2012 IL App (2d) 120124-U
No. 2-12-0124
Order filed September 27, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-289
TIMOTHY ABED,	)	Honorable Michael W. Feetterer,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

RULE 23 ORDER

¶ 1 *Held:* The admission of the victim's outcry statement, other-crimes evidence, and evidence that the victim was in counseling did not amount to plain error or ineffective assistance of counsel. Therefore, defendant's conviction was affirmed.

¶ 2 After a bench trial, defendant, Timothy Abed, was convicted of two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)) and sentenced to two, four-year terms of imprisonment, to run concurrently. On appeal, defendant argues that the admission of the victim's outcry statement, other-crimes evidence, and evidence that the victim was involved in counseling,

denied him a fair trial and rose to the level of plain error. In the alternative, defendant argues that defense counsel was ineffective for either failing to object to this evidence or for eliciting it. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 21, 2010, the grand jury returned a two-count indictment against defendant alleging that he committed aggravated criminal sexual abuse against A.R., who was at least 13 years old but under the age of 17, on two different dates. Count I alleged that defendant, who was 17 years old or older, knowingly committed an act of sexual penetration with A.R. by placing his penis in her vagina on or about June 22, 2008. Count II alleged the same conduct with A.R. on or about November 12, 2009.

¶ 5 On May 10, 2011, defendant filed three motions *in limine*. First, defendant sought to bar the introduction of his prior criminal record; second, defendant sought to bar A.R. from testifying to any alleged sexual acts with defendant outside of the two incidents alleged in the indictment; and third, defendant sought to admit evidence of A.R.'s prior sexual activity. According to defendant, A.R. had made substantially similar allegations against various other individuals.

¶ 6 Because defendant also waived his right to a jury trial that day, defense counsel noted that the motions *in limine* could be handled by taking objections at the time. Defense counsel stated that now that it was a bench trial, the court would consider only relevant and admissible evidence. The State agreed with this approach, advising the court that the parties generally agreed as to what questions were proper and improper; otherwise, they would object. The court allowed the parties to proceed in this fashion.

¶ 7 During the State's brief opening statement, the prosecutor argued that A.R. would testify as to the sexual acts defendant, a family friend, committed against her. The prosecutor maintained that A.R. had no motive or bias to lie about what happened. Defense counsel countered that A.R. had a "strong motive" to lie and that A.R.'s mother also had a "strong motive to make up things" in the instant case. Defense counsel further argued that there was no physical evidence or corroboration of A.R.'s allegations.

¶ 8 The State's first witness, Holly Vollmer, testified as follows. Vollmer was A.R.'s mother. A.R. was born on August 29, 1994, and was now sixteen years old. Vollmer had known defendant since she was 15 years old; she had lived at the motel owned by his family. Currently, Vollmer was 33 years old, and defendant was in his mid-forties.[1] As recently as 2008, Vollmer considered defendant a family friend. Defendant had known A.R. through Vollmer and her family since A.R. was seven or eight years old. He was involved in activities with A.R. such as taking her to the movies, providing transportation to and from youth group meetings, swimming, and eating out. Vollmer also allowed A.R. to go to defendant's home in Crystal Lake.

¶ 9 In 2009, on the day before Thanksgiving, Vollmer confronted A.R. about her grades and her behavior for the past few months. A.R. had been acting out and behaving in a "very disrespectful" manner, especially after spending time with defendant. Vollmer was upset that A.R.'s grades had fallen from A's to F's. There was no reason for A.R. to be failing classes, so Vollmer asked A.R. "what [was] going on." A.R. replied that there was a reason, and she started to cry. A.R. left the room and then returned, saying she would answer yes or no to Vollmer's questions. Vollmer asked

[1]The parties stipulated that defendant's date of birth was August 1, 1965.

A.R. if she was pregnant, and A.R. "kind of looked at [her] upset like no." Next, Vollmer asked A.R. if she had had sex for the first time, and A.R. looked at Vollmer "like come on but you're getting closer." Vollmer then asked A.R. if someone was making her do something sexually that she did not want to do, and A.R. said yes. Vollmer asked who, and A.R. answered defendant. A.R. told Vollmer that defendant had had sexual intercourse with her, amongst other sexual acts. Vollmer "freaked out big time" and wanted to kill defendant. She went to the Crystal Lake police station, and the police questioned A.R.

¶ 9 The State then asked Vollmer if she had ever been in any type of relationship with defendant when she was younger, and Vollmer answered yes. When the State asked if it was a dating relationship, Vollmer replied "[a] sexual secret one, yeah. I'm sure [defendant's] Uncle Don knew." The State asked Vollmer if she had known defendant for approximately 15 years, and she said yes, maybe even "a bit more than that."

¶ 10 On cross-examination, defense counsel asked Vollmer "when" she had had a relationship with defendant. Vollmer said the relationship started when she was "very young"; it "started out where [they] would play cards. He would give [her] wine coolers." Their relationship was on and off until 2002, when they "called it quits." Defendant always confused Vollmer because one minute he wanted to marry her, and the next minute they were not dating. Vollmer admitted that defendant played with her head, and that "unfortunately," she had, in the past, wanted a relationship with him. Vollmer denied telling anyone that she wanted to continue a relationship with defendant. In 2009, defendant dated a woman named Stacy Myers, whom Vollmer had met once. Vollmer denied caring about defendant's relationship with Myers; she was upset, however, that defendant was cheating on her neighbor, whom he was dating at the same time as Myers.

¶ 11 The night Vollmer confronted A.R. about her grades and her behavior, A.R. left the house with Vollmer's brother, "Uncle John." She was gone about one hour. A.R. did not want to tell Vollmer about what had happened with defendant until Vollmer calmed down. One of the reasons A.R. came forward with this information was that another girl in her youth group had also claimed to have been raped.

¶ 12 Vollmer further testified on cross-examination that after taking A.R. to the Crystal Police Department, Vollmer learned that the motel defendant "was raping her at" was in the jurisdiction of the McHenry County Sheriff's Department, as opposed to the Crystal Lake Police Department. Not long after A.R. confided in her, Vollmer also took A.R. to the Northern Illinois Medical Center to ascertain whether there was any physical evidence of abuse. A.R. refused to allow the exam, however, because she did not want anyone "touching her down there."

¶ 13 On redirect, Vollmer testified that defendant had taken A.R. to a motel. Vollmer also testified that defendant had given her (Vollmer) wine coolers when she was 15 or 16 years old.

¶ 14 A.R. testified as follows. A.R. first met defendant when she was seven or eight years old. She knew defendant through her mom (Vollmer); he was Vollmer's best friend and they had dated. Defendant would drive A.R. to youth group meetings, take her to the movies, and take her grocery shopping.

¶ 15 On the day before Thanksgiving in 2009, A.R. told Vollmer that defendant was sexually abusing her with "intercourse and oral." One incident occurred in the middle of November, about two weeks before A.R. confided in Vollmer. On that occasion, defendant drove her to his house. In his bedroom, defendant had a blow-up air mattress and maybe a fan. Defendant got on top of her and ejaculated on her stomach. Afterwards, A.R. called Vollmer to come get her. In the summer

of 2008, when she was 14 years old, another incident occurred. Defendant picked up A.R. from her house and took her to the Holiday Inn. He checked in, saying they were coming in from out of state and needed a place to stay. They then went up to the room, had intercourse, and left. Defendant did not wear a condom during either incident.

¶ 16 A.R. came forward because her friend Whitney in her youth group was going to talk about having been being raped at the next meeting. In addition, someone told A.R. she needed to tell someone what happened. A.R. made Vollmer guess what happened because she was afraid to talk about it. A.R. thought that what defendant did was her fault and that everyone would blame her. Defendant also told A.R. not to tell anyone, and he threatened to kill Vollmer and her family and to hurt A.R. A.R. had seen knives and handguns in defendant's house.

¶ 17 The following exchange then occurred between the State and A.R.:

"Q. Are you involved in counseling now?

A. Yes.

Q. How often do you go to counseling?

A. Every week and group every week.

Q. Do you still think this is your fault?

A. No."

¶ 18 On cross-examination, A.R. testified that her Uncle John, Vollmer's brother, told her she needed to tell Vollmer about what happened with defendant. A.R. admitted that Vollmer was angry at her based on her grades. Her grades the previous and current semester were F's. After Vollmer confronted A.R. about her grades, A.R. left the house with Uncle John for ten minutes; they went to Taco Bell. A.R. knew that Vollmer would be angry at defendant when she learned what

happened. Prior to A.R.'s disclosure of these incidents, defendant was one of Vollmer's best friends. Defendant was also a father figure to A.R.

¶ 19 Regarding the November 2009 incident, A.R. could not remember the day of the week, the time of day, or what she was wearing. Neither of them wore any clothes during intercourse. Regarding the summer 2008 incident at the Holiday Inn, A.R. did not remember what day of the week it occurred. She also did not remember what she and defendant were wearing. A.R. did recall that they stayed in the room about one hour.

¶ 20 Defendant drove A.R. to youth group meetings. During November 2009, A.R. had a boyfriend named Austin. Defendant would not drive Austin home, and this caused her to argue with defendant.

¶ 21 The purpose of going to the medical center was to take a rape kit and see if she had caught any sexually transmitted diseases from defendant. A.R. thought she completed a rape kit at the medical center.

¶ 22 At this time, defense counsel moved for a directed finding, and the trial court denied the motion.

¶ 23 The only defense witness to testify was Richard Kropp, who testified as follows. Kropp had known defendant since they were kids. Throughout the years, they interacted through some mutual friends. In November 2009, Kropp was a board member of Community Life Church and involved in the church's youth group. Defendant came to Bible studies quite often and volunteered with the youth group. Kropp knew A.R. as someone defendant wanted to bring into the youth group. A.R. did not attend the youth group a lot; it was only two or three times. Kropp picked up A.R. from

defendant's house, drove her to youth group, and then drove her home. Kropp did not remember A.R. ever attending youth group when he did not drive her.

¶ 24 During closing arguments, the State argued that A.R. offered credible testimony as to the two incidents of sexual abuse. On the other hand, defense counsel argued that A.R. was not credible by pointing out inconsistencies between the testimony of A.R. and Vollmer. Defense counsel also argued that A.R. attempted to deflect Vollmer's anger over her grades by claiming that these incidents occurred with defendant. On rebuttal, the State argued that A.R. delayed coming forward because she thought people would think that it was her fault.

¶ 25 The court began by summarizing the testimony adduced at the hearing. Regarding A.R.'s testimony, it found that "she was asked questions that - on cross-examination that one might think would hurt her case, *** while there was [*sic*] long delays in her testimony, the Court found that she testified truthfully, and *** believes her testimony and believes that the Defendant committed the acts that he's accused of committing." The court therefore found defendant guilty of both counts of aggravated criminal sexual abuse.

¶ 26 On June 8, 2011, defendant moved to reconsider or, alternatively, for a new trial. Before this motion was ruled on, defendant also moved for a substitution of counsel, which the trial court granted. As a result, defense attorney Jamie Wombacher withdrew and attorney James Schwarzbach filed an appearance.

¶ 27 On September 30, 2011, defendant filed an amended motion for a new trial. In his amended motion, defendant first argued that the trial court erred by admitting A.R.'s hearsay outcry statement to Vollmer. According to defendant, admission of A.R.'s outcry statement violated section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2010)) because the

statements were not made before A.R. reached the age of 13 and because the court failed to conduct a reliability hearing. In a related argument, defendant also argued that defense counsel was ineffective for failing to object to the outcry statement, and, in fact, compounded the error by eliciting and emphasizing it during cross-examination. Defendant further argued that A.R.'s outcry statement was relied upon by the court in making its decision and thus amounted to plain error. Second, defendant argued that the court erred by admitting evidence that Vollmer had had a "sexual secret" relationship with defendant that started when she was "very young," and that he had supplied her with wine coolers when she was 15 or 16 years old. As with the first argument, defendant also maintained that defense counsel was ineffective for failing to object and/or eliciting and emphasizing such testimony on cross-examination. Third, defendant argued that the court erred by admitting A.R.'s testimony of her current involvement in counseling, and that defense counsel was ineffective for failing to object to this testimony.

¶ 28 The trial court issued a 13-page memorandum denying defendant's amended motion for a new trial. First, the court agreed that for hearsay statements to be admissible under section 115-10 of the Code, the declarant must be under 13 years of age at the time the statement was made, and pretrial reliability findings must be made by the court. Nevertheless, defense counsel did not object to A.R.'s outcry statement during trial but instead allowed the statement to come in. The court noted that defense counsel cross-examined both Vollmer and A.R. about their conversation in an attempt to "elicit inconsistencies" about the statement and circumstances surrounding their conversation. Defense counsel then made the following closing argument:

> " 'I submit to you that [A.R.] has not established by the testimony of one individual that this may have happened is not proof beyond a reasonable doubt. There is no physical

> evidence. There is no corroboration, and her credibility was completely obliterated by the testimony of her own mother with respect to several of the key incident factors with respect to this matter. They both contradicted each other.' "

Though the court did not find the inconsistencies between Vollmer's and A.R.'s testimony to be material, it was clear that allowing A.R.'s "statement into evidence and then cross-examining the witnesses about the statement and the circumstances surrounding the conversation in which the statement was made was part of the attorney's overall trial strategy." The court reasoned that nothing presented by defendant rebutted the presumption that the attorney's trial strategy was a sound one.

¶ 29 The court further stated that it found defendant guilty based on A.R.'s testimony describing the incidents in the summer of 2008 and November 2009. A.R.'s outcry statement, "although falling within section 115-10, merely provided a reference point to explain how these allegations came to light." Therefore, even if defense counsel was deficient for failing to object to the outcry statement, which the court "expressly" found she was not, it was not plausible, based on A.R.'s testimony, to find that the result of the trial would have been different, absent this error.

¶ 30 Second, the court addressed defendant's claim regarding Vollmer's testimony that she had had a relationship with defendant when she was very young and that he had supplied her with wine coolers when she was 15 or 16 years old. According to the court, defense counsel cross-examined Vollmer about her relationship with defendant, eliciting testimony that their relationship ended in 2002; that defendant confused her and played with her head; that in 2009, defendant was dating Stacy Myers; and that Vollmer had met Myers once. Defense counsel asked Vollmer if it was fair to say that she did not like defendant having a relationship with Myers. In addition, defense counsel

stated during opening argument that both A.R. and Vollmer had a strong motive to "make up things" in this case.

¶ 31 Based upon its review of the entire record, the court believed that defense counsel anticipated Vollmer's testimony about her prior relationship with defendant. Defense counsel intended to use this testimony to discredit Vollmer by arguing that she had a motive to lie because she still had unresolved feelings for defendant, but those feelings were no longer reciprocated. Though the court was not persuaded that Vollmer's previous relationship with defendant motivated her to accuse defendant of having a sexual relationship with A.R., the use of this testimony "was clearly part of the attorney's overall trial strategy." Defendant had not rebutted the presumption that defense counsel's strategy was sound.

¶ 32 Moreover, even if defense counsel was deficient for failing to object to Vollmer's testimony about her relationship with defendant, which she was not, the court determined that the result of the trial would not have been different. Again, this was because the court found defendant guilty based on A.R.'s testimony regarding the two incidents.

¶ 33 Finally, with respect to A.R.'s testimony that she participated in weekly counseling, the court noted that defense counsel failed to object to this testimony, and that defendant cited no authority in support of his argument that this testimony was improper.

¶ 34 Following a sentencing hearing, defendant was sentenced to two, four-year terms of imprisonment, to run concurrently. Defendant moved to reconsider his sentence, which the trial court denied. Defendant timely appealed.

¶ 35 II. ANALYSIS

¶ 36 A. Outcry Statement

¶ 37 Defendant first argues that he was denied a fair trial based on the admission of A.R.'s outcry statement to Vollmer regarding his alleged sexual abuse of her. Defendant argues that the outcry statement was hearsay and not subject to the hearsay exception in section 115-10. As defendant argued in his amended motion for a new trial, he argues that section 115-10 did not provide an exception to this hearsay because A.R. was beyond the 13-year old age limit when the outcry statement was made, and because the trial court did not assess the reliability of the statements. For the first time on appeal, defendant also argues that the State failed to give defense counsel reasonable notice of its intention to offer the statement as required by section 115-10(d) (725 ILCS 5/115-10(d) (West 2010)). Conceding that A.R.'s outcry statement was not objected to by defense counsel, defendant argues that admission of the statement rose to the level of plain error, or, in the alternative, that defense counsel was ineffective for not objecting to the evidence but instead eliciting and emphasizing it on cross-examination. We begin with defendant's plain-error argument.

¶ 38 1. Plain Error

¶ 39 The plain-error doctrine contained in Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967) provides a narrow exception to the general rule of procedural default. *People v. Lewis*, 234 Ill. 2d 32, 42 (2009). The doctrine allows a reviewing court to consider an unpreserved error when (1) a clear or obvious error occurs 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 occurs 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. *Id.* at 42-43. The defendant bears the burden of persuasion under both prongs of the plain-error test.

Id. at 43. Before analyzing the individual prongs, however, our first inquiry under plain-error review is to determine whether any error occurred. *Id.*

¶ 40 The first "error" claimed by defendant is that the admission of A.R.'s outcry statement to Vollmer violated section 115-10 of the Code. While defendant is correct that A.R.'s outcry statement was not admissible under the hearsay exception set forth in section 115-10 of the Code, this is because that entire section is not applicable to this case. Section 115-10(a) provides a hearsay exception in a prosecution for a sexual act perpetrated upon or against a child "*under* the age of 13" (emphasis added) (725 ILCS 5/115-10 (West 2010)), and A.R. was not under the age of 13 when the two sexual acts at issue in this case occurred. See *People v. Johnson*, 296 Ill. App. 3d 53, 59 (1998) (child outcry statements are admissible under section 115-10 only if the victim was under the age of 13 when the physical or sexual act occurred and when the outcry statement was made). While both parties seem to focus on the timing of the outcry statement, section 115-10 does not apply for the simple fact that A.R. was over 13 years of age at the time of the sexual abuse. Therefore, we disagree with defendant's assertion that A.R.'s outcry statement was "subject to admissibility pursuant to the parameters" of section 115-10. For this reason, we also need not consider whether specific sections of section 115-10, such as the need for a reliability hearing or notice from the State, were violated. Because that section as a whole does not apply to permit A.R.'s outcry statement, failure to comply with it cannot constitute error.

¶ 41 That said, the issue remains whether the admission of A.R.'s outcry statement was error on the basis that it was hearsay. For this argument, defendant relies on *People v. E.Z.*, 262 Ill. App. 3d 29 (1994). In *E.Z.*, the victim was eight years old but did not complain of the defendant's abuse to her mother until after reaching the age of 13. *Id*. at 30, 34. As a result, section 115-10 still barred

the admissibility of the outcry statement, since in order for such hearsay statements to be admissible under that section, the victim must be under the age of 13 at the time the statement is made. *Id*. at 34. Though the defendant in *E.Z.* argued that section 115-10 was violated due to the trial court's failure to hold a reliability hearing, this court reasoned that the statement would not have been admissible under that section even if the required hearing had been held. *Id*. Going a step further, this court held that the admission of the outcry statement amounted to reversible or plain error because the record failed to show that it was not prejudicial. *Id*. The rationale for this conclusion was that the State presented no testimony concerning any physical evidence of abuse; there were no witnesses to the alleged crimes; and the guilt of the defendant hinged entirely on the credibility of the victim and defendant. *Id*. As in *E.Z.*, defendant argues that this case lacked physical evidence and witnesses of the alleged abuse, and it boiled down to the credibility of A.R. and defendant.

¶ 42 The instant case is distinguishable from *E.Z.* in two critical respects, however. First, this case was a bench trial, and a trial judge sitting as a trier of fact is presumed to have considered only admissible evidence in making his decision. *People v. Jackson*, 409 Ill. App. 3d 631, 647 (2011). Second, we have the benefit of the trial court's reasoning, as expressed in its rulings regarding defendant's guilt and his amended motion for a new trial. Regarding the trial court's reasoning, defendant argues that the trial court clearly relied on A.R.'s outcry statement as corroboration of defendant's guilt, and that the record shows no restriction or limitation of the court's consideration of this testimony. While the presumption that the trial court considered only admissible evidence can be rebutted through affirmative evidence in the record (*id*.), defendant's characterization of the court's ruling is not borne out by the record.

¶ 43 In finding that the State met its burden of proof in this case, the court focused exclusively on A.R.'s testimony. The court stated its belief that she testified truthfully, even when faced with hard questions on cross-examination. Moreover, when ruling on defendant's amended motion for a new trial, the court specifically stated that it found defendant guilty based on A.R.'s testimony describing the incidents in the summer of 2008 and November 2009. As for A.R.'s outcry statement, the court made it clear that it used it "merely" as a "a reference point to explain how these allegations came to light." See *People v. Roman*, 260 Ill. App. 3d 436, 444 (1992) (no plain error where the outcry statement was not admitted pursuant to section 115-10, and where the trial court likely admitted the statement to show how the victim's mother was notified of the sexual assault and not for the truth of the matter asserted). In this case, because the court viewed the outcry statement for the limited purpose of how Vollmer became aware of the sexual abuse, and not for the truth of the matter asserted, no error occurred.

¶ 44 2. Ineffective Assistance of Counsel

¶ 45 Defendant next argues that defense counsel was ineffective for failing to object to A.R.'s outcry statement during Vollmer's direct examination and also for eliciting and emphasizing it on cross-examination. Under the two-prong test for assessing whether trial counsel was ineffective articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result would have been different. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). "In demonstrating, under the first *Strickland* prong, that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under

the circumstances, counsel's conduct must be considered sound trial strategy." *Id.* Under the second prong, a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome. *Id.* In order to establish ineffective assistance of counsel, a defendant must satisfy both the performance and prejudice prongs of *Strickland*. *Id.* at 144-45. The question of whether defense counsel provided ineffective assistance requires a bifurcated standard of review, wherein a reviewing court must defer to the trial court's findings of fact unless they are against the manifest weight of the evidence but must make a *de novo* assessment of the ultimate legal issue of whether counsel's omission supports an ineffective assistance claim. *People v. Bailey*, 375 Ill. App. 3d 1055, 1059 (2007).

¶ 46 As the trial court determined, defense counsel's strategy was to allow in A.R.'s outcry statement and then cross-examine Vollmer and A.R. to point out inconsistencies. On direct examination, the State questioned Vollmer regarding the circumstances of her conversation with A.R. on the night before Thanksgiving, including the timing, how it came about, and what A.R. confided in her. On cross-examination, defense counsel then drilled down on some of the specifics, such as the length of time A.R. left the house that night before confiding in Vollmer, A.R.'s grades, and A.R.'s medical examination. Defense counsel elicited inconsistencies between A.R.'s and Vollmer's testimony such as whether A.R. left the house that evening for 10 minutes or an hour, the level of A.R.'s grades the semester before, and whether A.R. completed a rape kit. These inconsistencies were highlighted by defense counsel during closing argument. Though the court did not find these inconsistencies to be material, the court found that nothing presented by defendant rebutted the presumption that the strategy was sound. We agree with the trial court.

¶ 47 Matters of trial strategy are generally immune from claims of ineffective assistance of counsel. *People v. Manning*, 241 Ill. 2d 319, 327 (2011). The defense theory relied upon at trial is a matter of trial strategy, and a claim of ineffective assistance of counsel cannot be predicated upon a matter of defense strategy unless the strategy was unsound. *People v. Ramey*, 152 Ill. 2d 41, 54 (1992). Decisions regarding what matter to object to and when to object are matters of trial strategy (*People v. Perry*, 224 Ill. 2d 312, 344 (2007)), including the decision not to object to the admission of purported hearsay testimony (*People v. Theis*, 2011 IL App (2d) 091080, ¶ 40). For example, an attorney may forego an objection or a motion to strike for strategic reasons. *People v. White*, 2011 IL App (1st) 092852, ¶ 75. A reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight. *Perry*, 224 Ill. 2d at 344.

¶ 48 As stated, pointing out inconsistencies regarding A.R.'s outcry statement was a matter of trial strategy. Defense counsel was therefore not deficient for allowing in the statement and then cross-examining Vollmer and A.R. about the circumstances surrounding the statement. And while defendant's inability to establish the first prong of *Strickland* is dispositive, we also note that the trial court determined defendant could not establish prejudice because it was not plausible, based on A.R.'s testimony, to find that the result of the trial would have been different, absent this alleged error.

¶ 49 B. Other-Crimes Evidence

¶ 50 Defendant next argues that the admission of other-crimes evidence denied him a fair trial. In particular, he challenges Vollmer's testimony about a "sexual secret" relationship with defendant that occurred when defendant gave her wine coolers. Defendant points out that on redirect

examination, the State elicited testimony that defendant gave Vollmer wine coolers when she was around 15 or 16 years old, which led to the inference that Vollmer was 15 or 16 years old at the time of their "sexual secret" relationship. According to defendant, the admission of this other-crimes evidence violated section 115-7.3 of the Code, which requires the court to weigh the probative value of the evidence against the prejudicial effect (725 ILCS 5/115-7.3(c) (West 2010)), and also requires the State to disclose its intention to offer such evidence prior to trial (725 ILCS 5/114-7.3 (West 2010)). Once again, defendant argues that admission of this evidence constituted plain error or ineffective assistance of counsel.

¶ 51 1. Plain Error

¶ 52 Evidence that a defendant has committed crimes other than the one for which he is on trial may not be admitted for the purpose of demonstrating his propensity to commit crimes. *People v. Adkins*, 239 Ill. 2d 1, 22-23 (2010); see also *People v. Ward*, 2011 IL 108690, ¶ 24 (generally, evidence relating to a defendant's propensity to commit crimes is excluded from criminal trials because it tends to be overly persuasive to a jury who may convict the defendant only because it feels he or she is a bad person deserving punishment). In this case, defendant's challenge is really based on the "inference" of other-crimes evidence because Vollmer never directly testified that she was underage at the time she had a sexual relationship with defendant. In any event, a review of how this evidence was introduced shows that defendant invited the error, meaning that he has forfeited any right to plain-error review.

¶ 53 During the State's direct examination of Vollmer, the prosecutor inquired whether Vollmer had ever been in any type of relationship with defendant when she was younger. Vollmer responded affirmatively. When the State asked if it was a dating relationship, Vollmer said "[a] sexual secret

one, yeah. I'm sure [defendant's] Uncle Don knew." The State then asked Vollmer if she had known defendant for about 15 years, to which she replied yes, and possibly even longer. At this point, no inference of other-crimes evidence was created because Vollmer's age at the time of their "sexual secret" relationship was unknown. On cross-examination, however, defense counsel specifically asked Vollmer "when" she had had a relationship with defendant. Vollmer said that the relationship started when she was very young; it began when they played cards and he gave her wine coolers. At this point, defense counsel opened the door to the State's questioning of when the relationship occurred during redirect examination. See *People v. Tolbert*, 323 Ill. App. 3d 793, 805 (2001) (a party who opens the door on a particular subject is barred from objecting to questioning based on the same subject because a defendant cannot complaint about a line of inquiry that he has invited.). On redirect examination, the State asked Vollmer how old she was when defendant gave her wine coolers, and Vollmer stated that she was 15 or 16 years old.

¶ 54 Defendant argues that Vollmer's testimony led to the inference that she was underage at the time of their sexual relationship, the very crime defendant was charged with in the instant case. While we agree with defendant on this point, a defendant cannot complain on appeal about an error that was procured or invited by the defendant at trial. *People v. Spicer*, 379 Ill. App. 3d 441, 463 (2007). And where the defendant invited the error, plain-error review is forfeited. *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17.

¶ 55 2. Ineffective Assistance of Counsel

¶ 56 Defendant next argues that defense counsel was ineffective for failing to "object and limit the admissibility of that testimony." According to defendant, without notice or a pretrial hearing

regarding the admissibility of this evidence, defense counsel "cannot be claimed to have operated according to any strategy." We disagree for two reasons.

¶ 57 First, we note that defendant makes the same mistake now as he made in the plain error argument, in that he blames the State for the introduction of this evidence. There was no need for pretrial notice or a pretrial hearing regarding Vollmer's underage relationship with defendant because, as stated, the evidence was introduced by defense counsel, not the State. Second, in light of the *Strickland* principles stated earlier, defense counsel's handling of Vollmer's direct and cross-examination was a matter of trial strategy.

¶ 58 As the trial court stated when denying defendant's amended motion for a new trial, defense counsel likely anticipated that Vollmer would testify about a prior relationship with defendant. This factored into defense counsel's theory during opening argument, in which she stated that Vollmer had a "strong motive" to lie in this case. Defense counsel's questioning of Vollmer furthered the theory that: she had a long history of dating defendant; their relationship was on and off; over the course of their relationship, he played with her mind by talking marriage one minute and then not wanting to even date; she still cared about him; he was currently dating someone else named Myers; and Vollmer did not like this fact. We agree with the trial court that defense counsel's strategy was to discredit Vollmer by showing that her feelings for defendant were unreciprocated, which, in turn, created a motive to lie. The record thus belies defendant's claim that defense counsel lacked any trial strategy, or that it was unsound. See *People v. Smith*, 242 Ill. App. 3d 555, 566-67 (1993) (the defendant's argument that defense counsel was ineffective lacked merit where defense counsel's failure to object to evidence that the defendant committed other bad acts was a matter of trial strategy). Accordingly, defendant cannot establish the first prong of *Strickland* that defense counsel

was deficient. Again, we also note the trial court's ruling that defendant could not establish prejudice as the result of the trial would not have been different, absent this alleged error.

¶ 59 C. Evidence of Counseling

¶ 60 Defendant's final argument is that the State improperly elicited during A.R.'s direct examination testimony of "her current trauma counseling." Defendant argues that testimony of a victim's psychiatric treatment in a criminal prosecution for sexual offenses is inadmissible, irrelevant, and prejudicial in the sense that it evokes sympathy for the victim. Because defense counsel did not object to this testimony, defendant once again argues that the admission of this evidence constitutes plain error or ineffective assistance of counsel.

¶ 61 1. Plain Error

¶ 62 In general, testimony regarding psychiatric treatment is not admissible. *People v. Hodor*, 341 Ill. App. 3d 853, 860 (2003). To this end, defendant relies on two cases in which such testimony constituted reversible error. First, in *People v. Gillman*, 91 Ill. App. 3d 53, 60 (1980), the court found that questions posed to the victim about her visits to a psychiatrist were deliberately intended to elicit the sympathy of the jury and prejudice the defendant in its eyes. The prosecutor's comment that the purpose of the visit to the psychiatrist, which was to make sure that the incident would not always affect her life, was, according to the court, "deliberately underlined" and should not have been allowed. *Id*. at 60-61. Similarly, in *People v. Fuelner*, 104 Ill. App. 3d 340, 351 (1982), the court found that evidence of the victim's suicide attempt and five-week hospitalization in a psychiatric ward was irrelevant, unduly prejudicial, and denied the defendant a fair trial. In reaching this conclusion, the court noted that the testimony was elicited from three witnesses: the victim, her father, and the treating physician. *Id.* at 351.

¶ 63 The case at bar is distinguishable from *Gillman* and *Fuelner* because the questions were not deliberately intended to elicit sympathy, and were relevant for a different purpose. See *Hodor*, 341 Ill. App. 3d at 860 (where testimony regarding psychiatric treatment has relevance *beyond* evoking sympathy from the jury, such testimony is admissible).

¶ 64 Defense counsel, when cross-examining Vollmer, questioned her about the reason A.R. decided to come forward with the sexual abuse allegations, and whether it was because A.R.'s friend Whitney was also coming forward about having been raped. Then, during its direct examination of A.R., the State asked her why she waited until the day before Thanksgiving to tell Vollmer "what was going on" with defendant. A.R. replied that she decided to disclose what happened because of her friend Whitney and also because someone else (Uncle John) had said she should come forward. A.R. further testified that she made Vollmer guess as to what happened because she thought that defendant's actions were her fault, and that everyone would blame her. A.R. testified that defendant had told her not to tell anyone and had threatened her and her family. It was at this point that the prosecutor asked A.R.:

"Q. Are you involved in counseling now?

A. Yes.

Q. How often do you go to counseling?

A. Every week and group every week.

Q. Do you still think this is your fault?

A. No."

¶ 65 Contrary to defendant's assertion, this evidence did not come in to evoke sympathy for A.R. Rather, it came in to explain A.R.'s initial reluctance in confiding in Vollmer; why she made

Vollmer ask questions rather than simply saying what happened; and why she was now able to openly testify about what happened at trial. We further note that the reference to counseling in this case was isolated, brief, and not on the level present in *Gillman* and *Fuelner*. Therefore, defendant cannot show that error, much less plain error, occurred.

¶ 66 2. Ineffective Assistance of Counsel

¶ 67 Having determined that the admission of this evidence was not improper, the logic follows that defense counsel was not ineffective for failing to object to it. See *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 63 (where the admission of testimony was not error, defense counsel was not deficient for failing to object to it). Accordingly, defendant's claim that defense counsel was ineffective for failing to object to the testimony regarding counseling fails.

¶ 68 III. CONCLUSION

¶ 69 For the reasons stated, we affirm the judgment of the McHenry County circuit court.

¶ 70 Affirmed.