2013 IL App (4th) 120370-U

NO. 4-12-0370

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 24, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
ROBERT C. CRAIG,	)	No. 10CF33
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Glenn,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant's arguments with regard to the admission of the child victim's hearsay statements, the alleged indoctrination of the jury by the State, and the trial court's failure to instruct the jury pursuant to section 115-10(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10(c) (West 2008)) were forfeited and defendant failed to establish plain error.

(2) It was not necessary for the trial court to appoint separate counsel on defendant's *pro se* claims of ineffective assistance of counsel as defendant's claims had no possible merit and related to matters of trial strategy.

¶ 2 In September 2011, a jury convicted defendant, Robert C. Craig, of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)). In April 2012, the trial court sentenced defendant to 42 years in the Department of Corrections (DOC), followed by a 7-year term of mandatory supervised release (MSR).

¶ 3 Defendant appeals, arguing the following: (1) the trial court erred in admitting

five out-of-court statements made by the child-complainant; (2) defendant was denied a fair trial because the court failed to (a) stop the State's efforts to indoctrinate the jury and argue its theory of the case during *voir dire* and (b) properly instruct the jury on how to evaluate the credibility of the child-complainant's out-of-court statements; and (3) the court erred by failing to appoint new counsel for a full inquiry into defendant's posttrial allegations of ineffective assistance of counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On January 22, 2010, the State charged defendant by information with one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)), alleging defendant placed his penis in D.A.'s (born February 28, 2003) mouth. On September 1, 2011, the State filed a motion *in limine* to admit pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2008)) statements made by D.A. to Tina Best (school social worker), Ryan Reardon (formerly Ryan West), Officer Jonathan Seiler (Mattoon police department), and Jaime A. (D.A.'s mother).

¶ 6 In September 2011, the trial court held a hearing on the State's motion *in limine*. Ryan Reardon, a friend of Jaime A., testified she occasionally babysat D.A. In January 2010, she was babysitting D.A. at her house, and D.A. kept placing a toy car in his mouth. She told him not to put the car in his mouth several times. When he placed the car in his mouth again, Reardon said: "The car is mine [D.A.,] give it here. We don't put things in our mouth." D.A. responded, "Well, Pa Pa puts his pee pee in my mouth and it spits, ha ha ha." D.A. called defendant Pa Pa.

¶ 7 When Jaime A. and defendant arrived, Reardon told Jaime A. about D.A.'s

statements. Jaime A. spoke with D.A. alone in Reardon's room. When Jaime A. and D.A. came out of her room, Jaime A. said, "[D.A.] just said it because he is mad at Grandpa." Reardon testified Jaime A. made D.A. apologize to defendant and give him a hug. Reardon testified her son, who was 11 at the time of the hearing, was in the room working on the computer when D.A. made the statement.

¶ 8 Tina Best, a school social worker at D.A.'s elementary school, testified she received information regarding possible child abuse on January 10 or 11, 2010. Best testified Reardon's son, a student at the elementary school, told his teacher about the statements D.A. made to Reardon. Best called Reardon to get more information and encouraged Reardon to call the Department of Children and Family Services (DCFS) Hotline and report what D.A. said.

¶ 9 Best also testified she met with D.A. on the morning of January 11, 2010. She asked D.A. to tell her what he told Reardon. D.A. replied, "Pa Pa puts his pee pee in my mouth." She asked where this happened, and D.A. responded, "at his house." Best asked D.A. what happened next, and D.A. said, "He pees, awwwk." When Best asked D.A. if Pa Pa did anything else, D.A. said, "He puts his pee pee in my butt, too." Best questioned D.A. how that felt, and D.A. responded, "Gross." Best stopped at that point because her job is not to do the investigation. She reported D.A.'s allegations to DCFS.

¶ 10 Detective Jonathan Seiler of the Mattoon police department testified he received information about D.A.'s allegations through DCFS and spoke briefly to Tina Best about her conversation with D.A. He conducted an audio/video recorded interview with D.A. at the Mattoon police department on January 11, 2010. In the interview, D.A. said defendant put defendant's penis in D.A.'s mouth and in his "butt." D.A. said this happened at the "new

apartment" in Mattoon. D.A. told Seiler defendant's penis spit when it was in his mouth.

¶ 11 Jaime A., D.A.'s mother, testified she and her husband Albert, her son D.A., their son W.A., and defendant lived together in January 2010. D.A. sometimes slept with defendant. D.A. called defendant "Pa Pa." On January 10 or 11, 2010, Reardon told Jaime A. about D.A.'s allegations of sexual abuse. D.A. then repeated the statements to Jaime A. at Reardon's home. D.A. told her this happened at defendant's home on Champaign Avenue in Mattoon. She asked D.A. whether what he was saying was true or if he was mad at defendant. D.A. told her he was just mad at defendant.

¶ 12 In ruling on the motion, after watching D.A.'s recorded interview, the trial court noted D.A. was a six-year-old child with possible learning disabilities or cognitive delay, but, as Best testified, D.A. was not low-functioning. However, the court found D.A. had difficulty communicating and staying focused. The court found D.A. appeared competent on the video.

¶ 13 In addressing the factors the trial court needed to consider with regard to D.A.'s statements, the court found D.A.'s statements were spontaneous and consistently repeated. The court also found D.A.'s statements were not prompted and described acts a child would not make up. Further, the court stated:

> "In other words, I don't—I don't believe this is something that the minor child would just make up and say, based on the terminology that he used.
>
> There is some discussion from the very beginning, the statement that he made to Ms. [Reardon], when the minor's mother became involved, that possibly he said something because he was

mad at [defendant], but that really wasn't—that really wasn't developed. That was actually something that was suggested and prompted by another person. The mother saying 'Are you just mad at your grandfather?' That was a prompted response.

The comments by the minor, however, of the alleged sexual abuse were not prompted. And as I take everything together, it would be a little difficult if it was—if I was taking it one at a time.

But when I look at what Ms. Reardon says, and what the mother says, and what Ms. Best says, and then what Mr.—Officer Seiler and the tape says, putting it all together, it is consistent enough and it flows well enough together that I think that the time, content and circumstances do provide sufficient safeguards of reliability to allow a finder of fact to weigh the credibility."

The court then allowed the State's motion in *limine* over defendant's objection and found the statements D.A. made in January 2010 to Tina Best, Ryan Reardon, Detective Seiler, and Jaime A. all fell within the hearsay exception found in section 115-10 of the Code (725 ILCS 5/115-10 (West 2008)).

¶ 14 At the trial, Reardon's trial testimony on direct examination was consistent with the testimony she provided at the section 115-10 hearing. On cross-examination, Reardon testified she had daily contact with defendant and Jaime A. When asked if anything seemed "out of order" when defendant and Jaime A. came to visit her, Reardon testified: "At times. It was a messed-up situation because [defendant] and Jaime was [*sic*] having an affair, and there was just

things that wasn't right between [defendant] and [D.A.], in my opinion ***." Tina Best's trial testimony on direct examination was also consistent with her testimony at the section 115-10 hearing.

¶ 15 Jaime A. testified at trial she had been in a sexual relationship with defendant from 2005 until January 11, 2010, which was the day after D.A. first made the sexual abuse allegation to Ryan Reardon. Her testimony was also consistent with her testimony at the section 115-10 hearing. However, she also testified she went into the other room at Reardon's residence and began yelling at defendant after D.A. told her what defendant had done. She then went back and talked to D.A. and asked him if what he was saying was true or if he was just mad at defendant. D.A. said he was just mad at defendant.

¶ 16 D.A. testified he was 8 years old at the time of the trial. D.A. identified defendant in court. He testified defendant put his private in D.A.'s mouth and in D.A.'s privates.

¶ 17 The State next called Noelle Cope, a nurse practioner in pediatrics at Sarah Bush Lincoln Health System. She testified she performed all of the sexual abuse exams for the seven-county area in addition to her regular duties. On or about January 20, 2010, Cope received a report about and examined D.A. D.A.'s appointment for an examination was made by the Children's Advocacy Center. Prior to D.A. arriving for his appointment, Cope knew about allegations of anal penetration and oral sex. She also knew D.A. was six, took several different medications for attention-span issues, and had some developmental delays.

¶ 18 Cope testified her time with children who have alleged sexual abuse begins with a lot of questions for the child. According to Cope:

"I usually let them know that I'm going to be writing the

whole time that I'm talking to them, because what I do when I'm asking the questions, for me it's more of a medical interview. It's not the same as a forensic interview that law enforcement and DCFS does. My questions are really more generated to my medical portion of the examination and what I need to know about what happens so I can examine their bodies appropriately and make sure I'm looking in the right places."

During this portion of the appointment, D.A. told Cope the following: defendant put D.A.'s penis in defendant's mouth; defendant put his penis between D.A.'s buttocks and tried to put his penis in D.A.'s anus; and defendant put his penis in D.A.'s mouth and "peed into his mouth." D.A. told Cope defendant told him "no telling" about the sexual abuse.

¶ 19 Cope testified she then performed the physical examination of D.A. Cope testified she found no physical evidence to support D.A.'s allegations. However, she testified that did not mean nothing happened. According to Cope:

"Honestly, the most important part of the medical examination is the interview portion of it. Because there's such a high percentage of normal examinations, really what information you get from the child, the details they're able to provide, the consistency of what they're telling you is really more important even than the physical examination portion."

¶ 20 The State next called Detective Seiler. Seiler's testimony with regard to D.A.'s allegations of sexual abuse was consistent with the testimony Seiler provided at the section 115-

10 hearing, with one exception. Seiler did not remember D.A. stating anything came out of defendant's penis. Seiler testified his interview with D.A. was recorded. The video was played for the jury.

¶ 21 Seiler also testified he interviewed defendant on January 11 after Seiler had interviewed D.A. and other witnesses. Upon request, defendant came to the police station freely and voluntarily for an interview. After speaking with defendant for an extended period of time, defendant's statement was memorialized on an audio recording. Defendant denied anally penetrating D.A. However, defendant said in the spring or summer of 2009 he woke from an erotic dream and found D.A. had his mouth on defendant's erect penis. Defendant's recorded statement was played for the jury. Defendant told Seiler he did not initiate D.A.'s actions and immediately told D.A. to stop it when defendant realized what was going on. Defendant said he did not tell D.A.'s mother or father about what D.A. did to protect D.A. At the end of the interview, Seiler placed defendant under arrest.

¶ 22 Defendant called no witnesses to testify on his behalf. The jury found him guilty of predatory criminal sexual assault.

¶ 23 On November 16, 2011, at the beginning of defendant's scheduled sentencing hearing, the trial court noted it had reviewed a statement from defendant attached to the presentence investigation report and asked the parties whether the court needed to conduct a hearing with regard to defendant's allegations of ineffective assistance of counsel. Defense counsel told the court he believed it would be appropriate for the court to question defendant about his allegations regarding his trial attorney's effectiveness.

¶ 24 At that point, the trial court swore defendant to testify and asked him to identify in

what ways defendant believed his trial counsel was ineffective. (Those claims are examined below in section D.) After the court allowed defendant to explain why he thought his trial counsel was ineffective, the court then allowed the State to question defendant about his claims. The State's questions were limited to defendant's knowledge of the rules of evidence and criminal procedure. The court then allowed defense counsel to give his version of events. After hearing from both defendant and defense counsel, the court allowed both defense counsel and the State to argue why none of defendant's arguments rose to the level of ineffective assistance of counsel.

¶ 25 The trial court found defense counsel's representation did not fall below an objective standard of reasonableness, noting trial counsel made reasonable decisions about the admissibility of evidence and the items defendant complained of would not have enhanced his defense, and defendant suffered no prejudice by his counsel's decision not to place certain information before the jury.

¶ 26 The trial court sentenced defendant to 42 years in the DOC with 7 years of MSR. On December 14, 2011, defendant filed a motion for a new trial and/or arrest of judgment and/or reduction of sentence. On February 29, 2012, another motion to reduce sentence was filed. On April 18, 2012, the court denied these motions.

¶ 27 This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 Defendant makes the following arguments on appeal: (1) the trial court erred with regard to allowing D.A.'s out-of-court statements because (a) several of the statements did not meet the requirements of section 115-10 of the Code (725 ILCS 5/115-10 (West 2010)) and (b) admission of D.A.'s statements to five different witnesses was cumulative, prejudicial, and

beyond the intended scope of section 115-10; (2) defendant was denied a fair trial because the court failed to (a) stop the State's efforts to indoctrinate the jury and argue its theory of the case during *voir dire* and (b) properly instruct the jury on evaluating the credibility of D.A.'s out-of-court statements; and (3) the court erred by failing to appoint new counsel for a full inquiry into defendant's posttrial allegations of ineffective assistance of counsel. Defendant concedes he did not preserve the arguments he raises with regard to section 115-10 of the Code, the State's "indoctrination" of the jury, and the court's failure to instruct the jury regarding the need to assess the credibility of D.A.'s statements admitted pursuant to section 115-10 of the Code. However, defendant argues this court should review these issues under the plain-error rule.

¶ 30 "To obtain relief under [the plain-error doctrine], a defendant must first show that a clear or obvious error occurred." *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). After showing a clear or obvious error occurred, a defendant must then show "either (1) the evidence was so closely balanced that the plain error alone severely threatened to tip the scales of justice against the defendant or (2) the plain error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Hillsman*, 362 Ill. App. 3d 623, 638, 839 N.E.2d 1116, 1129-30 (2005). Defendant bears the burden of persuasion under both prongs of the plain-error doctrine. *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187.

¶ 31 The evidence in this case was not closely balanced. Even if the trial court had prohibited Best, Jaime A., or Cope from testifying to D.A.'s out-of-court statements because their testimony was cumulative, the jury still would have heard and seen D.A. testify defendant put his private in D.A.'s mouth and privates, Reardon testify about D.A.'s spontaneous declaration with

regard to the alleged abuse, and Detective Seiler testify with regard to what both D.A. and defendant told him. (Defendant does not raise any argument D.A.'s interview with Seiler or his statements to Reardon failed to meet the requirements of section 115-10.) The jury would have also seen the video of Seiler's interview with D.A. and heard Seiler's interview with defendant. As a result, any unpreserved error would be reviewable only if defendant can establish the error was of "such magnitude that the accused [was] denied the right to a fair trial and remedying the error is necessary to preserve the integrity of the judicial process." *People v. Johnson*, 208 Ill. 2d 53, 64, 803 N.E.2d 405, 412 (2003).

¶ 32 A. Child-Hearsay Exception

¶ 33 We first address defendant's arguments with regard to D.A.'s allegations of defendant's sexual abuse. Defendant makes several different arguments. We again note defendant concedes these issues were not preserved in the trial court.

¶ 34 First, defendant argues D.A.'s statements to Tina Best and Jaime A. were not covered by the hearsay exception found in section 115-10 of the Code (725 ILCS 5/115-10 (West 2008)) because D.A.'s statements were not complaints. Instead, according to defendant, D.A.'s statements to Best and Jaime A. were simply responses to requests to repeat what he had already said. Even assuming defendant's characterization of D.A.'s statements is correct, defendant fails to provide this court with any authority to support his claim section 115-10 is inapplicable to these statements.

¶ 35 This court is not a depository for a party to dump the burden of argument and research. *People v. O'Malley*, 356 Ill. App. 3d 1038, 1046, 828 N.E.2d 376, 384 (2005). As a result, we find this argument forfeited pursuant to Illinois Supreme Court Rule 341(h)(7) (Ill. S.

Ct. R. 341(h)(7) (eff. Feb. 6, 2013)).

¶ 36 Defendant also argues the trial court erred in allowing nurse practitioner Cope to testify before determining D.A.'s statement to her was reliable outside the presence of the jury pursuant to section 115-10 of the Code (725 ILCS 5/115-10 (West 2008)). However, defendant acknowledges the State did not offer her testimony pursuant to section 115-10. Defendant did not object to her testimony at trial so the State had no need to provide a theory for the admissibility of this testimony. Defendant contends the State introduced these statements pursuant to a hearsay exception for statements made for purposes of medical treatment. See Ill. R. Evid. 803(4)(A) ("Statements made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment but, subject to Rule 703, not including statements made to a health care provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial" are not excluded by the hearsay rule); 725 ILCS 5/115-13 (West 2008) ("statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule" in prosecutions for certain offenses).

¶ 37 Defendant argues Cope was not providing medical care when these statements were made but was simply acting as a forensic investigator for the State. However, we disagree with defendant's characterization of Cope's time with D.A. While Cope had received training

through the Illinois Attorney General's Office and other organizations on how to conduct interviews with children who may have been victims of sexual abuse, Cope testified her examinations begin with a lot of questions. According to Cope:

> "I usually let them know that I'm going to be writing the whole time that I'm talking to them, because what I do when I'm asking the questions, for me it's more of a medical interview. It's not the same as a forensic interview that law enforcement and DCFS does. My questions are really more generated to my medical portion of the examination and what I need to know about what happens so I can examine their bodies appropriately and make sure I'm looking in the right places."

During this portion of the examination, D.A. told Cope the following: defendant put D.A.'s penis in defendant's mouth; defendant put his penis between D.A.'s buttocks and tried to put his penis in D.A.'s anus; and defendant put his penis in D.A.'s mouth and "peed into his mouth." D.A. told Cope defendant told him "no telling" about the sexual abuse.

¶ 38 Defendant argues D.A.'s identification of defendant as his abuser and statements about the location where the alleged acts occurred were in no way related to medical diagnosis or treatment and were inadmissible pursuant to section 115-13. While this argument may have some validity, defendant's failure to object denied the trial court the opportunity to limit the scope of Cope's testimony pursuant to section 115-13. Theoretically, the court might have agreed portions of Cope's testimony were inadmissible under section 115-13. Thereafter, though, the State could have asked for the court to conduct a hearing outside the presence of the jury

pursuant to section 115-10 to determine the reliability of D.A.'s statements. Considering D.A.'s statements to Cope were consistent with his statements to Reardon, Jaime A., Best, and Seiler, the court likely would have found the statements admissible under section 115-10 of the Code.

¶ 39 Further, Cope's testimony was cumulative to testimony the jury heard from D.A. and other witnesses. D.A. testified in open court defendant placed his penis in D.A.'s mouth and privates. The jury also heard audio of defendant telling Seiler he woke up from an erotic dream and found D.A. had his mouth on defendant's erect penis. The jury also heard D.A.'s statements to Reardon and Seiler about defendant's sexual abuse. [As we noted earlier, defendant does not argue Reardon and Seiler's testimony was not admissible pursuant to section 115-10]. As a result, even if defendant had objected to Cope's testimony and defendant could establish the trial court erred in allowing Cope's testimony, the error would be harmless based on the record in this case. See *People v. Davis*, 337 Ill. App. 3d 977, 990, 787 N.E.2d 212, 223 (2003) (error resulting from the admission of hearsay testimony was harmless because it "was cumulative and corroborated by substantial other evidence").

¶ 40 Finally, defendant argues, even assuming the trial court did not err in allowing the testimony of Reardon, Jaime A., Best, Cope, and Seiler with regard to D.A.'s hearsay statements, the admission of all of their testimony was prejudicial and cumulative and far exceeded the intended scope of the hearsay exception. Defendant concedes section 115-10 of the Code does not include an explicit limit on the number of hearsay statements that may be allowed. However, defendant argues the cumulative nature of the evidence regarding D.A.'s statements was more prejudicial than probative.

¶ 41 We first note the decision whether to admit cumulative evidence rests within the

sound discretion of the trial court, and this court will not interfere with the trial court's exercise of its discretion absent a showing of abuse prejudicial to defendant. *People v. Brown*, 319 Ill. App. 3d 89, 95, 745 N.E.2d 173, 180 (2001). The trial court did not err by allowing these witnesses to testify. Illinois courts have held section 115-10 contains no express limit on the number of witnesses who may testify, and thus have found no error when multiple statements are admitted. See *People v. Moss*, 275 Ill. App. 3d 748, 756, 656 N.E.2d 193, 199 (1995); *People v. Lofton*, 303 Ill. App. 3d 501, 508, 708 N.E.2d 569, 574 (1999); *People v. Branch*, 158 Ill. App. 3d 338, 340, 511 N.E.2d 872, 873 (1987), *People v. Greenwood*, 2012 IL App (1st) 100566, ¶¶ 31-32, 971 N.E.2d 1116.

¶ 42 B. *Voir Dire*

¶ 43 Defendant next argues the trial court erred by allowing the State to ask certain questions during *voir dire*. Defendant concedes he forfeited this argument. The goal of *voir dire* is to select an impartial jury. *People v. Bowel*, 111 Ill. 2d 58, 64, 488 N.E.2d 995, 998 (1986). *Voir dire "*is not to be used as a means of indoctrinating a jury, or impaneling a jury with a particular predisposition." *Bowel*, 111 Ill. 2d at 64, 488 N.E.2d at 998. As a result, specific questions tailored to the facts in the case to be heard are not allowed in *voir dire*. *People v. Mapp*, 283 Ill. App. 3d 979, 986-90, 670 N.E.2d 852, 857-60 (1996). According to our supreme court:

> "*[V]oir dire* questions, whether asked by the trial court or by the parties with the sanction of the court, must not be 'a means of indoctrinating a jury, or impaneling a jury with a particular predisposition.' [Citation.] Rather than a bright-line rule, this is a

> continuum. Broad questions are generally permissible. For example, the State may ask potential jurors whether they would be disinclined to convict a defendant based on circumstantial evidence. [Citation.] Specific questions tailored to the facts of the case and intended to serve as 'preliminary final argument' ([citation]) are generally impermissible." *People v. Rinehart*, 2012 IL 111719, ¶ 17, 962 N.E.2d 444.

We use an abuse-of-discretion standard when reviewing a court's decisions with regard to questions asked during *voir dire*. *Rinehart*, 2012 IL 111719, ¶ 16, 962 N.E.2d 444.

¶ 44 Although defendant did not object at trial, defendant takes issue with the following line of questioning by the State to the first panel of potential jurors during *voir dire*:

> "[STATE]: I can address all of you with this, too: In all of our everyday lives, we find ourselves in situations where we need to judge the credibility of what people are saying.
>
> Do any of you feel any differently about that situation if the person is a child with respect to their credibility?
>
> ***
>
> If a child were to testify in this case, as we do expect a child to testify, and that child does not act in a—or behave in a manner that you might expect that child to behave in, would you make any assumptions about whether that child was telling the truth or not based upon their behavior on the stand?

***

If a child takes the stand in this case, and it's likely that the child will take the stand in this case, if their behavior while they're testifying is other than what you might expect, would that affect whether or not you believe that child?

***

Would any of you automatically believe an adult over a child?

***

Do you agree with this principle that it is human and even expected that when a person tells or describes an event that in success [*sic*] of tellings of that event they might vary some of the details or it may be slightly different with each telling? Is that something that you would agree that any of us might do? Would anybody disagree with that notion?

***

Would all of you agree that discussing the intimate details of a humiliating act such as a sex crime—that that telling of the story might be more traumatic or more traumatizing to the victim than the actual act was? Is that something that you would generally agree would be possible at least? Would anybody disagree with that notion?

***

Have any of you ever been the person that someone has come to to disclose sexual abuse? ***"

The State asked similar questions to the second panel of prospective jurors.

¶ 45 The trial court did not abuse its discretion in allowing the State to ask these questions, especially since defendant did not object at the time. Defendant's reliance on *People v. Boston*, 383 Ill. App. 3d 352, 893 N.E.2d 677 (2008), and *People v. Bell*, 152 Ill. App. 3d 1007, 505 N.E.2d 365 (1987), is misplaced. Unlike in those cases, the questions at issue in this case did not highlight specific facts in the case. Further, the State was not asking the prospective jurors to prejudge the facts in this case.

¶ 46 C. Failure To Give Credibility Instruction Pursuant to Section 115-10

¶ 47 Defendant next argues the trial court erred by allowing witnesses to offer testimony as to D.A.'s out-of-court statements pursuant to section 115-10 of the Code (725 ILCS 5/115-10 (West 2010)) but not instructing jurors on how to assess the credibility of those statements. Section 115-10(c) states:

> "If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child *** [and] the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." 725 ILCS 5/115-10(c) (West 2010).

Illinois Pattern Jury Instruction No. 11.66 addresses this statutory requirement, stating as follows:

> "You have before you evidence that ____ made [(a statement) (statements)] concerning [(an) (the)] offense[s] charged in this case. It is for you to determine [whether the statement[s] [(was) (were)] made, and, if so,] what weight should be given to the statement[s]. In making that determination, you should consider the age and maturity of ____, the nature of the statement[s], [and] the circumstances under which [(a) (the)] statement[s] [(was) (were)] made [, and ____]." Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. 2000).

Defendant concedes this argument was not preserved in the trial court and is forfeited on appeal. However, once again, defendant argues we should review the error pursuant to the plain-error doctrine.

¶ 48 The State concedes the trial court erred by not giving this instruction pursuant to section 115-10(c) of the Code (725 ILCS 5/115-10(c) (West 2008)). However, the State argues this error was harmless and does not amount to plain error. We agree. The jury was given the following instruction:

> "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, [his age,] his memory, his manner while testifying, any interest, bias, or

prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case." See Ill. Pattern Jury Instruction, Criminal, 1.02 (4th ed. 2000).

¶ 49 Defendant argues the failure to provide an instruction as required by section 115-10(c) is not cured by other more general credibility instructions a jury receives because instructing a jury on how to assess the credibility of a witness is not the same as instructing the jury on how to assess the credibility of a statement. However, in *People v. Sargent*, 239 Ill. 2d 166, 940 N.E.2d 1045 (2010), a case where the jury was not given the instruction as required by section 115-10(c), our supreme court stated:

> "The function of jury instructions is to convey to the jurors the law that applies to the facts so they can reach a correct conclusion. The erroneous omission of a jury instruction rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial. [Citation.] This standard is a difficult one to meet." *Sargent*, 239 Ill. 2d at 191, 940 N.E.2d at 1059.

The supreme court went on to state the absence of the instruction did not severely threaten the fairness of defendant's trial in that case, noting the jury was given Illinois Pattern Jury Instruction, Criminal, No. 1.02, which, as indicated above, was given in this case. The court stated:

> "While the language in these two instructions differs, they

> convey similar principles regarding the jury's role in assessing witness credibility and the various criteria jurors may consider when making that assessment. Under similar circumstances, where instructions based on Illinois Pattern Jury Instructions, Criminal, No. 1.02, have been given to the jury, our appellate court has held the failure to also tender an instruction based on Illinois Pattern Jury Instructions, Criminal, No. 11.66, was actually harmless and not even subject to the plain-error rule." *Sargent*, 239 Ill. 2d at 192-93, 940 N.E.2d at 1060.

The supreme court then cited this court's decision in *People v. Booker*, 224 Ill. App. 3d 542, 585 N.E.2d 1274 (1992). In *Booker*, this court found "[a]lthough the specific instruction required by section 115-10(c) of the Code was not given, the error was harmless and not subject to the plain[-]error rule because the defendant was not denied any substantial right." *Booker*, 224 Ill. App. 3d at 556, 585 N.E.2d at 1284. The same is true in this case. D.A. testified, the jury was able to judge his credibility, and the jury was instructed with basically the same principles required under section 115-10(c). The court's failure to give this instruction did not deny defendant a fair trial.

¶ 50 D. *Krankel* Claim

¶ 51 Defendant next argues the trial court erred by (1) failing to conduct a proper inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), after defendant raised posttrial claims of ineffective assistance of counsel; and (2) not appointing defendant separate counsel for purposes of litigating his claims of ineffectiveness. According to

defendant's brief:

> "After the jury returned its verdict, but before the matter proceeded to sentencing, Craig filed a letter with the court in which he alleged trial counsel was ineffective for failing to present evidence and arguments that Craig claimed would have proved his innocence. Craig maintained, among other things: that trial counsel was ineffective for failing to present evidence that Craig could not have left Jaime alone long enough to commit the offenses due to her high-risk pregnancy; that two witnesses were prepared to testify that D.A. had been caught lying before; that Reardon's 11-year-old son accessed pornography and D.A. could have learned of the acts he alleged from him; and that counsel failed to argue that Craig was not the abuser because D.A. described the perpetrator as 'brown', while Craig is Caucasian."

Defendant argues the court erred in ruling on the ultimate question of counsel's effectiveness without appointing other counsel to litigate the claims of ineffectiveness.

¶ 52 The proper scope of a preliminary investigatory hearing to determine whether to appoint defendant new counsel is a question of law we review *de novo*. *People v Moore*, 207 Ill. 2d 68, 75, 797 N.E.2d 631, 636 (2003). During the preliminary investigation the State should not be allowed to participate in an adversarial manner or to argue against the appointment of separate counsel for the defendant. *People v. Jolly*, 2013 IL App (4th) 120981, ¶ 62; *People v. Fields*, 2013 IL App (2d) 120945**,** ¶ 40, 997 N.E.2d 791. If the trial court erred in the manner it

conducted the hearing, the error can be harmless beyond a reasonable doubt. *People v. Nitz*, 143 Ill. 2d 82, 135, 572 N.E.2d 895, 919 (1991).

¶ 53 Our supreme court has stated *Krankel* did not establish a *per se* rule a defendant is entitled to a new attorney every time he presents a *pro se* motion for a new trial alleging ineffective assistance of counsel. *Nitz*, 143 Ill. 2d at 134, 572 N.E.2d at 919. Instead, " 'the trial court should examine the factual matters underlying the defendant's claim[.] *** [I]f the claim lacks merit or pertains to matters of trial strategy, then no new counsel need be appointed.' " *Nitz*, 143 Ill. 2d at 134, 572 N.E.2d at 919 (quoting *People v. Washington*, 184 Ill. App. 3d 703, 711, 540 N.E.2d 1014, 1019 (1989); *Moore*, 207 Ill. 2d at 77-78, 797 N.E.2d at 637). "A claim lacks merit if it is ' "conclusory, misleading, or legally immaterial" or do[es] "not bring to the trial court's attention a colorable claim of ineffective assistance of counsel." ' " *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 22, 960 N.E.2d 27 (quoting *People v. Burks*, 343 Ill. App. 3d 765, 774, 799 N.E.2d 745, 753 (2003)). However, if a defendant's factual allegations " 'show possible neglect of the case *** new counsel [should] be appointed.' " *Nitz*, 143 Ill. 2d at 134, 572 N.E.2d at 919 (quoting *Washington*, 184 Ill. App. 3d at 711, 540 N.E.2d at 1019).

¶ 54 A trial court should ordinarily conduct a preliminary investigation before proceeding to a full evidentiary hearing on the merits (*People v. Cabrales*, 325 Ill. App. 3d 1, 5, 756 N.E.2d 461, 464-65 (2001)). During the preliminary investigation, the State should not be allowed to participate in an adversarial manner or to argue against the appointment of separate counsel for defendant to litigate the ineffective assistance of counsel claims. *Jolly*, 2013 IL App (4th) 120981, ¶ 62; *Fields*, 2013 IL App (2d) 120945**,** ¶ 40. The court can speak with defendant, defense counsel, or rely on its own knowledge and the record in the case. *People v. Peacock*, 359

Ill. App. 3d 326, 339, 833 N.E.2d 396, 407 (2005); *Jolly*, 2013 IL App (4th) 120981, ¶ 50. If the court determines the claims reveal no possible neglect of the case, the court need not appoint new counsel for an evidentiary hearing. *People v. Robinson*, 157 Ill. 2d 68, 86, 623 N.E.2d 352, 361 (1993). If the defendant's claims have any potential merit, the court must appoint counsel to represent the defendant in an adversarial hearing. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637.

¶ 55 In this type of case, when considering the trial court's review of a defendant's *pro se* allegations of ineffective assistance counsel, our supreme court has held:

> "*The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's pro se allegations of ineffective assistance of counsel.* [Citation.] During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations. [Citations.] A brief discussion between the trial court and the defendant may be sufficient. [Citations.] Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." (Emphasis added.) *Moore*, 207 Ill. 2d at

78-79, 797 N.E.2d at 638.

¶ 56 Defendant argues the trial court improperly denied defendant's claim of ineffective assistance after only a cursory review. In his letter to the trial court, defendant argued the jury would have found him not guilty if his attorney had provided all the facts and evidence the defense had at its disposal. According to the letter:

> "The jury would have heard that the time line did not match. They would have herd [*sic*] that the Papa time that Mrs[.] Arthur mentioned was always in a public place[:] Wal-Mart, Rural King, park 2 or 3 times[—]and only if there were other kids to play with. All Mr. Lutz had on his mind was to talk to the State[']s Attorney[,] set me up to fail[,] and make up comments like 'there by the grace of god, go thee' and then not explain what he was talking about. As far as Bocher and J Seiler are concerned[,] they made coment [*sic*] that [D.A.] blurted out the statement again and again which showed signs of coercion[,] and Seiler[']s ability to flip a statement to suit his needs. Remimber [*sic*] the line between persuasion and coercion can be very thin when the person who wants or needs the results are members of law enforcement. Also there is the fact that there are internet web sites telling kids how to get even or rid of Mom, Dad, Grandparents[,] even your teacher. [D.A.] has come home several times and said or done something nasty, and we asked him where he learned to do that[.] His

comment would be at school[.] I would ask him where at, at school[.] [T]hen he would name one of his teachers[.] I am charged with doing this vile act in either late spring or early summer. If this was done to [D.A.] then he would have went to somebody then[,] not the next day[,] that is the way I had taught him. Right away that way you don't forget anything. The question Seiler asked me on the audio[—] has this happened since[,] and I said 'not to my knowledge[.]' How am I supposed to know if he done this to someone else, I hope not[.] [T]here [are] 1 and 1/2 pages of evidence that was not brought out in [*sic*] jury trial. The night before the verdict I found out that it was all over Mattoon that Lonnie Lutz [(defense counsel)] had me set up to go to prison[.] [D]oing this is a false representation calling for a mistrial."

At the sentencing hearing, the court addressed the allegations defendant raised above and placed defendant under oath to address his allegations of his attorney's ineffectiveness. The following exchange occurred between the court and defendant:

"[THE COURT]: And you just indicated to me that you are making a claim of ineffective representation of counsel regarding your attorney, Mr. Lutz?

[DEFENDANT]: Yes.

[THE COURT]: Tell me what your basis is?

[DEFENDANT]: My basis is 17 pieces of information that was left out at jury trial that would have proved my innocence. First, beginning with the fact that Jaime was in an extremely high[-]risk pregnancy and she couldn't be left alone for more than 15 minutes. And it takes approximately 3 to 5 minutes to drive over to my house. And for me to do what [D.A.] said I did, it takes at least 45 minutes.

[THE COURT]: You may continue.

[DEFENDANT]: Okay. The, what, during the trial, Jaime said that [D.A.] and I did some Pampaw [*sic*] time. And Pampaw [*sic*] time was always in a public setting, like Rural King or Walmart or someplace like that. It was never anyplace private. Towards the end of the school year, Jaime and I discussed her going with, with us when I need to go somewhere. Because [D.A.] slowed me down, and that would invade that 15 minute window. And she agreed.

[D.A.'s] statement to Lieutenant Seiler, which was kind of rubbed out in court. He said several times, he's brown. And I'm not brown. He was describing somebody else.

And even on the, even on the, that same DVD, there was no time and date stamp on it. And, if I'm not mistaken, by law, there has to be one. And I don't know. I know, probably, you couldn't

see it and you didn't notice it; but there was no time and date stamp on it.

Motive, means and opportunity was not satisfied. I had no motive. Means was very minimal. And I had no opportunity.

For one thing, the house was a total wreck, like Jaime said in court. There would have been no place to do what I, what I've been accused of.

[D.A.] never called me Pampaw [*sic*] Robert until about a week before, the eleventh. He always called me Pampaw [*sic*]. And about a week before the eleventh, he come up to me several times. Pampaw [*sic*], are you Pampaw [*sic*] Robert? And I'd tell him, no, you call me Pampaw [*sic*], just what you always called me. Don't change it.

Both Jaime, Alan and I have taught [D.A.], when something like this happens, you tell right away. You don't wait six, six months or a year. Because you forget what, what, what's happened. You tell right away. And he's learned that. He's learned that, that, the nasty parts; because I taught him that. It wasn't Seiler that taught him that. That was me.

The State's Attorney made a comment during closing arguments that a man with normal sex life would not have wet dreams. That's not true at all. Anybody can have a wet dream.

> And then there's the fact that Alec, which is Ryan, was Ben West's son, had internet available in the house; but he showed me how to get on internet porn. He asked me one time, he said, do you know how to get on internet porn? I told him, no. I don't like that stuff and I don't get on it. He said, well, come here. I'll show you. So I went over there to see if he could show me. He did. And I told his mom. Or I told Jaime, and she told his mom.
>
> That's, that's about it, Your Honor."

Later during the hearing, defendant stated he had talked to attorney Lutz before the trial and told him about possible witnesses who could testify D.A. had been caught lying on other occasions. Defendant said Lutz told him such testimony would be hearsay.

¶ 57 The trial court also allowed defendant's trial counsel to give his version of events. Defendant's trial counsel stated:

> "Well, Judge, I think a lot of the things that Mr. Craig has spoken of and has contained in his statement to the court as far as the presentence report and today, deal with matters of, as Mr. Bucher said, criminal procedure and rules of evidence and so on.
>
> In fact, I think the court had made a ruling on the motion *in limine* limiting what one could get into concerning raising allegations of whether or not the minor witness was credible or not. And the court has ruled in the State's favor, as I recall. So those witnesses, as I understood that Mr. Craig mentioned would not

have been allowed to testify in any event, if their testimony would have been relevant.

And, again, I think most of the matters he raises are matters of procedure and trial strategy and in some cases, lack of relevance, it to [*sic*], I don't think would have been admissible if they had been attempted to be brought forward as evidence, Judge."

¶ 58 In response, the trial court stated:

"[T]he court has considered the items that [defendant] has read off as he looked at the piece of paper that he apparently submitted to his attorney. Much of those items, the defense attorney could make a reasonable decision that those items would not be admissible and those items would not enhance any defense that he has, in particular, based on the statement that he made.

I find that counsel's representation did not fall below an objective standard of reasonableness; and, also, based on the evidence that was presented, there was no prejudice to the defendant by those things not being brought to the jury.

For those reasons, the claim of ineffective assistance of counsel during trial and during the pretrial proceedings is denied."

¶ 59 According to defendant, the trial court erred because it cannot be said defendant's claims have no possible merit. We disagree. Defendant's claims have no possible merit, they relate to matters of trial strategy, and the trial court did not err when it did not appoint separate

counsel for defendant and found defendant's claims of ineffective assistance of counsel baseless.

¶ 60 E. Ineffective Assistance of Counsel

Defendant also argues his trial counsel was ineffective for the following reasons: (1) failing to preserve an objection to the cumulative testimony of Jaime A., Best, Seiler, and Cope; (2) failing to request the jury instruction as required by section 115-10(c) of the Code (725 ILCS 5/115-10(c) (West 2008)); and (3) failing to object to the State's alleged improper questioning during *voir dire*. To establish a claim of ineffective assistance of counsel, a defendant must establish both (1) his attorney's alleged unprofessional acts or omissions were "outside the wide range of professionally competent assistance," and (2) a reasonable probability exists the result of the proceeding would have been different but for counsel's unprofessional errors. *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984). Based on our analysis above, defendant cannot establish the conduct of his attorney caused him any prejudice.

¶ 61 III. CONCLUSION

¶ 62 For the reasons stated, we affirm defendant's conviction.

¶ 63 Affirmed.