be adequate to support a conviction for sexual abuse. [Citations.]' " *Garcia*, 2012 IL App (1st) 103590, ¶ 84 (quoting *People v. Soler*, 228 Ill. App. 3d 183, 200 (1992)).

¶ 54 Further, "[t]he date of the crime is not an essential element of the offense when the statute of limitations is not questioned." *People v. Letcher*, 386 Ill. App. 3d 327, 331 (2008). Here, A.C. testified that about a sexual assault that occurred in the summer when she was 9 or 10. The indictment charged for continuing conduct from A.C.'s 10th birthday, September 23, 2004, until the day before her 12th birthday, September 22, 2006. Her testimony detailed multiple instances of sexual contact between her and defendant. Given her age at the time of the offenses, it was not unreasonable for A.C. to be unsure which sexual assault occurred first. It was for the trier of

fact to determine what weight to give her testimony in light of the inconsistencies between her trial testimony and her initial report two years earlier to Detective Franchini. The trier of fact was also made aware of a potential motive to fabricate the allegations of sexual assault because she was angry with defendant for his abusive relationship with her mother, culminating in the October 2008 car accident. A.C. denied that she reported defendant in retaliation. We do not find that any of the inconsistencies in A.C.'s testimony were significant enough to prevent a rational trier of fact from finding defendant guilty of predatory criminal sexual assault.

Accordingly, we affirm defendant's conviction for the predatory criminal sexual assault against A.C.

¶ 55 Next, defendant asserts that the trial court erred in failing to suppress his statements because the State failed to establish that the statements were made knowingly, intelligently, and voluntarily. Specifically, defendant argues that (1) the record fails to establish that the *Miranda* rights given to defendant in Spanish were sufficient and intelligible and that defendant understood his rights; (2) Detective Franchini acted as the interpreter, despite having investigated the allegations against defendant; and (3) the record is devoid of any way to verify that the *Miranda* waiver and custodial statements written in English were accurately interpreted to defendant before he signed them. The State first points out that defendant never asserted in the trial court that his statement should be suppressed because his waiver of his *Miranda* rights was not knowingly or intelligently made. In his motion to suppress, defendant only argued that his statement was involuntary because he was not given his *Miranda* rights, his primary language was Spanish, he was unfamiliar with the American criminal justice system, and the detective called him a liar and told that she would help him get out if he told them what happened.

¶ 56 In reviewing a trial court's ruling on a motion to suppress, this court applies a *de novo* standard of review. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001); see also *Ornelas v. United States*, 517 U.S. 690, 699 (1996). However, findings of historical fact will be reviewed only for clear error and the reviewing court must give due weight to inferences drawn from those facts by the fact finder. *Ornelas*, 517 U.S. at 699. Accordingly, we will accord great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence; however, we will review *de novo* the ultimate question of the defendant's legal challenge to the denial of his motion to suppress. *Sorenson*, 196 Ill. 2d at 431. "Further, the reviewing court may consider evidence adduced at trial as well as at the suppression hearing." *People v. Richardson*, 234 Ill. 2d 233, 252 (2009).

¶ 57 Defendant contends that the trial court did not make any findings of fact in its ruling. We disagree, though brief, the trial court did offer its reasoning on the record.

"I heard the evidence and the arguments of counsel. It's clear to me that the issues raised by [defense counsel] in this motion are factual issues that go to the weight of the statement, not it's admissibility.

[Defendant's] version of his involuntary statement as far as I am concerned is more or less absurd, but whether he understood what he was signing and the weight to be given to a statement transferred to English and then asked him to sign it is a question for the trier of fact, not for a Motion to Quash and Suppress. Motion denied."

¶ 58 The trial court expressly found defendant's version of the events to be "absurd," indicating that the court did not find defendant to be credible. Thus, we will accord deference to the trial court's factual findings.

¶ 59 Defendant contends that the State failed to prove that defendant knowingly and intelligently waived his *Miranda* rights before making a statement. However, defendant presented a different argument before the trial court. In his motion to suppress and at the suppression hearing, defendant asserted that he was not given his *Miranda* rights prior to giving his statement. The State maintains that this argument has been forfeited. To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992).

¶ 60 Defendant argues that forfeiture should not apply because while this issue was not fully developed in the trial court, it was before the trial court. "An issue raised by a litigant on appeal does not have to be identical to the objection raised at trial, and we will not find that a claim has been forfeited when it is clear that the trial court had the opportunity to review the same essential claim." *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009). Despite his claims to the contrary, defendant is advancing a different argument that is at odds with his previous position. The question before the trial court regarding his *Miranda* rights was whether he had received them at all, not whether he knowingly and intelligently waived these rights. We disagree with defendant that this new alternative theory was sufficiently similar to the argument advanced in the trial court and find it forfeited on appeal.

¶ 61 Nevertheless, defendant asserts that if the issue was forfeited, this court can consider this issue under the plain error doctrine or ineffective assistance of trial counsel. Supreme Court

Rule 615(a) states that “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.” Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule “allows a reviewing court to consider 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. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). However, the plain error rule “is not ‘a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.’ ” *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the supreme court has held that the plain error rule is a narrow and limited exception to the general rules of forfeiture. *Herron*, 215 Ill. 2d at 177.

¶ 62 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that the evidence was closely balanced under the first prong because the sisters' testimony without defendant's statement might not have been sufficient to find defendant guilty since the sisters had a motive to fabricate their allegations. “Where the only basis proffered for plain-error review is a claim that the evidence is closely balanced, an assessment of the impact of an alleged evidentiary error is readily made after reading the record. When it is clear that the alleged error would not have affected the outcome of the case, a court of review need not engage in the meaningless endeavor of determining whether error occurred.” *People v. White*, 2011 IL 109689, ¶ 148.

¶ 63 Here, the evidence was not so closely balanced that the alleged error would have threatened to tip the scales against defendant. Both A.C. and N.C. detailed multiple instances of sexual assault that defendant committed against both of them when they were between the ages of 9 and 14. Even if defendant's statement had been suppressed, the evidence presented would have been sufficient to find defendant guilty beyond a reasonable doubt.

¶ 64 Defendant also argues that his trial counsel was ineffective for failing to specifically assert that defendant's waiver of his *Miranda* rights was knowing and intelligent. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 65 "An attorney's decision whether to file a motion to quash arrest and suppress evidence is a matter of trial strategy that should be accorded great deference and is not ordinarily

challengeable as ineffective assistance of counsel." *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2003). "[I]n order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *People v.*

Henderson, 2013 IL 114040, ¶ 15. Here, defendant's claim of ineffective assistance must fail because we have already concluded that the evidence was not closely balanced and the result of the trial would not have been different if defendant's statements had been suppressed. Therefore, we decline to review defendant's newly raised arguments regarding his motion to suppress.

¶ 66 We now turn to the preserved issues related to defendant's motion to suppress. Defendant argued before the trial court that his statements were involuntary and should be suppressed.

"The test of voluntariness is "whether the defendant made the statement freely, voluntarily, and without compulsion or inducement of any sort, or whether the defendant's will was overcome at the time he or she confessed." ' ' *Richardson*, 234 Ill. 2d at 253 (quoting *People v. Slater*, 228 Ill. 2d 137,160 (2008), quoting *People v. Gilliam*, 172 Ill. 2d 484, 500 (1996)).

"In determining whether a statement is voluntary, a court must consider the totality of the circumstances of the particular case; no single factor is dispositive. Factors to consider include the defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the presence of *Miranda* warnings; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises." *Id.* at 253-54.

¶ 67 Illinois courts have previously held that statements written in English from a non-English speaking defendant were voluntary. Similar to the instant case, in *People v. Villagomez*, 313 Ill. App. 3d 799 (2000), a detective testified at the hearing on the defendant's motion to suppress. The detective stated that he initially interviewed the defendant in Spanish, including giving the defendant his *Miranda* rights in Spanish. Later, the detective acted as an interpreter when the defendant gave a statement to an ASA. The detective translated each line of the statement into Spanish for the defendant and the defendant indicated that he understood. In contrast, the defendant testified that the detective accused him of lying and threatened the defendant. He also stated that the detective told him the ASA was the defendant's attorney. The trial court denied the motion to suppress. *Villagomez*, 313 Ill. App. 3d at 801-03.

¶ 68 On appeal, the defendant argued that the statement was not voluntary because of the English-Spanish language barrier. The reviewing court rejected this argument.

"The record reveals that the State presented testimony that defendant was informed of his constitutional rights in Spanish. [The detective] and the assistant State's Attorney both testified that as defendant gave his statement in Spanish, [the detective] translated to English and the assistant State's Attorney wrote the statement in English. Once the statement was written, [the detective] translated each sentence to Spanish for defendant and asked if the sentence was correct. Any corrections were made sentence by sentence. [The detective] then read the entire corrected statement to defendant in Spanish with defendant signing the written statement and initialing the bottom of each page. We

further note that there is no evidence in the record to suggest that defendant had difficulty understanding [the detective] or that he expressed a desire for a different interpreter." *Villagomez*, 313 Ill.

App. 3d at 808-09.

¶ 69 The reviewing court in *People v. Joya*, 319 Ill. App. 3d 370 (2001), followed the holding in *Villagomez*. There, the defendant also challenged the voluntariness of his statement based on the language barrier, contending that the statement contained things he never said. The *Joya* court opined as follows.

"Whenever a witness' or a defendant's statements are not in English, translation is a necessity to make those statements intelligible to the court and the jury. This is why the statements are translated to English in the first place. To say that the written statement must be taken in the defendant's own language and then translated to the court and jury would not make it any more accurate. Testimony regarding a confession by a non-English-speaking defendant is admissible because it satisfies the most important requirements of other exceptions to the hearsay rule: (1) it has circumstantial guarantees of trustworthiness; (2) it concerns admissions of a party; and (3) it consists of admissions against the declarant's penal interest. Of course, the fact that an interpreter is used and, significantly, the fact that the written statement is not intelligible to the defendant are bases upon which to attack the statement's accuracy. However, if the trial court finds the

statement to have been voluntarily made, such statements are admissible." *Joya*, 319 Ill. App. 3d at 380 (citing *People v. Gukouski*, 250 Ill. 231, 235 (1911)).

¶ 70 Defendant attempts to distinguish this case from *Villagomez* by contending that "Detective Franchini was not a government agent who was unrelated to or only remotely involved in the case." However, neither *Villagomez* or *Joya* limited the finding of a voluntary statement to instances in which the translating detective was unrelated or remotely involved in the case. Instead, defendant relies on *U.S. v. Monreal*, 602 F. Supp. 2d 719 (E.D.Va., 2008). In that case, the defendant was charged with the possession of heroin shortly after crossing the Mexico border. The defendant did not speak English and was questioned by a police department agent in Spanish with a DEA agent acting as a witness. The police department agent transcribed the defendant's statement in English. The defendant subsequently filed a motion to suppress. The district court granted the defendant's motion to suppress, finding the law enforcement officers' testimony "incredible." *Monreal*, 602 F. Supp. 2d at 723. The court observed that it was "undisputed" that the defendant did not understand English and there was no indication that she had spent a significant amount of time in the United States. *Id.* The court based its holding on three grounds, first, inconsistencies in the testimony that the DEA agent was present during the questioning; second, the court observed that the police department agent "stumbled and hesitated" when translating the Spanish Advise of Rights into English; and third, the police department paraphrased the defendant's statement and the court was "unsure of where [the police department agent's] paraphrasing begins and where the Defendant's actual testimony ends." *Id.*

¶ 71 In contrast, Detective Franchini testified that Spanish was her first language. She also said that defendant told her he understood 85% of the English language and he had been living in

Chicago for 22 years. Defendant also has prior contact with criminal justice system when he was arrested for the October 2008 car accident and a prior arrest for retail theft. Based on these circumstances, we find *Monreal* to be distinguishable and to be in line with the prior cases of *Villagomez* and *Joya*.

¶ 72 Defendant also notes that the Illinois legislature recently passed a bill to expand the recording of interrogations, but while noting that the bill would not be applicable to him, asks this court "demand the same protection." However, defendant fails to cite any authority holding that legislation not in existence at the time of the suppression hearing would be relevant to a review of the trial court's denial of the motion to suppress. Supreme Court Rule 341(h)(7) requires appellants' brief to include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Contentions supported by some argument, but no authority do not meet the requirements of Supreme Court Rule 341(h)(7) (*People v. Pickens*, 354 Ill. App. 3d 904, 917 (2004)), and, therefore, defendant has forfeited this argument.

¶ 73 Based on the foregoing analysis, we conclude that the trial court did not err in denying defendant's motion to suppress his statements as involuntary. The trial court found defendant was not credible, and his testimony was "absurd." Detective Franchini testified that she questioned defendant in Spanish, advised him of his *Miranda* rights, and translated the statement given to the ASA. Under *Villagomez* and *Joya*, the language barrier alone does not render a statement involuntary. Defendant's motion to suppress was properly denied.

¶ 74 Finally, defendant contends that the trial court erred in ruling that it would only grant defendant's motion for joinder if defendant elected to have a bench trial. Defendant asserts that this ruling prohibited him from having a joint jury trial. The State responds that defendant

forfeited this issue, but alternatively, no act of the trial court prevented defendant from having a jury trial and to find otherwise would require speculation.

¶ 75 Defendant was charged in two separate indictments, one for each victim. Prior to trial, the State moved to admit other crimes evidence to allow N.C. to testify about the offenses committed by defendant against her at the trial on charges pertaining to A.C. The trial court granted the motion. Defendant then moved to join the cases. The State initially objected to the motion, but later stated that it did not object.

¶ 76 In ruling on the motion, the trial court expressed some due process concerns.

"[I]f this is going to be a jury trial what's going to happen in a jury trial or a proof of other crimes as opposed to joinder? You'll have two trials going on the same date versus some evidence about the proofs of other crimes for a limited purpose, and so I'm concerned about his due process. It's easy for me to separate those issues whether it's a bench or jury, so here's my ruling.

Because --- especially when you make a motion for joinder or proof of other crimes that trumps due process. So if it's going to be a jury trial your request for joinder is denied. If it's going to be a bench trial then your request is granted, but I'm not going to allow a jury to hear two criminal sexual assault cases at the same time.

But all the cases say [the proof of other crimes is] supposed to be for limited purposes, it's not supposed --- the cases don't say, hey,

that's fine but on two cases. They don't say that for a limited purpose of the prejudicial equity. You're first of all talking the only crime where this type of evidence is allowed in the first place except for the real kind. That's the rule. You don't have to like it, but that's what it is."

¶ 77 Defense counsel then indicated that defendant had not made his final decision about whether to proceed with a bench trial or a jury trial. Defendant subsequently waived his right to a jury trial and proceeded with a bench trial. The trial court admonished defendant about his right to a jury trial and defendant made no objection or voiced any complaint that his decision to proceed with a bench trial was based solely on the trial court's ruling on his joinder motion.

¶ 78 The State asserts that defendant has forfeited this issue by failing to object at trial and to raise this claim in his motion for a new trial. Defendant concedes that he failed to preserve this issue for review, but asks this court to review it under the plain error doctrine.

¶ 79 As we previously stated, a defendant must object both at trial and in a written posttrial motion to preserve an error for review (*Enoch*, 122 Ill. 2d at 186), and the failure to do so operates as a forfeiture as to that issue on appeal (*Ward*, 154 Ill. 2d at 293). Supreme Court Rule 615(a) states that “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.” Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule “allows a reviewing court to consider 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.” *Piatkowski*, 225 Ill. 2d at 565 (citing *Herron*, 215 Ill. 2d at 186-87).

¶ 80 Defendant carries the burden of persuasion under both prongs of the plain error rule. *Lewis*, 234 Ill. 2d at 43. Defendant asserts that the second prong of the plain error rule is applicable because “improper conditioning a defendant's unfettered right to a trial by jury is serious enough to affect the fairness of the trial and challenge the integrity of the judicial process.” However, “[t]he first step of plain-error review is to determine whether any error occurred.” *Lewis*, 234 Ill. 2d at 43. We will review defendant's claim to determine if there was any error before considering it under plain error.

¶ 81 Defendant relies on the decision in *People v. Trail*, 197 Ill. App. 3d 742 (1990), to support his argument that the trial court improperly affected his right to a jury trial. In *Trail*, the defendant was convicted of two counts of criminal sexual assault against his stepdaughters. The defendant argued on appeal that the trial court erred in denying his request for severance. “A defendant may be placed on trial in one proceeding for separate offenses if the offenses are based on the same act or on two or more acts which are part of the same comprehensive scheme.” *Trail*, 197 Ill. App. 3d at 746 (citing Ill. Rev. Stat.1987, ch. 38, par. 111-4(a)). The reviewing court observed that the trial court's decision on joinder will not be reversed absent an abuse of discretion. *Id.*

¶ 82 The *Trail* court concluded that the trial court did not abuse its discretion, finding that based on the facts of that case, “evidence pertaining to one sexual assault count would have been admissible as ‘other crimes’ evidence for the other count on at least the basis of similar *modus operandi*.” *Id.*

"We emphasize that where, as here, 'other crimes' evidence is properly admissible, the potential prejudice to a defendant of having the jury decide two separate charges is greatly diminished because the jury is going to be receiving evidence about both charges anyway. While we do not suggest that the admission of 'other crimes' evidence should necessarily be determinative of the issue of severance, that admission is nonetheless a significant consideration." *Id.*

¶ 83 Defendant contends that *Trail* "demonstrates that there was no legal need for the court to condition the joinder of [defendant's] cases upon [defendant] electing a bench trial." Defendant asserts that the record shows that prior to the joinder ruling, he was considering a bench trial and his subsequent jury waiver was rendered invalid because of the conditional joinder ruling. However, defendant admits that the record does not show why he elected to have a bench trial.

¶ 84 In *People v. Brownell*, 79 Ill. 2d 508, 521-22 (1980), the defendant requested to ask questions during *voir dire* about the death penalty, but the trial court denied the defendant's motion. The defendant subsequently waived his right to a jury trial and elected to proceed with a bench trial. On appeal, the defendant argued that the trial court's denial of his request to ask questions about the death penalty during *voir dire* improperly influenced his right to a jury trial.

¶ 85 The supreme court found that the defendant had preserved the issue of whether the trial court erred in denying his request for questions relating to the death penalty, but in deciding to proceed in a bench trial, the defendant "eliminated the need to conduct *voir dire*" and the defendant cannot assert that had *voir dire* been conducted, an error would have occurred.

Brownell, 79 Ill. 2d at 522. The supreme court also rejected the defendant's argument that the trial court's ruling influenced his decision to waive his right to a jury trial.

"No act of the court prevented the defendant from having a jury trial. If error had occurred in *voir dire*, the defendant could have objected at that point and counsel could have drawn the court's attention to the error. If the error was not corrected, the defendant could raise the issue here. The defendant did none of this. Instead he argues that he was deprived of a jury trial because of error which might have occurred, but did not. We will not indulge in speculation as to what error the court might have committed, and we refuse to assume that the spectre of speculative error influenced the defendant to waive his right to trial by jury." *Id.* See also *People v. Person*, 102 Ill. App. 3d 474, 479-80 (1981) (following *Brownell* to conclude that the actions of the trial court and the prosecution did not violate defendant's right to due process by coercing his waiver of a trial by jury).

¶ 86 In *People v. Kratovil*, 351 Ill. App. 3d 1023, 1034-35 (2004), the defendant asserted that the trial court's denial of her motion *in limine* to present an affirmative defense forced her to forego a jury trial. The reviewing court disagreed.

"The defendant was not deprived of a jury trial. Although the trial court's ruling may have had a bearing on the defendant's decision to seek a bench trial, the ruling did not directly deprive her of her constitutional right. The defendant still had the option

of a trial by jury and voluntarily waived that right orally and in writing." *Kratovil*, 351 Ill. App. 3d at 1034-35.

¶ 87 Similarly, the trial court in this case did not deprive defendant of his right to a jury trial. The ruling on the joinder motion may have factored into defendant's ultimate decision to proceed with a bench trial, but that decision rested with defendant. Defendant engages in speculation as to the reasons he chose to have the cases tried together. Defendant speculates that his theory of defense that the girls falsified their allegations would have been more fully developed in a joint trial. He also theorizes that his trial counsel might have preferred to proceed with a bench trial for efficiency and that he, as an immigrant with limited English, would have been susceptible to proceed as his attorney desired. These arguments have no basis in the record and do not show how the trial court's ruling on the joinder motion deprived him of his right to a jury trial. Here, the decision to waive his right to a jury trial belonged to defendant and he voluntarily waived this right. The trial court's ruling on a pretrial motion did not deprive defendant of that right and we decline to find any error. Since we have concluded that no error occurred, defendant's plain error argument must fail.

¶ 88 Based on the foregoing reasons, we affirm defendant's convictions and sentences for predatory criminal sexual assault and vacate defendant's conviction and sentence for criminal sexual assault.

¶ 89 Affirmed in part, vacated in part.