2012 IL App (2d) 100679-U
No. 2-10-0679
Order filed January 17, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-1433
RAY G. MATAZZONI,	)	Honorable Blanche Hill Fawell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: The trial court did not err in allowing evidence of numerous weapons found inside defendant's home. It also did not err in allowing evidence of one of defendant's domestic violence offenses against another victim. The trial court did abuse its discretion in allowing evidence of a second, dissimilar domestic violence offense, but that error was harmless beyond a reasonable doubt. The trial court also erred in allowing other-crimes evidence of a prior sexual offense, but the error did not rise to the level of plain error.

¶ 1 Following a jury trial, defendant, Ray G. Matazzoni, was found guilty of one count of armed violence (720 ILCS 5/33A-2(a) (West 2008)), three counts of domestic battery (720 ILCS 5/12-3.2(a)(1), 12-3.2(b) (West 2008)), and two counts of aggravated criminal sexual abuse (720 ILCS

5/12-16(c)(1) (West 2008)). Defendant was sentenced to concurrent terms of 14 years' imprisonment on the armed violence conviction, 3 years' imprisonment on each of the domestic battery convictions, and 6 years' imprisonment on the aggravated criminal sexual abuse convictions. On appeal, defendant argues that the trial court erred in allowing the State to present inadmissible evidence. We affirm.

¶ 2 I. BACKGROUND

¶ 3 On July 9, 2009, defendant was charged by indictment. Counts I and II, pertaining to aggravated criminal sexual abuse, alleged between June 1 and September 1, 2008, defendant, who was 17 years or older, committed an act of sexual conduct with Violet P., who was under 13 years, in that he knowingly touched her sex organ (count I) and had her touch his penis (count II) for sexual gratification. The remaining counts alleged actions occurring on May 18, 2009. Count X alleged aggravated criminal sexual abuse for touching Violet's buttocks. As amended, count III alleged aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2008)) in that defendant, while holding a sword, knowingly and without legal authority detained Rachel P., in that he prevented her from leaving a living room. Counts IV through VII alleged domestic battery. Count IV and VI alleged that defendant, knowingly and without legal justification, caused bodily harm to a household or family member, in that he grabbed and bent Violet's wrist (count IV) and grabbed Rachel's neck and struck her body (count VI). Counts V and VII were identical except that they alleged that the actions were of an insulting and provoking nature, rather than causing bodily harm (count V pertained to Violet and count VII to Rachel). Count VIII alleged armed violence in that defendant, while armed with a dangerous, category II weapon, being a sword, knowingly performed an act prohibited by statute, being intimidation by threat to inflict harm, in that he made Rachel promise not to contact the police and report a disclosure of sexual abuse made by Violet. As amended, count

IX was identical except that it alleged intimidation by subjection to physical confinement (to the living room). The State later charged defendant with two counts of unlawful restraint, but it subsequently withdrew these charges.

¶ 4 Defendant's jury trial took place in March 2010. Violet testified that she was ten years old. In May 2009 she lived with her mother, Rachel, her little brother, Drake, and defendant. Her mother and defendant were boyfriend-girlfriend. In summer 2008, defendant watched Violet and her brother while Rachel was at work. One day that summer, Violet was taking a bath. Defendant asked if he could use the bathroom, and Violet pulled the curtain closed and said yes. After using the toilet, defendant asked Violet if she wanted to see and touch his "privates." Violet agreed. After she touched him, defendant "shook it" and "milky stuff came out." Another time, Violet was watching television in the living room. Her mother was at work, and Drake was sleeping. Defendant sat down next to Violet and asked if he could touch her "private." He said that he would give her a handful of chocolate covered raisins. Violet agreed, pulling down her pants and underwear. Defendant touched the outside of her front "private" with his finger. He then walked away, and Violet pulled her pants back up. During both of these incidents, defendant told Violet not to tell Rachel. Violet also did not tell Rachel because Violet was scared defendant would hurt them. She had seen him sharpen swords in the house. On another occasion, Violet was walking back to her room after taking a shower, wearing a towel. Defendant offered her money if she took the towel off, but Violet said no.

¶ 5 Violet further testified that one night, she went to sleep around 9 p.m. Later that night, defendant came in the room and tucked her in. Afterwards, he lifted up the covers and touched her butt, over her clothing. He then put the covers back down and left the room. Violet stayed still during this time. Defendant then came back with a flashlight and shone it in her face. Violet asked

why he was there, and defendant said that he was coming to tuck her in. He then left. At trial, Violet denied that her dog scratched her leg that day. Violet decided to get up and tell her mom that defendant had been touching her. Defendant grabbed the back of her shirt and told her not to wake Rachel up. Violet did so anyway, and they went into the bathroom to talk. Violet told Rachel about the incidents, and Rachel told her to pack.

¶ 6 Violet later returned to Rachel's room, where Rachel and defendant were arguing. She was not able to leave the room because defendant held them "hostage." Defendant choked Rachel and pulled her wrist backwards. Rachel tried to phone for help, but defendant tried to break the phones in the room by banging them together. He then took the batteries out. When Violet tried to leave the room, he bent her wrist back. Violet felt scared because defendant had weapons in the house. They eventually left the room when Drake woke up and Rachel had to get a bottle for him.

¶ 7 Violet testified that she liked defendant at first. She did not like him as time went on and wanted him out of the house. However, she denied that she ever lied to get him out of the house.

¶ 8 Rachel testified as follows. She and defendant moved in together in January 2007, after she became pregnant with his child, Drake. In the summer of 2008, defendant worked nights. He watched the kids during the daytime hours. Violet liked defendant at first, but after 2008, they argued often, and Violet got angry a lot. Violet said that she did not want to stay alone with defendant anymore. Violet said defendant made her do things she did not want to, like walking the dog and cleaning her room.

¶ 9 On May 18, 2009, defendant returned home around midnight. Rachel went to sleep soon after. She awoke because she heard Violet and defendant arguing in the hallway. Violet said that defendant had been shining a light in her bedroom, and defendant said that he was just checking on her. Rachel told defendant to stop and Violet to go back to bed. Later that night, Violet came into

the room and asked to talk to Rachel. They went into the bathroom, and Violet told her about the incidents that night and the previous summer. Rachel told Violet to pack. Violet changed her clothes. Rachel went to her bedroom to get dressed, and Violet entertained Drake, who had awoken.

¶ 10 Defendant came back into the bedroom, and he asked why she was getting dressed. Rachel said that they were leaving because Violet told her what he had done to her. Rachel said that they were going to go to the police. Defendant closed and locked the bedroom door. He stood in front of it, saying that they were not going anywhere. He asked what Violet had said, and Rachel described the incidents. Defendant said that Violet was lying to get him out of the house. Rachel reached for the phone to call the police, but defendant grabbed her wrist and squeezed it until she dropped the phone. Rachel tried to use another phone, but the battery was dead. Defendant took both phones and smashed them together in front of Rachel's face. They did not break, so he took the batteries out.

¶ 11 Rachel tried to get to the bedroom door, but defendant grabbed her, twisted her right arm behind her back, and pushed her onto the bed. Drake started crying, so Rachel stopped struggling so as not to further upset Drake. Rachel asked if defendant would let them go or leave himself. Defendant said that he could not because either way, they would go to the police. Defendant said that "there was only really one other option." Rachel thought defendant meant that he was going to kill them, because she did not know what other options there were, and defendant had a gun and at least one knife in the bedroom.

¶ 12 Rachel went to the door again, but defendant grabbed her hand around the doorknob and squeezed it. He also grabbed her other arm behind her back and pushed her to the bed. Rachel tried to go to the balcony door, but he threw her back on the bed and started choking her. Drake started

crying again, and defendant let her go. Drake found a bottle and asked for milk, and defendant eventually unlocked the door so they could get him some. He followed Rachel to the kitchen. Rachel yelled for Violet to go to her room and lock the door, which she did. Rachel poured the milk, and defendant gave Drake the bottle. Rachel tried to get up the stairs, but defendant grabbed her and threw her down.

¶ 13 Rachel went over to the living room couch, and Drake sat in her lap. Defendant sat on the coffee table in front of her and tried to bargain with her to let him go without calling the police. Rachel refused, and defendant said there was "only one option then." There was a sword stand on a table behind the couch, and defendant took the sword and sat down with it on his lap. Rachel had purchased the sword for defendant as a gift. He pulled the blade about an inch out of the scabbard and said that she was not leaving him any choice. Rachel thought he was going to kill her and said that defendant would not want to do that in front of Drake. Defendant then put the sword away.

¶ 14 At this point, it was around 5 a.m., close to the time Rachel would normally start getting ready for work. She told defendant that if she did not show up for work, her employer would try to contact her. Defendant told her to call in sick, but Rachel said that she would not do so until he left the house. Defendant changed his clothes and left. Rachel called her mother to watch Drake, and then she called the police. When the officers came, she asked them to remove defendant's weapons, which consisted of several swords and knives, as well as a couple of guns. At trial, Rachel explained that defendant was involved in martial arts and "was attracted to weapons."

¶ 15 Bloomingdale police officer Steve Abruzzo testified that he was dispatched to Rachel's apartment to respond to a domestic disturbance. Abruzzo removed the following weapons from the apartment at Rachel's request: four "samurai-type" swords; an AK-47 assault rifle with three magazines; a Beretta 9-millimeter handgun; two black powder handguns, and eight "throwing

knives." The weapons came from the bedroom, the attic, and the front room. A sword Rachel removed from the living room had an approximately three-foot sharpened blade. The three other swords were also "battle ready" in that they had sharpened blades. All of the weapons were unloaded and in cases or sheaths, and defendant had a valid "FOID" card. Abruzzo did not observe any injuries on Rachel, nor did she complain of any pain.

¶ 16 Investigator Boris Vrbos testified that he was an investigator with the Du Page County State's Attorney's Office. He interviewed Violet on May 18, 2009; the videotape was played for the jury. Vrbos met with defendant on June 12, 2009. Defendant said that on the night of May 18, he went to the doorway of Violet's room and shined a flashlight on her leg because Rachel had told him that the dog scratched Violet's leg. Defendant told him that he did not go into the bedroom because Violet did not like him and he was not allowed in there. When Vrbos asked defendant if he had ever touched Violet, defendant said that he "was not that kind of man."

¶ 17 The State presented evidence that defendant stayed in a hotel from May 18 to May 21, 2009, and provided a false name and address.

¶ 18 Katie B., a former girlfriend of defendant, testified that she began dating defendant in 1993, when she was 16 and he was 32. Within a few months of their relationship, he moved into her room in her mother's house. She had two children with defendant, one when she was 16 and the second when she was 17. Katie testified about an incident that took place in July 1997. She and defendant had been arguing, and she and the kids stayed at her mother's house for a few days. Defendant came to pick them up. When they arrived home, Katie was about to get out of the car, but defendant grabbed her by the shirt and said that she was not going to take his kids away from him. Katie tried to remove his hand, and they struggled. In the process, defendant ended up hitting her in the face

with his hand. Katie opened the car door, and defendant put it in reverse. Katie was able to get out of the car, and she ran to a nearby police station.

¶ 19 Katie broke up with defendant in April 1998. She obtained an order of protection against defendant in April 1999. On April 18, 1999, while leaving a friend's house, Katie saw defendant's truck a few doors down. When she rode past, she saw defendant crouched down on the side of his vehicle.

¶ 20 In closing argument, the State argued, among other things, that the only reason a person of defendant's age would want to touch a little girl's vaginal area was because "he gets off on little children." The State argued that Katie's testimony also showed that defendant "gets off on little children" because he had sex with Katie when she was 16 and 17. In discussing the armed violence charges, the State argued that defendant's actions constituted intimidation because, while holding a sword, he threatened Rachel, saying that she was not leaving him with any options. The State argued that Rachel did not have any reason to believe that defendant would not carry out the threat, because she knew about all the weapons defendant had, including the AK-47s and other guns, "battle ready" swords, and throwing knives.

¶ 21 The jury found defendant guilty of two counts of aggravated criminal sexual abuse (counts I and II), three counts of domestic battery (counts IV, VI, and VII), and one count of armed violence (count VIII). It found him not guilty of aggravated unlawful restraint (count III), one count of domestic violence (count V), one count of armed violence (count IX), and one count of aggravated criminal sexual abuse (count X). Following sentencing and the denial of defendant's motion to reconsider, defendant timely appealed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant argues that the trial court erred in allowing the State to introduce improper evidence, thereby denying him of a fair trial. Defendant first argues that the State should not have been allowed to introduce prejudicial testimony that he possessed numerous weapons that had nothing to do with the crimes charged. The admission of evidence is within the trial court's discretion, and its evidentiary rulings will not be reversed absent an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would agree with the trial court's position. *Id.*

¶ 24 Prior to trial, defense counsel filed a motion *in limine* to exclude testimony regarding weapons seized from the apartment, other than the sword that was allegedly used in the offense. Defense counsel argued that evidence of the remaining weapons was irrelevant. The trial court denied the motion, stating that the evidence of other weapons in the house was relevant to the intimidation element of the armed violence charge.

¶ 25 Defendant notes that evidence of weapons is inadmissible unless there is proof connecting the weapons to the defendant and the crime with which he is charged, or the defendant possessed the weapon when arrested. See *People v. Evans*, 373 Ill. App. 3d 948, 960 (2007). Defendant points out that the State had Officer Abruzzo detail all of the weapons he removed from the home, and the State commented on the number of weapons in closing argument. Defendant argues that other than the one samurai sword he allegedly held in the living room and which was referred to in several charges, the remaining weapons seized by the police had no connection to any of the charged offenses. Defendant argues that it was immaterial whether Rachel and Violet were scared by the other weapons in the home. According to defendant, the armed violence charge predicated on intimidation alleged only the involvement of a single sword and required evidence only that he was

holding that sword while intimidating Rachel to convict him of the offense. Defendant argues that the weapons evidence served only to make the jurors believe that he was a dangerous and violent individual who must have been guilty of armed violence and of having abused Rachel and Violet.

¶ 26 The State argues that the evidence concerning the weapons was directly relevant because both victims testified that the presence of weapons contributed to the intimidation they felt while defendant was holding them hostage. The State argues that the fact that the weapons were related to the crimes charged makes the facts in this case stronger than those in cases where the court allowed evidence of weapons found in the defendants' vicinity when they were arrested. See *People v. Upshire*, 62 Ill. App. 3d 248, 252 (1978) (even if a weapon was not used in a crime, it may be the subject of testimony about the details of the arrest); *People v. Longstreet*, 23 Ill. App. 3d 874, 882 (1974) (same). The State further argues that even if the evidence was improperly admitted, any error was harmless.

¶ 27 Although the parties' arguments both refer to intimidation of Violet in relation to the armed violence charges, on February 4, 2010, the State amended the armed violence counts to refer only to intimidation of Rachel in the living room. In any event, we conclude that the trial court acted within its discretion in allowing evidence of weapons in the house beyond the sword specifically mentioned in the indictment. As mentioned, amended count VIII alleged armed violence in that defendant, while armed with a sword, knowingly performed an act prohibited by statute, being intimidation by threat to inflict harm. The count alleged that defendant made Rachel promise not to contact the police and report Violet's disclosure of sexual abuse.

¶ 28 As relevant here, a person commits intimidation "when, with intent to cause another to perform or to omit the performance of any act, he communicates to another *** a threat to" unlawfully "[i]nflict physical harm on the person threatened or any other person." 720 ILCS 5/12-

6(a)(1) (West 2008). The intimidation statute's purpose is to prohibit threats intended to compel a person to act against his will. *People v. Barner*, 383 Ill. App. 3d 356, 359 (2008). The heart of the offense is the exercise of improper influence, that being a threat intended to coerce another. *Id.* For the words to constitute a "threat," the expression must, in its context, have a reasonable tendency to create apprehension that the speaker will act according to its tenor. *People v. Byrd*, 285 Ill. App. 3d 641, 647 (1996). Intimidation is a specific intent crime, and the trier of fact may determine intent from the facts and circumstances surrounding the offense. *Id.* The intent at issue is that to cause someone to act or not act, rather than the intent to carry out the threat. *Id.* at 648. The question is therefore whether the defendant's words had a reasonable tendency, under the circumstances, to create fear in another that the defendant would perform the threatened act. *Id.* "[W]hile the issue of whether particular words have a reasonable tendency to coerce or cause apprehension is essentially an objective determination, the subjective reactions of the recipients is a proper factor to consider" because it is evidence of the threat's tendency to create apprehension. *People v. Peterson*, 306 Ill. App. 3d 1091, 1103 (1999).

¶ 29 In *Byrd*, the appellate court held that the trial court did not err in allowing evidence of the defendant's gang affiliation in connection with charges that he intimidated police officers by threatening them. *Byrd*, 285 Ill. App. 3d at 649. The *Byrd* court stated that the evidence explained why the defendant threatened the officers in the manner that he did and why the threats had a reasonable tendency, under the circumstances, to make the officers fear that he would shoot them if they did not act accordingly. *Id.*

¶ 30 Here, the jury was required to determine whether defendant's statement in the living room that there was "only one option then" if Rachel would not agree to let him go without calling the police constituted a threat. That is, the jury had to determine whether, under the circumstances, the

words had a reasonable tendency to make Rachel fear that defendant would perform the threatened act. See *id* at 648. Rachel testified that she thought that defendant meant that he was going to kill her. Relevant circumstances included that defendant was holding a sword when he said this. However, the sword was a gift from her, had a three-foot blade and had been on display in the living room, making it far from the typical murder weapon. Similar to *Byrd*, that defendant was trained in martial arts and had many additional weapons in the house, including guns, other swords, and throwing knives, helped explain why defendant's threat would make Rachel afraid that he would kill her, as it showed his familiarity with weapons and his easy access to other weapons with which to carry out his threat. In other words, relevant circumstances showing that defendant's words had a reasonable tendency to create apprehension were not limited to the fact that he was holding a sword, but also that he had many other weapons in the house.

¶ 31 Additionally, the presence of the weapons was relevant to the aggravated criminal sexual abuse charges. The evidence showed that Violet did not tell Rachel about defendant inappropriately touching her while Rachel was at work until almost one year after the acts occurred. This time lag could have affected the jury's assessment of Violet's credibility. Violet testified that she did not say anything before because defendant told her not to tell Rachel, and she was scared that defendant would hurt them. She testified that she knew he had weapons in the house, and he had sharpened his swords in front of her. Thus, the weapons evidence was also relevant to explain why Violet may have been afraid of defendant and not reported the sexual abuse earlier. Accordingly, the trial court did not abuse its discretion in denying defendant's motion *in limine* to exclude evidence of weapons other than the sword named in the indictment.

¶ 32 Defendant next argues that the trial court erred in allowing evidence of his prior domestic battery and sexual offenses against Katie. "At common law, other-crimes evidence is admissible

only if it is relevant to matters other than the defendant's propensity to commit crimes, such as the motive and intent of the accused." *People v. Peterson*, 2011 IL App (3d) 100513, ¶60. Section 115-7.4 of the Code of Criminal Procedure of 1963 (Code) abrogates this common law rule for certain domestic violence offenses. *Id.* It states that where a defendant is accused of an offense of domestic violence, "evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.4(a) (West 2008). Section 115-7.4 further provides:

> "In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:
>
> (1) the proximity in time to the charged or predicate offense;
>
> (2) the degree of factual similarity to the charged or predicate offense; or
>
> (3) other relevant facts and circumstances." 725 ILCS 5/115-7.4(b) (West 2008).

¶ 33 Thus, section 115-7.4 allows domestic violence offenses to be admissible for any relevant purpose, including the defendant's propensity to commit crimes of domestic violence. *Peterson*, 2011 IL App (3d) at ¶60. The statute's purpose is to address the concern that a domestic violence victim may be fearful to testify against her abuser, and the abuser may present the victim as hysterical or mentally ill. *People v. Dabbs*, 239 Ill. 2d 277, 293 (2010). Evidence that the defendant had been involved in a prior, similar incident serves to corroborate the victim's testimony. *Id.* Still, the evidence will be excluded if its probative value is substantially outweighed by the risk of undue prejudice. *Id.* at 291.

¶ 34 Similar to section 115-7.4, section 115-7.3 of the Code abrogates the common law and allows evidence of prior sexual offenses for any relevant purpose, including to show a defendant's propensity to commit sex crimes. *People v. Ward*, 2011 IL 108690, ¶25. Section 115-7.3 states that

where a defendant is charged with certain sexual or other offenses, evidence of prior such offenses "may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(b) (West 2008). As with section 115-7.4, the trial court must still conduct a balancing test and weigh the evidence's probative value against possible undue prejudice. *Ward*, 2011 IL at ¶26. The factors that the trial court is to consider in conducting the balancing test are identical to those in section 115-7.4(b). 725 ILCS 5/115-7.3(c) (West 2008).

¶ 35 Regarding the factor considering the factual similarity between the offenses, our supreme court has stated that to be admissible under section 115-7.3, the other-crimes evidence must have a threshold similarity to the charged crime. *People v. Wilson*, 214 Ill. 2d 127, 142 (2005). The relevance or probative value increases as the factual similarities increase. *Id.* Still, if the evidence is offered for a purpose other than showing *modus operandi*, mere general areas of similarity are sufficient. *Id.*

¶ 36 Defendant argues that Katie's testimony regarding the domestic violence offenses should have been excluded because it was remote in time, occurring more than ten years before the date of the current offenses. Defendant cites cases where the appellate court found that evidence of prior sexual offenses that took place around 10 years before the charged offenses was properly excluded. See *People v. Stanbridge*, 348 Ill. App. 3d 351, 357 (2004) (stating that 10-year age of prior conviction weighed against its admissibility); *People v. Childress*, 338 Ill. App. 3d 540, 546 (2003) (finding it proper to exclude evidence of sexual offense that occurred 13 years before the charged offense). However, in both of these cases, the age of the prior offenses was just one factor the court considered. Indeed, our supreme court has explicitly declined to adopt a bright-line rule as to when cases are too remote under section 115-7.3 (*People v. Donoho*, 204 Ill. 2d 159, 183-84 (2003)), and

it affirmed the trial court's decision to allowed evidence of offenses that took place 12 to 15 years before the charged offenses (*id.* at 186). Further, this court criticized the *Stanbridge* analysis in *People v. Walston*, 386 Ill. App. 3d 598, 616 (2008). We stated that the age of the prior offense alone did not render it inadmissible, and the *Stanbridge* court did not properly consider the prejudice inquiry under section 115-7.3 in the proper manner, which is to allow the State to use evidence of prior sex crimes as proof of the defendant's propensity to commit the charged crime. *Id.* at 616-17; see also *People v. Ross*, 395 Ill. App. 3d 660, 677 (2009) (criticizing *Stanbridge*'s analysis).

¶ 37 Defendant also argues that the domestic violence incidents were not factually similar. Defendant argues that one incident occurred in a car rather than a home; he seems to have spontaneously grabbed Katie by her shirt; and the blow to the face may have been accidental. Defendant argues that the second incident where he allegedly watched Katie from his parked car had no similarity, as there was no act of violence alleged there. Defendant argues that the admission of the second incident was particularly egregious because it served only to portray him as paranoid and controlling.

¶ 38 " '[R]easonable minds [can] differ' about whether such evidence [of other crimes] is admissible without requiring reversal under the abuse of discretion standard. The reviewing court owes some deference to the trial court's ability to evaluate the impact of the evidence on the jury." *Donoho*, 204 Ill. 2d at 186, quoting *People v. Illgen*, 145 Ill. 2d 353, 375-76 (1991). Under this standard, we conclude that the trial court acted within its discretion in allowing evidence of the domestic violence incident against Katie that took place while they were both in the car. Although the incident was not recent, as discussed, age alone would not disqualify it. The offenses were factually similar in that they were both perpetrated against defendant's girlfriends and in scenarios where the parties had recently been arguing. The girlfriends had also recently left or were planning

to leave defendant. Further, defendant tried to physically prevent Katie from leaving the car, just as he tried to prevent Rachel from leaving the bedroom, the living room, and the house in general. The prior incident also took place in front of the parties' children, just as the charged domestic violence offenses took place in front of Drake. Considering all of the facts and circumstances, the trial court did not abuse its discretion in allowing evidence of the domestic violence act against Katie that took place in defendant's car.

¶ 39 That being said, we do agree with defendant that it was an abuse of discretion for the trial court to allow evidence of the incident where defendant was hiding behind a parked car. The age of the offense itself, as with the other incidents, decreased to some extent its probative value. More importantly, the incident did not involve any physical or even verbal contact with Katie and cannot be said to have even a threshold similarity to the charged offenses. This lack of similarity clearly mandated its exclusion. Still, we conclude that the error was harmless. An evidentiary error is harmless beyond a reasonable doubt if there is no reasonable probability that the jury would have acquitted the defendant without the error. *In re E.H.*, 224 Ill. 2d 172, 180 (2006). Our supreme court has identified three approaches for making this assessment: (1) focusing on the error to determine whether it might have contributed to the conviction; (2) determining whether properly-admitted evidence overwhelmingly supports the conviction; and (3) determining whether the improperly-admitted evidence is merely cumulative or duplicative of properly-admitted evidence. *People v. Becker*, 239 Ill. 2d 215, 240 (2010). The first approach applies here. As stated, the incident did not involve any violence or even any direct contact with Katie. Katie's testimony regarding the parked car incident was also brief and not specifically referenced in closing argument. Given Katie's testimony about her relationship and physical altercation with defendant, there is no reasonable probability that the jury would have acquitted defendant if it had not heard that defendant

appeared to have followed Katie one time after she broke up with him.

¶ 40 Regarding the evidence that defendant had a sexual relationship with Katie when she was 16 years old and he was in his 30s, defendant recognizes that he forfeited the right to challenge this evidence because he failed to specifically object to it or preserve it as error in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for review, the defendant must object at trial and raise the issue in a written posttrial motion). However, he argues that the admission of this evidence constitutes plain error. The plain error doctrine allows a reviewing court to consider an unpreserved error where either (1) a clear error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear error occurs that is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). In applying the plain error test, the first step is to determine whether error occurred at all. *People v. Kitch*, 239 Ill. 2d 452, 462 (2011).

¶ 41 Defendant argues that the testimony was improper because it predated the charged offense by 16 years. He also argues that there was no factual similarity between the two situations. He argues that his relationship with Katie was consensual, and although she was not of legal age when he first had sex with her, by the time she was 17 there was nothing legally wrong with their relationship. See *People v. Lloyd*, 2011 IL App. (4th) 100094, ¶6 (legal age of consent for sexual relations in Illinois is generally 17). Defendant argues that there is no threshold similarity between a consensual sexual relationship with a teenager who is almost an adult and the sexual abuse of an eight or nine-year-old girl, except that they were both female. Defendant maintains that for the prosecutor to suggest that defendant's relationship with Katie could be used to show "propensity to commit sex crimes against young children" is ludicrous.

¶ 42 Defendant argues that this case is similar to *People v. Johnson*, 406 Ill. App. 3d 805 (2010), and *People v. Holmes*, 383 Ill. App. 3d 506 (2008), vacated, 235 Ill. 2d 59 (2009). In *Johnson*, the court held that significant dissimilarities between the two assaults, along with the trial court's failure to conduct a meaningful assessment of the other-crimes evidence's prejudicial effect, led to the conclusion that the trial court erred in admitting other-crimes evidence to establish the defendant's propensity to commit sexual offenses. *Johnson*, 406 Ill. App. 3d at 811-12. In *Holmes*, the court held that the trial court properly excluded prior offenses where the attacks did not share enough general similarities. *Holmes*, 383 Ill. App. 3d at 518-19.

¶ 43 We note that *Holmes* was subsequently vacated by our supreme court on jurisdictional grounds (*Holmes*, 235 Ill. 2d 59), so defendant may not rely on that case for authority. In any event, we agree with defendant that the trial court abused its discretion in allowing the State to present evidence that defendant had a sexual relationship with Katie when she was 16. As stated, section 115-7.3 requires the trial court to conduct a balancing test and weigh the evidence's probative value against possible undue prejudice. 725 ILCS 5/115-7.3(c) (West 2008); *Ward*, 2011 IL at ¶26. Here, the record shows that the trial court did not discuss the factors involved in the balancing test before ruling that the evidence was admissible. As in *Johnson*, the trial court's failure to conduct such a test was error. See also *People v. Boyd*, 366 Ill. App. 3d 84, 94 (2006) (the trial court's failure to consider the risk of unfair prejudice of other-crimes evidence was error).

¶ 44 Having determined that the trial court erred in admitting evidence of defendant's sexual relationship with Katie without conducting the required balancing test, we now examine whether the error satisfies either prong of the plain error test. Defendant has the burden of establishing plain error. *People v. Rinehart*, 406 Ill. App. 3d 272, 277 (2010).

¶ 45 Showing plain error under the closely-balanced-evidence prong of the plain error test is

similar to showing prejudice for ineffective assistance of counsel, in that the defendant must show that the evidence was so closely balanced that the error alone would tip the scales of justice against him. *People v. White*, 2011 IL 109689, ¶133. That is, the defendant must show that the verdict may have resulted from the error and not the properly-admitted evidence, or there was a reasonable probability that the result would have been different without the error. *Id.*

¶ 46 Defendant argues that the evidence on the aggravated criminal sexual abuse charges should be considered closely balanced because: the jury acquitted him on one count of the offense, finding insufficient evidence that he knowingly touched Violet's buttock for sexual gratification; Violet admitted in the videotaped interview that she disliked defendant because he lied, watched violent movies, and was a bad influence on her younger brother; Violet did not disclose the prior alleged abuse for almost one year; and there was no physical evidence to corroborate her testimony that she had been abused. Defendant argues that the jury may have been persuaded of his guilt on the aggravated sexual abuse charges only because of evidence of his prior sexual relationship with Katie, along with the prosecutor's argument that such evidence showed his propensity to commit sex crimes against young children.

¶ 47 We conclude that the evidence regarding the sexual abuse against Violet during the summer of 2008, while not overwhelming, cannot be labeled as so closely balanced that there is a reasonable probability that the verdict would have been different without the error. Violet personally testified at trial about the incidents, and the jury also viewed her videotaped description of the incidents to investigators. Rachel testified that Violet's behavior had changed around the time the incidents were alleged to have occurred. Further, there was circumstantial evidence of defendant's consciousness of guilt. Both Violet and Rachel testified about defendant's violent behavior and attempts of preventing them from going to the police after he learned of Violet's accusations, and the evidence

also showed that after leaving the house and going to a hotel, defendant provided a false name and address. Although the jury was required to assess Violet's credibility, including her motives, such credibility assessments alone do not make a case closely balanced where, as here, the jury is not required to determine the credibility of competing witnesses. See *People v. Hammonds*, No. 1-08-0194, slip op. at __ (May 6, 2011). We recognize that the jury acquitted defendant of one of the sexual abuse charges, but the evidence for that charge showed that defendant touched Violet on the butt, over her clothing, while tucking her in bed. Thus, the jury could have believed Violet's testimony but still concluded that any such touching was accidental and not for the purpose of sexual gratification. In contrast, the other touching described by Violet could not have been benign. In sum, the evidence regarding the sexual abuse charges at issue was not so closely balanced that the verdict may have resulted from the improper admission of defendant's prior sexual relationship with Katie rather than the properly-admitted evidence. *Cf. Rinehart*, 406 Ill. App. 3d at 277 (where victim testified about the sexual assault and the defendant presented no evidence, evidence was not closely balanced).

¶ 48 Turning to the second prong of the plain error test, an error qualifies as so serious that it affected the fairness of the trial and challenged the integrity of the judicial process if it is a "structural" error. *People v. Thompson*, 238 Ill. 2d 598, 608 (2010). The Supreme Court has found structural error in just a few types of situations, such as "a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *Id.* at 609.

¶ 49 Defendant argues that he was denied his substantial right to a fair trial when the prosecutor presented the improper evidence and made inflammatory comments about the evidence in closing argument, urging the jury to convict him for emotional reasons. Defendant cites *People v. Carter*,

297 Ill. App. 3d 1028, 1036-37 (1998), and *People v. Threadgill*, 166 Ill. App. 3d 643, 650-51 (1988).

¶ 50 Defendant does not provide analysis and citations to support a contention that the prosecutor's comments in closing argument alone constituted reversible error, so we do not analyze that issue independently. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006) (points not argued in the appellant's brief are forfeited); *People v. Jacobs*, 405 Ill. App. 3d 210, 218 (2010) (the appellant must clearly define issues, cite pertinent authority, and present cohesive arguments; the appellant may not impose the burden of argument and research on the appellate court, nor is it the court's role to act as advocate or search the record for error). Even otherwise, the appellate court has recently held that error in closing argument does not constitute structural error. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶78; see also *People v. Garcia*, 407 Ill. App. 3d 195, 205-06 (2011) (alleged error in opening remarks was not structural). As for the evidence of defendant's prior sexual relationship with Katie, whether to allow its admittance was a discretionary decision for the trial court. Although we have held that the trial court erred by not applying the appropriate balancing test before admitting the evidence, the failure does not constitute a structural error challenging the integrity of the judicial process. Accordingly, the error also does not rise to the level of plain error under the second prong of the plain error test, and defendant's argument fails.

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

Affirmed.