2014 IL App (2d) 121322-U
No. 2-12-1322
Order filed April 22, 2014

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. 11-CF-1159
RAYMOND M. KASPER,	)	Honorable Joseph P. Condon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective; the trial court properly excluded evidence of prior sexual activity under the rape shield statute; and, there was sufficient evidence to convict defendant of predatory criminal sexual assault and aggravated criminal sexual abuse beyond a reasonable doubt. Therefore, we affirmed.

¶ 2 Following a jury trial, defendant was convicted of three counts of predatory criminal sexual assault (720 ILCS 5/11-1.40(a)(1) (West 2010)) and three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1) (West 2010)) and sentenced to 24 years' imprisonment. In this direct appeal, defendant argues that: (1) his trial counsel was ineffective on numerous grounds; (2) the trial court abused its discretion in barring evidence of prior sexual allegations

under the rape shield statute (725 ILCS 5/115-7(a) (West 2012)); and (3) the evidence was insufficient to find him guilty of the offenses beyond a reasonable doubt. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In an amended indictment dated April 18, 2012, a grand jury indicted defendant on four counts of predatory criminal sexual assault and three counts of aggravated criminal sexual abuse. Count I alleged that defendant committed aggravated criminal sexual abuse between June 1, 2011, and June 30, 2011, against H.H., who was under 13 years old, by rubbing her breasts; count II alleged that defendant committed predatory criminal sexual assault between September 1, 2011, and September 30, 2011, by rubbing H.H.'s vagina; count III alleged that defendant committed criminal sexual abuse between September 1, 2011, and September 30, 2011, by touching H.H.'s vagina; counts IV, V, and VI alleged that defendant committed predatory criminal sexual assault between October 1, 2011, and October 27, 2011, by placing his finger in H.H.'s vagina; and count VII alleged that defendant committed aggravated criminal sexual abuse between October 1, 2011, and October 27, 2011, by touching H.H.'s vagina.

¶ 5 Prior to trial, both parties filed several motions *in limine*. In one such motion, defense counsel sought to bar prior orders of protection entered against defendant, and the trial court reserved ruling on this motion. In another motion, the State sought to bar evidence of H.H.'s sexual history and reputation, which the trial court granted. These motions are discussed in more detail below, within the context of defendant's arguments on appeal.

¶ 6 We begin with a summary of events and the theories advanced during opening arguments. H.H., born on May 5, 1999, lived with her mother, Laura Taets, and her brother, Bradley, born May 9, 1998. Defendant was Taets's boyfriend and lived with them from 2003 until 2011. H.H. alleged that all of the incidents of sexual conduct committed by defendant

occurred when she was 12 years old. H.H. came forward with the allegations in October 2011, the same month as the last alleged incident.

¶ 7 H.H.'s initial allegations against defendant occurred on October 26, 2011, when she spoke to Janet Morales Ory, a social worker at H.H.'s middle school. The next day, October 27, 2011, Officer Amy Bucci interviewed H.H. at the Child Advocacy Center (CAC), and the interview was videotaped (CAC interview). Several months later, on May 20, 2012, H.H. and other family members, including Taets, Bradley, and defendant's sister, Kim Kasper (Aunt Kim), met at defense counsel's office, and H.H. recanted her allegations. H.H. then wrote a letter of recantation on May 22, 2012. The next day, on May 23, 2012, Officer Bucci and an investigator with the Department of Children and Family Services (DCFS), Janet Lennemann, met with H.H. at school. H.H. testified that during this interview, she relayed that she "believed" in her recantation letter, whereas DCFS investigator Lennmann testified that H.H. claimed that one of the incidents was real and the other two incidents were 70% real.

¶ 8 The State's theory during opening statement was that defendant groomed H.H. and was obsessed with her menstrual cycle. The State argued that the jury would hear evidence that after H.H. got some mosquito bites in June or July 2011, defendant drew a bath for her and washed her body and chest. He then applied lotion to her body and chest (bathtub incident). On another occasion in September 2011, when H.H. had her period, defendant had H.H. get in the shower so that he could penetrate the outer folds of her vagina and rub between her legs (first shower incident). On yet another occasion in October 2011, when H.H. had her period, defendant had H.H. get in the shower again, and he inserted his fingers in her vagina three times and rubbed her vagina (second shower incident). The State went on to say that after H.H. came forward and defendant was arrested, she was subject to "months and months of endless tampering" by Taets

and Aunt Kim until she broke down and wrote a letter saying it was "all a dream." The State argued that H.H. changed her story because she was not supported and because Taets was still in love with defendant.

¶ 9 Defense counsel presented a different theory in his opening statement. Defense counsel argued that defendant was in a long-term relationship with Taets during which he helped raise and support her two children. However, in February 2011, defendant had an affair that devastated the family, and he moved out. The affair made Taets very angry, and there were a lot of arguments. H.H. was angry that defendant hurt Taets, and she felt betrayed as well. When defendant moved out, H.H. had free reign, but when he moved back in, the "disciplinarian [was] back with his rules." After defendant grounded H.H. and took away her Nintendo DS game and cell phone, H.H. made allegations that he molested her. However, H.H.'s allegations were inconsistent, and her story changed each time she told it. With Taets and Aunt Kim beside her, H.H. came into defense counsel's office and recanted much of her story. Defense counsel concluded that the State's case was full of reasonable doubt and that the jury would see the truth.

¶ 10 A. State's Witnesses

¶ 11 Ory testified first for the State. H.H. initially came to her office on October 26, 2011, based on an issue with another student. Then, H.H. asked if she could stay and talk about defendant. H.H. began by saying that she wanted defendant to leave. H.H. described an incident in which she was playing outside and got a bunch of mosquito bites (bathtub incident). Defendant made her come inside, go into the bathroom, undress, and get in the bathtub. He then washed her body while H.H.'s brother, Bradley, was still outside playing. This made H.H. "uncomfortable."

¶ 12 H.H. described another incident in the bathroom that had occurred one or two weeks ago (second shower incident). Defendant took her into the bathroom, locked the door, ran the shower, and then put his fingers "in her" and moved them around. H.H. grasped the ground with her toes and told defendant "in a little voice" that it hurt. H.H. had her period at the time, and Taets had told her to use the shower head to clean herself when she was having her period. Defendant wanted her to use a douche, but H.H. wanted to follow Taets's instruction. H.H. had said that the shower head tickled her, and defendant was trying to find out why. H.H. did not know why defendant was doing that, however, because she had said that it tickled " 'on the outside, not the inside.' "

¶ 13 Ory prepared a written statement for police the next day (October 27, 2012). In her written statement, Ory indicated that H.H. was sitting on the toilet seat when defendant put his fingers in her. Now, she was not sure that H.H. "actually said the toilet seat." Ory surmised that H.H. was on the toilet seat because her toes were "clinched on the ground" to keep from sliding.

¶ 14 When Ory asked if "any other things had happened," H.H. said that during the summer, defendant called H.H. in to watch a video. H.H. wanted to watch something on "Monster Light," but defendant clicked on "Monster One," a Japanese animation video showing male and female private parts. H.H. told defendant that it was not the right website, but defendant told her to watch it anyway. She watched it and then went to the bathroom because she felt sick.

¶ 15 At this point, the State asked Ory if she had "occasion to meet with [H.H.] after she made the disclosure to you throughout the school year." Ory replied, "Yes, several times." The State then asked, "And did you have any other conversations with her, not going into anything that she said, that was inconsistent with what she had told you" in October 2011. Ory said "No."

¶ 16 Ory went on to testify that she met with H.H. on May 8, 2012. H.H. told Ory that Aunt Kim was " 'in the picture again.' " H.H. relayed that Aunt Kim had said that H.H. would not be able to be around any of Aunt Kim's friends anymore because they were afraid that H.H. might say the same things about them that she had said about defendant.

¶ 17 Ory further testified that H.H. was brought to her office on May 23, 2012, which was the last day of school. Those present included Officer Bucci and a DCFS representative (Lennemann). When asked to describe H.H.'s demeanor in describing the things that had happened with defendant, Ory said that H.H. seemed "relieved, like she was getting it all off her chest what happened."

¶ 18 On cross-examination, Ory confirmed that H.H.'s first remark about defendant was that she wanted him to leave. Regarding the bathtub incident, H.H. did not say that defendant put lotion on her. With respect to the second shower incident, Ory "was not sure" whether H.H. was on the toilet or in the shower even though she wrote in her October 27 statement that H.H. said she was on the toilet. After H.H. relayed the second shower incident, Ory asked if defendant had done anything like that before. H.H. did not mention another incident besides the Japanese animation video.

¶ 19 Police Officer Bucci conducted the CAC interview on October 27, 2011, which was videotaped. Officer Bucci testified that Taets, Kasper, and Bradley accompanied H.H. to the interview and that Taets seemed in disbelief.

¶ 20 Besides the CAC interview, Officer Bucci met with H.H. twice at her school: once in mid-April 2012 and a second time on May 23, 2012. The State asked if at either the April or May meeting, H.H. indicated that what she said during the CAC interview was not true. Officer Bucci responded, "No, she did not."

¶ 21 During the CAC interview, H.H. referred to a dress given to her by defendant that was form fitting and had holes up the side. Officer Bucci was not able to recover the dress; both times she went to the home to retrieve it, Taets was gone.

¶ 22 Officer Bucci further testified that she had talked to Aunt Kim regarding Aunt Kim's conversations with H.H. Aunt Kim admitted to Officer Bucci that she had spoken to H.H. three times: in mid-April 2012, on May 11, and on May 20, 2012.

¶ 23 H.H., who was now 13 years old, testified next. When asked if she wanted to be in court, H.H. said no. Ory was H.H.'s school counselor, and H.H. saw her "maybe once a week." H.H. loved Ory; they were friends; and she felt comfortable talking to her. H.H. did "not really" remember talking to Ory about defendant, other than when they "were punished, like for discipline."

¶ 24 H.H. remembered going to the CAC with Taets. Bradley did not come because he was at a friend's house, and Aunt Kim did not come along. When asked how Aunt Kim felt about the things that H.H. said about defendant, H.H. said that Aunt Kim felt "upset." Before the CAC interview, H.H. was called "a liar a few times" by Taets and Aunt Kim, which made H.H. "a little upset." After the CAC interview, "[t]hey didn't really say anything."

¶ 25 H.H. described her relationship with Taets as "mother and daughter" or "best friends." H.H. did not tell Taets what was happening with defendant; the first person H.H. told was her grandmother, whom H.H. loved. H.H. then met with Ory about two weeks later.

¶ 26 H.H. testified that she had recently watched the CAC interview, which made her feel "upset." At this time, the CAC interview was played for the jury. During the CAC interview, H.H. described the bathtub incident, in which defendant washed her body, including her breasts, and applied lotion to her body, including her breasts. Then, she described the first shower

incident in which defendant rubbed and touched her vagina, and a second shower incident, in which defendant penetrated her vagina with his fingers three times.

¶ 27 After the CAC interview, the State resumed its questioning of H.H. H.H. did not need defendant's help taking a bath, showering, or applying lotion. When asked how she felt about all of the incidents involving defendant, H.H. said "nervous." Regarding the first shower incident, H.H. did not believe it was real. When asked if she believed it was real at the time she talked about it, H.H. said "[w]hen I was confused, yes, when I was angry."

¶ 28 H.H. could talk about private things with her grandmother, Ory, Taets, and "it used to be" Aunt Kim. H.H. would talk about her "monthly curse" to Taets and Aunt Kim. When she first got her period, however, she "went to" defendant. After that, she did not remember if she talked to defendant about her period. H.H. did not remember defendant coming to her to talk about her period. H.H. "kind of" remembered talking to defendant about using tampons or pads. One time, defendant talked about douching, and he explained what it was. Defendant also gave H.H. an electric razor. When asked why he did that, H.H. said she was "kind of uncomfortable." H.H. agreed that she did not want to use a razor.

¶ 29 When asked if H.H. wished she had never told anyone about defendant, she said "sometimes" and later "yes." Defense counsel and Aunt Kim asked H.H. to write "a letter" if that was something she wanted to do. Defense counsel and Aunt Kim said that if she wrote a letter, she might not have to testify, and H.H. was scared to testify.

¶ 30 Monster High was a video game she liked to play. After defendant showed H.H. "the [Japanese] videos," she felt "nervous." H.H. did not remember how she felt when defendant told her not to tell Taets about the videos. Defendant also said not to tell Taets about the shower incidents.

¶ 31 H.H. loved defendant but was a "little" mad over the way he punished them. H.H. would be "okay" with being alone with defendant. Both Taets and her grandmother believed H.H.

¶ 32 On cross-examination, H.H. testified that defense counsel had asked her to write a letter. When she went to defense counsel's office on May 20, 2012, it was the first time she met defense counsel. Taets, Aunt Kim, and Bradley also came to the May 20, 2012, meeting at defense counsel's office, which lasted about two hours. H.H. was never alone with defense counsel during the meeting. With the exception of Bradley, who played outside part of the time, Taets and Aunt Kim were present for the entire meeting. During the meeting, defense counsel and Aunt Kim asked H.H. some questions, but neither of them pressured H.H. to say anything in particular. Defense counsel asked open-ended questions, such as what happened; he did not tell her to lie but said to tell the truth. H.H. admitted that although she loved Aunt Kim, she did not always agree with her and was even angry with her at times. Still, Aunt Kim did not "brainwash" H.H. or pressure her to say anything to defense counsel that night. Aunt Kim would not do that because she loved H.H.

¶ 33 During the meeting, H.H. remembered telling defense counsel that "this was a big mistake." She also remembered telling defense counsel about a time in which she was riding with her friend Elaina on the bus. They were listening to a song by One Direction on an MP3 player. The next day, H.H. asked Elaina if they could listen to the MP3 player again, and Elaina said she " 'didn't understand. She said she never had an MP3 player. She's never had one.' " At this time, H.H. realized that "this never really happened." This type of experience had happened to her many times before.

¶ 34 During the meeting, H.H. told defense counsel that defendant never touched her inappropriately. H.H. told defense counsel that she made these accusations against defendant

because she was angry with him for not letting her hang out with her friend Nicki and for taking away her DS game and cell phone. Defendant became the "bad guy" in her dreams. Defense counsel then asked H.H. if she wanted to make a written statement about what she said during the meeting, and H.H. agreed. H.H. wrote the letter when she got back home. She wrote it in her bedroom; no one else was present and no one helped her. H.H. believed that everything in the letter was the truth.

¶ 35 H.H. further said during the meeting that defendant never rubbed lotion on her breasts. That was the truth; she was saying the same thing now at trial. H.H.'s CAC interview saying otherwise was incorrect. In addition, defendant never placed his fingers in her vagina in September or October of 2011. When asked if she was saying this because it was the truth or because she wanted defendant to come home again, H.H. answered that it was the truth.

¶ 36 On redirect, H.H. testified that she went on a walk with Aunt Kim the same day (May 20, 2011) that they went to defense counsel's office. H.H. had not told anyone it was a dream until she went on a walk with Aunt Kim that day. Before that, in April 2011, H.H. spoke to Aunt Kim about defendant, and H.H. told Aunt Kim what she had said to Ory and Officer Bucci. Aunt Kim told H.H. that her story kept changing and did not make sense. H.H. denied that Aunt Kim had "talked to [her] for hours on other days," their conversations were "just a couple minutes."

¶ 37 After she wrote the letter, Officer Bucci and DCFS investigator Lennemann came to see her at school and asked about the letter. H.H. told them that she "believe[d] the letter, and it was mostly all like – I mean, it was all me"; no one was in the room when she wrote the letter. When asked about the bathtub and shower incidents, H.H. said that she "believed in that letter, and what [she] said in that letter, it was a dream, and that's it." H.H. did not remember telling Officer Bucci and DCFS investigator Lennemann that she knew it was real and not a dream

because Bradley was outside the bathroom door. She also did not remember telling them that defendant was helping her clean herself during her period. Finally, H.H. did not remember saying that she was 70% certain that the two shower incidents were real. During the meeting with DCFS investigator Lennemann and Officer Bucci, Lennemann asked about cheerleaders and referees. H.H. testified that her grandmother was a cheerleader and that Aunt Kim was on the sidelines, meaning that she was on both sides of defendant and H.H.

¶ 38 H.H. hoped that by writing the letter, she would not have to testify and that people would believe the letter. Neither Taets nor Aunt Kim treated H.H. differently after she made allegations against defendant. Aunt Kim told H.H. that she could not be around Aunt Kim's friends because they were afraid of H.H. H.H. did not think she said it was all a dream until the day she went to defense counsel's office.

¶ 39 Taets testified next on behalf of the State. Taets worked two jobs, one as a school bus driver and the other at a grocery store deli. She and defendant, who was now age 49, were in a relationship from 2003 until the end of 2010. Defendant did not live with them for a few months, but Taets allowed him to move back in to help with the children since she worked two jobs. Their relationship ended because he cheated on her. Taets helped defendant post bond of $10,000, which was 10% of $100,000.

¶ 40 When defendant lived with Taets and the children, he was the main disciplinarian because he was home most of the time. Taets first learned of H.H.'s allegations against defendant at the CAC interview. Taets drove to the CAC with H.H., Aunt Kim, and Bradley, and was angry about taking off work. Taets had doubt about H.H.'s allegations because defendant had taken things away from her, and she was angry at him. A couple of months before

trial, Taets expressed doubt to H.H.'s counselor about the allegations because of H.H.'s past behaviors.

¶ 41 Taets described her relationship with H.H. as close. She loved H.H. and would tell her so. When asked if she was affectionate, Taets said "not so much." Taets did not recall telling defendant over the phone that she did not tell H.H. that she loved her because she was not a verbally affectionate person.

¶ 42 During the CAC interview, H.H. described a dress that defendant gave to her that had holes down the side. Taets testified that defendant bought H.H. two dresses that were "inappropriate," although H.H. had picked them out. When the State asked Taets to bring in the dress or dresses, Taets refused without a warrant.

¶ 43 Taets admitted meeting with defense counsel three times. Taets went voluntarily with H.H. to defense counsel's office because H.H. "had made a comment about fixing something and that she had her ways."

¶ 44 On cross-examination, Taets testified that defendant bought H.H. clothes because other kids at school were making fun of what she wore. When she and H.H. went to defense counsel's office on May 20, no one asked H.H. leading questions. Many times, Taets told H.H. that no matter what H.H. said, defendant was "not returning home."

¶ 45 Aunt Kim testified as follows. On the way to the CAC interview, Aunt Kim was not sure what to believe. She was upset and felt what H.H. said "could be a lie," which she told H.H. in the car. Aunt Kim admitted telling H.H. that defendant should not be in jail because H.H. was mad at him. Aunt Kim talked to H.H. about defendant a few times and told defendant that she would talk to H.H. after Taets went to work. Aunt Kim denied going to Taets's house and "roughing" H.H. up even though her initial reaction to the allegations was anger. Aunt Kim was

concerned that H.H. was describing what happened to another girl at school, because H.H. had done that before.

¶ 46 Aunt Kim had gone to defense counsel's office two or three times. At the meeting at defense counsel's office on May 20, 2012, Aunt Kim and defense counsel clarified some things with H.H. that she had been saying. A few days later, H.H. wrote a recantation letter. Aunt Kim denied reading H.H.'s letter or saying "good job." Aunt Kim was aware that the gist of H.H.'s recantation letter was that it was all a dream. When asked where the idea that it was just a dream originated, Aunt Kim admitted that she felt that way from the beginning, and that defendant discussed the idea that it was a dream with her and Taets. Aunt Kim also denied telling H.H. that her friends were worried about H.H. making similar allegations about them.

¶ 47 On cross-examination, Aunt Kim testified regarding her conversation with H.H. in early April 2012. Aunt Kim told H.H. that she was not mad and would love her as a niece forever. H.H. talked about the bathtub incident, saying that defendant ran a bath and left the bathroom. While H.H. had a towel wrapped around her and was wearing bottoms, defendant rubbed lotion on her back, arms, and neck. H.H. did not say anything about defendant washing her entire body or rubbing lotion on her breasts. H.H. described a second incident in the shower where defendant put soap on his hands, asked her to close her eyes, and washed the inside of her legs. In a third shower incident, H.H. said that defendant "checked inside." However, H.H. never said that defendant washed his hands and did it again.

¶ 48 Aunt Kim met with H.H. for H.H.'s birthday at the beginning of May 2012, and H.H. wanted to talk about her allegations against defendant. H.H. said that she was " 'going to make this right,' " and not to worry about it. She had " 'her ways.' " Later that month, on May 20, 2012, before they went to defense counsel's office, Aunt Kim and H.H. went on a walk, as they

often did. At that time, H.H. said that everything she said about defendant was a dream; that she was confused; and that she believed that everything was a dream based on the MP3 incident with her friend at school.

¶ 49 Lori Thompson, a pediatric nurse practitioner, testified as follows. Thompson had performed hundreds of sex assault examinations and was qualified as an expert. Thompson interviewed H.H. on November 3, 2011. H.H. understood that she was there because defendant had " 'stuck his finger inside her.' " H.H. said that defendant would " 'stick it in sometimes all the way, sometimes partially.' " H.H. also said that sometimes, he would take it out and rinse it off and put it back in her. It would happen as she was getting ready to shower or when she was already in the shower. H.H. said there was a certain spot on the outside of her body that he would touch that would make her knees shake.

¶ 50 H.H. further stated that it always happened during her " 'monthly curse,' " which defendant knew about because Taets made H.H. record it on the calendar each month. H.H. tried to use tampons but they hurt so she did not insert them. Defendant told H.H. that the reason for putting his finger inside her was to figure out why she could not wear tampons. It started happening in September 2011 and the last time was the week of October 3, 2011.

¶ 51 Thompson's exam revealed a partial hymenal cleft or tear at the five o'clock position, which was consistent with the insertion of an object or sexual abuse. It was consistent with a male's finger. When asked if the injury was caused by the use of a tampon, Thompson responded "probably not" because H.H. had said that she tried to use a tampon but that it hurt. Thompson opined that the tear was caused by sexual abuse.

¶ 52 On cross-examination, Thompson admitted that she was not sure whether H.H. was successful in fully inserting a tampon. It was "unlikely" that the hymenal cleft was caused by a tampon but "anything" was "possible."

¶ 53 Officer Bucci testified again as follows. On May 23, 2012, she went to H.H.'s school to meet with H.H. and DCFS investigator Lennemann. They discussed H.H.'s recantation letter that she had written the day before. H.H. said that she wrote the letter in her bedroom by herself but then went downstairs and presented it to Taets and Aunt Kim. H.H. was told that she did "a good job," and Aunt Kim and defense counsel told her that she was a good writer.

¶ 54 On cross-examination, Officer Bucci testified that H.H. never indicated that defense counsel was present at the house when H.H. presented the letter. Officer Bucci understood that defense counsel was not present but Aunt Kim was.

¶ 55 Police officer Michael Seegers, the primary investigating officer on this case, testified that he met with defendant on November 9, 2011. Defendant agreed to speak with Officer Seegers. Defendant said that he had been in an exclusive relationship with Taets for about 10 years and felt that H.H. was upset with him over an affair he had in February 2011. Regarding H.H.'s menstrual cycle, defendant said that H.H. approached him the year before because she had started to bleed. Defendant explained to H.H. that it was her menstrual cycle and she needed to talk to Taets. Later, H.H. approached defendant, saying the other kids at school could see that she was wearing a pad. Defendant explained the purpose of a tampon so that the other kids would not know she was having her period. Defendant had bought tampons for her in the past but did not know if she was using them.

¶ 56 With respect to the bathtub incident, defendant said that H.H. either had bug bites or a rash, so he put some "stuff" in the bath for her to bathe in. After the bath but while H.H. was

still naked, he put some anti-itch cream on her back and arms. Regarding the video on the computer, H.H. wanted to go to a high school website, and defendant pulled up the website for her. Defendant then showered and was told by H.H. that it was bad cartoon. Defendant thought it may have been pornographic. Defendant denied any inappropriate touching of H.H. Officer Seegers asked numerous times if defendant was calling H.H. a liar, and defendant never responded to the question.

¶ 57 On cross-examination, Officer Seegers admitted that his report did not say that H.H. was naked when defendant applied the anti-itch cream; that H.H. was wearing a pad under her swim suit during swim class; or that defendant was the one to pull up the pornographic website.

¶ 58 DCFS investigator Lennemann testified that she began investigating H.H.'s case in October 2011. Later, on May 23, 2012, she met with H.H. and Officer Bucci at the school. H.H. said that she was asked to write the recantation letter the day before because her stories kept changing. According to H.H., Aunt Kim insisted that her allegations kept changing, but H.H. said that they were not changing. H.H. also wrote the letter to avoid testifying in court, which could be scary. If she wrote the letter, she would not have to testify.

¶ 59 H.H. said that with the exception of Aunt Kim, defendant's friends and family blamed her for putting him in jail and accused her of lying. The family was fearful that H.H. would make similar allegations against them. When asked if she would like to see defendant again, H.H. responded that if she were to see him, she preferred having someone else around. She did not want him to return home and did not want to be alone with him.

¶ 60 H.H. further said that she knew the bathtub incident was "real" because Bradley was standing outside the bathroom door. When asked if the two shower incidents were real, H.H.

answered that " 'she was 70% sure that those incidents were real' "; she "could feel [defendant] touching her body."

¶ 61 DCFS investigator Lennemann first met with H.H. in October 2011, and then there were subsequent meetings, including the meeting in May 2012, the day after H.H. wrote the recantation letter. When DCFS investigator Lennemann was asked, "comparing this [May 2012] conversation with conversations that you have had with [H.H.] previously in October and since then, has she ever been inconsistent with you in her allegations?", she answered no.

¶ 62 Carol Fetzner, a licensed clinical professional counselor, testified as follows. Fetzner was qualified as an expert in child abuse accommodation syndrome. Child abuse accommodation syndrome was applicable in cases where the victim was abused by a father or a person in the fatherly role. It had five components, which were secrecy, helplessness, entrapment, delayed and unconvincing disclosure, and recantation. If the victim's mother or other family members were not supportive, the likelihood of recantation was "very high." The child may say that it was a dream; that the child made it up because they were mad at the perpetrator; that it was an impulsive, rageful thing to say; and that it was not true. Fetzner had not read any of the file concerning H.H.'s case.

¶ 63 On cross-examination, Fetzner agreed that child abuse accommodation syndrome was not empirically validated or developed on any scientific research; it was merely a behavioral model. In addition, it was not a diagnostic instrument, meaning it should not be used to determine whether or not a child had been sexually abused. If a child displayed a symptom or symptoms of child abuse accommodation syndrome, it was not proof of sexual abuse and did not increase the likelihood that the child had been abused.

¶ 64 B. Defense Witnesses

¶ 65 Taets testified first on behalf of defendant. After defendant was injured on the job in 2008 or 2009, he was at home with the children more than Taets, who worked two jobs. Defense counsel asked whether it was correct that Taets had "testified earlier for the State that there was a time last year when [defendant] had an affair," and Taets replied yes. When asked if "he moved out as a result," Taets said yes. Taets testified that defendant moved out for a few months in February 2011 and moved in with Aunt Kim. During this time, H.H. did not have a lot of supervision. In April or May 2011, defendant then moved back in because the children were asking for him and because he had a disagreement with Aunt Kim.

¶ 66 When defense counsel asked if Taets remembered any "arguments" after defendant moved back in, the State objected, and the trial court sustained the objection. Defense counsel requested a sidebar conference and explained that he sought to introduce evidence that Taets had called defendant a "child molester" based on the age of the person with whom defendant had an affair. Defense counsel argued that defendant had had an affair with a 23-year-old and that Taets's remark could have put "the idea in H.H.'s head." The State countered that this evidence was not relevant and that defense counsel had opened the door to "a lot of bad acts," which included Taets's complaints for orders of protection against defendant because he was "beating on" her. Defense counsel argued that at most, he had opened the door to the fact that defendant and Taets had argued. The court sustained the State's objection.

¶ 67 Taets further testified regarding the bathtub incident, which occurred during the summer of 2011. Bradley and H.H. went out to catch frogs, and H.H. was bitten up by mosquitoes. H.H. came home, took a shower, and asked defendant to put lotion on her back. Taets was home but did not see defendant apply the lotion.

¶ 68 After defendant moved back in, neither H.H. nor Bradley were doing as they pleased or going wherever they wanted. Also, H.H. was not allowed to hang out with certain friends at school. At the beginning of October 2011, H.H. was grounded with no phone and no TV, which made her angry.

¶ 69 Defendant and H.H. did things together such as watching movies and shopping, and he helped her with violin lessons. One time, H.H. spilled nail polish and both defendant and H.H. cleaned it up and hid it from Taets. H.H. had defendant painting her nails so that she would not destroy the carpet.

¶ 70 Defendant and H.H. discussed female issues like personal grooming and hygiene. Taets learned from defendant that a "wolf monkey" was an "overgrowth" in the pubic area that "came out of the underwear." Because Taets did not have trimmers, defendant gave her a pair, and she helped H.H. use them in the bathroom. After H.H. started her period in the sixth grade, Taets discussed tampons with her, suggesting that she not wear tampons unless she was in swim class. Defendant bought tampons for H.H.

¶ 71 After the jury was excused, the State announced its intention to question Taets about why defendant moved out of the house. According to the State, Taets testified that defendant moved out because he was having an affair, but she did not testify that he moved out because of complaints of domestic battery and abuse against the children. The State argued that it could impeach Taets with "prior inconsistent statements and statements that would reveal" her bias in favor of defendant. Defense counsel objected, arguing that the evidence was more prejudicial than probative and that defendant did in fact move out because of the affair. Defense counsel also pointed out that defendant was never convicted of domestic battery, making it more prejudicial than probative. The court noted that Taets gave one reason why defendant moved

out, and "now that's out there. And so when the State cross examines, they can ask the witness about are there any other reasons or if so, what are they." The court continued that defense counsel "brought it up," meaning it was a "legitimate area of inquiry now."

¶ 72 Defense counsel resumed questioning, and Taets testified that from June to October of 2011, H.H. was "happy, normal," unless she got in trouble. She was grounded quite a few times during that period. H.H.'s freedom to do things increased after defendant moved out again in October 2011.

¶ 73 Taets had shown H.H. love since defendant moved out. In particular, Taets supported H.H. by making her go to counseling. From November 2011 until March or April 2012, Taets drove H.H. to weekly counseling sessions. H.H. did not want to continue counseling, however.

¶ 74 On cross-examination, the State questioned Taets that "it sure sounds like [H.H.] enjoys not having [defendant] around because she gets to do whatever she wants." Taets responded that "[w]ouldn't any kids [*sic*] like that," and the State said "[t]his isn't about [H.H.]. This about your parenting." Defense counsel objected, and the court sustained the objection.

¶ 75 Next, the State asked why defendant moved out in February 2011, and Taets responded that there "was an incident that occurred." According to Taets, the affair was "part of it," but "[t]here were arguments." Over defense counsel's objection, Taets testified that defendant was arrested for domestic violence. The State questioned Taets regarding a document,[1] dated February 2, 2011, in which Taets claimed that defendant called her " 'a psycho.' " In that document, Taets further claimed that she called defendant " 'a liar and a cheater' "; defendant grabbed her by the neck and pushed her into the car; Taets pushed defendant out of the way so

[1] Although the State never identified the document, it appears to be Taets's petition for the February 4, 2011, order of protection.

that she could go inside the house and call 911; he pushed her again to prevent her from getting to the phone; defendant pulled the phone jack off of the wall; and when Taets walked outside to meet with police officers, she could feel her neck burning with pain and her lower back starting to hurt.

¶ 76 Over defense counsel's objection, the State then asked if Taets had ever complained of defendant abusing H.H. or Bradley. At first, Taets did not remember any complaints, and then she testified that defendant had said something about taking the children away from her. In an order of protection, dated February 4, 2011, Taets claimed that defendant had "thrown objects, pushed or shoved, slapped, called names, abused the children emotionally, verbally, [and] children witnessed physical abuse, prevented from calling 911 and cheated on me."

¶ 77 Taets admitted that she allowed defendant to move back in with them in May or June 2011. Both Bradley and H.H. had asked for defendant to move back in. Taets also admitted meeting with defendant's defense attorney in conjunction with the case. Taets denied believing defendant over H.H. She also denied finding pornography on the computer; Taets found "pictures of someone that wasn't supposed to be on [her] computer."

¶ 78 H.H. testified next as follows. She remembered going to defense counsel's office on May 20, 2012, and then writing a letter afterwards. She wrote the letter "[m]ostly because [she] didn't really want to testify, and [she], you know, felt like it was a dream." When defense counsel attempted to question her further, the State objected that the testimony was cumulative. The court excused the jury and advised defense counsel to not rehash H.H.'s cross-examination from the day before. Defense counsel explained that he wanted to delve deeper into why H.H. thought it was a dream, and the court sustained the State's objection. H.H. further testified that

after writing the recantation letter, she did not remember telling Officer Bucci and DCFS investigator Lennemann that she was 70% sure of something.

¶ 79 H.H. remembered shopping with defendant, and the two of them picked out two dresses. Taets, however, did not like the dresses.

¶ 80 Bradley, age 14, testified next as follows. He remembered the bathtub incident in the summer. H.H. got a lot of mosquito bites and took a shower; defendant was in the back bedroom. H.H. then asked defendant to put some ointment on her, which he did. Bradley waited in his bedroom for H.H. to finish her shower so that he could take one, and his bedroom was about three feet from the bathroom.

¶ 81 Bradley recalled a time that defendant went into the bathroom when H.H. was in the shower. Defendant went into the bathroom because the shower curtain holder fell down, and H.H. had yelled for defendant to fix the curtain as she was getting out of the shower.

¶ 82 Dr. Robert Meyer, a licensed clinical psychologist, was qualified as an expert in child abuse accommodation syndrome. Dr. Meyer testified that there were flaws with the theory of child abuse accommodation syndrome. For example, a large, comprehensive study found that the only aspect of the theory that held up was secrecy or the delayed response in coming forward about the abuse. In Dr. Meyer's opinion, the theory was not a valid scientific tool because it was not "true." Dr. Meyer did not believe in "incremental disclosure" or suggestive interviewing, because it led to children embellishing the story after multiple interviews. In addition, victims who were personally threatened were more likely to disclose the abuse than victims who had been subtly abused or groomed over time. The diagnostic statistic manual (DSM-IV) did not recognize child abuse accommodation syndrome.

¶ 83 Defendant testified next as follows. He had worked as a licensed fireman, paramedic, and school bus driver. Most recently, he worked as a logistics manager for a trucking company, where he was injured at the end of 2009.

¶ 84 Defendant had three children of his own. He and Taets began dating around 2002, and in 2003, he moved in with Taets and her children. Bradley and H.H. called him "dad," and he had known H.H. since she was two years old. Defendant was at home more with the children after his injury.

¶ 85 In February 2011, Taets found out that defendant was having an affair. Defendant was outside showing Bradley how to use a snow blower when Taets came out of the house screaming and very upset. Defendant had just had shoulder surgery, and Taets pushed him and called the police. Defendant was removed from the house and moved in with Aunt Kim for five months.

¶ 86 In June 2011, defendant moved back in with Taets and the children. They were going to try and fix their relationship, and the children wanted him home. However, he and Taets got into several arguments in which Taets called him a " 'child molester.' " Defendant was able to patch up his relationship with Bradley but not H.H.

¶ 87 Regarding the bathtub incident, H.H. and Bradley came home from the park, and H.H. was covered in mosquito bites. Defendant told the children to get out of their dirty clothes and take baths. Defendant then retrieved anti-itch Aveeno, started a bath, and poured the Aveeno in. He told H.H. to take a bath and call him when she was finished so that he put Calamine lotion on her. H.H. did not enter the bathroom until he had walked out into the hallway. Defendant went to the back bedroom to watch TV. H.H. called him after she finished her bath, and defendant went into the bathroom and put the lotion on her back, neck, and on the back of her arms. Defendant closed the door for H.H.'s privacy because Bradley was sitting on his bed directly

across from the bathroom. H.H. was wearing pajama bottoms and had a towel wrapped around her head and a towel in front of her. Defendant denied rubbing lotion on her breasts. He also denied rubbing or placing a finger in H.H.'s vagina.

¶ 88 Defendant painted H.H.'s nails for a couple of her band concerts because Taets was at work. In the summer of 2011, H.H. asked to use the computer, and he turned it on for her and left the room to shower. He did not look up any website for her. When he came back, H.H. said that she had seen something inappropriate. Defendant did not see what H.H. saw because the browser deleted everything when it was shut down. The two then watched a movie together. Defendant told Taets about it when she got home from work.

¶ 89 Because H.H. was being teased at school, defendant gave H.H. trimmers and said to ask Taets how to use them. Defendant also took H.H. to the store to buy tampons and nail polish. Defendant took H.H. dress shopping in Elgin, and they picked out two dresses that were less objectionable than the other dresses H.H. had picked out. The dresses had mesh things on the shoulders and were more like tops than dresses. After showing the dresses to Taets, defendant tried to return them.

¶ 90 Defendant was asked to leave the home on October 27, 2011. At that time, his relationship with H.H. was really bad. Two weeks before he left, he had punished her by taking away her cell phone and her DS game, and by grounding her. However, before he left, Taets had allowed H.H. to spend the weekend with Aunt Mary and her grandmother. Defendant had never gotten along with H.H.'s grandmother.

¶ 91 The final witness to testify was Jessica Starks, a bus driver who had worked with defendant for four or five years. When defense counsel asked about defendant's reputation for truthfulness, the State objected. At a sidebar conference, the State argued that veracity was not

relevant in a sex abuse case, and the trial court agreed and sustained the State's objection. Defense counsel then stated that he had no more questions, and Starks was excused.

¶ 92 During its closing argument, the State argued that H.H.'s recantation was the result of an unsupportive mother who had no maternal bone in her body and did not want to be bothered with having to raise her own children. The State went on to say that Taets complained about taking H.H. to the CAC for the interview and that her poor judgment had been demonstrated throughout the trial.

¶ 93 Defense counsel argued as follows in his closing argument:

> "Beyond a reasonable doubt, it's not a mere tipping of the scales, it's not oh, he's probably guilty, it's more likely than not guilty or there is a small chance he's guilty or he might be guilty. It's a much higher burden than it should be."

He further argued:

> "But there is another theory that compels you to return a not guilty verdict, and that's even if you don't believe – even if you don't believe he's innocent, if you believe the State has failed to meet its burden of proof beyond a reasonable doubt, you have no choice, no discretion, you have to return a verdict of not guilty because that's what we do in America.
>
> It's a serious case. We would be – it would be improper if a jury member thought I think he might be guilty, I don't know. But unless we find him guilty, we could be letting a child molester out on the street. But that's improper. Anybody can be wrongfully accused. And under that thinking, anybody would be convicted."

Defense counsel went on to say:

> "What a horrible groomer trying so hard to romance this girl, win her affections, when at the same time, he's stupidly butting heads over his harsh punishment, his unfair punishments. It seems to me he'd let things slide if this was his big romance he was grooming, that she would have gotten more privileges. *** Does this make sense? Even an ape knows better."

Finally, defense counsel said:

> "Ladies and gentlemen, we would ask you to look at all the evidence, the reasonable inferences therefrom, and put the State to the task, did they prove beyond a reasonable doubt? And I believe you're going to be coming back with a guilty – a verdict of not guilty. Not guilty. Thank you."

¶ 94 The jury found defendant guilty of six of the seven counts.[2] Defendant moved for a new trial, which the trial court denied. The trial court sentenced defendant to 24 years' imprisonment, and he timely appealed.

¶ 95 II. ANALYSIS

¶ 96 A. Ineffective Assistance of Counsel

¶ 97 Defendant's first argument on appeal is that defense counsel provided ineffective assistance of counsel. 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

[2] It acquitted him of count II, which alleged that defendant committed predatory criminal sexual assault between September 1, 2011, and September 30, 2011, by rubbing H.H.'s vagina.

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; see also *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010) (because a defendant must satisfy both prongs of this test, the failure to establish either prong is fatal to the claim).

¶ 98 The question of whether defense counsel provided ineffective assistance of counsel 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). Here, the facts surrounding defendant's claims of ineffective assistance of counsel are undisputed, so our review is *de novo*. See *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008) (because the facts surrounding the defendant's ineffective assistance of counsel claim were undisputed, the court's review was *de novo*).

¶ 99 1. Orders of Protection

¶ 100 Defendant first argues that defense counsel was ineffective for opening the door to the admission of other-crimes evidence. In particular, defendant argues that defense counsel was deficient for opening the door to two orders of protection that were highly prejudicial. It was devastating to his credibility, defendant argues, for the jury to hear Taets's sworn statements in

applying for the orders of protection against him. Defendant argues that it could not have been sound trial strategy to open the door to defendant's acts of violence against Taets and the children. Defendant further argues that defense counsel was aware of the prejudicial nature of this other-crimes evidence because it was the subject of his own motion *in limine*.

¶ 101 Defendant is correct that, prior to trial, defense counsel filed a motion *in limine* to bar the admission of two orders of protection that were filed by Taets against defendant. The orders were dated July 2010 and February 2011. At the hearing on defendant's motion, the State pointed out that in both orders of protection, Taets "laid out fear of" defendant and concerns about his treatment of her and the children. Although the State did not intend to introduce this evidence in its case-in-chief, it argued that the evidence would be admissible if Taets were to testify in contradiction. In other words, if Taets were to testify that defendant was peaceful and loving and that she and the children were not scared of him, then the orders of protection would be relevant as to Taets's bias in favor of defendant. The court reserved its ruling on defendant's motion, stating that a lot depended on the nature of Taets's testimony.

¶ 102 At trial, Taets testified for both the State and defendant. When testifying for the State, Taets indicated that her relationship with defendant ended because he cheated on her. When testifying on behalf of defendant, Taets similarly testified that defendant moved out in February 2011 because of the affair. Defense counsel then sought to elicit evidence of "arguments" between Taets and defendant after he moved back in (in June 2012) to show that Taets called defendant a "child molester" based on the age of the person with whom he had had an affair. At this point, the State argued that defendant had opened the door to the February 2011 order of protection and the verified petition for order of protection. (It does not appear from the record that the State questioned Taets regarding the July 2010 order of protection). The trial court

agreed, and Taets testified that defendant was arrested for domestic violence; that she called him a liar and a cheater; that he grabbed her by the neck and pushed her into the car; and that he pulled the phone jack off of the wall when she tried to call 911. In addition, Taets confirmed that the order of protection stated that defendant had "thrown objects, pushed or shoved, slapped, called names, abused the children emotionally, verbally, children witnessed physical abuse, prevented from calling 911 and cheated on [her]."

¶ 103 Contrary to defendant's assertion, defense counsel was not deficient for opening the door to this evidence because it came in during the pursuit of a reasonable trial strategy. 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). 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.

¶ 104 As reflected in his opening statement, defense counsel's strategy was to show that defendant's affair had devastated the family and that H.H. was upset at defendant for hurting Taets. Not only was H.H. mad about the affair, she was mad at defendant for moving back in and being a disciplinarian. However, defense counsel also elicited evidence that H.H. had a close father-daughter relationship with defendant and that she loved him. Thus, defense counsel's strategy was to explain H.H.'s motive to fabricate allegations of sexual abuse against defendant as well as her decision to recant those allegations. In order to pursue this strategy, defense counsel had to tread the line of eliciting testimony about the affair, its adverse effect, and

defendant's moving in and out of the family's lives without opening the door to the February 2011 order of protection.

¶ 105 Defense counsel's strategy was reasonable despite the risk of this evidence coming in. Though defense counsel did ultimately open the door to the evidence he had sought to bar in his motion *in limine*, this did not render his performance deficient. Significantly, once the State argued that defense counsel had opened the door to the evidence, defense counsel strenuously argued that it should not come in, and he made several objections during the State's cross-examination of Taets.

¶ 106 While defendant's inability to establish the deficient performance prong is enough to defeat his ineffective assistance of counsel claim, we further note that defendant cannot establish prejudice, as defendant's testimony explained the circumstances surrounding the February 2011 order of protection. Defendant testified that Taets had just discovered defendant's affair and came out of the house, screaming and upset. She then pushed defendant and called the police. The February 2011 order of protection referred to defendant cheating on Taets, and it was reasonable for the jury to believe that Taets sought an order of protection against defendant because she was angry over the affair. Defendant's testimony also helped explain why Taets would then allow defendant to move back in after seeking the order of protection; it was reasonable to believe that Taets's real problem with defendant was the affair and not domestic violence. Defendant further testified that after he moved back in, he and Taets continued to argue over the affair. According to defendant, he was able to mend his relationship with Bradley but not H.H. Therefore, defense counsel, after opening the door to the February 2011 order of protection, used it to bolster his theory that H.H. had a motive to fabricate allegations against

defendant based on the affair and her anger over him moving back in and disciplining her, but also why she recanted the allegations.

¶ 107 Finally, defendant's reliance on *People v. Valentine*, 299 Ill. App. 3d 1, 4 (1998), is misplaced. In *Valentine*, defense counsel was deficient for not challenging the State's use of inadmissible prior battery arrests before calling defendant to the witness stand. In addition, defense counsel actually opened the door to that line of questioning by eliciting testimony that gave a false impression of the defendant's criminal history. *Id.* The situation in the case at bar differs dramatically from that in *Valentine*. Here, defense counsel sought to bar the orders of protection in a motion *in limine*; he opened the door through the pursuit of a reasonable defense theory; he argued that he had not opened the door and objected during the State's cross-examination of Taets; and he used the circumstances surrounding the February 2011 order of protection to support his theory of why H.H. was motivated to fabricate allegations against defendant. For these reasons, defense counsel was not ineffective.

¶ 108 2. Section 115-10 Hearing

¶ 109 Defendant's second claim that defense counsel was ineffective pertains to the section 115-10 hearing, which permits the admission of testimony of an out-of-court statement made by a victim, who is less than 13 years old, concerning a sexual offense. See 725 ILCS 5/115-10(a) (West 2010). Section 115-10(b) provides that the statements shall be admitted as an exception to the prohibition against hearsay evidence under certain circumstances, one of which is the court conducting a hearing outside the jury's presence to determine whether the time, content, and circumstances of the statement provide sufficient safeguards of reliability. See 725 ILCS 5/115-10(b) (West 2010).

¶ 110 The subject of the section 115-10 hearing in this case was H.H.'s statements to Ory on October 26, 2011, and the October 27, 2011, CAC interview with Officer Bucci. Ory and Officer Bucci testified at the section 115-10 hearing, and the court reviewed the CAC interview. In addition, the State indicated that H.H. had been served with a subpoena for trial and thus would be available to testify. According to the State, H.H.'s statements were reliable enough to be admissible at trial.

¶ 111 Defense counsel argued that even though H.H.'s statements were only one day apart, there were numerous inconsistencies; her story grew bigger and grander; a portion of Ory's testimony was not supported by what H.H. said to her; and Officer Bucci used some suggestive questioning during the CAC interview. Defense counsel argued that "to make certain" that defendant received a fair trial, H.H. "should have to come in here to answer all the inconsistencies."

¶ 112 The State responded that it would make H.H. available to testify and that it was not "trying to circumvent anything." The State further argued that as long as H.H. was available for cross-examination, then the statements "should come in." The court agreed with the State and determined that the time, content, and circumstances of the out-of-court statements to Ory and Officer Bucci were sufficiently reliable and would be admissible during the trial on the condition that H.H. was available for cross-examination.

¶ 113 Defendant argues that because section 115-10 contemplates that the victim will testify at trial, defense counsel misunderstood the nature of the hearing. According to defendant, defense counsel was deficient for failing to challenge the reliability of the statements at the section 110-15 hearing. We disagree. By his cross-examination of Ory and Officer Bucci and his argument to the court, defense counsel clearly recognized the inconsistencies in H.H.'s statements. Rather

than argue that the statements were inadmissible, however, defense counsel made the strategic decision to highlight the inconsistencies in H.H.'s statements to discredit them. Defense counsel's strategy was to show that H.H. fabricated the statements because she was mad at defendant, which was supported by her recantation and her trial testimony. Thus, the record does not support defendant's argument that defense counsel misapprehended the nature of a section 115-10 hearing. Instead, defense counsel's strategy was to use the inconsistencies to his advantage.

¶ 114 3. Failure to Object

¶ 115 A. Hearsay Testimony

¶ 116 Defendant next argues that defense counsel was ineffective for failing to object to the hearsay testimony of several witnesses. We begin with defendant's arguments pertaining to the testimony of Ory and Officer Bucci. As stated, the trial court found H.H.'s initial statements to Ory on October 26, 2011, as well as the October 27, 2011, CAC interview with Officer Bucci, admissible under section 115-10. Defendant concedes that the statements to Ory and the CAC interview were admissible but argues that defense counsel was deficient for failing to object to a few questions posed during the State's direct examination of Ory and Officer Bucci.

¶ 117 After Ory testified regarding H.H.'s initial statements on October 26, 2012, the State asked whether Ory had had occasion to meet with H.H. after she made that disclosure throughout the year, to which Ory responded "Yes, several times." Next, the State asked whether Ory had had any other conversations with H.H. that were inconsistent with what H.H. had said in October 2011, and Ory said no.

¶ 118 Turning to Officer Bucci, she testified regarding the CAC interview on October 27, 2011. Subsequent to that interview, Officer Bucci testified that she met with H.H. twice at her school:

once in mid-April 2012 and a second time on May 23, 2012. Then, the State asked if at either the April or May meeting, H.H. indicated that what she had said during the CAC interview was not true. Officer Bucci responded, "No, she did not."

¶ 119 Defendant argues that defense counsel should have objected to Ory's and Officer Bucci's testimony of "consistent conversations" with H.H., because the evidence did not fall under any hearsay exceptions. First, defendant argues that the statements were not admissible under section 115-10 because the statements were made after H.H. turned 13. See *In re E.Z.*, 262 Ill. App. 3d 29, 34 (1994) (in order for hearsay statements to be admissible under section 115-10, the child must be under the age of 13 when the statement is made). Second, defendant argues that they were not admissible as prior consistent statements of her initial outcry because H.H. had not yet testified regarding her recantation. See *People v. McWhite,* 399 Ill. App. 3d 637, 641 (2010) (prior consistent statements are admissible in only two circumstances: (1) where there is a charge that the witness has recently fabricated the testimony, or (2) or where the witness has a motive to testify falsely); see also *People v. Crockett*, 314 Ill. App. 3d 389, 408 (2000) (eliciting the testimony of prior consistent statements on direct examination, before any evidence of a motive to fabricate was produced, is an improper way to proceed). Defendant argues that eliciting this evidence "undoubtedly left the jury with the impression" that H.H. had spoken with Ory and Officer Bucci on multiple occasions after her initial outcry in October 2011 and had "consistently repeated her accusations at each meeting."

¶ 120 We disagree with defendant's argument. As we explain, defense counsel's decision not to object was a matter of trial strategy. 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.

¶ 121 Defense counsel's theory was that H.H. made allegations that defendant molested her because she was angry over his affair and also his disciplinarian role over her when Taets allowed him to move back in. In his opening statement, defense counsel argued that H.H.'s allegations were inconsistent; that her story changed each time she told it; and that because the allegations were not true, she eventually recanted the allegations. While defendant argues that Ory and Officer Bucci should not have been allowed to testify that H.H. never deviated from her initial statements to them (*i.e.*, prior consistent statements) before H.H. testified, it was reasonable for defense counsel not to object to these four questions (defendant challenges only two questions per witness) by the State. This is because the State did not get into the content of H.H.'s subsequent conversations with Ory and Officer Bucci; the questions were brief; and defense counsel's objections might have resulted in drawing unnecessary attention to this issue. Moreover, despite the State's theory that H.H. remained consistent in her allegations and wavered only due to family pressure, defense counsel had a strong argument that H.H.'s recantation letter and trial testimony were the truth. After Ory and Officer Bucci testified regarding H.H.'s prior consistent statements, H.H. testified on cross-examination that her recantation letter was the truth, thus discrediting the State's theory of consistency. As a result, defense counsel was not deficient for allowing this testimony to come in.

¶ 122 Defendant next argues that defense counsel was deficient for not objecting to the hearsay testimony of DCFS investigator Lennemann. As previously mentioned, the sequence of events is that H.H. made her initial statements to Ory on October 26, 2011; the CAC interview with Officer Bucci occurred on October 27, 2011; H.H. wrote a letter of recantation on May 22, 2012;

and then H.H. met with Officer Bucci and DCFS investigator Lennemann the next day at the school (May 23, 2012).

¶ 123 DCFS investigator Lennemann testified that during the May 23, 2012, interview, H.H. said that her stories did not keep changing, despite Aunt Kim's claims that they were; H.H. was asked to write the recantation letter because of her changing stories and because she did not want to testify; H.H. knew the bathtub incident was real because Bradley was standing outside the bathroom door; and H.H. was 70% sure the shower incidents were real. DCFS investigator Lennemann also testified that H.H. said that the family was fearful that she would make similar allegations against them.

¶ 124 Again, defendant argues that this testimony was not admissible under section 115-10 due to H.H.'s age or as a prior consistent statement. However, DCFS investigator Lennemann's testimony followed H.H.'s testimony, and the State is correct that the circumstances for allowing prior consistent statements are present here. With H.H.'s back and forth statements, it is arguable that she had a motive to testify falsely or had recently fabricated her testimony. See *McWhite*, 399 Ill. App. 3d at 641. In any event, we need not determine whether Lennemann's testimony would have been admissible as prior consistent statements because defense counsel used her testimony as part of his trial strategy. See *Theis*, 2011 IL App (2d) 091080, ¶ 40 (no ineffective assistance of counsel where defense counsel used the alleged hearsay testimony as part of her trial strategy).

¶ 125 Defense counsel used DCFS investigator Lennemann's testimony that H.H. was 70% sure that the incidents were real as proof that the State could not satisfy its burden of proof beyond a reasonable doubt. At the beginning of his closing argument, defense counsel argued, "I'm 70% sure the incidents real. I'm 70% sure. Folks, that's the best they have got." Defense

counsel then went on to argue how H.H. testified at trial that defendant never did any of the things she had alleged. He highlighted the fact that H.H. and Taets supported defendant, saying it was "pretty difficult to convict a man beyond a reasonable a doubt when everyone involved is saying he's innocent." Later, defense counsel pointed to Dr. Meyer's testimony that the memories of sex abuse victims were clear. He said, "I think they'd remember it better than just 70%. Does that means she's 30% sure the incidents never happened? Is that beyond a reasonable doubt?" Accordingly, while the State used DCFS investigator Lennemann's testimony to weaken H.H.'s recantation letter, defense counsel used it to disprove the State's ability to prove defendant guilty beyond a reasonable doubt. It was a reasonable defense strategy to argue that being 70% sure did not meet the burden of beyond a reasonable doubt, especially given H.H.'s trial testimony that was the same as her recantation letter.

¶ 126 Defendant also challenges alleged hearsay testimony by DCFS investigator Lennemann, Ory, and H.H. that unnamed friends and family were scared to be around H.H. because she may make similar allegations against them. Once again, this testimony benefitted the defense theory that H.H.'s claims were not true but fabricated to get back at defendant for the affair and his disciplinary role. See *People v. Valladares*, 2013 IL App (1st) 112010, ¶¶ 86, 90 (allowing in the evidence was a matter of trial strategy because it was beneficial not just to the State's case, but to the defense counsel as well). Likewise, testimony that Aunt Kim accused H.H. of changing her stories supported the defense theory that H.H.'s allegations against defendant were inconsistent and that the only consistent part was H.H.'s recantation letter and trial testimony. Finally, the lack of support for H.H.'s allegations from Aunt Kim and Taets aided the defense theory that the allegations were not true but fabricated, which lent credibility to H.H.'s recantation letter and trial testimony.

¶ 127 B. Improper Vouching

¶ 128 Defense counsel was also deficient for failing to object, defendant argues, during the State's closing argument. Defendant contends that the State improperly vouched for the credibility of two witnesses, DCFS investigator Lennemann and Ory.

¶ 129 It is improper for a prosecutor to vouch for the credibility of a witness because allowing such a practice would give the State an unfair advantage by allowing it to place the integrity of the State's Attorney's office behind the credibility of its witnesses. *People v. Garcia*, 231 Ill. App. 3d 460, 473 (1992). A prosecutor, as the representative of the State, stands in a special relation to the jury. *People v. Schaefer*, 217 Ill. App. 3d 666, 669 (1991). Therefore, he must choose his words carefully, making sure not to place the authority of his office behind the credibility of his witnesses. *Id*. He may express an opinion if it is based on the record but may not state his personal opinion regarding the veracity of a witness or vouch for a witness' credibility. *Id*.

¶ 130 Beginning with DCFS investigator Lennemann, we set forth the context of the statements defendant challenges. During defense counsel's closing argument, he attacked DCFS investigator Lennemann's testimony regarding the May 23, 2012, meeting, which occurred the day after H.H. wrote her letter of recantation. According to DCFS investigator Lennemann, H.H.'s exact words were that she was 70% sure that the incidents were real. At trial, however, H.H. testified that she did not remember saying that she was 70% sure that the incidents were real during that meeting. In fact, H.H. testified that during the meeting, she told them that she "believed" her recantation letter. As a result, defense counsel attacked DCFS investigator Lennemann's testimony of what H.H. conveyed during the May 23 meeting. He argued that H.H. never uttered the words that she was 70% sure that the incidents were real. In response, the

State argued during rebuttal, "even after this recantation, when Janet Lennemann, who is not going to get up on the stand, take an oath and lie to you, but Janet [Lennemann] says I had a conversation with [H.H.] where she said, you know what, yeah, I'm 70% sure."

¶ 131 Turning to Ory, defense counsel argued during closing argument that her testimony was not believable. He did this by highlighting the discrepancy in her written report that H.H. was sitting on the toilet when defendant inserted his fingers in her vagina. According to defense counsel, Ory "conveniently" forgot whether H.H. had actually said that when the incident occurred, even though her report specifically indicated that H.H. had said she was sitting on the toilet. Defense counsel argued that it was no coincidence that Ory, an experienced professional who knew to report the significant facts, made a "mistake" that was devastating to the State's case by forgetting such a key detail of whether H.H. was on the toilet or in the shower. Such a mistake was not likely with Ory's experience, defense counsel argued. To counter defense counsel's attack on Ory, the State argued during rebuttal that Ory "got on the stand" and "took an oath to tell the truth." The State continued, "[t]he defense would like you to believe that she got on that stand and she lied, this professional woman. She is not biased. She might care about [H.H.], but she's not going to get on the stand and lie."

¶ 132 Contrary to defendant's assertion, the prosecutor did not vouch for the credibility of DCFS investiagator Lennemann and Ory with the authority of her position as an assistant state's attorney. Instead, the prosecutor argued that DCFS investigator Lennemann and Ory were telling the truth and not lying, as argued by defense counsel. The statements were fair comments on the evidence and made in direct response to defense counsel's argument that H.H. did not say what DCFS investigator Lennemann claimed she said and that Ory was not a believable witness. See *People v. Emerson*, 122 Ill. 2d 411, 434 (1987) (fair comment on the evidence for the State

to say that "we know" a particular witness "was telling the truth"); see also *People v. Curry*, 2013 IL App (4th) 12074, ¶ 84 (the prosecutor did not express her personal belief in the witness' credibility by questioning why the witness would lie); *People v. Myers*, 246 Ill. App. 3d 542, 547 (1993) (nothing improper about the prosecutor's reference to the officers' experience or their lack of reason to lie). Because the comments challenged by defendant were not improper, defense counsel was not deficient for failing to object.

¶ 133 C. Irrelevant and Prejudicial Testimony

¶ 134 Defendant also argues that defense counsel failed to object to irrelevant and prejudicial testimony throughout the trial. Beginning with Taets, defendant contends that defense counsel was deficient for failing to object to her testimony regarding: (1) her parenting of H.H.; (2) the amount and posting of defendant's bond; (3) whether she was an affectionate person who verbalized her love for H.H.; and (4) H.H.'s counseling sessions.

¶ 135 At the outset, we note that contrary to defendant's assertion, defense counsel did object to the State's question regarding Taets's parenting of H.H. During the State's cross-examination of Taets, the State asked Taets whether H.H. enjoyed not having defendant around because she got to do whatever she wanted, and Taets responded that any kid would like that type of freedom. When the State then said, "[t]his isn't about [H.H.]. This is about your parenting," defense counsel objected, and the court sustained the objection. Thus, defense counsel made the appropriate objection when necessary.

¶ 136 For the remainder of defendant's claims relating to Taets's testimony, it was a matter of defense strategy not to object because much of the evidence was beneficial not just to the State's case but to the defense case as well. See *Valladares*, 2013 IL App (1st) 112010, ¶¶ 86, 90 (allowing in the evidence was a matter of trial strategy because it was beneficial not just to the

State's case, but to the defense counsel as well); *People v. Smith*, 2012 IL App (1st) 102354, ¶ 71 ("Trial counsel's decision to object to testimony is generally a matter of trial strategy that is entitled to great deference and does not amount to ineffective assistance.").

¶ 137 During closing argument, defense counsel argued that despite the State's theory that Taets was not supportive of H.H., H.H. testified that she loved Taets and that Taets was her best friend. In addition, defense counsel pointed out during closing argument that Taets testified that she did support H.H., even taking her to counseling. Thus, defense counsel elicited evidence during the trial that contradicted the State's theory, which he then highlighted during closing argument. Contrary to defendant's assertion, the evidence of counseling benefitted the defense case by showing that Taets did in fact support H.H.

¶ 138 Likewise, defense counsel used the evidence of Taets's posting of defendant's bond to his advantage. During closing argument, defense counsel emphasized the fact that H.H. testified at trial that defendant never touched her inappropriately. He argued that "Laura Taets, [H.H.'s] mother posted [defendant's] bond. What does that tell you?" Defense counsel went on to argue that "here you have the alleged victim and her mother in support of" defendant. "Right now, nobody is saying he did it. How can you convict a man when there is nobody accusing him now?" In other words, defense counsel argued that rather than pressuring H.H. to recant her story, Taets only supported H.H. to tell the truth. The truth, defense counsel argued, was H.H.'s recantation letter and trial testimony, which Taets supported by posting defendant's bond. In other words, the fact that Taets helped post defendant's bond supported the inference that she believed in defendant's innocence, which was a reasonable defense theory.

¶ 139 Defendant also argues that Taets and Aunt Kim improperly testified regarding H.H.'s credibility without objection. See *People v. Kokoraleis*, 132 Ill. 2d 235, 264 (1989) (it is

generally improper to ask a witness whether an adverse witness' testimony is truthful; questions of credibility are to be resolved by the trier of fact). However, as the State points out, the State's questioning was not about H.H.'s credibility *per se*, but about the reaction of Taets and Aunt Kim to H.H.'s allegations. Taets testified that when she first learned of H.H.'s allegations, she had doubts because she thought they stemmed from H.H.'s anger towards defendant over taking things away from her. Likewise, the State questioned Aunt Kim about what she thought about H.H.'s allegations at the CAC interview, to which Aunt Kim responded that she was not sure what to believe; she thought the allegations could be a lie. Taets's and Aunt Kim's doubtful reactions to H.H.'s allegations supported the defense theory that H.H. had fabricated the allegations against defendant after he had once again assumed a disciplinarian role over her.

¶ 140 Finally, defendant argues that defense counsel should have objected to Officer Seegers's testimony that defendant would not call H.H. a liar, because it was especially prejudicial. Officer Seegers testified that when he interviewed defendant, defendant denied ever inappropriately touching H.H. When asked numerous times if defendant was calling H.H. a liar, defendant never responded to the question. Again, this testimony cut both ways. The fact that defendant did not call H.H. a liar when he was questioned by Officer Seegers showed that defendant cared for H.H. despite her allegations. Also, defense counsel clarified this testimony when questioning defendant. Defendant explained that he did not use the word "liar" but said that H.H. was "emotionally disturbed." Thus, Officer Seegers's testimony that defendant refused to call H.H. a liar was consistent with the defense theory that defendant had played a long-term parental role with H.H. and still cared for her deeply. Overall, defense counsel's decision not to object to any of these claimed errors was a matter of trial strategy.

¶ 141 4. Violation of Advocate-Witness Rule

¶ 142 Defendant next argues that defense counsel was deficient for violating the advocate-witness rule. Noting that an attorney shall not act as advocate at a trial in which the attorney is likely to be a necessary witness, defendant argues that defense counsel made himself a fact witness in this case and thereby improperly occupied the dual role of witness and advocate. Had defense counsel not been defendant's advocate at trial, defendant argues that he would "surely have been called as a fact witness to H.H.'s recantation and his testimony would easily have carried more weight" than that of Taets and Aunt Kim.

¶ 143 "The advocate-witness rule precludes an attorney from acting as advocate and witness in the same case." *People v. Koen*, 2014 IL App (1st) 113082, ¶ 39; see Ill. R. Prof. Conduct R. 3.7(a)(3) (eff. Jan. 1, 2010) ("a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless" certain circumstances are present). The advocate-witness rule reflects the inconsistency between the role of an advocate and that of a witness; the function of an advocate is to advance or argue the cause of another, whereas the function of a witness is to objectively state the facts. *People v. Gully*, 243 Ill. App. 3d 853, 859 (1993). The advocate-witness rule is not absolute, however. *Id.*

¶ 144 Although not entirely clear, it appears that defendant is arguing that defense counsel was deficient for not withdrawing and testifying on his behalf. *Cf. People v. Burrows*, 148 Ill. 2d 196, 244, 246-47 (1992) (where the only two witnesses to a witness's recantation statements were the defendant's attorney and that attorney's law partner, meaning they were the only persons who could rebut the witness's testimony that the recantation statements were coercively obtained, the court should have determined whether either one of them should testify on behalf of the defendant, and defense counsel was deficient for failing to withdraw in order to testify).

In any event, we agree with the State that defense counsel was not a "necessary" witness in this case.

¶ 145 In this case, defense counsel was not the sole witness to the meeting on May 20, 2012, in which H.H. recanted her allegations. Taets and Aunt Kim were also present at the meeting and able to testify regarding what transpired. See *Burrows*, 148 Ill. 2d at 247 (citing an out-of-state case for the proposition that an attorney ought not testify where his testimony would have been cumulative). Moreover, H.H. did not write a recantation letter until two days after the meeting, on May 22, 2012, and she wrote it alone in her bedroom. Because defense counsel was not present when the letter was written, his testimony would have been relevant only to the May 20, 2012, meeting itself, in which others were present. Also, the State focused more on the conversations leading up to the May 20 meeting (between Aunt Kim and H.H.) rather than the meeting itself. Therefore, to the extent that defendant argues that defense counsel was deficient for not withdrawing and testifying, this argument is not supported by the record.

¶ 146 In a related argument, defendant claims that defense counsel's behavior was an integral part of the State's "conspiracy theory" that defendant, Aunt Kim, Taets, and defense counsel had orchestrated H.H.'s false recantation. According to defendant, the subject of witness tampering pervaded the trial and prejudiced defendant by fostering an " 'appearance of impropriety' " by defense counsel. To support his argument, defendant points to the following comments by the State during opening and closing arguments.

¶ 147 In the State's opening argument, it argued that H.H. had been subjected "to months and months of endless tampering, tampering by her mother Laura [Taets], tampering by the defendant's sister [Aunt] Kim." The State continued, "[o]ver and over they have asked [H.H.] are you sure you're telling the truth, are you sure this isn't a lie, are you sure this wasn't a

dream." According to the State, "it all culminated in an event at [defense counsel's] office on May 20 of this year where H.H. was corralled in a car with [Aunt] Kim and [Taets] and taken to [defense counsel's] office where she was sat down and they all questioned her repeatedly."

¶ 148 During closing argument, the State argued how Aunt Kim had manipulated H.H. The State commented that Aunt Kim:

> "was having conversations with [H.H.] from the moment the defendant was taken out of the house until [Aunt Kim] brought [H.H.] gift wrapped to [defense counsel's] office, a meeting in which [Aunt] Kim did most of the talking, a meeting in which [H.H.] sat with an unsupportive mother [Taets] and her brother [Bradley] at times in the room, sometimes outside the room and [defense counsel], all people who wanted her to recant. If you write the letter, you won't have to testify. That's what she was told by her Aunt Kim and [defense counsel]."

¶ 149 The State also argued that Taets showed poor judgment by repeatedly meeting with defense counsel. Finally, on rebuttal, the State commented that the jury would receive an instruction saying that it was proper for any attorney to interview a witness for the purpose of learning the testimony the witness would give. "That's not what we had here," the State argued. It argued, "We had the defendant's sister [Aunt Kim] interviewing the witness [H.H.] for the umpteenth time, and this time mom [Taets], and the attorney happened to be in the room, write a letter, and you won't have to testify."

¶ 150 We reject this claim. The State's argument regarding H.H.'s recantation was focused on the aggressive actions of Aunt Kim and the unsupportive posture of Taets; it did not impute any wrongdoing to defense counsel. As previously mentioned, the State's primary focus was on the conversations that led up to the May 20 meeting at defense counsel's office, not defense

counsel's actions. The theory of witness tampering argued by the State pertained to the family pressure exerted by Aunt Kim, Taets, and defendant, not defense counsel. Thus, we disagree that defendant's role in this case "became a cornerstone in the State's theory of guilt."

¶ 151 Finally, defendant relies on *People v. Blue*, 189 Ill. 2d 99 (2000), for the argument that defense counsel improperly attempted to introduce contrary evidence during his cross-examination of H.H. Defendant's reliance on *Blue* is unpersuasive because it involved the wrongdoing of prosecutors, not defense counsel. In *Blue*, multiple errors by the State resulted in the reversal of the defendant's convictions. *Blue*, 189 Ill. 2d at 139. There, the State conceded that the prosecutors made " 'testifying' " objections that rebutted the witness' testimony with their own testimony. *Id*. at 136-37. The court found that the State's objections violated the advocate-witness rule, a rule that was particularly pertinent to *prosecutors* in criminal cases because of the sensitive role they assume as the government's representative in the courtroom. *Id*. at 136. Obviously, the case at bar is nothing like *Blue*, and defendant cites no other case (besides a federal one) in support of his position. Thus, we reject this argument.

¶ 152 5. Defense Counsel's Closing Argument

¶ 153 Defendant next argues that defense counsel was ineffective based on various comments he made during closing argument. Defense counsel's decision to argue a particular defense theory during closing argument is a matter of trial strategy. *People v. Milton*, 354 Ill. App. 3d 283, 289-90 (2002). Defense counsel's choice does not constitute ineffective assistance of counsel simply because the strategy was unsuccessful. *Id*. at 290.

¶ 154 Defendant's first contention of error is that defense counsel was deficient for arguing that reasonable doubt was "a much higher burden than it should be." However, there is no merit to this argument because it was a scrivener's error. The State moved to correct the record with the

court reporter's affidavit, and this court allowed the motion. Pursuant to the court reporter's affidavit, the transcript should read "[i]t's a much higher burden, as it should be," and it has been revised accordingly. Thus, there is nothing improper about this statement.

¶ 155 Defendant next argues that defense counsel was deficient for two comments regarding defendant not being innocent or being a "child molester." In particular, defense counsel argued that even if the jury did not believe that defendant was innocent, if it believed that the State had failed to meet its burden of proof beyond a reasonable doubt, then it had no choice but to return a verdict of not guilty. Defense counsel then argued:

> "it would be improper if a jury member thought I think he might be guilty, I don't know. But unless we find him guilty, we could be letting a child molester out on the street. But that's improper. Anybody can be wrongfully accused. And under that thinking, anybody would be convicted."

¶ 156 There was nothing improper about defense counsel's comments. During closing argument, defense counsel focused much of his argument on the State's burden of proof, and how the jury was required to hold the State to the high burden of proving defendant's guilt beyond a reasonable doubt. This was a reasonable strategy given H.H.'s incriminating statements, her recantation letter, and her trial testimony that was consistent with the recantation letter. Defense counsel accurately argued that no matter what the jury thought about defendant's potential guilt, if the State failed to meet its burden, then it had to find defendant not guilty. Similarly, defense counsel correctly argued that the jury's fear that defendant "might" be guilty or its fear of letting a "child molester out on the street" was not enough to convict defendant. Rather, the only basis for finding defendant guilty was if the State satisfied its burden beyond a reasonable doubt, which was proper argument.

¶ 157 Defendant next challenges defense counsel's comment that "even an ape knows better." Defendant, however, takes this comment out of context. Defense counsel was not calling defendant an "ape," he was refuting the State's theory that defendant's overall intention was to groom H.H. It was a reasonable strategy for defense counsel to argue that defendant's actions were not consistent with someone trying to groom a young girl. As defense counsel argued, if defendant were truly grooming H.H., then he would have given her more privileges or bribed her rather than being such a disciplinarian. Defense counsel argued that it did not "make sense" for defendant to impose "harsh punishment" against H.H. and not "let things slide" if grooming were his real intention; even an "ape knows better." There was nothing improper in pointing out the flaws in the State's theory. *Cf. People v. Daniels*, 331 Ill. App. 3d 380, 393 (2002) (defense counsel's reference to the defendant as a "thug" and "bully" was reasonable trial strategy to distinguish the defendant's admitted offenses from the more serious charged offense).

¶ 158 The final comment challenged by defendant was defense counsel's misstatement at the end of his argument, in which he asked the jury to return a "guilty" verdict. Specifically, defense counsel advised the jury "to look at all the evidence, the reasonable inferences therefrom, and put the State to the task, did they prove beyond a reasonable doubt? And I believe you're going to be coming back with a guilty – a verdict of not guilty. Not guilty. Thank you." Defendant makes much of this misstatement, arguing that the record does not reflect the audible gasp in the courtroom that prompted defense counsel to stand back up and correct himself.

¶ 159 The State asks this court to disregard defendant's claim of an audible gasp in the courtroom, as it is not borne out by the record. We agree and disregard it. See *Rice v. Merchants Nat'l Bank*, 213 Ill. App. 3d 790, 796 (1991) (the reviewing court granted the plaintiff's motion to strike one sentence of the defendant's brief on the basis that it was an

opinion not found in the trial record). Regarding the misstatement itself, we note that it was an isolated and brief mistake that defense counsel immediately corrected twice for the jury. As such, this single incident does not render defense counsel deficient. See *People v. Watson*, 2012 IL App (2d) 091328, ¶ 88.

¶ 160 6. Improper Character Evidence

¶ 161 Defendant next argues that defense counsel was ineffective for seeking to elicit character evidence at trial. The last witness called by defense counsel was Starks, a school bus driver who had worked with defendant. When defense counsel asked Starks about defendant's reputation for truthfulness, the State objected, and a sidebar conference was held. During the sidebar conference, the State argued that veracity was not relevant in a sex abuse case, and the court agreed and sustained the trial court's objection. Defense counsel then excused Starks.

¶ 162 Based on this sequence of events, defendant argues that the jury heard defense counsel ask about defendant's reputation for truthfulness; the State object; and then Starks be excused as a witness. At best, defendant argues that this was confusing to the jury; at worst, it left the impression that defendant was untruthful. Defendant argues that defense counsel was deficient for calling Starks, and "the slightest amount of legal research would have revealed this."

¶ 163 At the outset, we note that the State filed a motion *in limine* to bar defendant from calling character witnesses to testify to *specific acts* of good conduct. At the hearing, the State pointed out that it had received the names of a couple of witnesses but no summaries of their statements. According to the State, if the witnesses were "going to be reputation witnesses," they were not allowed to talk about "specific good acts or a specific act of good conduct" by defendant. The State said that "[i]t would just be the general reputation, specifically dealing with the sex offense that would be admissible." However, "anything other than that" should not be allowed. Defense

counsel replied that he would make sure that the "character witnesses" would not testify regarding "any specific good acts." The court granted the State's motion *in limine*.

¶ 164 Evidence of a defendant's reputation for honesty is admissible when it relates to some issue involved in the crime charged. *People v. Krause*, 241 Ill. App. 3d 394, 401 (1993). In general, a defendant's reputation for truth and veracity is not at issue in a prosecution for criminal sexual abuse. *People v. Petitt*, 245 Ill. App. 3d 132, 148 (1993). However, evidence of good reputation for truth and veracity is permissible when the credibility of the defendant has been attacked by the State. *People v. Reid*, 272 Ill. App. 3d 301, 310 (1995). Evidence of a good reputation for truth and veracity is not admissible simply because a defendant has testified at trial; mere contradiction of the defendant's testimony is not, in itself, sufficient to allow the introduction of supportive reputation testimony. *Krause*, 241 Ill. App. 3d at 401. Such evidence is admissible where the State has presented evidence to show the defendant's bad reputation for veracity or attacked his veracity during cross-examination. *Id.*

¶ 165 During the State's cross-examination of defendant, it questioned defendant regarding recorded conversations with Taets and Aunt Kim. Defendant denied telling Taets that H.H. needed to say that she made up the allegations, and he denied telling Aunt Kim to put the idea that it was a dream in H.H.'s head. While we do not answer the question of whether the State's questioning opened the door to Stark's testimony regarding defendant's reputation, defense counsel was not deficient for seeking to elicit this evidence. See *Clendenin*, 238 Ill. 2d at 319 (defense counsel has the right to make the ultimate decision with respect to matters of tactics and strategy, including what witnesses to call). As stated, the State's motion *in limine* sought to bar only specific good acts and not reputation evidence in general. After the State cross-examined defendant and arguably attacked his veracity, defense counsel called Starks as his next witness to

offer evidence of defendant's reputation for truthfulness. Not only was this a reasonable strategy, defendant's blanket assertion that such reputation evidence is not relevant in a sexual assault case ignores the case law stating that such evidence may become relevant based on the State's cross-examination. Having determined that defense counsel was not deficient, we need not discuss defendant's claim that he suffered prejudice over Stark's inability to testify.

¶ 166 Regarding defendant's argument that defense counsel was "chastised" by the court in terms of his direct examination of Aunt Kim and defendant, we deem this argument forfeited for failure to cite legal authority as required by Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). See *Ford v. Round Barn True Value, Inc.*, 377 Ill. App. 3d 1109, 1115 (2007) (the plaintiff forfeited her argument by failing to cite authority as required by Rule 341(h)(7)).

¶ 167 7. Cumulative Error

¶ 168 Defendant's final argument is that the errors of ineffective assistance of counsel that he alleged, taken collectively, denied him a fair trial and prevented the jury from fairly weighing the evidence and testimony. However, in rejecting every claim of error, a cumulative-error analysis is not necessary. See *People v. Perry*, 224 Ill. 2d 312, 356 (2007).

¶ 169 B. Rape Shield Statute

¶ 170 Defendant's next argument is that the trial court erred by granting the State's motion *in limine* to bar evidence of H.H.'s past sexual conduct under the rape shield statute (725 ILCS 5/115-7 (West 2012)). We review evidentiary rulings for an abuse of discretion. *People v. Santos*, 211 Ill. 2d 395, 401 (2004). An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable man would take the view adopted by the trial court. *Id.*

¶ 171 The rape shield statute absolutely bars evidence of the alleged victim's prior sexual activity or reputation, subject to two exceptions: (1) evidence of past sexual activities with the accused, offered as evidence of consent; and (2) where the admission of such evidence is "constitutionally required to be admitted." 725 ILCS 5/115-7(a) (West 2012); *Santos*, 211 Ill. 2d at 401-02. It is undisputed that the first exception does not apply because H.H. was not old enough to consent. The issue is whether the second exception applies.

¶ 172 In its motion, the State indicated that H.H. had made prior statements about her brother Bradley, also a minor, touching her. According to the State, such evidence was inadmissible because the defense had not disclosed that H.H.'s accusations against Bradley were false.

¶ 173 At the hearing, the State argued that "everyone agrees that Bradley has inappropriately touched [H.H.] in the past. That he's groped her breast. He's grabbed her crotch area." In response, defense counsel agreed that the rape shield statute barred evidence of Bradley groping H.H.'s breast or other sexual contact. However, defense counsel argued that H.H.'s "false allegation" against Bradley about an incident in 2011 was admissible (occurring when H.H. was age 12 and Bradley was age 13). According to defense counsel, H.H. had made a false allegation "when she wanted to get [Bradley] in trouble" that Bradley had forced or pinned her down and tried to put his penis in her mouth and that this occurred in 2011. It was then "months later," defense counsel argued, that H.H. claimed that the above incident "never happened in 2011, but rather it happened when they were like four or five" years old. Defense counsel argued that H.H. claimed that it had just happened to get Bradley in trouble, making it a "false allegation against someone she was mad at just like what we're saying happened here" with defendant. The State countered that even if there was a question as to when the incident occurred, H.H. said it happened, meaning it was not a false allegation.

¶ 174 The court granted the State's motion to bar the evidence, reasoning as follows. H.H. was "saying it happened. It's just a question of when it happened." The court went on to say that even assuming the accusations were false "for purposes of the discussion; that they [were] completely false; she makes false accusations against her brother. Why does that tend to prove that the allegations against [defendant] are false?" According to the court, "Teddy Kennedy cheated on his Spanish exam at Harvard. Does that mean he lied about everything in his life?" The court concluded that H.H.'s prior lies were not relevant to the issues in the case.

¶ 175 Relying on *People v. Grano*, 286 Ill. App. 3d 278 (1996), defendant argues that the trial court erred by excluding this evidence under the rape shield statute. In *Grano*, defense counsel sought to impeach the 17-year-old victim with the testimony of three witnesses who would testify that the victim told them that she had had sex with three other adult men, and three witnesses (the other adult men) who would testify that they never had sex with the victim. *Id*. at 287-88. In other words, defense counsel sought only to introduce evidence of the prior allegedly *false* statements for impeachment purposes; he made no contention that the victim had ever engaged in sexual activity. *Id*. at 288. The State moved to bar this evidence under the rape shield statute, and the trial court granted the State's motion.

¶ 176 On appeal, this court reversed and granted the defendant a new trial based on the trial court's erroneous application of the rape shield statute. *Id*. at 289. This court reasoned that the legislature intended to exclude the "actual sexual history" of the complainant, not "prior accusations" of the complainant. *Id*. Noting that "[l]language or conversation does not constitute sexual activity," this court stated that because there was no contention that the complainant ever engaged in sexual activity, there was no need to invoke the rape shield statute

to prevent the disclosure of the complainant's prior statements accusing others of improper sexual behavior toward her. *Id.*

¶ 177 *Grano* is distinguishable from the instant case in one key respect: in *Grano*, the complainant's allegations of prior sexual activity with other men were false. See *People v. Davis*, 337 Ill. App. 3d 977, 985 (2003) (distinguishing *Grano* on the basis that the defendant in *Grano* presented the court with specific evidence of the *falsity* of the allegations). Here, H.H.'s allegation that Bradley pinned her down and tried to put his penis in her mouth was not false. As the trial court noted, it had occurred; it was just a question of when. Thus, this evidence falls under the actual sexual history of the complainant, which the rape shield statute excludes. See *Grano*, 286 Ill. App. 3d at 288 (the legislature intended to exclude the actual sexual history of the complainant in the rape shield statute).

¶ 178 In a related argument, defendant argues that the trial court "indicated it did not believe" that H.H.'s accusations against Bradley had occurred, making this case similar to *Grano*. We disagree. The court, in ruling that the evidence was barred under the rape shield statute, first noted that H.H. was saying that the incident happened; it was just a matter of when. Therefore, it is not accurate to say that the trial court did not believe that the incident occurred. However, the trial court then offered a second basis for its ruling, stating that even assuming that H.H.'s accusations were false, the evidence was still irrelevant. Regardless of this second rationale for the trial court's ruling, we may affirm on any basis appearing in the record. See *Heinz by Heinz v. McHenry County*, 122 Ill. App. 3d 895, 898 (1984) (regardless of whether the trial court's stated rationale was correct, the reviewing court noted that it could affirm on any basis appearing in the record). Thus, the trial court did not abuse its discretion in excluding this evidence under the rape shield statute.

¶ 179 C. Sufficiency of the Evidence

¶ 180 Defendant's final argument is that the evidence was insufficient to find her guilty, beyond a reasonable doubt, of the offenses. When reviewing a challenge to the sufficiency of the evidence, we consider whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). We will not retry a defendant when considering a sufficiency of the evidence challenge; the trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses. *Id.* at 114-15. A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Id.* at 115.

¶ 181 In support of his argument, defendant points to the following evidence: (1) H.H.'s recantation letter, trial testimony, and explanation that she falsely accused defendant because she was angry with him and because she confused dreams with reality; (2) Ory's admission that she had surmised details and filled in some blanks when taking H.H.'s initial outcry statement; (3) inconsistencies between H.H.'s initial outcry statement to Ory and the CAC interview the next day; and (4) the inconclusive medical evidence.

¶ 182 The evidence was sufficient to prove defendant's guilt on all of the offenses. Essentially, the State separated the incidents into the bathtub incident and two shower incidents. H.H. told Ory about the bathtub incident, in which defendant drew a bath and washed her body, and one of the shower incidents, in which defendant put his fingers "in her" and moved them around. During the CAC interview, which this court reviewed, H.H. then provided a detailed account of the bathtub incident and the two shower incidents. With respect to the bathtub incident, H.H.

said that defendant washed her body, including her breasts, and then put lotion on her body, including her breasts. For the first shower incident, which occurred sometime in September 2011, defendant touched and rubbed her vagina. For the second shower incident, which occurred sometime between October 1 and October 27, 2011, defendant inserted his fingers in her vagina three times.

¶ 183 While defendant argues that there were a number of inconsistencies between H.H.'s initial outcry to Ory and the CAC interview the next day, it was up to the jury to view any discrepancies as inconsistencies or mere elaborations on her initial statements to Ory. Also, to Ory and Thompson, as well as during the CAC interview, H.H. consistently maintained that the shower incidents occurred while she was having her period. Consistent with the CAC interview, nurse practitioner Thompson testified that during her examination of H.H., H.H. relayed that defendant had put his finger inside of her, sometimes partially and sometimes all the way, and that he had touched or rubbed her vagina.

¶ 184 Turning to the medical evidence, Thompson's exam revealed a partial hymenal cleft or tear which was consistent with insertion of an object or sexual abuse. H.H. told Thompson that although she tried to use tampons, they hurt, so she did not insert them. Though defendant deems Thompson's opinion as inconclusive, Thompson was specifically asked whether H.H.'s injury was caused by the use of a tampon. Thompson responded "probably not" because H.H. had said that she tried to use a tampon but that it hurt. According to Thompson, it was "unlikely" that the hymenal cleft was caused by a tampon, but "anything" was "possible." Still, Thompson opined that the tear was caused by sexual abuse.

¶ 185 Defendant is correct that H.H. recanted her allegations against defendant and testified consistently with her recantation at trial. As a result, the jury was presented with two opposing

views as to the veracity of the allegations by H.H. herself. However, the jury heard evidence that both Taets and Aunt Kim had doubts about H.H.'s allegations. Shortly after H.H. wrote the recantation letter, she met with DCFS investigator Lennemann, who testified that H.H. relayed that defendant's friends and family blamed her for putting defendant in jail and accused her of lying. Overall, it was reasonable for the jury to believe the State's theory that H.H. recanted due to family pressure and because she did not want to testify.

¶ 186 Based on the testimony of Ory and DCFS investigator Lennemann, the CAC interview, and Thompson's medical exam, there was sufficient evidence to find defendant guilty of the offenses beyond a reasonable doubt.

¶ 187 III. CONCLUSION

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

¶ 189 Affirmed.