2015 IL App (5th) 120557-U

NO. 5-12-0557

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 10-CF-514
	)	
CLINT J. MUELLER,	)	Honorable
	)	John Speroni,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Cates and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction and 13-year sentence on count I are affirmed, but his conviction and sentence on count II are vacated because defendant was not a "family member" as that phrase was defined by the statute under which defendant was convicted. Defendant's term of mandatory supervised release is modified to two years.

¶ 2 After a jury trial in the circuit court of Williamson County, defendant, Clint J. Mueller, was convicted of two counts of criminal sexual assault (720 ILCS 5/12-13(a)(1), (3) (West 2002)) and acquitted of a third count. The victim was defendant's stepniece. The acts for which defendant was convicted occurred in 2003, approximately seven years before the victim reported them to authorities. Defendant was sentenced to 13 years in

the Department of Corrections on both counts, with the sentences to run consecutively, and ordered to serve a 4-year-to-life term of mandatory supervised release. The issues raised on appeal are: (1) whether defendant's conviction on count II should be vacated because he was not the victim's "family member" as that phrase was defined by statute; (2) whether the trial court erred in allowing the propensity testimony of J.M., V.M., and Dr. Swafford; (3) whether the trial court complied with the requirements of Illinois Supreme Court 431(b) (eff. May 1, 2007); and (4) whether the trial court erred in sentencing defendant to a four-year-to-life term of mandatory supervised release. We affirm in part, vacate in part, and modify in part.

¶ 3 FACTS

¶ 4 In November 2010, the victim, who was then 20 years old (date of birth January 3, 1990), told her mother, Cindy, that she was sexually assaulted by defendant seven years earlier. Cindy was previously married to defendant's brother, Lonnie Mueller, Jr. Cindy then asked the victim's half-sisters, J.M., V.M., and O.M. whether they had been assaulted by defendant, and they said they had been. The police were notified and statements were taken. Ultimately, the State charged defendant by information with several counts of criminal sexual assault and abuse with regard to the allegations made by the victim and her half-sisters.

¶ 5 On December 8, 2010, defendant was charged with four counts with regard to the victim. Count I alleged that on September 1, 2003, defendant committed an act of sexual penetration with the victim in that he placed his penis in her vagina. Count II alleged that "on or about November to December 2003," defendant committed sexual assault in that

defendant "who was the step-uncle of [the victim], committed an act of sexual penetration with [the victim] who was under 18 years of age when the acts were committed, in that the defendant placed his penis in the mouth of [the victim]." Count III alleged that from 1997 to 1999 defendant committed criminal sexual assault in that defendant, who was over 17 years of age and "held a position of trust and authority over [the victim], committed an act of sexual penetration with [the victim]" by placing his tongue on her vagina. Count IV alleged that in January 2004, defendant "committed criminal sexual assault in that he committed an act of sexual penetration with [the victim]" in that by the use of force he placed his penis in her vagina. Count III was dismissed prior to trial.

¶ 6 On March 9, 2011, defendant was charged with three additional counts regarding acts committed with V.M. and J.M. Counts V and VI charged defendant with predatory criminal sexual assault and alleged that between 2008 and 2010, defendant committed acts of sexual penetration on V.M. Count VII alleged that between 2008 and 2010, defendant committed an act of aggravated criminal sexual abuse on J.M. On July 19, 2011, defendant was charged with count VIII, indecent solicitation of a child, which alleged that defendant solicited O.M. (date of birth October 3, 1998), who is V.M. and J.M.'s sister, to perform oral sex upon him for money.

¶ 7 Defendant filed a motion to sever counts I, II, and IV from counts V through VIII. After a hearing, the trial court granted defendant's motion to sever. However, the trial court granted the State's request to allow evidence regarding defendant's alleged assaults against V.M. and J.M. as propensity evidence.

¶ 8 The victim, who was 22 at the time of trial, testified defendant sexually assaulted her on three separate occasions when she was 13. Defendant was 22 when the alleged acts occurred. She explained that she has a large family with several siblings and half-siblings. She was approximately four years old when her mother and father divorced, and she was seven when her mother married Lonnie. She recalled that on September 1, 2003, Lonnie told her to go wake up defendant, who was sleeping in a nearby trailer. Defendant often stayed with her family, and she did not think anything about going to wake him because she often did so. Defendant was fixing up the trailer so he and his pregnant girlfriend could live there. While at the trailer, defendant pushed her down, pulled down her pants and pulled her underwear to the side, and forced his penis into her vagina. Defendant threatened to kill her if she told anyone. The victim said she was crying when she left the trailer and went home, took a shower, and washed her clothes. She said she did not tell anyone about the assault because the family was "very close knit" and she thought no one would believe her.

¶ 9 The victim testified defendant assaulted her again in November or December 2003, while she was spending the night at her stepgrandmother's doublewide trailer. The victim's sisters and her cousin were also spending the night. The victim could not sleep in the living room because there were too many people sleeping there. She was sleeping in a separate bedroom. She said defendant was living at his grandmother's trailer at the time and during the night he came in and forced her to give him a "blow job," meaning "[h]e put his penis inside my mouth and came in my mouth." She said after it was over she ran into the bathroom and threw up. Defendant threatened her. She said she ended

up going back to bed and not telling anyone what had happened. She explained everyone was family and said, "I mean, I was 13. I had no clue what to do. *** Step-children didn't get accepted as well as family did. That's just how it was."

¶ 10 The third assault took place in January 2004 when she was in her bedroom. Defendant was spending the night at her family's three-bedroom home. The victim explained that because her mother had seven children, there was not enough room for everyone. Defendant ended up sleeping in her room where there were bunk beds. She was on the bottom bunk, and defendant was on the top bunk. The victim testified that she was lying on her stomach, and defendant "crawled down on my bed and he pulled my pants down and put his penis in my vagina from behind." She said she just laid there while defendant had sex with her and "he pulled out right before he came." Defendant threatened her, crawled back on the top bunk, and went to sleep. She said she cried, but did not tell anyone what had happened because she did not think anyone, including her mother, would believe her.

¶ 11 The victim testified that shortly after the third assault, her mother left Lonnie and she moved with her mother to Indiana. She said her mother filed for divorce, but did not go through with it, and got back together with Lonnie. The victim testified that Lonnie and her mother separated several times between 2003 and 2006. At some point, the victim moved back to Illinois with her mother and eventually her mother and Lonnie divorced.

¶ 12 The victim testified that she was close with her stepcousin, Nicola, and she later told her about the sexual abuse, specifically stating, "I was probably 15, and she−[Nicola]

knew about it. But I shouldn't really repeat that conversation because it doesn't really matter. She didn't say anything. We kept it a secret." The victim testified she did not attempt to contact Nicola via Facebook after the allegations came to light; rather, she "deleted her and blocked her as soon as this all happened."

¶ 13 The victim finally disclosed the alleged sexual abuse in 2010 after her brother, Tommy, told her that defendant told him he was in love with her. Tommy, age 23 at the time of trial, stayed in contact with defendant even after Lonnie and Cindy divorced. Tommy testified he was good friends with defendant. In the summer of 2010, defendant told Tommy he still loved the victim. Tommy testified he was not surprised by the statement because it was consistent with a 2005 conversation in which defendant told Tommy that he and the victim were having sex. The victim testified Tommy told her about the conversation around November 12, 2010. Later, the victim was with a friend, and the friend disclosed that she had been sexually abused. The victim then told her friend that she had also been sexually abused. The friend told her she needed to check with her sisters whether defendant sexually abused them.

¶ 14 The victim called Tommy and asked him to talk to their mother with her. Tommy came home for Thanksgiving. The day after Thanksgiving, the victim and Tommy talked to their mother about defendant's sexually assaulting the victim. Ultimately, the victim's younger sisters were questioned and reported incidents of abuse by defendant; however, the victim testified she did not tell her younger sisters about what defendant did to her because she was embarrassed. Tommy testified consistently with the victim that he told Cindy about defendant's alleged abuse and then they talked to the younger children about

whether they were molested by defendant. Afterwards, the police were notified, and a report was prepared.

¶ 15 J.M., the victim's half-sister, was 13 at the time of trial. She testified that when she was 9 or 10 years old, she was watching a movie with defendant, who is her uncle, while at her grandmother's house. Defendant took J.M.'s hand and stuck it down his pants and made her feel his penis. Her grandmother came into the bedroom and told them it was time for dinner, so the assault stopped. Her grandmother did not witness it. Defendant did not threaten her. J.M. testified this was the only time something sexual occurred between her and defendant. J.M. did not disclose what had happened until her mom brought all of her sisters into a room and asked them if anything had happened between them and defendant. On cross-examination, J.M. admitted that she told her Aunt Shannon that nothing had happened between her and defendant. J.M. explained that she was visiting her great-grandmother at the hospital and saw her Aunt Shannon, defendant's sister, and told her that nothing had happened. J.M. said she did not want to talk about the incident, but admitted that her aunt had not asked her any questions, just said she had missed seeing her nieces.

¶ 16 J.M.'s sister, V.M., age 12 at the time of trial, testified that she was sexually assaulted by defendant on two separate occasions. Both incidents occurred in a small room in the back of her grandmother's trailer. In 2007, defendant tried to put his penis in her vagina. She said defendant was "kind of drunk" and she was able to get away. She did not scream, nor did she tell anyone about the incident. In 2008 or 2009, defendant tried to put his finger in her vagina while they were in the same room as the first incident

occurred. She said she did not tell anyone because she did not think anyone would believe her and it would "kind of mess up everything that was happening, you know. Like, everything was sort of getting better, and it just didn't feel right to say anything at the time. I kind of felt like it was sort of my fault." She said her parents, Lonnie and Cindy, were not fighting at this particular time. She said the first time she disclosed anything was when her mom, sister, and brother took her in a room and her mom asked her if anything had happened with defendant. On cross-examination, V.M. admitted that she told her Aunt Shannon that nothing had happened, but said she only did so because she "didn't want to talk about it" with her family. She said she had not seen her aunt in a long time and she did not want to talk to her about it.

¶ 17 Kathy Swafford, a pediatrician who works part-time for Children's Medical Resource Network which provides abuse exams and reviews abuse cases, testified she examined V.M. on December 15, 2010. V.M. was 11 and entering puberty. Swafford said V.M. was apprehensive about the genital exam and Swafford did not feel she was able to get a complete exam of the rim of the hymen due to V.M.'s anxiety. Swafford testified that while her physical findings were normal, she believed the case was indicative of abuse based on the history of the forensic interview V.M. provided.

¶ 18 Detective Brian Thomas testified he interviewed the victim on December 3, 2011. The victim told him that she tried to tell her mother after the incidents occurred, but was unable to do so. He also testified that the victim's mother called her a "slut, whore, and other names." According to Thomas, the victim was afraid her mother would not believe her, so the victim never told her.

¶ 19 Shannon Tippy, defendant's sister, testified she was in a traffic accident in which her car flipped six times on July 21, 2003. Her husband was deployed with the military, so after she was released from the hospital, her parents brought defendant to Tennessee where she lives so that defendant could help take care of her and her two children while she recuperated. Defendant stayed with her in Tennessee from the end of July 2003 until October 2003. Tippy testified defendant drove her and her children back to Illinois over Labor Day weekend so they could attend the DuQuoin State Fair, and she said they all stayed at her parents' home that weekend. Tippy did not recall defendant's staying at Lonnie's home that weekend. According to Tippy, defendant moved out the week before Halloween, but moved back in with her on January 9, 2004, and remained in Tennessee until November 2006 when he moved back to Illinois.

¶ 20 Tippy testified that while she was visiting her grandmother in the hospital in April 2011, she saw V.M., J.M., and O.M. It was the first time she had seen them since the allegations against defendant came to light. She said that "out of the blue" all three of the girls told her they missed her and that "all three of them told me that nothing happened to them." She said O.M. said nothing had happened, and then J.M. also said nothing had happened to her, followed by V.M., who said nothing had happened to her. Then O.M. told V.M. she was lying, and again V.M. denied that anything had happened. Tippy testified O.M. got mad at V.M. and got her phone out and called her mother and ran away. Tippy then specifically asked V.M. whether anything had happened to her, and V.M. replied, "Well, it almost did." Tippy tried to calm the situation down and told V.M. to "not even talk about it." They then went and found O.M. Tippy said she does not see

any of her three nieces, but sometimes they contact her via Facebook. She is willing to have a relationship with them despite the allegations. On cross-examination, Tippy admitted that it was possible defendant came back to Illinois in 2003 to see his pregnant girlfriend or attend doctor's appointments with her and came back during other times that she could not recall.

¶ 21 Several other witnesses testified for the defense. Defendant's mother and his previous girlfriend, Kim, with whom he has a daughter, confirmed that defendant went to Tennessee to help take care of his sister and her two children. Several witnesses testified that most of the Mueller family, including defendant, attended the DuQuoin State Fair over Labor Day 2003, but Lonnie specifically testified that defendant did not sleep in the trailer near his home on the night before they attended the fair. He recalled that defendant was with his girlfriend the entire weekend. Kim also testified that defendant was with her on Labor Day and did not attend the fair.

¶ 22 Lonnie testified that the victim and defendant never shared a bedroom. He said he added rooms to the house, and the boys and girls were always separated. He said he never noticed the victim or any of his daughters trying to avoid defendant. On cross-examination, Lonnie admitted that he pled guilty to battery for shoving his now ex-wife, Cindy, and that was what precipitated the divorce proceedings.

¶ 23 The victim's brother, Harris, testified that defendant, his stepuncle, was a lot of fun. He recalled defendant staying in a trailer near his home "for a couple of days." He testified defendant and the victim never shared a bedroom. He did not recall the victim's ever trying to avoid defendant. Harris testified that even after his mother and Lonnie

divorced, he would still go over to Lonnie's mother's house, but his mother tried to keep him, his brothers, and his sisters away from the Mueller side of the family after she divorced Lonnie. He said he never noticed his sisters' not wanting to be around defendant until defendant was "taken in" on the current charges. Harris said he tried to talk to his sisters about the allegations, but he has not been allowed to do so. On cross-examination, he was specifically asked whether or not the abuse occurred and he answered, "Well, I don't think it did, but, like I said, I wanted to hear what they [his sisters] had to say first. You know, I never was able to."

¶ 24 Nicola Tippy, Shannon's daughter, testified that she was very close with the victim when they were younger. When she lived in Illinois, she lived next to the victim and her family. She testified the victim never told her that defendant did anything to her. She said even after the allegations came to light, the victim never told her. According to Nicola, the victim never liked the fact that Cindy married Lonnie, and "she [the victim] was kind of for the divorce." She said about a month before the allegations came to light, the victim's brother, Tommy, called her and told her that defendant had touched some of her cousins and said he knew it also had happened to her. Nicola told Tommy she had no idea what he was talking about and nothing had happened to her. She said Tommy got "really upset," called her a liar, and told her she was not standing up for her family. She said Tommy called her multiple times a day to "cuss" her out and degrade her and that this went on for a couple of months. She testified defendant never did anything inappropriate to her.

¶ 25 Defendant did not testify. After hearing all the evidence, the jury convicted

defendant on counts I and II, but acquitted defendant on count IV. The trial court sentenced defendant to consecutive 13-year terms in the Department of Corrections, as well as a 4-year-to-life term of mandatory supervised release. Defendant filed a motion to reconsider sentence, which was denied. Defendant now appeals.

¶ 26 ISSUES

¶ 27 I. Count II

¶ 28 The first issue raised by defendant is whether his conviction on count II should be vacated because defendant was not the victim's "family member" as that phrase was defined by statute at the time of the charged act. The State concedes that defendant's conviction should be reversed because in 2003, when the acts occurred, defendant was not a family member as defined by statute.

¶ 29 In 2003, a "family member" was defined as follows:

> " 'Family member' means a parent, grandparent, or child, whether by whole blood, half-blood or adoption and includes a step-grandparent, step-parent or step-child. 'Family member' also means, where the victim is a child under 18 years of age, an accused who has resided in the household with such child continuously for at least one year." 720 ILCS 5/12-12(c) (West 2002).

In order to secure a conviction on count II, the State was required to prove that defendant was the victim's family member.

¶ 30 We accept the State's concession that it failed to prove an essential element of count II as charged. Because defendant is the victim's stepuncle and did not reside in the household with the victim continuously for one year, defendant was not a family member

as defined by statute. We also accept the State's concession that because defendant received two consecutive 13-year sentences, rather than one, defendant was indeed prejudiced by the error. Accordingly, defendant's conviction and sentence on count II must be vacated.

¶ 31 II. Propensity Evidence

¶ 32 The second issue is whether the trial court erred in allowing propensity testimony. Defendant specifically objects to the testimony of J.M., V.M., and Dr. Swafford and asserts that probative value of such testimony was substantially outweighed by its prejudicial effect. We disagree.

¶ 33 In general, evidence of a defendant's other crimes is usually inadmissible if offered to demonstrate defendant's bad character or his propensity to commit crimes. *People v. Evans*, 373 Ill. App. 3d 948, 869 N.E.2d 920 (2007). However, section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) provides an exception to this general rule. 725 ILCS 5/115-7.3 (West 2010). Section 115-7.3 states that if a "defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, [or] criminal sexual abuse" then "evidence of the defendant's commission of another [similar] offense or offenses *** may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(a)(1), (b) (West 2010). Section 115-7.3 of the Code "enable[s] courts to admit evidence of other crimes to show [a] defendant's propensity to commit sex offenses." *People v. Donoho*, 204 Ill. 2d 159, 176, 788 N.E.2d 707, 718 (2003).

¶ 34 We are cognizant, however, that section 115-7.3 is not without limitation, as it

incorporates the general rules of evidence (725 ILCS 5/115-7.3(b) (West 2010)) and expressly provides for the balancing of the probative value against its undue prejudicial effect (725 ILCS 5/115-7.3(c) (West 2010)). Therefore, while section 115-7.3 provides an exception to the general rule that other-crimes evidence of propensity is inadmissible, it allows such evidence to be admitted only where the trial court finds that its undue prejudicial effect does not substantially outweigh its probative value. *People v. Suastegui*, 374 Ill. App. 3d 635, 645, 871 N.E.2d 145, 153 (2007). The key to balancing the probative value of propensity of other-crimes evidence against its possible prejudicial effect is to avoid admitting evidence that entices a jury to find the defendant guilty "*only* because it feels he is a bad person deserving punishment." (Emphasis in original). *People v. Childress*, 338 Ill. App. 3d 540, 548, 789 N.E.2d 330, 337 (2003). In weighing the probative value against undue prejudice, the court may consider "(1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; or (3) other relevant facts and circumstances." 725 ILCS 5/115-7.3(c) (West 2010). A trial court's ruling on the admissibility of propensity evidence is reviewed under an abuse of discretion standard. *Donoho*, 204 Ill. 2d at 182, 788 N.E.2d at 721.

¶ 35 In the instant case, the trial court granted the State's motion to admit other-crimes evidence, specifically citing to *Donoho* and finding it more probative than prejudicial to allow the evidence of other alleged sexual assaults involving defendant against the victim's half-sisters, J.M. and V.M., to be introduced at trial for the purpose of showing the propensity of defendant to commit similar sexual offenses. Before we address

whether the trial court erred, we must first address defendant's contention that defense counsel was ineffective for failing to fully apprise the trial court of the factual circumstances behind the proffered testimony of J.M. and V.M. Defendant insists his counsel was ineffective for failing to apprise the trial court (1) that J.M. and V.M. first made their allegations against defendant after being placed in a room with family members and being questioned by their mother whether defendant did anything to them, (2) that Nicola was pressured by the victim's brother, Tommy, to falsely allege that defendant abused her as well, (3) that J.M. and V.M. later told their aunt that defendant did nothing to them, and (4) that J.M. and V.M.'s allegations came "in the midst of a particularly adversarial divorce between their parents."

¶ 36 To prove ineffective assistance, a defendant must show (1) his lawyer's performance fell below an objective standard of reasonableness, and (2) but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-27, 473 N.E.2d 1246, 1255 (1984). We agree with the State that none of defendant's claims are sufficiently relevant to have affected the trial court's decision to admit the propensity testimony of J.M. and V.M.

¶ 37 First, the trial court was aware of the circumstances surrounding the allegations of abuse, as additional counts pertaining to J.M. and V.M were severed from the instant charges. Second, Nicola's testimony proved to be rather weak in that she was inconsistent and contradictory. Third, Shannon Tippy's testimony that J.M. and V.M. told her defendant did not abuse them was weak and was sufficiently explained by J.M.

and V.M. when they testified. They simply did not want to talk about the abuse with their aunt, defendant's sister. Finally, as for defendant's argument that defense counsel should have advised the trial court that J.M.'s and V.M.'s allegations were made in the midst of their parents' nasty divorce, we agree with the State that it simply does not make sense for Cindy to get her children to fabricate allegations of sexual abuse against defendant rather than Lonnie because charges of sexual abuse against defendant would not dramatically impact Lonnie's visitation with his daughters. At the worst, the trial court would have ordered Lonnie not to allow his brother around the children during his visitation. Accordingly, we find that even if defense counsel brought up these "facts" to the trial court at the hearing, the result of the hearing would not have been different. The trial court still would have allowed the State to present the propensity testimony of J.M. and V.M because the prejudicial effect of the testimony did not outweigh its probative value.

¶ 38 Overall, we cannot say the trial court abused its discretion by admitting the propensity evidence offered by J.M. and V.M. against defendant at trial. The first factor in balancing the probative and prejudicial value of the other-crimes evidence, proximity in time, did not weigh against admission. It has been held that a 12- to 15-year lapse between offenses is not too remote in time to be admissible. *Donoho*, 204 Ill. 2d at 183-84, 788 N.E.2d at 722. Here, the time between the sexual assault of the victim and the subsequent alleged sexual assaults of J.M. and V.M. was five and seven years. Relying on *Donoho*, we do not find that too remote in time to conclude that defendant is entitled to relief on this basis.

¶ 39 The second factor, the degree of factual similarity between the two crimes, weighs in favor of admission. The trial court correctly noted that the victims were all under age at the time of sexual abuse, that defendant was either their uncle or stepuncle, and that one of the three locations in which the victim alleged abuse was the same location alleged by the other two victims. Even though the victim in the instant case was the oldest, the ages of all the victims at the time of alleged abuse were close enough to make the assaults similar. The victim was only 13 and, contrary to defendant's assertion, was in no way capable of consenting to having sex with defendant.

¶ 40 With regard to the third factor, other relevant facts and circumstances, we point out that the trial court made it clear that it was not going to hold minitrials within this trial and insisted that the State should not elicit much detail about the alleged abuse of J.M. and V.M. so as to ensure that the prejudicial effect of the evidence did not outweigh its probative value. After carefully reviewing the trial court record, we find that the propensity evidence was not presented in a way that the jury would tend to convict defendant solely on the basis that he was a bad person deserving of punishment. To the contrary, the record is replete with testimony that defendant was good-natured and a beloved uncle or uncle figure to some of the victim's relatives, including her brother, Tommy. Accordingly, we hold that the trial court did not abuse its discretion in allowing the State to present the propensity testimony of J.M. or V.M.

¶ 41 Likewise, we find that the trial court did not abuse its discretion in admitting the testimony of Dr. Swafford regarding her examination of V.M. Dr. Swafford's testimony was relevant on the issue of propensity and admissible under section 115-7.3(e) of the

Code, which specifically provides that "proof may be made by *** testimony in the form of an expert opinion." 725 ILCS 5/115-7.3(e) (West 2010). Defendant contends that because the trial court did not admit the evidence under section 115-7.3, it did not conduct a balancing test; however, as the State points out, the balancing test is not unique to propensity evidence, and a trial court must always weigh the probative value of evidence and balance it against the risk of unfair prejudice. See *People v. Roman*, 2013 IL App (1st) 110882, ¶ 23, 1 N.E.3d 552. Thus, there is no reason to believe that the trial court did not consider the probative value of Dr. Swafford's testimony and balance it against its prejudicial effect. We also point out that a reviewing court can sustain a trial court's decision for any appropriate reason regardless of whether the trial court's reasoning was correct. *People v. Johnson*, 208 Ill. 2d 118, 129, 803 N.E.2d, 442, 449 (2003). As previously stated, the evidence was admissible under section 115-7.3(e) of the Code.

¶ 42 Defendant relies on two cases, *People v. Simpkins*, 297 Ill. App. 3d 668, 697 N.E.2d 302 (1998), and *People v. Howard*, 305 Ill. App. 3d 300, 712 N.E.2d 380 (1999), in support of his contention that it was error to admit Dr. Swafford's testimony. We find both cases distinguishable. In *Simpkins*, the testimony of a Department of Children and Family Services investigator was essentially used to establish the reliability of the victim's recanted testimony. *Simpkins*, 297 Ill. App. 3d at 683, 697 N.E.2d at 312. Here, V.M. did not recant, but testified she was sexually assaulted by defendant on two separate occasions. Likewise, we believe *Howard* is inapplicable because it does not deal with the admissibility of evidence under section 115-7.3(e) of the Code, which specifically allows

an expert to testify.

¶ 43 Even assuming *arguendo* that the trial court should not have allowed Dr. Swafford to testify, we find any error caused by the admission of her testimony to be harmless. Dr. Swafford testified that the physical findings of her examination of V.M. were normal; therefore, this testimony did not harm defendant. Dr. Swafford testified her finding of abuse was based solely on the forensic interview of V.M. Because V.M. actually testified at trial about the abuse, Dr. Swafford's testimony was merely cumulative to the testimony of V.M. and does not constitute reversible error.

¶ 44 III. Supreme Court Rule 431(b)

¶ 45 The third issue we are asked to address is whether the trial court complied with the requirements of Supreme Court Rule 431(b). Defendant contends the trial court failed to ask the jurors who were eventually seated whether they accepted the four principles enumerated in Rule 431(b). Defendant acknowledges he failed to object to the alleged error and failed to include it in a posttrial motion. Normally, a defendant forfeits appellate review where he fails to object to the alleged error at trial and fails to include it in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1129 (1988). However, defendant insists he is entitled to have his argument reviewed under the plain error doctrine.

¶ 46 Forfeited errors are reviewable in two instances: (1) where a clear or obvious error occurred 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, and (2) where a clear or obvious error occurred 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). Therefore, we must first determine whether any error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964, 971 (2008). Construction of a supreme court rule is reviewed *de novo*. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 332, 775 N.E.2d 987, 992 (2002).

¶ 47 Supreme Court Rule 431(b) codified our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472, 477, 469 N.E.2d 1062, 1064 (1984). It provides as follows:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." __ Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Our review of the record shows that the trial court did not violate Rule 431(b) in its questioning of prospective jurors.

¶ 48 Defendant concedes the questions posed to the jury were adequate to establish that

the jurors understood these four principles, but argues the jurors were not specifically asked whether they "accepted" these principles. However, as our colleagues in the First District pointed out, there is no "special magic language that needs to be used to show whether a prospective juror understands and accepts the four *Zehr* principles." *People v. Ware*, 407 Ill. App. 3d 315, 356, 943 N.E.2d 1194, 1228 (2011). The way the trial court posed questions to prospective jurors by asking them for example whether they had "any problem with" a specific concept such as "a defendant does not have to testify or present any evidence whatsoever" indicates that by not voicing a concern, the prospective juror accepted the principle. The record here shows the trial court allowed the prospective jurors time to respond to its questions concerning the *Zehr* principles and that none of the seated jurors expressed any doubt about the principles. The record specifically shows that the jurors were asked if they could follow the law as given by the trial court, and all agreed they could. Overall, our review of the record shows that the trial court's questions to potential jurors satisfied the requirements of Supreme Court Rule 431(b). Even assuming *arguendo* the trial court violated Rule 431(b), as previously discussed, defendant has forfeited the issue on appeal by failing to properly raise it below.

¶ 49 Contrary to defendant's assertion, the evidence in this case was not closely balanced. The victim succinctly testified that defendant sexually abused her on three separate occasions when she was 13 years old. While defendant's relatives testified he was living in Tennessee, everyone agreed that defendant was in the area on Labor Day 2003, the date the victim testified defendant first had sex with her when she went to a nearby trailer to wake him up. Lonnie testified that defendant did not stay at the trailer

on the night in question, but his testimony is clearly suspect as he is defendant's brother. The evidence established that defendant worked intermittently at the trailer where the victim claims she was raped by defendant. The victim did not initially report the abuse due to her tender years and the fact that she did not think anyone would believe her.

¶ 50 The victim's testimony was corroborated by her brother, Tommy, who testified that in 2005, defendant told him he previously had sex with the victim. Tommy's testimony is crucial to our determination that the evidence was not closely balanced. Unlike some of the witnesses, it is clear that Tommy did not have an axe to grind with defendant or with Lonnie. He remained friends with defendant even after Cindy and Lonnie divorced. The victim ultimately reported the sexual abuse in 2010 after Tommy informed her that defendant said he was in love with her. After confiding in a friend about defendant's sexual abuse, the friend made her realize she needed to check to see whether her younger half-sisters had been victimized by defendant. Because of her concern for her younger half-sisters, the victim ultimately came forward and reported that she had been raped and sexually abused by defendant.

¶ 51 Finally, the victim's half-sisters, J.M. and V.M., both testified that defendant sexually abused them, thereby establishing defendant's propensity to sexually abuse underage girls with familial ties. Under these circumstances, we do not agree with defendant that the evidence was closely balanced. Thus, defendant has failed to establish plain error.

¶ 52 IV. Mandatory Supervised Release

¶ 53 The final issue we are asked to address is whether the trial court erred in

sentencing defendant to a four-year-to-life term of mandatory supervised release. The State concedes that defendant's mandatory supervised release should be reduced to two years because in 2003, the year defendant committed the offense of criminal sexual assault of which he was found guilty, the term of mandatory supervised release was two years. 730 ILCS 5/5-8-1(d)(2) (West 2002). We accept the State's confession of error and modify the term of mandatory supervised release to two years.

¶ 54 CONCLUSION

¶ 55 For the foregoing reasons, we affirm defendant's conviction and sentence of 13 years on count I; however, we modify the term of mandatory supervised release to 2 years. We also vacate defendant's conviction and sentence on count II.

¶ 56 Affirmed in part, modified in part, and vacated in part.