Illinois Official Reports

Appellate Court

People v. Gilker, 2023 IL App (4th) 220914

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRUCE W. GILKER, Defendant-Appellant.
District & No.	Fourth District No. 4-22-0914
Filed Rehearing denied	December 1, 2023 January 9, 2024
Decision Under Review	Appeal from the Circuit Court of Adams County, No. 21-CF-548; the Hon. Michael L. Atterberry, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	James E. Chadd, Santiago A. Durango, and Mark D. Fisher, of State Appellate Defender's Office, of Ottawa, for appellant. Gary L. Farha, State's Attorney, of Quincy (Patrick Delfino, David J. Robinson, and James Ryan Williams, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE STEIGMANN delivered the judgment of the court, with opinion. Presiding Justice DeArmond and Justice Zenoff concurred in the judgment and opinion.

OPINION

¶ 1 In May 2022, a jury convicted defendant, Bruce W. Gilker, of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2018)) and sexual exploitation of a child (*id.* § 11-9.1(a)(1)). The trial court later sentenced him to consecutive prison terms of 15 years and 4 years.

¶ 2 Defendant appeals, arguing that (1) he was denied a fair trial because of the improper admission of evidence regarding other criminal conduct or bad acts, (2) he was denied a fair trial as a result of testimony vouching for the credibility of the alleged victim, and (3) he was prejudiced by the State's improper comments during closing argument. We disagree.

¶ 3 I. BACKGROUND

¶ 4 A. The Charges

¶ 5 In September 2021, the State charged defendant with three counts of predatory criminal sexual assault of a child (*id.* § 11-1.40(a)(1)) and one count of sexual exploitation of a child (*id.* § 11-9.1(a)(1)). The State alleged that defendant committed the offenses against I.R.G. (born in March 2014), a minor under 13 years of age, by touching her sex organ with his penis (count I) and hand (count II), touching her hips and buttocks with his penis (count III), and masturbating in her presence, knowing she would view the act (count IV). (We note that defendant is I.R.G.'s father.)

¶ 6 B. Pretrial Proceedings

¶ 7 Prior to trial, the trial court granted the State's motion *in limine* seeking to introduce, pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2020)), a videotape of an interview of I.R.G., conducted by Susan Tode at the Children's Advocacy Center (CAC). The court also granted the State's motion to introduce the testimony of (1) Susan Tode, (2) I.R.G.'s therapist, Jeanette Edwards, and (3) I.R.G.'s mother, J.J., about statements I.R.G. made to them. The court further allowed the State to (1) present evidence that defendant showed I.R.G. pornography and (2) impeach defendant with his prior conviction of intimidation if he chose to testify.

¶ 8 C. Trial Evidence for the State

¶ 9 At trial, the parties stipulated that I.R.G. lived with her mother, J.J., and her father, defendant, from her birth until October 2019. On October 10, 2019, defendant obtained an emergency order of protection against J.J. As a result, I.R.G. lived with defendant until November 5, 2019, when the emergency order of protection was dismissed. At that time, I.R.G. returned to live with J.J., who has had custody of I.R.G. since that time.

¶ 10 1. *I.R.G.*

¶ 11 I.R.G. testified that she was eight years old and currently lived with J.J. When she was three or four years old, she would sometimes shower with defendant when her mother was not home, and defendant would "mess with his private parts" and "get very close to [her]." I.R.G. also testified that she and defendant would be together in bed or on a couch and he would touch her "private" with his hand or his "private," making her feel "scared or nervous or sad." When

her mother was not home, defendant also showed her movies with naked people kissing each other. I.R.G. testified there were "kids or grownups" in the movies. For a few weeks when she was five years old, I.R.G. lived with defendant at her Aunt Jessie's house, but I.R.G. could not remember if any of the incidents happened while she lived there. I.R.G. identified People's group exhibit No. 1 as drawings she made depicting some of the incidents, and she testified she showed the drawings to Edwards during counseling sessions.

¶ 12 On cross-examination, I.R.G. testified that defendant sometimes touched her with his hands and "private" while they lived at her Aunt Jessie's house. She testified that defendant began touching her when she was two years old and the touching sometimes caused her to feel burning in the front and back of her "privates" and to bleed in her underwear, which defendant hid or threw away. I.R.G. also testified that one of her drawings contained in the group exhibit depicted her sister, her sister's boyfriend, defendant, and her Aunt Jessie in the garage smoking a pipe "when [her] mom left for the jail thing."

¶ 13 2. *J.J.*

¶ 14 J.J. testified that she lived with I.R.G. and defendant until October 2019. Because J.J. worked full-time, defendant cared for I.R.G. during the day from the time I.R.G. was born in 2014 until she was 2½ years old. Although J.J. knew defendant and I.R.G. sometimes took showers together, she testified that she never saw defendant do anything inappropriate. On October 10, 2019, a court issued an order prohibiting J.J. from having any contact with I.R.G. or defendant. But when J.J. regained custody of I.R.G. on November 5, 2019, I.R.G. was "clingy" and often woke up with nightmares. J.J. arranged for I.R.G. to have counseling with Edwards, beginning in April 2020.

¶ 15 In November 2020, I.R.G. told J.J. for the first time that defendant "would start playing, messing with himself" and rubbed against her back when they took showers together. Following a counseling session between I.R.G. and Edwards on April 22, 2021, Edwards told J.J. she was going to make a report. A few days later, J.J. was contacted by the CAC to arrange for an interview with I.R.G. J.J. testified that she did not tell I.R.G. what to say during the interview, during which she stayed in a separate room at the CAC. J.J. testified that she did not tell I.R.G. to make the drawings contained in People's group exhibit No. 1.

¶ 16 On cross-examination, J.J. testified that when she was forced to leave her home on October 10, 2019, she saw her older daughter, her daughter's boyfriend, defendant, and defendant's sister, Jessie, in the garage. I.R.G. later showed J.J. a drawing of those four people in the garage with what looked like a pipe and a baggy. I.R.G. told J.J. that she had seen defendant with those items several times.

¶ 17 J.J. testified that defendant was allowed supervised visitation with I.R.G. off and on, starting in June 2020, and I.R.G. began having nightmares again following those visits. J.J. was shown defendant's exhibit No. 1 and identified it as her petition for an order of protection against defendant, filed on May 5, 2021, which she had signed under penalty of perjury. Defense counsel went through J.J.'s allegations against defendant contained in her petition. Despite those allegations, J.J. admitted she never saw blood in I.R.G.'s underwear or pornography in the house and she never saw any indication that defendant sexually abused I.R.G. The trial court admitted the exhibit on defense counsel's motion.

¶ 18 On redirect, J.J. testified that she made the allegations supporting the order of protection based on what people at the CAC told her to say. She acknowledged that the allegations were

not based on her own personal knowledge.

¶ 19 3. *Jeanette Edwards*

¶ 20 Jeanette Edwards testified that she was a therapist and began counseling I.R.G. in April 2020. During a counseling session on April 22, 2021, I.R.G. showed Edwards the drawings she drew that were contained in People's group exhibit No. 1. The exhibit was admitted into evidence over defense counsel's objection.

¶ 21 Edwards testified that I.R.G. explained to her that one of the drawings showed her and defendant taking a shower together; one showed defendant rubbing against her, causing her hip to become wet; one showed them in bed, where he would touch her bottom when her mother was at work; and one showed defendant, her Aunt Jessie, J.J.'s older daughter (Kim), and Kim's boyfriend taking what looked like crushed ice out of a bag, putting it in a "thing," and passing it around in the garage.

¶ 22 I.R.G. told Edwards that when her body got wet from contact with defendant, he would dry her off and tell her not to tell anyone. Edwards testified that J.J. was in a separate room when I.R.G. showed and explained the drawings.

¶ 23 After that counseling session, Edwards made a hotline call to report the discussion because she was a mandated reporter.

¶ 24 On cross-examination, defense counsel asked about the fourth drawing in People's group exhibit No. 1, referring to it as "the one about the drugs apparently." Edwards testified that J.J. told her I.R.G. had "a hard time with sleep," but she did not recall J.J. mentioning nightmares. After reviewing her notes from April 20, 2020, contained in defendant's exhibit No. 2, Edwards confirmed that she did not document any complaint by J.J. about I.R.G. having nightmares. The trial court admitted defendant's exhibit No. 2 on defense counsel's motion over the State's objection.

¶ 25 Edwards also agreed that I.R.G. never complained about defendant until April 2021. When I.R.G. showed Edwards the drawings, I.R.G. did not cry or seem upset; she did, however, say that it was hard and uncomfortable to talk about the drawings.

¶ 26 4. *Susan Tode*

¶ 27 Susan Tode, a CAC coordinator and forensic interviewer, testified she interviewed I.R.G. on April 28, 2021. A videotape of the interview was played for the jury. Tode also testified that I.R.G. circled and named parts of the body involved in the alleged touching on male and female body charts. Tode identified the charts contained in People's exhibit No. 7, and the exhibit was admitted into evidence.

¶ 28 5. *Kelsey Miller*

¶ 29 Sheriff's Investigator Kelsey Miller testified she observed the interview between Tode and I.R.G. from a separate room at the CAC. She spoke with J.J. after the interview was completed but did not recall if she told J.J. that defendant would be arrested and go to prison. Miller subsequently questioned defendant at the sheriff's office in July 2021. Miller testified that defendant answered all her questions and denied ever sleeping in the same bed as I.R.G. or showering with her. The State then rested.

¶ 30 D. Trial Evidence for Defendant

¶ 31 1. *Kelsey Miller*

¶ 32 Defendant recalled Miller and sought to impeach her with her recorded statement in which Miller told J.J. she would arrest defendant, and she hoped he would go to prison. The trial court allowed impeachment but limited it to Miller's stating she would arrest defendant. Defendant's counsel then asked Miller whether she told J.J. that she was going to arrest defendant. Miller testified that she did say that, adding she made the statement because she "found I.R.G.'s [interview] to be very compelling and credible."

¶ 33 Upon defense counsel's further questioning, Miller acknowledged that she made that statement before she had collected all of the evidence in the case, including statements from other witnesses and a doctor's medical examination of I.R.G. Nor had she yet (1) secured a search warrant to look for pornography in defendant's home or (2) interviewed I.R.G.'s older sister.

¶ 34 On cross-examination, the State asked Miller if her statement to J.J. was Miller's "comment on the compelling nature" of I.R.G.'s interview at the CAC. Miller agreed.

¶ 35 2. *Erica Corriveau*

¶ 36 Erica Corriveau testified she worked as a student support family liaison at the school I.R.G. attended during the three-week period she lived with defendant in October and November 2019. Corriveau testified that I.R.G. seemed nervous and anxious during her first few days at the school, but after that she made a good transition and made new friends. Defendant brought I.R.G. to school the first day she attended there. Corriveau sent defendant text messages about how I.R.G. was doing. Corriveau never saw any indication that I.R.G. was having physical problems.

¶ 37 3. *Lauren Cannady*

¶ 38 Lauren Cannady, I.R.G.'s kindergarten teacher at the school, testified consistently with Corriveau's testimony. In addition, Cannady testified that defendant brought I.R.G. to the classroom in the morning and I.R.G. did not appear afraid of him.

¶ 39 4. *Jennifer Stickler*

¶ 40 Jennifer Stickler testified that she supervised visits between defendant and I.R.G. beginning in late 2020 or early 2021. The visits always involved normal interactions, and I.R.G. never appeared fearful or scared of defendant. Stickler testified that I.R.G. was "a very active and spunky young lady." I.R.G.'s visits with defendant were "one of the only times that there were cartwheels and headstands being done in [Stickler's] office and playing different games, creating their own games to play together while they were there and their visits seemed to go pretty well." Stickler testified that I.R.G. was "talkative, laughing, smiling, engaging with [defendant]" during the visits, and she never cried or seemed sad.

¶ 41 5. *Joann C.*

¶ 42 Joann C., defendant's mother, testified that she had frequent contact with I.R.G. and never saw anything to cause concern for I.R.G.'s welfare. She testified that I.R.G. never appeared

afraid or sad around defendant.

¶ 43 6. *Jessie H.*

¶ 44 Jessie H., defendant's sister, testified that defendant and I.R.G. had a very close relationship. I.R.G. never appeared sad or afraid of defendant. She denied smoking a pipe in the garage with defendant in October 2019.

¶ 45 Jessie testified that she took care of I.R.G. at bedtime, including bathing, when defendant and I.R.G. lived at her house in October and November 2019. I.R.G. never appeared to experience physical discomfort or exhibit signs of abuse. As a foster parent, Jessie had received training regarding abuse, and I.R.G. appeared only happy and outgoing while living at her house.

¶ 46 7. *Defendant*

¶ 47 Defendant testified and denied all the allegations against him. Defendant asserted he never showered or slept with I.R.G., touched her inappropriately, or showed her pornography. Defendant testified that he first became aware of the allegations when he read the order of protection J.J. had obtained against him in May 2021. Defendant testified it was "one of the hardest things [he has] ever read." He acknowledged, however, that he had previously been convicted of intimidation.

¶ 48 8. *Charone Tolbert*

¶ 49 Defendant's last witness was Dr. Charone Tolbert, a pediatrician. She testified that she performed a physical examination of I.R.G. on May 7, 2021, due to allegations of physical or sexual assault. Tolbert testified she did not find any abnormalities, tears, scars, or other indications of sexual abuse.

¶ 50 E. Closing Arguments

¶ 51 In closing argument, the prosecutor stated the following:

> "[T]o find the [d]efendant guilty, you have to find that [I.R.G.] is a credible—was a credible witness. You have to believe her because this is—these are not crimes that occur in front of witnesses. These are crimes that occur in private. [There is] not going to be a witness. If there was a witness around, it wouldn't have occurred."

The prosecutor also stated that "it's very believable that a young child being molested by a parent is not going to disclose for a period of time." The prosecutor later commented,

> "Investigator Kelsey Miller was correct when she said the [CAC] interview of [I.R.G.] was compelling. I also suggest to you that her testimony here in court *** was compelling. Her statements to Jeanette Edwards were compelling. Together every statement she's given is very compelling, is very believable, is very credible."

¶ 52 F. Jury Deliberations

¶ 53 During deliberations, the jury asked to rewatch the videotape of I.R.G.'s CAC interview, and the trial court granted the request. The jury ultimately returned verdicts of (1) not guilty of predatory criminal sexual assault of a child in counts I and II, (2) guilty of predatory criminal sexual assault of a child in count III, and (3) guilty of the sexual exploitation of a child in count

IV.

¶ 54 G. Sentencing

¶ 55 The trial court sentenced defendant to 15 years in prison for predatory criminal sexual assault of a child and 4 years in prison for sexual exploitation of a child, to be served consecutively.

¶ 56 This appeal followed.

¶ 57 II. ANALYSIS

¶ 58 Defendant appeals, arguing that (1) he was denied a fair trial because of the improper admission of evidence regarding other criminal conduct or bad acts, (2) he was denied a fair trial as a result of testimony vouching for the credibility of the alleged victim, and (3) he was prejudiced by the State's improper comments during closing argument. We disagree.

¶ 59 A. The Admission of Evidence of Other Crimes or Bad Acts

¶ 60 1. *Testimony About Pornographic Movies*

¶ 61 Defendant first argues that the trial court abused its discretion by allowing the State to present evidence that he showed I.R.G. pornographic movies. Defendant claims the evidence was irrelevant because it did not establish that he "groomed" I.R.G. Defendant contends that the offense of grooming—with which defendant was never charged—is defined as knowingly using an electronic device to seduce, solicit, lure, or entice a child younger than 17 years of age to engage in a sexual offense. 720 ILCS 5/11-25 (West 2018). However, the term "grooming" may also refer to methods used to gain access to a child or to build trust, rendering the child susceptible to sexual abuse. See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/grooming (last visited Nov. 15, 2023) [https://perma.cc/ZSY9-C3HZ]. Defendant asserts that (1) he was not charged with grooming and (2) the evidence in this case did not fit any definition of grooming.

¶ 62 Defendant notes that I.R.G. testified that defendant's showing her pornographic movies was one of the things he did that made her feel sad, fearful, or nervous, but she did not testify it led to sexual abuse. Accordingly, defendant concludes the court abused its discretion by admitting the testimony about pornographic movies because it was overly prejudicial and had no probative value. We disagree.

¶ 63 a. The Applicable Law

¶ 64 A defendant's guilt must be based on relevant and competent evidence, "uninfluenced by bias or prejudice raised by irrelevant evidence." *People v. King*, 2020 IL 123926, ¶ 43, 161 N.E.3d 143 (citing *People v. Bernette*, 30 Ill. 2d 359, 371, 197 N.E.2d 436 (1964)). Generally, evidence is relevant and admissible if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. Rs. Evid. 401, 402 (eff. Jan. 1, 2011). Even relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ill. R. Evid. 403 (eff. Jan. 1, 2011).

¶ 65 As this court explained in *People v. Pelo*, 404 Ill. App. 3d 839, 867 (2010), unfair prejudice occurs when a "jury would be deciding the case on an improper basis, such as sympathy, hatred, contempt, or horror." In other words, "the evidence in question will somehow cast a negative light upon a defendant for reasons that have nothing to do with the case on trial." *Id.*

¶ 66 Generally, evidence of a crime or other bad act unrelated to the matter at issue is inadmissible if its only relevance is to show the defendant's propensity to commit crimes. *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 36, 964 N.E.2d 1174. Evidence of other crimes is admissible, however, if it is relevant for any other purpose. *People v. Stevenson*, 2014 IL App (4th) 130313, ¶ 44, 12 N.E.3d 179 (citing *People v. Chapman*, 2012 IL 111896, ¶ 19, 965 N.E.2d 1119). Evidence of other crimes or bad acts may be admissible as "part of a continuing narrative of the event[s] giving rise to the offense [or] intertwined with the charged offense." *People v. Patterson*, 2013 IL App (4th) 120287, ¶ 58, 2 N.E.3d 642.

¶ 67 "The admissibility of evidence at trial is a matter within the sound discretion of the trial court, and that court's decision may not be overturned on appeal absent a clear abuse of discretion." *People v. Illgen*, 145 Ill. 2d 353, 364, 583 N.E.2d 515, 519 (1991). "Such an abuse of discretion will be found only where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court." (Internal quotation marks omitted.) *Id.*

¶ 68 b. This Case

¶ 69 Defendant was charged with predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2018)) and sexual exploitation of a child (*id.* § 11-9.1(a)(1)). We note that whether defendant was ever charged with the crime of grooming is irrelevant to a determination of whether evidence of grooming was properly admitted. Testimony at trial indicated that this sexual abuse occurred over an extended period of time. Evidence that defendant exposed I.R.G. to pornographic movies is relevant to the State's claims involving an ongoing pattern of behavior. The exposure of I.R.G. to pornographic movies is consistent with the charged sex offenses and has a tendency to make it more probable that he committed the offenses than it would be without the evidence.

¶ 70 Additionally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Although it was "prejudicial," this evidence was properly admitted because, as we have explained, the evidence did not "cast a negative light upon *** defendant *for reasons that have nothing to do with the case*" or cause the jury to decide the case on an "improper basis, such as sympathy, hatred, contempt, or horror." (Emphasis added and internal quotation marks omitted.) *McSwain*, 2012 IL App (4th) 100619, ¶ 37. Because the trial court's decision to admit the evidence was not arbitrary, fanciful, or unreasonable (*Illgen*, 145 Ill. 2d at 364), we conclude the court did not abuse its discretion by admitting the evidence.

¶ 71 2. *I.R.G.'s Drawing*

¶ 72 Next, defendant argues that the trial court abused its discretion by admitting I.R.G.'s drawing depicting him, his sister Jessie, and two other people in the garage smoking a pipe. Defendant asserts that the drawing leads to the assumption that he was smoking an illegal substance. Defendant contends the drawing is irrelevant and prejudicial because it implies he and his sister Jessie engaged in criminal conduct and may not be reliable witnesses.

¶ 73 Defendant acknowledges he forfeited his challenge to the admissibility of the drawing by failing to include the issue in his posttrial motion. Defendant, nonetheless, asks this court to review his forfeited claim as either plain error or, alternatively, as ineffective assistance of counsel. Defendant claims the error was clear and obvious and the evidence was closely balanced. And in one sentence without any citation to authority, defendant also argues that second-prong plain error applies here because the error was "so egregious."

¶ 74 a. The Applicable Law

¶ 75 The plain-error rule allows appellate review of unpreserved claims of error when either

> "(1) 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, or (2) 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 (2007).

The usual first step of plain-error review is determining whether the defendant has established a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010).

¶ 76 A claim of ineffective assistance of counsel is reviewed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. To establish an ineffective assistance claim, "a defendant must show both that [(1)] counsel's performance was deficient and [(2)] that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010).

¶ 77 Deficient performance is defined as performance falling below an objective standard of reasonableness. *Henderson*, 2013 IL 114040, ¶ 11. "Effective assistance of counsel refers to competent, not perfect representation." (Internal quotation marks omitted.) *People v. Evans*, 209 Ill. 2d 194, 220, 808 N.E.2d 939, 953 (2004). A defendant must overcome the "strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy." *People v. Houston*, 226 Ill. 2d 135, 144, 874 N.E.2d 23, 29 (2007). A defendant establishes prejudice by showing that, absent counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v. Hale*, 2013 IL 113140, ¶ 18, 996 N.E.2d 607.

¶ 78 When addressing a claim of plain error and an alternative claim of ineffective assistance of counsel, appellate courts first consider whether the defendant has established a clear or obvious error. "Absent a clear or obvious error ***, neither the doctrine of plain error nor a theory of ineffective assistance affords any relief from the forfeiture." *People v. Jones*, 2020 IL App (4th) 190909, ¶ 179, 173 N.E.3d 978; *People v. Almanza*, 2022 IL App (4th) 210034-U, ¶ 18.

¶ 79 b. This Case

¶ 80 Defendant acknowledges that I.R.G's drawing does not necessarily show him and his sister smoking illegal substances. He claims instead that the drawing leads to that assumption. The drawing was admitted as part of a group exhibit containing all of I.R.G.'s drawings that were used in her therapy with Edwards. Collectively, the drawings explained the events at issue in

this case and demonstrated the method used by Edwards to assist I.R.G. in discussing those events. The drawing is connected to the events because it depicts what happened when I.R.G.'s mother was absent.

¶ 81 By itself, the drawing is not particularly prejudicial, given that it does not necessarily depict illegal activity. The trial court's decision to admit the exhibit containing the drawing is reviewed for an abuse of discretion, subject to reversal only if it is "arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court." (Internal quotation marks omitted.) *Illgen*, 145 Ill. 2d at 364. We conclude that defendant has not established a clear or obvious error occurred in admitting the drawing. Absent a clear or obvious error, defendant cannot establish plain error in the court's admission of the drawing or ineffective assistance of counsel for failing to preserve the issue for appeal. See *Jones*, 2020 IL App (4th) 190909, ¶ 179.

¶ 82 3. *Comments About I.R.G.'s Drawing*

¶ 83 Defendant also objects to his defense counsel's comments about I.R.G.'s drawing. Specifically, defendant complains that his counsel not only brought up the drawing on cross-examination of I.R.G. and Edwards, but also that he referred to it as "the one about the drugs apparently." Defendant asserts that "no other witnesses had specifically mentioned drugs or illicit substances in connection with that drawing," and he contends that counsel's references made it more likely the jury would conclude he was smoking an illegal substance. Defendant claims ineffective assistance of counsel based upon these assertions.

¶ 84 a. The Applicable Law

¶ 85 A defendant must satisfy both prongs of the *Strickland* test to establish a claim of ineffective assistance of counsel. Because a claim of ineffective assistance is precluded if a defendant fails to satisfy one of the prongs, a court may resolve a claim by reaching only the prejudice prong. See *People v. Hall*, 194 Ill. 2d 305, 337-38, 743 N.E.2d 521, 540 (2000) ("[A] lack of prejudice renders irrelevant the issue of counsel's alleged deficient performance."). To establish prejudice, a defendant must show a reasonable probability of a different result absent counsel's alleged error. *Hale*, 2013 IL 113140, ¶ 18.

¶ 86 b. This Case

¶ 87 Defendant has not shown he was prejudiced by the references to the drawing. Drug use was not a focus in this case. The essential issue was whether defendant committed the acts of sexual abuse alleged in the indictment. The comments defendant identifies here were isolated, passing references on a tangential issue. The State did not emphasize those comments, and they were not directly related to the ultimate issue of whether defendant committed the charged offenses. We conclude that defendant has not established a reasonable probability of a different outcome absent counsel's alleged errors. Accordingly, his ineffective assistance of counsel claim fails because he cannot establish the prejudice prong of his claim.

¶ 88 4. *The Order of Protection*

¶ 89 Defendant contends that his counsel also provided ineffective assistance by (1) requesting admission of defendant's exhibit No. 1, which contained J.J.'s petition for an order of

protection and the order of protection, and (2) failing to object to those documents being sent to the jury room during deliberations. Defendant concedes counsel acted reasonably by impeaching J.J. with her petition for an order of protection. Nevertheless, he claims the documents should not have been admitted into evidence or submitted to the jury during deliberations because they contained irrelevant and prejudicial other-crimes evidence.

¶ 90 Although not entirely clear, defendant appears to claim plain error on this point. In his reply brief, defendant asserts he "renews his opening-brief argument that *** counsel's presentation of prejudicial information" in the order of protection "constituted first- and/or second-prong plain error or ineffective assistance of counsel." However, in his opening brief, defendant claimed this was an "error of commission" by his counsel, and defendant did not make any specific plain-error argument.

¶ 91 In any event, the record shows defense counsel did not merely fail to object to the exhibit being submitted to the jury; instead, counsel moved to admit the exhibit and specifically asked for it to be submitted to the jury during deliberations. Accordingly, defendant waived any challenge to the trial court's decisions because counsel demonstrated a clear intention for the court to admit the exhibit and send it to the jury. See *People v. Jones*, 2023 IL App (4th) 220721-U, ¶ 133 (defendant waived the issue of evidence admissibility because counsel's conduct demonstrated a clear intention for the trial court to admit the evidence). Plain-error review is available when an argument is forfeited in the trial court, but it is not available when a defendant acquiesces to the complained-of procedure or error. *People v. Bates*, 2018 IL App (4th) 160255, ¶¶ 69-70, 74, 112 N.E.3d 657. Due to defense counsel's actions, plain-error review is unavailable. Therefore, defendant's claim is reviewable only as ineffective assistance of counsel. See *Jones*, 2023 IL App (4th) 220721-U, ¶ 133.

¶ 92 a. The Applicable Law

¶ 93 Appellate review of trial counsel's performance is highly deferential. *People v. McGath*, 2017 IL App (4th) 150608, ¶ 38, 83 N.E.3d 671. To establish deficient performance, a defendant must overcome the strong presumption that the challenged action or inaction may have been the result of sound trial strategy. *People v. Manning*, 241 Ill. 2d 319, 327, 948 N.E.2d 542, 547 (2011). Matters of trial strategy are generally immune from ineffective assistance of counsel claims on appeal. *Id.* Reviewing courts make "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). Ineffective assistance will be found only if counsel's strategy is so unsound that it results in a complete failure to conduct meaningful adversarial testing of the State's case. *People v. Peterson*, 2017 IL 120331, ¶ 80, 106 N.E.3d 944.

¶ 94 b. This Case

¶ 95 Defendant essentially argues that moving to admit the exhibit and asking to send it to the jury during deliberations was not effective trial strategy because the exhibit contained prejudicial information of other crimes or bad acts. However, we disagree because the record shows defendant's counsel's action was entirely reasonable trial strategy.

¶ 96 On cross-examination, defense counsel asked J.J. about many of the allegations contained in her petition for an order of protection. J.J. agreed she certified the allegations in the petition were true and correct under penalty of perjury. However, on cross-examination, she admitted

the allegations were not based on her own personal knowledge. J.J. further admitted she never saw blood in I.R.G.'s underwear or pornography in the house, and she never saw any indication that defendant sexually abused I.R.G. Thus, counsel effectively impeached J.J. by highlighting the allegations in her petition for an order of protection.

¶ 97 We view the cross-examination of J.J. with her petition for an order of protection as important impeachment evidence. Trial counsel effectively impeached J.J. on some of the allegations most relevant to this case, which supported his argument that J.J. was not a credible or reliable witness. Counsel's strategy was entirely reasonable and meaningfully challenged the State's case. The jury's review of the exhibit during deliberations would not have exposed them to those allegations for the first time, and it may have served to remind the jury that J.J. admitted making allegations supporting the order of protection without any personal knowledge of them. Accordingly, we conclude that defendant has not overcome the strong presumption that moving to admit the exhibit and asking to send it with the jury may have been a matter of sound trial strategy and not ineffective assistance of counsel.

¶ 98 5. *Counseling Progress Notes*

¶ 99 Although defendant acknowledges his counsel acted reasonably by using Edwards's counseling progress notes to impeach J.J.'s testimony about I.R.G. suffering from nightmares after returning from living with defendant, he argues defense counsel provided ineffective assistance when he requested the admission of Edwards's notes into evidence and failed to object to sending the notes with the jury during deliberations. Defendant asserts that the notes contained irrelevant and prejudicial other-crimes evidence, including allegations by J.J. that defendant had abused her and that J.J. and I.R.G. were afraid of defendant.

¶ 100 As with the petition for an order of protection, defendant asserts in his reply brief that he "renews his opening-brief argument" that defense counsel's presentation of prejudicial information in the counseling progress notes "constituted first- and/or second-prong plain error or ineffective assistance of counsel." However, plain-error review is not available when a defendant acquiesces to the complained-of error. *Bates*, 2018 IL App (4th) 160255, ¶ 74. The trial court admitted the notes contained in defendant's exhibit No. 2 on defense counsel's motion. Additionally, after the State objected to sending the notes with the jury during deliberations, defense counsel successfully argued they were used for impeachment, and the court allowed the exhibit to go with the jury during deliberations over the State's objection. Thus, defendant waived his challenge to the court's decisions by moving to admit the exhibit and asking to submit it to the jury for deliberations. See *Jones*, 2023 IL App (4th) 220721-U, ¶ 133. Defendant's claim is, therefore, reviewable only as ineffective assistance of counsel. See *id.*

¶ 101 Defense counsel used the counseling progress notes to impeach J.J.'s testimony that I.R.G. had suffered from nightmares when she returned from living with defendant. Counsel asked I.R.G.'s therapist, Edwards, whether J.J. reported any nightmares during the initial counseling sessions, and Edwards confirmed her notes did not document any such complaint. The counseling notes were used to impeach J.J.'s testimony on an important issue involving I.R.G.'s condition when she returned from living with defendant. The notes also helped further undermine J.J.'s credibility because they tended to contradict her testimony.

¶ 102 The prejudicial information identified by defendant in the notes is fairly limited, and the jury could have easily discounted that information in view of the impact of the impeachment

of J.J.'s credibility. Like his argument on the petition for an order of protection, defendant challenges defense counsel's trial strategy in moving to admit the exhibit and asking to submit it to the jury during deliberations. However, defense counsel's actions served to remind the jury of the impeachment and its impact on J.J.'s credibility as a witness. Because we conclude that defendant has failed to overcome the strong presumption that counsel's actions were the product of sound trial strategy, we conclude defendant's ineffective assistance of counsel claim fails.

¶ 103 6. *Cumulative Error*

¶ 104 Defendant argues this court should consider all of his claims of error in admitting other-crimes evidence together under the totality of the circumstances, instead of reviewing each of them in isolation. When viewed together, defendant maintains, the cumulative effect of the errors denied him a fair trial. Combining meritless claims, however, is like harvesting an empty field. Because we have concluded that each of defendant's claims fails on the merits, his argument of cumulative error based on those individual claims also fails.

¶ 105 B. Improper "Vouching" Testimony by Investigator Miller

¶ 106 Defendant next argues that defense counsel provided ineffective assistance by failing to object and move to strike Miller's testimony that she intended to arrest defendant because she found I.R.G.'s interview "very compelling and credible." Defense counsel also failed to object or move to strike when Miller reiterated on cross-examination that her statement about arresting defendant was a "comment on the compelling nature of [I.R.G.'s] *** interview."

¶ 107 Defendant contends Miller's testimony constituted improper vouching for the credibility of another witness. In the alternative, defendant argues that the admission of the improper comments should be reviewed as plain error, acknowledging that his counsel failed to preserve the issue by objecting at trial and including it in his posttrial motion.

¶ 108 1. *The Applicable Law*

¶ 109 "Because questions of credibility are to be resolved by the trier of fact [citation], 'it is generally improper to ask one witness to comment directly on the credibility of another witness.' " *People v. Boling*, 2014 IL App (4th) 120634, ¶ 121, 8 N.E.3d 65 (quoting *People v. Becker*, 239 Ill. 2d 215, 236, 940 N.E.2d 1131, 1143 (2010)). "[O]ne witness should not be allowed to express his [or her] opinion as to another witness's credibility." *People v. Henderson*, 394 Ill. App. 3d 747, 754, 915 N.E.2d 473, 478 (2009).

¶ 110 When addressing alternative claims of ineffective assistance of counsel and plain error, we first consider whether the defendant has established a clear or obvious error. "Absent a clear or obvious error ***, neither the doctrine of plain error nor a theory of ineffective assistance affords any relief from the forfeiture." *Jones*, 2020 IL App (4th) 190909, ¶ 179.

¶ 111 2. *This Case*

¶ 112 Here, defense counsel did not ask Miller to comment on I.R.G.'s credibility. Counsel simply asked Miller whether she told J.J. that Miller was going to arrest defendant and whether Miller hoped he would go to prison. After Miller responded that she did make that statement, she then volunteered that she "found [I.R.G.'s interview] to be very compelling and credible."

¶ 113 Counsel's question did not elicit Miller's volunteered remark commenting on I.R.G.'s credibility. However, instead of objecting or moving to strike the answer, counsel further questioned Miller and elicited her testimony that she had not yet at that point obtained all the relevant evidence, including securing a search warrant, statements from witnesses, and a doctor's medical examination.

¶ 114 On cross-examination by the State, Miller agreed that her statement was a "comment on the compelling nature" of I.R.G.'s interview.

¶ 115 Defendant's essential claim is that defense counsel provided deficient performance by failing to object and failing to move to strike the above testimony. Defendant argues that counsel could have both cross-examined the witness and also objected and moved to strike the testimony on I.R.G.'s credibility. We disagree and view counsel's decision on how to respond to Miller's statements to be a matter of trial strategy.

¶ 116 After receiving Miller's volunteered response to counsel's question, counsel effectively cross-examined Miller by attempting to show she rushed to judgment by deciding to arrest defendant before completing her investigation. Counsel's additional questioning of Miller may have reduced any prejudice from her testimony.

¶ 117 The effectiveness of counsel's additional questioning may have been reduced if he had also objected and moved to strike Miller's testimony. In addition, counsel may have thought that objecting and moving to strike the testimony would have (1) caused the jury to give Miller's testimony greater attention or (2) caused the jury to conclude that the testimony was so damaging to defendant that defendant wanted it to be stricken.

¶ 118 We wish to make two additional points regarding defendant's ineffective assistance of counsel claim. First, counsel had to decide *within seconds* of Miller's volunteered response how to respond to it. Counsel did not have hours (or even days, like this court or defendant's counsel on appeal) to determine what would be the best course to follow. The dynamic circumstances of trial with which trial counsel are frequently confronted—and the instantaneous response to these circumstances counsel is often required to make—serve to inform the strong presumption that a defense counsel's trial conduct was the product of sound trial strategy.

¶ 119 Second, defendant on appeal appears to assume that had his trial counsel objected to Miller's volunteered remark and moved to strike it, the trial court would have agreed. We are not so sure. After all, Miller was then testifying as a defense witness, and it is at least conceivable that the court might have viewed her testimony as responsive to the question she was asked. By choosing not to object and move to strike, counsel may have weighed that possibility and concluded that losing a motion to strike would just exacerbate any damage that Miller's volunteered remark had already caused.

¶ 120 And, again, because this analysis was required to be completed *within seconds*, this court should not view counsel's actions as we would if he had the luxury of time in which to make his decision.

¶ 121 We reiterate that a defense counsel's strategic decisions, like the ones we just discussed, are virtually unchallengeable on appeal. *Jones*, 2023 IL App (4th) 220721-U, ¶ 136. Reviewing courts will make "every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *Perry*, 224 Ill. 2d at 344. Defendant has failed to rebut the strong presumption that his counsel's conduct was the product of sound trial

strategy. Accordingly, we conclude there was no clear or obvious error in counsel's decision not to object or move to strike Miller's testimony.

¶ 122 C. Prosecutorial Misconduct

¶ 123 Last, defendant argues that the prosecutor improperly vouched for I.R.G.'s credibility during closing argument. Defendant acknowledges that he forfeited appellate review of this issue by failing to either object at trial or include it in a posttrial motion (see *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988)), but he argues that this court should review his claim as (1) plain error or (2) ineffective assistance for failing to preserve the issue for appeal.

¶ 124 1. *The Applicable Law*

¶ 125 The State "has wide latitude in making a closing argument and may comment on the evidence and any reasonable inferences that arise from it, even if those inferences reflect negatively on the defendant." *People v. Williams*, 2022 IL 126918, ¶ 44, 210 N.E. 3d 1207. Comments during closing argument should be considered in the context of the argument as a whole. *Id.*

¶ 126 The State "may argue that a witness is or is not credible but may not personally vouch for the credibility of a witness or use the credibility of the state's attorney's office to bolster a witness's testimony." *People v. Potts*, 2021 IL App (1st) 161219, ¶ 280, 196 N.E.3d 961. Reversal is required if such an improper comment caused " 'substantial prejudice,' such that a reviewing court cannot determine whether the verdict resulted from [it]." *Williams*, 2022 IL 126918, ¶ 54. A prosecutor's comment in closing argument is reversible error only if it is both (1) improper and (2) substantially prejudicial. *Id.* ¶ 49.

¶ 127 In *People v. Marzonie*, 2018 IL App (4th) 160107, ¶ 50, 115 N.E.3d 270, this court explained the applicable standard of review for allegations of prosecutorial misconduct in closing argument as follows:

> "The Illinois Appellate Court is divided on whether to apply an abuse of discretion standard or *de novo* review when reviewing allegations of prosecutorial misconduct. See Ryan T. Harding, *Division in the Illinois Appellate Court: What Is the Appropriate Standard of Review for Alleged Prosecutorial Misconduct During Closing Argument?*, 38 N. Ill. U. L. Rev. 504, 508-12 (2018). The First District has applied an abuse of discretion standard. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 102, 997 N.E.2d 947. The Third District and this court have consistently applied *de novo* review. *People v. Palmer*, 382 Ill. App. 3d 1151, 1160, 889 N.E.2d 244, 251 (2008); *People v. McCoy*, 378 Ill. App. 3d 954, 964, 881 N.E.2d 621, 631-32 (2008). Consistent with our court's established precedent, we will continue to apply *de novo* review. *Palmer*, 382 Ill. App. 3d at 1160 (citing *Wheeler*, 226 Ill. 2d at 121); *State Farm Fire & Casualty Co. v. Yapejian*, 152 Ill. 2d 533, 539-40, 605 N.E.2d 539, 542 (1992) (decision of an appellate court is not binding upon other appellate districts)."

Accordingly, we apply *de novo* review to this issue; however, we note the result would be the same under either standard.

¶ 128 2. *This Case*

¶ 129 In her closing argument, the prosecutor stated the following:

> "[T]o find the Defendant guilty, you have to find that [I.R.G.] is a credible—was a credible witness. You have to believe her because this is—these are not crimes that occur in front of [other] witnesses. These are crimes that occur in private. [There is] not going to be a witness. If there was a witness around, it wouldn't have occurred."

The prosecutor further stated as follows:

> "[I]t's very believable that a young child being molested by a parent is not going to disclose for a period of time *** Investigator Kelsey Miller was correct when she said the [CAC] interview of [I.R.G.] was compelling. I also suggest to you that her testimony here in court *** was compelling. Her statements to Jeanette Edwards were compelling. Together every statement she's given is very compelling, is very believable, is very credible."

¶ 130 We reject the defendant's argument that the prosecutor's comments were improper. The prosecutor began by noting the importance of witness credibility in this case. On that point, the prosecutor repeated Miller's testimony and agreed that I.R.G.'s testimony and statements were compelling and credible. The prosecutor, however, did not *personally* vouch for I.R.G.'s credibility. On this point, we reiterate what this court wrote in *People v. Pope*, 284 Ill. App. 3d 695, 707, 672 N.E.2d 1321, 1329 (1996):

> "[W]e expressly reject the notion that a prosecutor improperly crosses the bounds of asserting his personal views regarding witnesses' credibility *** if the jury has to *infer* the prosecutor is doing so from his comments. *** [F]or a prosecutor's closing argument to be improper, he must *explicitly* state that he is asserting his personal views, stating for example, 'this is my personal view.' " (Emphases in original.)

¶ 131 Here, the prosecutor made arguments only about witness credibility, the critical issue in this case, and did not cross the line into personally vouching for the complaining witness's credibility by making an explicit statement on her personal views. See *People v. Taylor*, 2018 IL App (4th) 140060-B, ¶¶ 35-36, 102 N.E.3d 799 (prosecutor's argument on the credibility of witnesses was not improper when he did not explicitly state it was his personal view).

¶ 132 We conclude that the prosecutor's arguments were proper comments on the credibility of the witnesses. Defendant has failed to establish a clear or obvious error from the prosecutor's argument. Again, "[a]bsent a clear or obvious error ***, neither the doctrine of plain error nor a theory of ineffective assistance affords any relief from the forfeiture." *Jones*, 2020 IL App (4th) 190909, ¶ 179. Because we have determined the prosecutor's statements in this case were proper, defendant's argument to the contrary fails.

¶ 133 The supreme court in *Williams* helpfully provided a standard by which to judge a prosecutor's allegedly improper closing argument, writing as follows: "The prosecutor's comment—whether it is preserved and attacked directly or it is unpreserved and attacked indirectly via the alternative contentions of plain error and ineffective assistance—must have been damaging enough that it 'severely threatened to tip the scales of justice' against the defendant." *Williams*, 2022 IL 126918, ¶ 57.

¶ 134 Applying this standard, we conclude that defendant's complaints about the prosecutor's closing argument fall far short.

¶ 135 As a last point in support of our conclusion that the prosecutor's closing arguments were proper, we reiterate yet again what this court has written about closing arguments:

> "[W]e have frequently repeated this court's view that trying felony cases before a jury 'ain't beanbag' and 'we expect advocates in our adversary system of justice to use all of their forensic skills to persuade the jury of the wisdom or justice of their respective positions.' See *People v. Montgomery*, 373 Ill. App. 3d 1104, 1118, 87 N.E.2d 403 (2007), *abrogated on other grounds by People v. Ayres*, 2017 IL 120071, 88 N.E.3d 732; *People v. Palmer*, 382 Ill. App. 3d 1151, 1161, 889 N.E.2d 244 (2008); *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 28, 963 N.E.2d 394; *People v. Staake*, 2016 IL App (4th) 140638, ¶ 102, 78 N.E.3d 388, *aff'd*, 2017 IL 121755. We take this opportunity to do so again." *People v. Neal*, 2020 IL App (4th) 170869, ¶ 170, 150 N.E.3d 984.

¶ 136 III. CONCLUSION

¶ 137 For the reasons stated, we affirm the trial court's judgment.

¶ 138 Affirmed.