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2017 IL App (4th) 150076-U

NO. 4-15-0076

FILED
April 11, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
BRANDON M. BOLING,	)	No. 11CF323
Defendant-Appellant.	)	
	)	Honorable
	)	Mitchell K. Shick,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment in part and reversed in part and remanded with directions, holding the following: (1) the jury instructions improperly defined the offense of predatory criminal sexual assault of a child; (2) the jury instructions properly defined the offense of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1) (West 2010)); (3) the State's charging of new counts on remand was not vindictive nor did it violate this court's prior mandate; (4) a State's witness did not testify about the credibility of another witness; and (5) the admission at the sentencing hearing of hearsay testimony about alleged other crimes was not error.

¶ 2 In July 2011, the State charged defendant, Brandon M. Boling, with three counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. (The State later dismissed the aggravated criminal sexual abuse charge.) Count I alleged that defendant placed his penis in the sex organ of his girlfriend's daughter, K.A., who was under the age of 13. Count II alleged that defendant placed his penis in the anus of K.A., and count III claimed that defendant placed his mouth on the sex organ of K.A.

¶ 3 After a February 2012 trial, a jury found defendant guilty of counts I and II but not guilty of count III. On direct appeal, we vacated both convictions, determining that various trial errors cumulatively amounted to plain error. *People v. Boling*, 2014 IL App (4th) 120634, 8 N.E.3d 65.

¶ 4 On remand, the State (1) reinstated the charge of aggravated criminal sexual abuse and (2) brought a new count of predatory criminal sexual assault of a child. (The State was precluded from reprosecuting the charge of predatory criminal sexual assault of a child for which defendant was acquitted at his first trial (count III).) In sum, after remand, defendant was charged with three counts of predatory criminal sexual abuse and one count of aggravated criminal sexual abuse.

¶ 5 After an October 2014 trial, the jury found defendant guilty of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse, while finding defendant not guilty of the remaining count of predatory criminal sexual assault of a child. The trial court sentenced him to 31 years in prison on each of the counts of predatory criminal sexual assault and 5 years in prison for aggravated criminal sexual abuse, all of which the court ordered to be served consecutively.

¶ 6 Defendant appeals, raising the following issues: (1) the jury instructions improperly defined predatory criminal sexual assault of a child; (2) the jury instructions improperly defined aggravated criminal sexual abuse; (3) the State improperly charged defendant with new counts on remand; (4) the State improperly elicited testimony from a witness about the victim's credibility; and (5) the State presented improper hearsay testimony during sentencing. We agree with defendant's first contention and therefore reverse his conviction on count III for predatory criminal sexual assault of a child and remand this case for further proceedings. In all other re-

spects, we affirm.

¶ 7 I. BACKGROUND

¶ 8 A. Defendant's First Trial and Appeal

¶ 9 In July 2011, the State charged defendant (born November 5, 1974) with three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) (counts I through III) and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1) (West 2010)) (count IV). (We note a scrivener's error in the charging instrument on count IV, listing the statutory citation of section 12-16(d) of the Criminal Code of 1961. The State dismissed count IV prior to trial.) The remaining counts alleged that defendant committed various acts of sexual penetration upon his girlfriend's daughter, K.A. (born October 8, 2002).

¶ 10 After a February 2012 trial, the jury found defendant guilty of counts I and II but not guilty of count III.

¶ 11 On appeal, we vacated defendant's two convictions, concluding that cumulative trial errors established plain error. *Boling*, 2014 IL App (4th) 120634, 8 N.E.3d 65. As relief, we wrote, "we reverse defendant's convictions and remand for a new trial." *Id.* ¶ 144. Our mandate stated, "It is the decision of this court that the order on appeal from the circuit court be REVERSED and the cause REMANDED to the Circuit Court for the Fifth Judicial Circuit Coles County, for such other proceedings as required by the order of this court."

¶ 12 B. Defendant's Second Trial

¶ 13 1. *The Charges*

¶ 14 On remand, the trial court conducted an October 2014 pretrial hearing, where the State announced that it planned to both "reinstate count IV" (aggravated criminal sexual abuse) and charge an additional count of predatory criminal sexual assault of a child. The trial court

asked defendant whether he objected to the State's reinstating count IV. Defendant—through defense counsel—requested a continuance to prepare for the new charges, but did not otherwise object to the reinstating of count IV. Later that month, the State reinstated count IV—still with the scrivener's error in the statutory cite, although the trial court corrected several other errors by interlineations—and, in addition, charged defendant with a new count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)), alleging that defendant, who was at least 17 years of age, committed an act of sexual penetration with K.A., who was less than 13 years of age, in that "defendant placed his hand or finger on the sex organ of K.A." (We refer to that charge as count III, although it is sometimes referred to in the record as count V.)

¶ 15 To summarize, the charges at defendant's second trial consisted of the following: (1) predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)), alleging that defendant placed his penis in the sex organ of K.A. (count I); (2) predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)), alleging that defendant placed his penis in the anus of K.A. (count II); (3) predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)), alleging that defendant placed his hand or finger on the sex organ of K.A. (count III); and (4) aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1) (West 2010)), alleging that defendant kissed the breasts of K.A. (count IV).

¶ 16 2. *The Evidence at Trial*

¶ 17 At an October 2014 jury trial, K.A. testified that she was born on October 8, 2002. When K.A. was eight years old, defendant—who was the boyfriend of K.A.'s mother, Jamie Burwell—touched K.A. in ways that made her uncomfortable on approximately five occasions. K.A. testified that, on one occasion, defendant kissed her "front part" and put his hand "on" her "front part." To clarify, the State asked whether K.A. meant that "the skin of [defendant's] hand

or fingers touched the part of your body where you pee from?" K.A. responded, "Yeah." Later, the State asked K.A., "[W]hen his hand touched your front part, did any part of his hand go inside of you?" K.A. responded, "Not that I remember." K.A. later testified that she did not remember whether defendant had kissed her anywhere other than her neck. She testified that the skin of defendant's hands touched her breasts, but she could not remember whether he kissed her breasts.

¶ 18 K.A. testified that she could not remember how many other times defendant had touched her inappropriately or any specific details about those other incidents. She said, "I can only remember a little bit like bits and pieces." When the State asked to clarify whether defendant had kissed K.A. on her "front part," K.A. responded, "Not that I can remember." K.A. testified that she was eight or nine years old when the alleged abuse occurred.

¶ 19 K.A.'s aunt, Ryan Reardon, testified that K.A. told her that defendant "had touched her in her mom's bedroom and that he had touched her private areas, that he had put his privates on her privates." The way K.A. described the episode to Reardon was that defendant "put his privates on her privates" and "the thing behind the long thing was big, and it was shaking up and down on her private area."

¶ 20 Nurse practitioner Noelle Cope testified that she conducted a physical examination of K.A. to check for sexual abuse in July 2011. K.A. told Cope that when defendant was babysitting her, he took her into a bedroom and removed the "bottom halves" of their clothes. Defendant then rubbed his body up and down on K.A.'s body. K.A. told Cope that defendant was "rubbing hard on her bad spot with his hand and fingers." Cope testified that "bad spot" was the term K.A. used to describe her vagina and to describe a man's penis. Cope asked K.A. whether defendant put his bad spot in K.A.'s bad spot or whether he merely rubbed it on the out-

side of her bad spot. K.A. said she could not tell but that it hurt. K.A. also told Cope that defendant touched her anus with his penis and that he touched her vagina with his mouth. During Cope's physical examination of K.A., Cope found no "physical finding" indicating sexual abuse. Cope elaborated that a physical finding of abuse is discovered in a small percentage of sexual abuse cases.

¶ 21 Mattoon police captain Jonathan Seiler testified that he conducted a recorded interview with K.A. at the police station. K.A. referred to her breasts as "boobies," her vagina as her "woo-woo," her anus as her "bottom," and a penis as a "private." K.A. told Seiler that defendant had touched her anus and her vagina with his hand and his penis. In addition, he touched her chest with his hand and lips. K.A. told Seiler that defendant touched her on the inside of her vagina and anus with his hand. She told Seiler that when defendant touched her vagina with his penis, his penis was "shaking up and down."

¶ 22 The State then rested, and the trial court read to the jury and entered into evidence the following stipulation, agreed to by the parties:

> "The parties stipulate that [K.A.], the victim in this cause, while preparing for trial testimony on October 22, 2014, at one time stated that she did not remember whether or not defendant's penis made physical contact with her sex organ or anus. At another time, she stated that defendant's penis did not make contact with her sex organ or anus. She stated that she was lying face down on her mother's bed with defendant lying on top of her, facing her. Her pants were down, and he was trying to pull her pants down, but she would always resist and pull her pants back up. She stated that at some point, she was on her back. He was attempting to touch his penis to her sex organ and anus but was never successful as

she was struggling against him. She said at one point that she was trying to forget what happened to her.

She did state that he touched her sex organ with his bare hand and kissed her boobies. She stated that these acts occurred about three times and were essentially the same every time. She stated that the first time occurred a few weeks before her cousin got a dog named Jasper and continued after they got the dog. She stated that she always closed her eyes during these incidents."

¶ 23 Defendant testified that during an interview with Seiler in July 2011, he denied abusing K.A. Defendant continued to deny that he ever had sexual contact with K.A. Defendant speculated that Burwell concocted the claims of sexual abuse after learning, in July 2011, that defendant had an affair with Burwell's friend.

¶ 24 Defendant presented no further evidence.

¶ 25 3. *The Jury-Instructions Conference*

¶ 26 After the close of evidence, the trial court conducted a jury-instructions conference outside the presence of the jury. The State introduced several pattern jury instructions without objection. When the State sought to introduce an issues instruction for predatory criminal sexual assault of a child, the court directed the State to introduce separate issues instructions for the three distinct counts charging that offense. A recess was taken to allow the State to make the suggested corrections to its proposed instructions.

¶ 27 After the recess, the State introduced the following relevant jury instructions without objection, which the trial court later read to the jury. (We describe only the instructions relevant to counts III and IV because those are the only counts involved in defendant's claims on appeal.)

¶ 28 As to count III, People's instruction No. 18 provided the definition of predatory criminal sexual assault of a child and was identical to Illinois Pattern Jury Instructions, Criminal, No. 11.103 (4th ed. 2000) (hereinafter IPI Criminal 4th). People's instruction No. 19C provided the issues in predatory criminal sexual assault of a child—as they related specifically to count III—and was based on IPI Criminal 4th No. 11.104.

¶ 29 In relevant part, People's instruction No. 19C stated that the first proposition the State was required to prove as to count III was "[t]hat the defendant knowingly committed an act of sexual penetration with [K.A.] as to placement of his hand or finger *on* the sex organ of [K.A.]" (Emphasis added.) People's instruction No. 16B defined "sexual penetration" and was identical to IPI Criminal 4th No. 11.65E. Specifically, People's instruction No. 16B defined "sexual penetration" as the following:

> "[A]ny contact, however slight, between the sex organ or anus of one person and the sex organ of another person or intrusion, however slight, of any part of the body of one person into the sex organ or anus of another person ***."

¶ 30 As to count IV, People's instruction No. 21 provided the definition of aggravated criminal sexual abuse and was identical to the definition of that offense provided by IPI Criminal 4th No. 11.61(c)(1). Specifically, People's instruction No. 21 defined aggravated criminal sexual abuse as the following manner:

> "A person commits the offense of aggravated criminal sexual abuse when he is 17 years of age or older and commits an act of sexual conduct with a victim who is under 13 years of age when the act is committed."

People's instruction No. 20 provided the definition of criminal sexual abuse and was identical to the definition of that offense provided by IPI Criminal 4th No. 11.59(1). Specifically, People's

instruction No. 20 provided the following definition for criminal sexual abuse:

> "A person commits the offense of criminal sexual abuse when he commits an act of sexual conduct and knows that the victim was unable to understand the nature of the act."

People's instruction No. 24 defined "sexual conduct" and was identical to IPI Criminal 4th No. 11.65D. People's instruction No. 22A provided the issues for aggravated criminal sexual abuse and was based on IPI Criminal 4th No. 11.62A. People's instruction No. 22A provided that the State was required to prove the following propositions to sustain the charge of aggravated criminal sexual abuse:

> "*First Proposition*: That the defendant committed an act of sexual conduct with [K.A.]; and
>
> *Second Proposition*: That the defendant was 17 years of age or older; and
>
> *Third Proposition*: That [K.A.] was under 13 years of age when the act was committed."

¶ 31 4. *Closing Arguments*

¶ 32 During closing argument, the State said the following about its burden of proof as to sexual penetration on count III:

> "[K.A.] said with absolute certainty his—the skin of [defendant's] hand touched the skin of her vaginal area. That's count III. And she said that every single time she's talked to anybody. That the skin of his hand made physical contact, however slight, with the skin of her vaginal area."

¶ 33 5. *The Jury's Verdicts*

¶ 34 The jury found defendant guilty as to counts I, III, and IV, and not guilty as to

count II. The verdict form for count III stated, "[W]e the jury, find the [defendant] guilty of predatory criminal sexual assault of a child as to placement of his hand or finger on the sex organ of [K.A.]"

¶ 35 6. *Sentencing*

¶ 36 At the January 2015 sentencing hearing, Seiler testified that he interviewed another child, A.W., and that the interview was audio- and video-recorded. The State offered to admit the recording of that interview into evidence. When asked by the trial court whether he objected to the recording, defendant—through defense counsel—answered, "I don't think I have a valid basis to object, Judge." The court admitted the recording into evidence.

¶ 37 Seiler testified further that two other alleged victims of defendant, both with the initials K.B., were interviewed in January 2012 and that the interview was recorded. Seiler testified that unlike the A.W. interview, Seiler did not personally conduct the interview with the other two victims. The trial court admitted an audio- and video-recording of the interview of the two victims without objection. The State published the recordings to the court.

¶ 38 The trial court sentenced defendant to prison terms of 31 years each on counts I and III, to run consecutively to each other and to a 5-year prison term on count IV. (The sentencing judgment contains the same scrivener's error in the statutory citation to the latter offense.)

¶ 39 This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 Defendant raises the following arguments on appeal: (1) the jury instructions improperly defined predatory criminal sexual assault of a child and criminal sexual abuse; (2) the State improperly charged defendant with counts III and IV on remand; (3) the State improperly

elicited testimony from Seiler about K.A.'s credibility; and (4) the State presented improper hearsay testimony during sentencing.

¶ 42 A. The Jury Instructions

¶ 43 Defendant makes the following two arguments concerning the jury instructions: (1) the elements instruction for predatory criminal sexual assault of a child as to count III improperly defined that offense and (2) the instruction defining criminal sexual abuse—given in relation to the charge of aggravated criminal sexual abuse (count IV)—improperly defined that offense. As a result, defendant asks this court to vacate his convictions on counts III and IV and remand for a new trial. For the following reasons, we disagree.

¶ 44 1. *Plain Error and Jury Instructions*

¶ 45 The State argues that defendant forfeited his jury-instruction claims by failing to preserve them in the trial court. Defendant concedes that he forfeited these claims by failing to object to the jury instructions; he requests that we review the errors under the plain-error doctrine.

¶ 46 A criminal defendant forfeits any claim of error as to a jury instruction unless he (1) objects to the instruction, (2) offers an alternative instruction, and (3) raises the issue in a posttrial motion. *People v. Sargent*, 239 Ill. 2d 166, 188-89, 940 N.E.2d 1045, 1058 (2010). But pursuant to Illinois Supreme Court Rule 451(c) (eff. April 8, 2013), a defendant may raise a forfeited jury-instruction error under the plain-error doctrine, alleging "substantial defects *** if the interests of justice require." See also *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1058. "Rule 451(c) is coextensive with the 'plain error' clause of Supreme Court Rule 615(a), and we construe these rules 'identically.' " *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 473 (2005).

¶ 47 Under the plain-error doctrine, we will reverse a forfeited error if the error was clear and obvious and either (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against defendant or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Id.*

¶ 48 The plain-error exceptions for jury-instruction errors are " 'strict tests' " that are "applicable only to serious errors which severely threaten the fundamental fairness of the defendant's trial." *People v. Hopp*, 209 Ill. 2d 1, 8, 805 N.E.2d 1190, 1194 (2004) (quoting *People v. Roberts*, 75 Ill. 2d 1, 15, 387 N.E.2d 331, 337 (1979)). A jury instruction error "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." *Id.* "We must determine whether the instructions, taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *People v. Parker*, 223 Ill. 2d 494, 501, 861 N.E.2d 936, 939 (2006). Whether the jury instructions accurately conveyed the applicable law is an issue we review *de novo*. *Id.*

¶ 49 "[T]he giving of contradictory instructions on an essential element in the case is prejudicial error, and is not cured by the fact that another instruction is correct." *People v. Jenkins*, 69 Ill. 2d 61, 66, 370 N.E.2d 532, 534 (1977). "This is particularly true where the instruction defines the issues in the case or is mandatory in character." *Id.* "Where the instructions are contradictory the jury is put in the position of having to select the proper instruction[—]a function exclusively that of the court." *Id.* at 67, 370 N.E.2d at 534.

¶ 50 We address defendant's claims in turn to determine whether they mandate reversal under the plain-error doctrine.

¶ 51 2. *Count III: Predatory Criminal Sexual Assault of a Child*

¶ 52 Defendant argues that this claim is reversible under either prong of the plain-error doctrine. As to the second prong, he argues that the evidence was closely balanced because defendant's conviction on count III depended on whom the jury found more credible: K.A. or defendant.

¶ 53 a. Was There Error?

¶ 54 To prove the offense of predatory criminal sexual assault of a child, the State was required to prove that defendant committed an act of "sexual penetration" upon K.A. Sexual penetration is defined as the following:

> "[A]ny contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person[.]" 720 ILCS 5/11-0.1 (West 2010).

Count III alleged that defendant committed an act of sexual penetration with his hand or finger. The State was therefore required to prove not merely that defendant's hand made contact with K.A.'s sex organ but that there was an intrusion, however slight into the sex organ.

¶ 55 Despite the statutory language requiring proof of an intrusion, the issues instruction for count III informed the jury that the State needed to prove that defendant "committed an act of sexual penetration with [K.A.] as to placement of his hand or finger *on* the sex organ of [K.A.]" (Emphasis added.) The issues instruction thus erroneously informed the jury that the State was not required to prove that an intrusion of defendant's hand occurred. Instead, the instruction provided that the jury could return a guilty verdict if it found beyond a reasonable doubt that defendant merely touched K.A.'s sex organ without intrusion. The count III issues instruc-

tion was therefore inaccurate.

¶ 56 The issues instruction was not alone in its inaccuracy about the required elements to prove count III. The charging information alleged that defendant committed an act of sexual penetration when he "placed his hand or finger *on* the sex organ of K.A." (Emphasis added.) At closing argument, when describing the elements of count III, the State argued "[t]hat the skin of his hand made physical contact, however slight, with the skin of her vaginal area." Finally, the verdict form for count III stated that "we the jury, find [defendant] guilty of predatory criminal sexual assault of a child as to placement of his hand or finger on the sex organ of [K.A.]" Those erroneous statements only exacerbated the error in the issues instruction.

¶ 57 The State urges that the instructions as a whole correctly defined the offense of predatory criminal sexual assault in count III and cured any error. The State notes that, although the issues instruction referred to the contact in question as defendant's placing his hand or finger "on" the sex organ, the jury also received a stand-alone definition of sexual penetration that properly instructed the jury that sexual penetration by a hand or finger requires an "intrusion" into the sex organ. The State argues that the accurate definitional instruction for sexual penetration essentially trumped the erroneous definition given by the charging information, issues instruction, closing argument, and verdict forms, thereby curing any confusion the jury may have been operating under. We disagree and conclude that the issues instruction on count III was given in error.

¶ 58 b. Was the Error Reversible Under the Plain-Error Doctrine

¶ 59 We conclude that the error as to the issues instruction on count III is reversible as plain error. The erroneous instruction, combined with the erroneous charging information, verdict form, and closing argument created a "serious risk that the jurors incorrectly convicted de-

fendant because they did not understand the applicable law." *Hopp*, 209 Ill. 2d at 8, 805 N.E.2d at 1194. There was no way for the jury in this case to square the contradictory definitions they were given of sexual penetration. "[T]he giving of contradictory instructions on an essential element in the case is prejudicial error, and is not cured by the fact that another instruction is correct." *Jenkins*, 69 Ill. 2d at 66, 370 N.E.2d at 534.

¶ 60 The potential for prejudice in this case was serious because the issue whether defendant placed his hand on or in K.A.'s sex organ was vigorously contested at trial. The evidence of intrusion was not overwhelming. The jury's understandable confusion on the law concerning a contested essential element of the offense "severely threatened the fairness of the trial." *Hopp*, 209 Ill. 2d at 8, 805 N.E.2d at 1194. We therefore find the error reversible as plain error and reverse defendant's conviction on count III. (We note that defendant does not request us to reverse his conviction outright, without the possibility of retrial.)

¶ 61 3. *Count IV: Aggravated Criminal Sexual Abuse*

¶ 62 Defendant argues that his conviction for aggravated criminal sexual abuse must be vacated because the jury was instructed on a theory of criminal sexual abuse that was different from the theory under which aggravated criminal sexual abuse was charged.

¶ 63 a. Did Error Occur?

¶ 64 In this case, the State charged defendant in count IV with aggravated criminal sexual abuse under the terms of section 12-16(c)(1) (720 ILCS 5/12-16(c)(1) (West 2010)) but with a scrivener's error citing subsection (d). Section 12-16 of the Criminal Code of 1961 provides several ways in which aggravated criminal sexual abuse may be charged. The State charged defendant under subsection (c)(1), which defines the offense under a theory that defendant committed an act of sexual conduct with a victim who was under 13 years of age, and de-

fendant 17 or over. Under that theory of aggravated criminal sexual abuse, the State was not required to prove that defendant committed an underlying act of criminal sexual abuse.

¶ 65 In contrast, subsection (a) of section 12-16 defines aggravated criminal sexual abuse as an act of criminal sexual abuse plus one of the applicable aggravating factors. 720 ILCS 5/12-16(a)(1) through (a)(7) (West 2010) (providing the different aggravating factors that enhance criminal sexual abuse to aggravated criminal sexual abuse). Aggravated criminal sexual abuse charged under subsection 12-16(a) requires proof that defendant committed a predicate act of criminal sexual abuse.

¶ 66 In this case, because defendant was charged under a theory of aggravated criminal sexual abuse that did not require proof of an underlying act of criminal sexual abuse, the jury instruction on criminal sexual abuse (People's instruction No. 20)—which actually applies when the State is charging violation of section 12-15(a)(2) of the Criminal Code (720 ILCS 5/12-15(a)(2) (West 2010))—was completely irrelevant. The giving of that instruction to the jury was error. It is inexplicable why the jury in this case was instructed on criminal sexual abuse. Jury instructions should be given only after careful consideration by the parties and the trial court. But the court should be able to rely on the professionalism of the lawyers, who should present the court with applicable instructions only. Further, the court should be able to rely on the opposing party's objecting when an erroneous instruction is proposed by the other party. Here, the record contains no indication why People's instruction No. 20 (victim unable to understand the nature of the act) was proposed and given without objection.

¶ 67 b. Was the Error Reversible?

¶ 68 Although People's instruction No. 20 should not have been given, it does not necessarily follow that defendant's conviction on count IV must be vacated. As noted above, de-

fendant failed to object when People's instruction No. 20 was given. He therefore has forfeited this claim, and we review it under the plain-error doctrine.

¶ 69 As the State argues in its brief, the jury was properly instructed as to the offense of aggravated criminal sexual abuse. The only problem was that the jury was given an additional instruction on criminal sexual abuse that was of no help or relevance in this case. We cannot know how the jury addressed the irrelevant jury instruction. But what we do know is that the jury was correctly instructed on the offense for which it found defendant guilty: aggravated criminal sexual abuse. Defendant has presented no scenario suggesting persuasively how the instruction on criminal sexual abuse might have confused or affected the jury's deliberations on aggravated criminal sexual abuse, for which the instructions were completely accurate. The errant People's instruction No. 20 did not "severely threaten the fairness of the trial." *Hopp*, 209 Ill. 2d at 8, 805 N.E.2d at 1194.

¶ 70 B. The Additional Charges

¶ 71 Defendant argues that the additional counts charged by the State on remand were improper for the following two reasons: (1) the State engaged in vindictive prosecution by charging the additional counts, intending to punish defendant for taking his previous appeal; and (2) our mandate in the previous appeal in this case did not authorize a trial on additional charges. We disagree with both of defendant's arguments and address them, in turn.

¶ 72 1. *Vindictive Prosecution*

¶ 73 Defendant argues that the State engaged in vindictive prosecution by charging him with count III and reinstating count IV after we remanded for a new trial. We disagree.

¶ 74 a. Plain Error

¶ 75 Defendant concedes that he failed to preserve this issue for review. He requests

that we review his claim under the plain-error doctrine. To determine whether this claim is reversible as plain error, we often first determine whether any error occurred. We note that the State's brief argues that, when engaging in plain error review, we must *always* first determine whether error occurred before determining whether that error is reversible under either of the two prongs of the plain-error doctrine. That argument is not correct. Although courts of review more commonly choose to determine whether error occurred as their first step, those courts are free to perform the two-step, plain-error analysis in whatever order the court chooses.

¶ 76 b. Relevant Case Law

¶ 77 A prosecution is vindictive in violation of due process if the prosecution was pursued " '[t]o punish a person because he has done what the law plainly allows him to do.' " *People v. Hall*, 311 Ill. App. 3d 905, 911, 726 N.E.2d 213, 218 (2000) (quoting *United States v. Goodwin*, 457 U.S. 368, 372 (1982)). The appropriate remedy for a vindictive prosecution is to dismiss the offending charges.

¶ 78 A presumption of prosecutorial vindictiveness occurs when the State brings additional or more serious charges after a defendant has successfully challenged a conviction on appeal. *Id.*

¶ 79 The seminal case on vindictive prosecution is *North Carolina v. Pearce*, 395 U.S. 711 (1969). In that consolidated case, the defendants successfully challenged their initial convictions and were then retried and again convicted. The trial court sentenced them to more onerous sentences than they had initially received. On appeal, the Supreme Court vacated those new, more onerous sentences, because they may have resulted from the trial court's vindictiveness.

¶ 80 The *Pearce* court held that the due process clause of the fourteenth amendment of the United States Constitution (U.S. Const. amend. XIV, § 1) prohibits a trial court from resen-

tencing a defendant to a more onerous sentence for the purpose of punishing him for having his initial conviction set aside. *Pearce*, 395 U.S. at 711. In other words, "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Id.* at 725. Otherwise, "the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal." *Id.* As a result, the Court held that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" in the record. *Id.* at 726. In addition, those reasons "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.*

¶ 81 In *Blackledge v. Perry*, 417 U.S. 21 (1974), the Court extended *Pearce*'s prohibition against vindictive sentencing to the situation in which a prosecutor charges a defendant with more serious offenses after the defendant mounted a successful appeal of his initial conviction. In that case, after the defendant filed an appeal to his conviction for misdemeanor assault, the State charged him with felony assault, to which he later pleaded guilty. The Court reversed that conviction, finding that it violated due process because it may have resulted from vindictiveness.

¶ 82 In reaching its decision in *Blackledge*, the Court held that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.' " *Id.* at 27. In *Blackledge*, there was "no evidence that the prosecutor in this case acted in bad faith or maliciously." *Id.* at 28. Nonetheless, the Court found a due process violation based on merely the "potential for vindictiveness." *Id.* The Court held that criminal defendants have the right to exercise their appellate rights "without apprehension" and that even the specter of vindictiveness might chill the exercise of those rights. *Id.*

¶ 83 Vindictive prosecution claims present questions of both law and fact. The court's legal conclusions we review *de novo*, while the findings of fact we review for clear error. *Hall*, 311 Ill. App. 3d at 910, 726 N.E.2d at 218.

¶ 84 c. This Case

¶ 85 In this case, there is no indication that the State acted vindictively by charging defendant with counts III and IV. Even under the heightened "potential for vindictiveness" standard of *Blackledge*, nothing here indicates vindictiveness. Further, without a timely objection from defendant below, the State was denied the opportunity to explain why it brought the new charges on remand. See *Id.* at 911, 726 N.E.2d at 218 (where no presumption of vindictiveness applies, a defendant must prove objectively that the State acted vindictively). This is a compelling reason why defendants must raise their claims of vindictive prosecution first in the trial court, not on appeal.

¶ 86 In addition, the situation in *Blackledge* involved the imposition of a more serious charge filed on remand based on the same act that substantiated the initial charge. By contrast, in this case the State charged defendant with an additional count of predatory criminal sexual assault of a child, a charge that was not more serious than the other counts of predatory criminal sexual assault of a child that defendant was already facing. In addition, the new charge was based on a distinct criminal act, unlike in *Blackledge*. Further, the reinstated charge of criminal sexual abuse was charged prior to defendant's first trial, unlike in *Blackledge*, where the additional charge may have been motivated by the defendant's exercising his right to appeal. It would be difficult to claim that a charge is based on vindictiveness when that same charge was brought prior to the appeal that supposedly motivated that charge.

¶ 87 Because we conclude that this record shows no prosecutorial vindictiveness, we

reject defendant's plain-error claim.

¶ 88 2. *Our Mandate*

¶ 89 Defendant argues that our mandate in his previous appeal—*Boling*, 2014 IL App (4th) 120634, 8 N.E.3d 65—prohibited the State from bringing any new charges against him on remand. We disagree.

¶ 90 "On remand, a trial court may only do those things directed by the reviewing court in the mandate; it has no authority to act beyond the dictates of the mandate." *People v. Craig*, 313 Ill. App. 3d 104, 106, 728 N.E.2d 1288, 1290 (2000). Further, "[n]either the trial court nor the parties have any authority to take any further action in the case except such as is necessary to carry out the mandate of the reviewing court." *Hamilton v. Faulkner*, 96 Ill. App. 2d 415, 418, 238 N.E.2d 631, 633 (1968).

¶ 91 In this case, our mandate did not prohibit the State from filing new charges before retrying defendant. Our opinion stated that "we reverse defendant's convictions and remand for a new trial." *Boling*, 2014 IL App (4th) 120634, ¶ 144, 8 N.E.3d 65. Similarly, our mandate provided, "It is the decision of this court that the order on appeal from the circuit court be REVERSED and the cause REMANDED to the Circuit Court for the Fifth Judicial Circuit Coles County, for such other proceedings as required by the order of this court." Our mandate thereby ordered a new trial. The mandate did not specify which charges should be prosecuted during the new trial, but merely that a new trial should occur. The State therefore had the flexibility under our mandate to determine which counts to try. Nothing in our mandate prevented the State from reinstating counts, charging additional counts, dismissing counts, or choosing not to retry defendant at all.

¶ 92 C. Testimony About Another Witness's Credibility

¶ 93 Defendant argues that the State improperly elicited testimony from Seiler about K.A.'s credibility. We disagree.

¶ 94 "Under Illinois law, it is generally improper to ask one witness to comment directly on the credibility of another witness." *People v. Becker*, 239 Ill. 2d 215, 236, 940 N.E.2d 1131, 1143 (2010). That is because credibility determinations are the responsibility of the trier of fact, not other witnesses. *Id.*

¶ 95 In this case, defendant takes issue with the following exchange during the State's examination of Seiler:

> "[THE STATE]: Captain Seiler, counsel asked you questions regarding the suggestibility of children. Did you detect any indications from [K.A.] that she had been told what to tell you?
>
> [SEILER]: No, I did not. She—her responses seemed to be spontaneous seemed to be at least from my perspective seemed to be appropriate and spontaneous based on the inquiries that I was making."

In addition, during its rebuttal argument, the State made the following comments about Seiler's testimony:

> "Captain Seiler did testify, this is a guy who has conducted over a thousand interviews in his police career, that he detected no indication that [K.A.] had somehow been put up to this story[,] or coached[,] or[,] that this story was suggested to her to say. He did not detect that."

Again, defendant failed to object to either Seiler's testimony or the State's comments during rebuttal argument. We therefore review this claim under the plain-error doctrine and choose to first

determine whether any error occurred.

¶ 96 We conclude that no error occurred. In this case, Seiler testified to the *spontaneity* of K.A.'s statements, not the credibility of those statements. These are distinct concepts. Seiler was competent to testify about the nature of his interview with K.A., including commenting about the spontaneity of her comments. Seiler's testimony on that aspect of his interview with K.A. did not usurp the jury's role as fact finder. Instead, Seiler's observations as to spontaneity provided additional information for the jury to use in reaching its independent determination of K.A.'s credibility. Because Seiler's testimony was permissible, the State committed no error by referring to Seiler's testimony during rebuttal. No error occurred, and, therefore, no plain error occurred.

¶ 97 D. Hearsay Testimony at Sentencing

¶ 98 Defendant argues that he is entitled to a new sentencing hearing because the trial court erred by admitting the recorded interviews of other alleged victims, K.B., K.B., and A.W., which constituted hearsay evidence of other crimes, without allowing defendant an opportunity to cross-examine the declarants.

¶ 99 Once again, defendant failed to object when this evidence was admitted at the sentencing hearing. We therefore review this issue under the plain-error doctrine, and again, we choose to first determine whether any error occurred.

¶ 100 1. *Relevant Law*

¶ 101 "[T]he ordinary rules of evidence which govern at trial are relaxed at the sentencing hearing." *People v. Harris*, 375 Ill. App. 3d 398, 408, 873 N.E.2d 584, 593 (2007). In keeping with that principle, "a court is permitted to consider hearsay information at sentencing." *People v. Spicer*, 379 Ill. App. 3d 441, 467, 884 N.E.2d 675 (2007). The sentencing court is granted

"broad discretionary power" to consider various types of information that may inform a reasoned sentencing decision. *Harris*, 375 Ill. App. 3d at 408, 873 N.E.2d at 593. "The only requirement for admission of evidence in a sentencing hearing is that the evidence must be reliable and relevant as determined by the trial court within its sound discretion." *Id.* at 409, 873 N.E.2d at 594. But the court must ensure the accuracy of the information to avoid the prejudice that results from considering improper materials. *Id.* A hearsay objection at sentencing goes to the weight rather than the admissibility of the evidence. *Id.*

¶ 102 "While evidence of past criminal conduct is often not admissible at trial, it is relevant information at sentencing." *People v. Jackson*, 149 Ill. 2d 540, 548, 599 N.E.2d 926, 930 (1992). Even uncharged criminal conduct may be considered. *Harris*, 375 Ill. App. 3d at 409, 873 N.E.2d at 593. Evidence of prior criminal activity "should be presented by witnesses who can be confronted and cross-examined, rather than by hearsay allegations in the presentence report, and the defendant should have an opportunity to rebut the testimony." *Jackson*, 149 Ill. 2d at 548, 599 N.E.2d at 930.

¶ 103 2. *This Case*

¶ 104 Although the live testimony of a witness may be preferable to hearsay evidence, the admission of hearsay evidence at sentencing is not necessarily error. Again, the overarching concern is whether the evidence in question is relevant and reliable. In this case, the recorded interviews describing prior sex offenses committed against other victims were highly relevant to the trial court's task at sentencing of understanding defendant's character and fashioning an appropriate sentence.

¶ 105 Further, the trial court could have reasonably concluded that the statements were reliable. Seiler—who provided the foundation for the recorded statements—personally conduct-

ed the interview with A.W. The interview with the two K.B.'s was conducted by trained professionals. In addition, the trial court had the benefit of hearing and seeing the alleged victims make the video-recorded statements, instead of merely hearing the statements secondhand from Seiler, for example. Considering the high degree of relevance and reliability, it was not error for the court to admit these statements, despite the fact that defendant did not have the opportunity to cross-examine them.

¶ 106 We also note that when the trial court asked defense counsel if he objected to these recordings being admitted at the sentencing hearing, counsel responded, "I don't think I have a valid basis to object, Judge." Although this response may not have been technically correct, it may nonetheless have been sound tactically. After all, had counsel objected, the State might simply have called both K.B.'s to testify, in person, perhaps thereby making even more apparent and immediate how they had suffered because of defendant's criminal conduct than the video-recording revealed.

¶ 107 Also weighing in favor of admissibility in this case is section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10 (West 2014)), which allows for the admission of an out-of-court statement made by the victim of a sex offense. Typically, in proceedings for other criminal offenses not encompassed by section 115-10, such hearsay would be inadmissible. Section 115-10 allows hearsay statements of the victims to be admitted if the trial court determines that the statements are reliable, and the victim either testified at the proceeding or was unavailable to testify. 725 ILCS 5/115-10(b) (West 2014). The existence of section 115-10 shows the legislature's intent to allow hearsay statements of sex-offense victims to be considered at trial. Considering that intent, we conclude that those statements should also be considered at sentencing, where the rules of evidence are relaxed, assuming that the trial court has exercised its discretion

and determined that the statements appear reliable, which the court did in this case.

¶ 108 Because admission of the recorded statements was not error, there was no plain error.

¶ 109 Defendant also argues that defense counsel's failure to object to the admission of the interviews constituted ineffective assistance of counsel. Under the familiar ineffective-assistance standard, the defendant must show both that (1) his attorney's representation fell below an objective standard of reasonableness, and (2) but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In applying that standard, courts must "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." *People v. Perry*, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 216 (2007).

¶ 110 In *People v. Veach*, 2016 IL App (4th) 130888, ¶¶ 71-87, 50 N.E.3d 87, we recently grouped ineffective-assistance claims into three categories. Category A cases involve claims of ineffective assistance that rely on facts outside the trial record. We will decline to address on direct appeal such cases because they are better suited for collateral proceedings, where additional fact-finding can occur. Category B cases are those that we *will* address on direct appeal because they are clearly groundless. Category C cases are those we choose to address on appeal because the claim of ineffective assistance is clearly meritorious.

¶ 111 This case falls into category A. The record does not disclose whether counsel's decision not to object to the admission of the recordings was a matter of trial strategy or merely an oversight. As we mentioned earlier, counsel's decision very well may have been a matter of sound trial strategy. Counsel may have determined—perhaps, accurately—that it was in his cli-

ent's best interest not to expose the sentencing court to the excruciating and emotional testimony of three additional alleged victims of child sex abuse. Any cross-examination of those children may have backfired and made it clear to the court that the statements made by the children on the recordings were, in fact, true. Nonetheless, without more in the trial record, we cannot be sure about the motivations of trial counsel. We therefore decline to decide the issue of ineffective assistance of counsel in this appeal.

¶ 112 III. CONCLUSION

¶ 113 For the foregoing reasons, we reverse defendant's conviction for predatory criminal sexual assault as charged in count III (also referred to as count V), and we remand this case for further proceedings. We direct the trial court to correct the statutory citation to aggravated criminal sexual abuse on the sentencing judgment from section 12-16(d) to section 12-16(c)(1) of the Criminal Code (720 ILCS 5/12-16(c)(1) (West 2010)). We otherwise affirm the judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 114 Affirmed in part and reversed in part; cause remanded with directions.