2017 IL App (4th) 150449-U

NO. 4-15-0449

FILED
November 13, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
JAMES L. LEWIS,	)	No. 13CF537
Defendant-Appellant.	)	
	)	Honorable
	)	Nancy S. Fahey,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justice Appleton concurred in the judgment.
Justice Steigmann specially concurred.

ORDER

¶ 1 *Held*: (1) The State presented sufficient evidence to prove defendant guilty of threatening a public official (peace officer) beyond a reasonable doubt, and the jury was properly instructed on this charge.

(2) The trial court erred by allowing the State to introduce evidence of K.B.'s out-of-court statements without following the requirements of section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2014)).

¶ 2 On October 7, 2013, the State charged defendant James L. Lewis with two counts of aggravated battery of a peace officer (720 ILCS 5/12-3.05(d)(4) (West 2012)), one count of threatening a public official (720 ILCS 5/12-9(a)(1)(i)(2) (West 2012)), and one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)). After a trial on April 2, 2015, a jury found defendant not guilty of aggravated battery of a peace officer and guilty of threatening a public official and aggravated criminal sexual abuse. On May 21, 2015, the trial court sentenced defendant to concurrent prison sentences of 10 years plus 1 year of

mandatory supervised release (MSR) for threatening a public official and 25 years plus 3 years of MSR for aggravated criminal sexual abuse. Defendant appeals, raising the following issues: (1) the State did not prove beyond a reasonable doubt he threatened a public official (peace officer); (2) the court did not properly instruct the jury with regard to the charge of threatening a public official; (3) the court erred by allowing the State to introduce the alleged victim's out-of-court statements without first having a hearing pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Procedure Code); (4) the court erred by not having a *Krankel* hearing (*People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984)) regarding defendant's claims of ineffective assistance of counsel on the aggravated criminal sexual abuse charge; and (5) the 25-year sentence for aggravated criminal sexual abuse was manifestly disproportionate to the charged offense and was vindictive. We affirm defendant's conviction and sentence for threatening a public official but reverse defendant's aggravated criminal sexual abuse conviction and remand for a new trial on that charge.

¶ 3 I. BACKGROUND

¶ 4 At defendant's trial in April 2015, K.B., who was born on August 23, 2008, and was the alleged child victim identified in the aggravated criminal sexual abuse charge against defendant, testified defendant lived across the road from her. K.B. testified she was six years old at the time of the trial. She knew defendant because he had puppies she visited. On October 6, 2013, she and her two sisters went to defendant's house to see his puppies. After seeing the puppies in the backyard, she and her sisters went inside the house. Later, after her two sisters had gone home, she used the bathroom. After she finished, defendant came into the bathroom with her and told her to pull down her pants. She took her pants and underwear off. She testified she was not scared when he asked her to do this. Defendant then took a picture of her "bottom." He

then poked her "bottom" with his bare hand. When asked what it felt like when he "poked" her "bottom," she simply stated, "Hurt." After this happened, defendant told her to pull up her pants, which she did. Her dad later came to defendant's house to take her home because it was dinner time.

¶ 5 The State then asked K.B. what happened after she went home. K.B. testified, "I told my dad that my bottom hurt." Defense counsel objected to the hearsay statement. The trial court overruled the objection, stating K.B. was just "saying what she said to her father."

¶ 6 We note defendant filed a pretrial motion *in limine* to exclude the use of any out-of-court statements K.B. might have made because the State did not follow the procedures outlined by section 115-10 of the Procedure Code, including having a hearing to determine the reliability of any out-of-court statement K.B. might have made. At a hearing on the motion, the State noted its intention not to follow the requirements of section 115-10 of the Procedure Code because K.B. was going to testify.

¶ 7 K.B. also testified she told her mom her bottom hurt. Defense counsel did not object to this statement. K.B. then stated she, her mom, and her dad went to the police station, and she told the police what happened. Defense counsel again objected. The trial court responded, "What's your objection? She's saying what she told." This was the court's same response to defense counsel's earlier hearsay objection. Defense counsel stated, "I understand, Judge, but I think that there is an issue with regard to foundation." The court sustained this objection. While laying the foundation for K.B.'s visit to the police station, the State asked K.B., "How long after you told your mommy and daddy that your bottom hurt did you go to the police station? Maybe I can help you. Was it the same day?" K.B. said yes. The State then asked her if

she told the police officers what happened. She said yes. On cross-examination, K.B. stated she did not go to the doctor after the police station.

¶ 8 Sergeant Jim DeWitt of the Hoopeston police department testified he was on duty at the police station on October 6, 2013, while defendant was being interviewed regarding K.B.'s allegation. Officer Jeremy Welch and Investigator Ron Cade began interviewing defendant. At some point, Welch left the room. Later, during the interview, Cade and defendant got in a struggle after Cade told defendant he was under arrest. DeWitt and Welch entered the room, subdued defendant, and sat him in a chair. Defendant then kicked DeWitt in the right knee.

¶ 9 Investigator Cade testified he was called into work on October 6, 2013, after the police received K.B.'s complaint. He and Welch went to defendant's home and asked him to talk at the police station. Defendant agreed.

¶ 10 Defendant's mother gave Cade permission to search the house. He did not find a phone during this search but found a phone charger in defendant's bedroom. After searching the home, Cade returned to the police station to interview defendant. During the interview, defendant denied having a cell phone. Defendant tried to leave, but Cade told him he could not. Defendant demanded he either be released or arrested. Cade told him to stand and placed him under arrest.

¶ 11 Cade testified both he and defendant were agitated. When placing defendant under arrest, defendant began to struggle while Cade tried to handcuff him. Welch and DeWitt then came in the room and a struggle ensued. The officers were eventually able to get defendant handcuffed. Defendant was then taken to a holding cell.

¶ 12 On cross-examination, Cade noted he was 6 feet tall and weighed 240 pounds. He estimated defendant was 5 feet 8 inches tall and weighed 200 pounds. Defendant was upset and kept telling Cade that he did not do anything. Cade continued to question defendant. The police

later searched defendant's house again and found a cell phone. The police did not know to whom the recovered cell phone belonged.

¶ 13 Welch testified he was on duty and in uniform on October 6, 2013, when he met with Holly B. and her daughter, K.B., regarding a sexual misconduct complaint. After taking the report, he contacted Cade because of the nature of the complaint.

¶ 14 Welch testified he and Cade then went to a residence on 640 East McCracken in Hoopeston, Illinois, and made contact with defendant. Welch transported defendant to the police station. Welch placed defendant in the interview room and advised him of his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)). Defendant told Welch he had not been in possession of a cell phone for 3 1/2 months. When Cade returned to the department, Welch worked on paperwork and made sure the child and her parents were kept away from defendant. He was in several different places while Cade was interviewing defendant but mainly in the station's communications center. DeWitt was also in the police department and in uniform.

¶ 15 Welch and DeWitt later entered the interview room because they believed Cade was in a physical confrontation with defendant. Cade was trying to handcuff defendant, and defendant was resisting. The officers were able to subdue and handcuff defendant and placed him in a chair in the corner of the room. Defendant then kicked DeWitt on his right leg. After this happened, Welch took defendant to prepare him for transport, presumably to another police or jail facility. Officer Cody Steeples was also present at that time. Defendant told Welch he knew where Welch lived, knew he lived there with his family, and asked Welch to remove his handcuffs so he could batter Welch and Steeples. Welch stated he could not quote defendant verbatim, but defendant was threatening to cause Welch bodily harm. Defendant was acting

hostile toward Welch at the time. Defendant was noncompliant, very agitated, very aggressive, and spoke with a raised voice.

¶ 16 Eric B. testified he was married to Holly B. They had three children, K.B., C.B., and L.B. On October 6, 2013, they all lived at 639 East McCracken in Hoopeston, Illinois. He testified K.B. told him she had been touched. The trial court sustained defense counsel's hearsay objection to this statement. Eric testified his kids had been playing with some puppies at defendant's house across the street. He went to defendant's house to get K.B. for supper. After supper, while Eric was getting ready to give K.B. a bath, K.B. told him something. He then had K.B. explain to his wife what happened. He and his wife then took K.B. to the Hoopeston police station. Eric and his wife took K.B. to the emergency room the next morning.

¶ 17 Defendant chose not to present any evidence.

¶ 18 During its closing argument, the State told the jury, "But more importantly, ladies and gentleman, you heard from [K.B.] and her daddy. Her dad told you what happened. *** Also, he told us today that the next day, because [K.B.] complained about her bottom still hurting, he took her to the hospital and had to refer her to Carle." Defense counsel told the jury the trial court was going to instruct the jury that "the term *** sexual conduct means any intentional or knowing touching or fondling by the accused, either directly or through the clothing, of the anus of the victim." Defense counsel then argued, "that's not what happened in this case, ladies and gentlemen. [Defendant] did not pull down [K.B.'s] pants and did not touch her anus or put his finger in her anus. You didn't hear any testimony about that." During its rebuttal argument, the State responded:

> "[K.B.] told you he put his hand or finger in her anus—on her bottom. I'm sorry. But it hurt. How do we know it hurt? It hurt so much that her father and mother

had to take her to the doctor the next day. They took her to the ER, and then to Carle. This wasn't a simple touching. However, I submit when you look at the jury instructions, which the judge will give you in a few moments, the element is not severe injury. The element is not has to take to the doctor. It just says that he made contact with the anus of a person of that age, and he did. There's nothing here that said that didn't happen. You have no evidence that says that didn't happen.

***

On that Sunday, October 6, 2013, a five-year-old girl, enjoying the fall afternoon, went to her neighbor's to play with the puppies, and then this happened. The Defendant, when he knew he had her in the bathroom, came in, did what he did, and touched her bottom, as she told you. She said it hurt. She told you today it hurt. She's always maintained that it hurt. She told her mommy and daddy that it hurt. They did the right thing and took her to the police. They then, the parents, took her to the doctor the next day, because it still hurt."

¶ 19 After deliberations, the jury found defendant not guilty of aggravated battery of a peace officer, guilty of threatening a public official, and guilty of aggravated criminal sexual abuse.

¶ 20 At the sentencing hearing, neither the State nor defendant presented any evidence. The State recommended a 25-year prison sentence with 3 years of MSR for aggravated criminal sexual abuse and a concurrent 10-year term with 1 year of MSR for threatening a public official, noting defendant's 25-year involvement with the criminal justice system. Defendant had prior armed robbery and aggravated battery convictions and was sentenced to concurrent 12-year and

5-year sentences in prison. Shortly after his release from prison, defendant pled guilty to involuntary manslaughter and was sentenced to another 12 years in prison. Defense counsel asked for concurrent nine year prison terms.

¶ 21 The trial court sentenced defendant to concurrent terms of 25 years in prison with 3 years of MSR for aggravated criminal sexual abuse and 10 years in prison with 1 year of MSR for threatening a public official. On May 26, 2015, defense counsel filed a motion to reconsider sentence. On June 3, 2015, the trial court denied defendant's motion to reconsider sentence.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Threatening a Police Officer

¶ 25 1. *Sufficiency of the Evidence*

¶ 26 Defendant first argues the State did not present sufficient evidence to prove Officer Welch suffered a reasonable fear of bodily harm or that defendant's statement to Welch contained specific facts indicative of a unique threat to the officer and not a generalized threat of harm. Defendant also argues the jury was not instructed defendant had to know his words would be received as a threat.

¶ 27 When an appellant argues the State failed to present sufficient evidence to convict, the reviewing court looks at "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in the light most favorable to the prosecution." *People v. Hopkins*, 201 Ill. 2d 26, 40, 773 N.E.2d 633, 641 (2002). "A reviewing court should not substitute its judgment for the trier of fact." *Hopkins*, 201 Ill. 2d at 41, 773 N.E.2d at 641. "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable

inferences to be drawn from the testimony are the responsibility of the trier of fact." *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178, 217 (2006). A trier of fact is entitled to draw reasonable inferences that flow from the evidence. *People v. Kirkpatrick*, 365 Ill. App. 3d 927, 930, 851 N.E.2d 276, 279 (2006). We will not reverse a criminal conviction unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Kirkpatrick*, 365 Ill. App. 3d at 930, 851 N.E.2d at 279.

¶ 28 Defendant was charged under section 12-9 of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/12-9 (West 2012)), which states in relevant part:

> "(a) A person commits threatening a public official when:
>
> (1) that person knowingly delivers or conveys, directly or indirectly, to a public official by any means a communication:
>
> (i) containing a threat that would place the public official or a member of his or her immediate family in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint; or
>
> (ii) containing a threat that would place the public official or a member of his or her immediate family in reasonable apprehension that damage will occur to property in the custody, care, or control of the public official or his or her immediate family; and
>
> (2) the threat was conveyed because of the performance or nonperformance of some public duty, because of hostility of the person

making the threat toward the status or position of the public official, or because of any other factor related to the official's public existence.

(a-5) For purposes of a threat to a sworn law enforcement officer, the threat must contain specific facts indicative of a unique threat to the person, family or property of the officer and not a generalized threat of harm."

A trier of fact is allowed to consider the context in which a threat arose in determining whether the threat was credible. *Kirkpatrick*, 365 Ill. App. 3d at 930, 851 N.E.2d at 279.

¶ 29 Noting Welch could not remember exactly what defendant said to him, defendant argues no rational juror could have found the "vague statements" relied on by the State could have put a police officer who was surrounded by other police officers in reasonable fear of bodily harm. We disagree. Defendant's argument is premised on two points which would expand the requirements to sustain a conviction for threatening a peace officer. Under defendant's theory, the peace officer would have to recite the defendant's threat verbatim and have feared the individual making the threat would act at the moment the threat was made. Defendant provides no authority or argument for his expansion of the elements necessary to convict a defendant of threatening a peace officer.

¶ 30 Defendant forfeited any argument the elements of threatening a public official should be expanded in the manner noted above. As this court often notes, we are entitled to have issues clearly addressed. It is not the function of this court to perform research or make arguments for an appellant. *Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 521-22 (2001). Regardless of forfeiture, we find no merit in either of these points. First, an officer is rarely going to be able to recite verbatim a defendant's threat. Second, section 12-9 of the Criminal Code (720 ILCS 5/12-9 (West 2012)) expressly covers future harm.

¶ 31 We next turn to defendant's arguments regarding the actual elements of the offense. Citing *People v. Dye*, 2015 IL App (4th) 130799, 37 N.E.3d 465, defendant argues this offense requires more than a menacing statement to a public official. This is true. However, this case is distinguishable from *Dye*.

¶ 32 In *Dye*, during a meeting with his public defender, the defendant told his attorney, "I'm going to get you." *Dye*, 2015 IL App (4th) 130799, ¶ 11, 37 N.E.3d 465. This was after the public defender told the defendant she had subpoenaed some documents and inadvertently uncovered evidence harmful to the defendant's case, which the State would receive. *Dye*, 2015 IL App (4th) 130799, ¶3, 37 N.E.3d 465. The defendant told his attorney he was going to complain to the chief circuit judge about her representation and request a different attorney. He also accused his attorney of selling him out and working for the State. *Dye*, 2015 IL App (4th) 130799, ¶4, 37 N.E.3d 465 Both the defendant and public defender were angry. When defendant was leaving the office, he said two or three times, "I'm gonna get you." When the public defender asked if defendant was threatening her, defendant said he was not. *Dye*, 2015 IL App (4th) 130799, ¶5, 37 N.E.3d 465. Based on this evidence, the defendant was convicted of threatening a public official.

¶ 33 On review, this court noted section 12-9 of the Criminal Code (720 ILCS 5/12-9(a)(1) (West 2012)) has to be interpreted within the scope of the first amendment. *Dye*, 2015 IL App (4th) ¶ 10, 37 N.E.3d 465. Citing the United States Supreme Court's opinion in *Virginia v. Black*, 538 U.S. 343, 359 (2013), this court noted the criminalization of a "true threat" does not violate the first amendment. *Dye*, 2015 IL App (4th) 130799, ¶ 8, 37 N.E.3d 465. In *Black*, the Supreme Court stated:

> " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. [Citations.] The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. [Citation.] Intimidation in the constitutionally proscribed sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." (Internal quotation marks omitted.) *Black*, 538 U.S. at 359-60.

¶ 34 Based on the evidence in *Dye*, this court reversed defendant's conviction for threatening a public official, stating the evidence did not justify a reasonable inference the defendant intended to convey the idea he was going to use violence to "get" the public defender. *Dye*, 2015 IL App (4th) 130799, ¶ 12, 37 N.E.3d 465. According to this court, based on the evidence in the case and the context in which the defendant's statements were made, it was just as likely defendant intended to "get" his public defender by going to the chief judge or some other nonviolent avenue as opposed to committing a violent act against her. *Dye*, 2015 IL App (4th) 130799, ¶ 12, 37 N.E.3d 465. This court noted the State had to prove beyond a reasonable doubt defendant intended to communicate a threat, not merely that the victim felt threatened. *Dye*, 2015 IL App (4th) 130799, ¶ 10, 37 N.E.3d 465. In this case, the evidence of defendant's statement and the context in which the statement was made establishes defendant intended to communicate a threat.

¶ 35 Defendant also argues the State failed to establish defendant made a unique threat to a police officer based on Welch's recollection of defendant's statement. We disagree. As stated earlier, defendant told Welch he knew where Welch lived and that he lived with his family. A rational trier of fact could have found defendant's statement presented a unique threat to Officer Welch and his family.

¶ 36 Based on the context in which defendant's statements were made in this case, including defendant's behavior in the interview room and his hostile behavior after the interview, a rational trier of fact could have easily concluded defendant intended to make a threat of violence against Officer Welch and his family which would be taken seriously by Officer Welch. Implicit in defendant's statement to Officer Welch was a threat he was going to pay Welch and his family an unwanted visit when Welch was not surrounded by other police officers. Unlike in *Dye*, an innocent interpretation of defendant's statement to Officer Welch does not exist in this case.

¶ 37 Considering this was an individual who could not control himself at the police station with multiple officers present, his threat to pay Officer Welch and his family a visit became more ominous and credible. Based on the context in which defendant's statement was made to Officer Welch, the State presented sufficient evidence for a rational trier of fact to find beyond a reasonable doubt defendant intended to communicate his intent to commit an act of unlawful violence in the future against Officer Welch and his family.

¶ 38 2. *Jury Instructions*

¶ 39 We next consider defendant's argument with regard to the jury instructions in this case. Normally, when reviewing a trial court's decision to give or deny a requested jury instruction, we only look to see if the court abused its discretion. *People v. Dorn*, 378 Ill. App.

3d 693, 698, 883 N.E.2d 584, 587-88 (2008). However, when reviewing whether the jury was properly instructed, we apply a *de novo* standard of review. *Dorn*, 378 Ill. App. 3d at 698, 883 N.E.2d at 587-88. Defendant is arguing the jury was improperly instructed by one of the jury instructions it received. As a result, we will apply a *de novo* standard of review.

¶ 40 We first note defendant concedes he forfeited this issue because he neither objected to the instruction during his trial or in a posttrial motion. However, defendant argues we should review the issue for plain error pursuant to Illinois Supreme Court Rule 451(c) (eff. April 8, 2013). Rule 451(c) states:

> "Except as otherwise provided in these rules, instructions in criminal cases shall be tendered, settled, and given in accordance with section 2-1107 of the Code of Civil Procedure, but substantial defects are not waived by failure to make timely objections thereto if the interests of justice require." Ill. S. Ct. R. 451(c) (eff. April 8, 2013).

Our supreme court has stated "Rule 451(c) crafts a limited exception to the general rule to correct grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed." (Internal quotes omitted.) *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 473 (2005). "Rule 451(c) is coextensive with the 'plain error' clause of Supreme Court Rule 615(a), and we construe these rules 'identically.' " *Herron*, 215 Ill. 2d at 175, 830 N.E.2d at 473. When determining whether plain error applies, the defendant bears the burden of persuasion under both prongs of the plain-error test. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). "The first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43, 912 N.E.2d at 1227.

¶ 41 According to defendant, the following jury instruction did not provide the jury with appropriate direction. The pattern jury instruction in question states in part:

> "To sustain the charge of threatening a public official, the State must prove the following propositions:
>
> First Proposition: That the defendant knowingly delivered or conveyed, directly or indirectly, to a public official by any means a communication containing a threat that would place the public official in reasonable apprehension of immediate or future bodily harm." Illinois Pattern Jury Instructions, Criminal, No. 11.50 (4th ed. 2000) (hereinafter, IPI Criminal 4th).

According to defendant, this instruction did not accurately state the law.

¶ 42 The State argues defendant has failed to overcome his burden of establishing the trial court erred in providing this instruction. We agree. "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Bannister*, 232 Ill. 2d 52, 81, 902 N.E.2d 571, 589 (2008). The jury instruction given by the trial court was an Illinois pattern jury instruction. "Whenever Illinois Pattern Jury Instructions, Criminal, contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines the jury should be instructed on the subject, the IPI Criminal Instruction shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 451(a) (eff. April 8, 2013).

¶ 43 Defendant has not established the trial court erred in providing this instruction. Based on our reading of the instruction as a whole, the instruction required the jury to find defendant not only knowingly delivered a communication but also knowingly delivered a threat

to someone he knew was a public official knowing the threat would place the official in reasonable apprehension of immediate or future bodily harm. While the pattern jury instruction could be clearer, this does not mean the jury was not properly instructed in this case. "[An instruction's] correctness depends not on whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them." *Bannister*, 232 Ill. 2d at 81, 902 N.E.2d at 589.

¶ 44 Defendant bases his arguments with regard to the jury instruction in this case in large part on the United States Supreme Court's recent decision in *Elonis v. United States*, __ U.S. __, 135 S. Ct. 2001 (2015). However, defendant's reliance on *Elonis* is misplaced based on the instruction given in this case.

¶ 45 First, defendant misreads part of *Elonis*. According to defendant's brief, "after [*Elonis*] it is clear that statutes criminalizing threats must specify some sort of culpable mental state regarding a reasonable person's reaction to the statement." We see no support for this assertion in *Elonis*. Instead, when a federal statute is silent as to the required mental state, the Supreme Court stated courts should read into the statute the *mens rea* requirement necessary to separate wrongful conduct from otherwise innocent conduct. *Elonis*, __ U.S. __, 135 S. Ct. at 2009.

¶ 46 Second, while *Elonis* involved a jury instruction, the instruction had little similarity to the jury instruction in the instant case. The instruction at issue in *Elonis* stated, " 'A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.' " *Elonis*, __ U.S. at __, 135

S. Ct. at 2007. The Supreme Court noted wrongdoing must be conscious to be criminal, and the instruction in *Elonis* did not require this. *Elonis*, __ U.S. at __, 135 S. Ct. at 2009.

¶ 47 Elonis moved to dismiss the indictment against him in the federal district court because it did not allege he intended to threaten anyone. *Elonis*, __ U.S. at __, 135 S. Ct. at 2007. The district court denied the motion, holding Third Circuit precedent required only that Elonis "intentionally made the communication, not that he intended to make a threat." *Elonis*, __ U.S. at __, 135 S. Ct. at 2007. The district court also denied the defendant's request for a jury instruction at trial stating "the government must prove that he intended to communicate a true threat." *Elonis*, __ U.S. at __, 135 S. Ct. at 2007-10.

¶ 48 Instead, the federal district court provided a jury instruction that allowed defendant to be convicted based solely on a negligence standard, *i.e.*, how a reasonable person would understand his post. *Elonis*, __ U.S. at __, 135 S. Ct. at 2011. The government even stated during its closing argument that whether Elonis intended the posts to be threats was irrelevant because Elonis's thoughts or intent did not matter. *Elonis*, __ U.S. at __, 135 S. Ct. at 2007.

¶ 49 The Supreme Court found this reasonable person standard inconsistent with the traditional requirement an offender must be aware of his wrongdoing. According to the Court:

> "In light of the foregoing, Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding 'took deep and early root in American soil' and Congress left it intact here: Under Section 875(c), 'wrongdoing must be conscious to be criminal.' [Citation.]

> There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Elonis*, __ U.S. at __, 135 S. Ct. at 2013.

¶ 50 Unlike the jury instruction in *Elonis*, the instruction at issue in our case did not instruct the jury it could find defendant guilty based on his negligence. The instruction in this case required defendant to both knowingly make a communication and know the communication contained a threat to a public official.

¶ 51 B. Prior Consistent Statements

¶ 52 Defendant next argues the trial court erred by allowing the State to bolster K.B.'s trial testimony by exposing the jury to her prior out-of-court statements without a hearing pursuant to section 115-10 of the Procedure Code (725 ILCS 5/115-10 (West 2014)). Defendant points out the State argued during its closing argument K.B.'s prior statements bolstered her trial testimony. In addition, defendant notes the State told defendant and the court it was not going to be utilizing section 115-10 of the Procedure Code because K.B. was going to testify. Finally, defendant argues he was further prejudiced by the court's failure to instruct the jury how to evaluate K.B.'s out-of-court statements. Defendant argues these errors necessitate a new trial in this case. We agree.

¶ 53 Section 115-10 of the Procedure Code provides an exception to the general rule barring hearsay from being introduced as evidence. Section 115-10 states in part:

> "(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13 *** at the time the act was committed, *** the following evidence shall be admitted as an exception to the hearsay rule:

(1) *testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another*; and

(2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.

(b) *Such testimony shall only be admitted if*:

(1) *The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and*

(2) The child *** either:

(A) *testifies* at the proceeding; *or*

(B) *is unavailable* as a witness and there is corroborative evidence of the act which is the subject of the statement; and

***

(c) 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, or the intellectual capabilities of the moderately, severely, or profoundly intellectually disabled person, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(d) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement." (Emphases added.) 725 ILCS 5/115-10 (West 2014).

The State bears the burden of establishing the prior statements are reliable and not the product of adult suggestion or coaching. *People v. Zwart*, 151 Ill. 2d 37, 43, 600 N.E.2d 1169, 1171-72 (1992).

¶ 54 Defense counsel objected to some of these statements. However, in defendant's posttrial motion, this specific issue was not raised. Defendant asks this court to review the alleged errors under the plain error doctrine.

> "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski,* 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007), citing *People v. Herron,* 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 475 (2005).

When determining whether plain error applies, the defendant bears the burden of persuasion under both prongs of the plain-error test. *Lewis*, 234 Ill. 2d at 43, 912 N.E.2d at 1227. "The first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43, 912 N.E.2d at 1227.

¶ 55 With regard to a trial court's evidentiary rulings, reviewing courts normally will not disturb the court's ruling unless the court abused its discretion. "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20-21, 743 N.E.2d 126, 138 (2000). However, an exception to this general rule exists when the ruling presents a question of statutory interpretation or a question of law. *Hall*, 195 Ill. 2d at 21, 743 N.E.2d at 138. Whether the State can introduce a child victim's out of court statements without a section 115-10 hearing presents a question of law we review *de novo*.

¶ 56 The plain language of section 115-10 of the Procedure Code (725 ILCS 5/115-10 (West 2014)) does not allow the State to introduce testimony regarding a child victim's out-of-court statements without the trial court having a hearing to determine the reliability of the out-of-court statements. Further, if the court finds the statements reliable, the statute provides other requirements for the State in order for defendant's rights to be safeguarded. Not only was no hearing held to determine the reliability of K.B.'s out-of-court statements, the State told the trial court and defendant a hearing was not necessary. Section 115-10(d) (725 ILCS 5/115-10(d) (West 2014)) requires the proponent of the statement to give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

¶ 57 Based on the plain language of section 115-10 of the Procedure Code (725 ILCS 5/115-10 (West 2014)), the trial court clearly erred in allowing any State witness to offer testimony regarding K.B.'s out-of-court statements. From both the State's reasoning for not having a section 115-10 hearing and the trial court's ruling when defense counsel first objected to K.B. talking about these out of court statements, it appears neither the State nor the trial court

understood K.B.'s testimony regarding her out-of-court statements constituted hearsay and section 115-10 applied to her statements.

¶ 58 Pursuant to section 115-10(b), a child's out-of-court statement can only be introduced after a hearing outside the presence of the jury to determine the reliability of the statement. Even if this is done, and the trial court finds the "time, content, and circumstances of the statement provide sufficient safeguards of reliability," the child must still testify or be unavailable before the out-of-court statements can be introduced. 725 ILCS 5/115-10(b) (West 2014).

¶ 59 Because we have found error, we next must determine whether the evidence was closely balanced and the error threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or whether the error was so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of how close the evidence was. *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11. We can review this error because the evidence against defendant on the aggravated criminal sexual abuse charge was closely balanced.

¶ 60 Pursuant to the State's theory of the case and its proposed instructions, which were ultimately given to the jury, the State had to prove beyond a reasonable doubt defendant touched K.B.'s anus for the purpose of sexual gratification or arousal. 720 ILCS 5/11-1.60(c)(1)(i), 11-0.1 (West 2012). (We note the State did not argue or otherwise assert defendant was guilty for touching any other part of K.B.'s body, including her buttocks, for the purpose of sexual gratification or arousal. See 720 ILCS 5/11-0.1 (West 2012) (defining "sexual conduct" as used in article 11 of the Criminal Code of 1961). Even with K.B.'s inadmissible out-of-court statements, the State presented no direct evidence defendant touched K.B.'s anus. The jury had

to infer K.B. meant defendant had contact with her anus when she said defendant "poked" her "bottom" with his finger. When the State solicited testimony regarding K.B.'s out-of-court statements, it wanted to persuade the jurors K.B. meant "anus" when she said "bottom." A reasonable juror could have found the State did not prove beyond a reasonable doubt defendant had contact with K.B.'s anus based on the admissible evidence presented. However, by introducing K.B.'s out-of-court statements that her "bottom" continued to hurt the day after the alleged incident, the State's theory defendant poked K.B.'s anus became much stronger as her buttock probably would not still be sore 12 hours after being "poked" with defendant's finger. Further, the State attempted to bolster K.B.'s credibility with these out-of-court statements by showing her version of events had remained consistent since the day of the alleged incident. Finally, the State presented these out-of-court statements after telling the trial court and defendant a hearing pursuant to section 115-10 of the Procedure Code would not be necessary because defendant would be testifying. We note section 115-10(d) of the Procedure Code (725 ILCS 5/115-10(d) (West 2014)) requires "[t]he proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement." Without attributing any bad faith to the State and assuming the State simply did not understand section 115-10, it appears defense counsel was surprised by the State's introduction of K.B.'s out-of-court statements.

¶ 61 The evidence in this case against defendant on the aggravated criminal sexual abuse charge consisted of the testimony of a six-year-old girl who was five when the abuse allegedly occurred. The State presented no physical evidence, and defendant never admitted committing the act in question. While a rational trier of fact could have convicted defendant of aggravated criminal sexual abuse based on the admissible evidence in this case, the evidence

arising from K.B.'s improperly admitted out-of-court statements dramatically strengthened the State's case. As a result, we reverse defendant's conviction for aggravated criminal sexual abuse and remand for a new trial on this charge.

¶ 62 C. *Krankel* Inquiry

¶ 63 As we are remanding this case for a new trial on the aggravated criminal sexual abuse charge, we need not consider whether the trial court erred in not having a *Krankel* hearing because defendant's allegations of ineffective assistance centered on his attorney's representation with regard to the sex charge.

¶ 64 D. Sentence

¶ 65 Defendant next argues his sentence of 25 years for aggravated criminal sexual abuse for "poking" a young girl's "bottom" is manifestly disproportionate to the crime. Defendant contends the fact he was offered concurrent six-year terms in exchange for pleading guilty raises a presumption the trial court was vindictive in sentencing him to 25 years in prison. Defendant argues nothing in the facts of this case or Lewis's criminal history justifies such an extreme sentence. Defendant's argument focuses on the 25-year sentence he received for aggravated criminal sexual abuse. He makes no real argument with regard to the 10-year sentence he received for threatening a public official. As a result, defendant forfeited any issue with regard to his sentence for threatening a public official. Because we are reversing defendant's conviction for aggravated criminal sexual abuse and remanding the case for a new trial, we need not consider defendant's arguments with regard to his sentence on that charge.

¶ 66 III. CONCLUSION

¶ 67 For the reasons stated above, we affirm defendant's conviction for threatening a police officer but reverse his conviction for aggravated criminal sexual abuse. We remand this

case for a new trial on the aggravated criminal sexual abuse charge. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

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

¶ 69 STEIGMANN, J., specially concurring:

¶ 70 Although I am not sure I agree with all of the majority's analysis, I concur with the judgment reversing the defendant's aggravated criminal sexual abuse conviction and remanding for a new trial on that charge. I conclude that action is appropriate because the State's conduct in this case is troubling. Specifically, in response to defendant's motion *in limine* to exclude any of K.B.'s out-of-court statements because the State did not follow the procedures set forth in section 115-10 of the Procedure Code, the State noted its intention not to follow the requirements of that section because K.B. was going to testify. Yet, both during K.B.'s testimony and the testimony of other witnesses, the State elicited her out-of-court statements to third parties that clearly could have been covered by section 115-10. Thus, it looks like the prosecutor was sandbagging defense counsel when he said he would not be seeking admission of K.B.'s statements to third parties under the statue but then went ahead at trial and offered the same statements on supposedly alternative grounds.

¶ 71 The prosecutor's stated specific election in this case *not* to use section 115-10 regarding the prior statements of the five-year-old victim seems inexplicable. Given the circumstances in which K.B. made those statements, the trial court very likely would have ruled them admissible at trial, assuming that K.B. first testified. Further, the prosecutor had nothing to lose if (1) he sought the admission of these statements, (2) the court conducted a hearing (as statutorily required), and (3) the court ultimately ruled that the statements were not admissible under section 115-10.

¶ 72 Whether K.B.'s out-of-court statements to third parties are viewed as hearsay or as prior consistent statements (that is, consistent with her trial testimony), while an interesting evidentiary issue, would not matter if the prosecutor had sought the admission of K.B.'s statements pursuant to section 115-10. In *People v. Stull*, 2014 IL App (4th) 120704, 5 N.E.3d 328, this court addressed the claim of the defendant, who had been convicted of multiple counts of predatory criminal sexual assault of a child, that the trial court erred by admitting out-of-court statements of the victim that were consistent with her trial testimony as substantive evidence under section 115-10 of the Procedural Code. In *Stull*, this court rejected that argument and concluded that because the statements at issue "were admitted as substantive evidence, it was of no moment that they happened to be consistent with the witness's trial testimony. When *** a prior statement is offered at trial as *substantive* evidence under an exception to the hearsay rule, the mere fact that the statement is consistent with the declarant's trial testimony does not render that prior statement no longer admissible." (Emphasis in original.) *Stull* at ¶ 100, 5 N.E.3d 328. We ultimately concluded in *Stull* that because the victim's prior statements at issue were properly admitted as substantive evidence under section 115-10 of the Procedural Code, those out-of-court statements could be considered substantively by the jury regardless of whether the victim testified at trial consistently or inconsistently with those prior statements. *Stull* at ¶ 101, N.E.3d 328.

¶ 73 This reversal and remand for a new trial is particularly regrettable. Had the State properly used the tools at its disposal and not misled defense counsel, this reversal and remand could have been totally avoided.