No. 124832

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant, -vs- HAYZE L. SCHOONOVER, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-16-0882. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 15-CF-1388. Honorable Thomas J. Difanis, Judge Presiding.

BRIEF OF APPELLEE
CROSS-RELIEF REQUESTED

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E-FILED
4/28/2021 12:02 PM
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ISSUES PRESENTED FOR REVIEW

I. Whether the trial court abused its discretion and denied Hayze Schoonover's right to a public trial when it barred family members with a direct interest in the proceedings from being present during M.L.'s testimony.

II. Whether defense counsel's ineffective assistance of counsel deprived Hayze Schoonover a fair trial. (Cross-relief requested)

III. Whether the trial judge abused its discretion when it applied a personal sentencing policy and failed to consider a statutory mitigating factor. (Cross-relief requested)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amends. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Ill. Const. 1970, art. 1, § 8;

In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation and have a copy thereof; to be confronted with the witnesses against him or her and to have process to compel the attendance of witnesses in his or her behalf; and to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.

725 ILCS 5/115-11 (2016)

In a prosecution for a criminal offense defined in Article 11 or in Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012, where the alleged victim of the offense is a minor under 18 years of age, the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media.

STATEMENT OF FACTS

Any facts in addition to those described in the State's brief that are necessary for an understanding of the issues presented in this appeal will be included, together with appropriate record references, in the argument portion of this brief.

ARGUMENT

I. The trial court abused its discretion and denied Hayze Schoonover's right to a public trial when it barred family members with a direct interest in the proceedings from being present during M.L.'s testimony.

Every criminal defendant is guaranteed a personal right to a public trial by both the federal and state constitutions. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. 1, § 8; *Presley v. Georgia*, 558 U.S. 209, 212 (2010); *Duncan v. Louisiana*, 391 U.S.145, 148 (1968). In effect, the Sixth Amendment's guarantee confers on criminal defendants the right to be tried in a courtroom "whose doors are open to any members of the public inclined to observe the trial." *Bowden v. Keane*, 237 F.3d 125 (2d Cir. 2001). Moreover, implicit in the guarantees of the First Amendment is a public right to attend criminal trials. *Presley*, 558 U.S. at 209. Trial courts are "obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Id.* at 215. Because Mr. Schoonover was denied his constitutional and statutory rights to a public trial, this Court should affirm the appellate court's judgment, and reverse and remand for a new trial.

Standard of Review

The State does not present the complete standard of review in their brief, as required by Illinois Supreme Court Rule 341(h)(3) (eff. Oct. 1, 2020); however, questions of statutory interpretation are reviewed *de novo*. *People v. Swift*, 202 Ill. 2d 378, 385 (2002). Additionally "[t]he standard of review for determining whether an individual's constitutional rights have been violated is *de novo*." *People v. Burns*, 209 Ill. 2d 551, 560 (2004).

General Authorities

The closure of a criminal trial courtroom may constitutionally occur only under limited circumstances. In *Waller*, the United States Supreme Court

established the test for determining whether a courtroom closure violates a defendant's Sixth Amendment right to a public trial:

> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (quoting *Press-Enter. Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984)).

Expounding on this, the Supreme Court created a four-factor test to determine whether the closure of a courtroom was justified:

> "[(1)] [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [(2)] the closure must be no broader than necessary to protect that interest, [(3)] the trial court must consider reasonable alternatives to closing the proceeding, and [(4)] it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48.

The *Waller* court did not distinguish between complete and partial closures of trials. *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015) (citing *Waller*, 467 U.S. at 47). Nonetheless, several United State Circuit Courts have distinguished between a complete and partial closure of the courtroom. *Simmons*, 797 F.3d at 413. These courts have modified the *Waller* test "so that the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure, but the other three factors remain the same." *Id.* However, it should be noted that this Court and other state supreme courts have not adopted the "substantial reason" standard for partial closures. See *People v. Holveck*, 141 Ill. 2d 84, 100 (1990) (applying the "overriding interest" test from *Waller* in a partial closure setting) (citing *Waller*, 467 U.S. at 45); see also *State v. Turrietta*, 308 P.3d 964, 970 (N.M. 2013) ("We adopt the 'overriding interest' standard as discussed by the Supreme Court in *Waller* for any type of courtroom closure."); *People v.*

Jones, 96 N.Y.2d 213, 219 (2001) ("We are aware that some courts have recognized that a less demanding standard can be applied to limited closure requests. We disagree.") (citations omitted); *State v. Mahkuk*, 736 N.W.2d 675, 685 (Minn. 2007) (applying the "overriding interest" test in a partial courtroom closure case).

Under section 115-11 of the Code of Criminal Procedure of 1963, a trial court may "exclude from the proceedings while [a minor] victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media." 725 ILCS 5/115-11 (2016). In *Holveck*, this Court determined that section 115-11 was constitutional. *Holveck*, 141 Ill. 2d at 103. In coming to this determination, this Court noted that section 115-11: (1) was limited to discretionary closures, (2) does not allow the media to be excluded, (3) provides guidelines to ensure that the judge does not overstep the authority conferred, and (4) only allows closure when a minor is testifying. *Id.* at 103.

In *Falaster*, this Court expounded that a trial judge who closes proceedings pursuant to section 115-11 need only satisfy the requirements of the section and not the more stringent limitation established by the United States Supreme Court. *People v. Falaster*, 173 Ill. 2d 220, 228 (1996). Essentially, section 115-11 functions as a limited pathway by which a trial judge can effect a partial courtroom closure without conducting the more complex *Waller* test. Therefore, it logically follows that failure to strictly comply with the dictates of section 115-11 places a court in constitutional peril. As this Court recognized in *Falaster*, absent section 115-11, a trial court must abide by the more stringent limitations established by the Supreme Court. *Falaster*, 173 Ill. 2d at 228.

A. The appellate court majority properly found that the trial court did not comply with section 115-11 where the court did not exercise its discretion to determine the interest of spectators before excluding members of Mr. Schoonover's family.

Under section 115-11, the trial court may exclude persons from the courtroom if three requirements are met: "(1) the court is explicitly prohibited from excluding the media; (2) persons with a direct interest in the case may not be excluded; and (3) the exclusion may occur only when the victim is testifying." *People v. Williams*, 2016 IL App (3d) 130901, ¶ 22; 725 ILCS 5/115-11. At issue in this case is whether the trial court improperly excluded persons with a direct interest in the case. During trial, before M.L.'s testimony, the following exchanges occurred:

> "THE COURT: When [M.L.] testifies, I want the courtroom cleared except for family members.
>
> MR. LARSON [(ASSISTANT STATE'S ATTORNEY)]: Thank you, Your Honor.
>
> MR. ALLEGRETTI [(DEFENSE COUNSEL)]: I'm sorry, Judge. Mr. Schoonover's family members are here. Is that—are you barring them?
>
> THE COURT: Out." (Vol. XIX, R. 3)

And:

> "THE COURT: All right. Well, pursuant to 725 ILCS 5/115-11, where the alleged victim of the offense is a minor under eighteen years of age, the court may exclude from the proceedings while the victim is testifying all persons who, in the opinion of the court, do not have a direct interest in the case except the media. So I'm going to order that the courtroom be cleared, with the exception of the media, when [M.L.] testifies. I will note [defense counsel's] objection.
>
> MR. LARSON: Your Honor, if I may.
>
> THE COURT: Yes.
>
> MR. LARSON: The victim's grandmother is here and would like to remain.
>
> THE COURT: She would be someone who is allowed to remain." (Vol. XIX, R. 11)

And:

> "THE COURT: All right. At this point pursuant to 725 ILCS 5/115-11,

> I'm going to clear the courtroom. Mr. Larson, you said the grandmother is going to be present.
> MR. LARSON: Yes, Your Honor.
>
> THE COURT: Who else?
>
> MR. LARSON: Your Honor, her father and stepfather we would also ask to be present.
>
> THE COURT: Who is in the back of the courtroom? Who is the gentleman sitting there? And then the rest of the people on this side. All right. As soon as we get done with her testimony, I will bring the rest of the people in the courtroom." (Vol. XIX, R. 18)

The appellate court correctly found that the trial court failed to comply with section 115-11 because it did not "exercis[e] its discretion to determine the interest of spectators" before excluding members of Mr. Schoonover's family. *People v. Schoonover*, 2019 IL App (4th) 160882, ¶ 48.

The United States Supreme Court has long recognized that trials carried a "presumption of openness" and that this rule of openness has been enshrined in both state and federal constitutions. *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 605 (1982); *In re Oliver*, 333 U.S. 257, 266–67 (1948). Accordingly, by default, all trials should be public. A defendant, therefore, should not be required to invoke his right to a public trial any more than he would need to invoke his right to silence (*Miranda v. Arizona*, 384 U.S. 436, 444 (1966)), representation by an attorney (*Gideon v. Wainwright*, 372 U.S. 335, 340 (1963)), or freedom from unreasonable searches and seizure (*Katz v. United States*, 389 U.S. 347, 351 (1967)). The State, however, asks this Court to place upon defendants the burden of securing their own public trial. (St. Br. 17)

It should be noted that Mr. Schoonover did raise an objection to his family's removal from the courtroom. (Vol. XIX R. 3, 11) Nonetheless, the State appears to suggest that defense counsel should have objected more frequently or strenuously.

(St. Br. 17–19) The State claims that for a defendant to preserve his public trial rights, the defendant must object to the trial closure and invoke section 115-11. (St. Br. 17–18) The State's interpretation abdicates the responsibilities of the trial court in securing a public trial and undermines the constitutionality of section 115-11. If the State's interpretation is followed, section 115-11 would no longer satisfy the constitutional requirements set forth in *Waller*. The statute would allow trial courts, without exercising discretion, to remove members of the public from the courtroom, specifically family members who may have a direct interest in the case. This overrides the *Waller* test which requires trial courts to consider reasonable alternatives to closure and to make findings adequate to support the closure. *Waller*, 467 U.S. at 48.

If it is reasonably possible, statutes must be construed in a manner that preserves their constitutionality. *People v. Melongo*, 2014 IL 114852, ¶ 20. Accordingly, this Court should reject the State's interpretation of section 115-11 which undermines its constitutionality. In *Holveck*, this Court determined that section 115-11 was constitutional because the statute "provide[d] guidelines to ensure that the judge does not overstep the authority conferred." *Holveck*, 141 Ill. 2d at 103. This Court should continue to hold trial courts responsible for ensuring that trials are freely open to the public and only closed in a manner that is statutorily and constitutionally acceptable.

Mr. Schoonover acknowledges that, practically speaking, the defense should inform the court on the record when spectators wish to remain in the courtroom. This is not because section 115-11 requires such action; rather, it is because a reviewing court may not otherwise be able to determine if persons were excluded from the proceedings. See, *e.g.*, *People v. Burman*, 2013 IL App (2d) 110807, ¶¶

49, 55–56. In *Burman*, for example, the appellate court denied the defendant's section 115-11 claim where there was no evidence in the record that anyone sought entry into the closed courtroom. *Burman*, 2013 IL App (2d) 110807, ¶¶ 49, 55–56.

Burman, however, is not analogous to the instant case. Here, the relevant proceedings were conducted on the record. The trial judge was informed that Mr. Schoonover's family was present. (Vol. XIX, R. 3) The judge, without exercising any discretion, barred Mr. Schoonover's family from the courtroom. (Vol. XIX, R. 3) The trial judge's actions went outside the authority conferred by section 115-11. In nearly every other case which has considered public trial issues related to section 115-11, the trial court exercised discretion and only excluded spectators who did not have direct interest in the case,[1] or the record made no mention of any spectators being excluded.[2] The instant case is distinguishable from nearly all other cases

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[1] *Falaster*, 173 Ill. 2d at 228 ("The persons who were temporarily excluded from the proceedings were not members of the defendant's immediate family and thus did not have a direct interest in the outcome of the case."); *People v. Martinez*, 2021 IL App (1st) 172097, ¶ 55 ("[I]t is clear that the individuals excluded were not members of defendant's immediate family who necessarily have a direct interest in the case."); *People v. Benson*, 251 Ill. App. 3d 144, 150 (4th Dist. 1993) ("[T]he court expressly asked defendant whether any spectators were members of his immediate family-persons who presumably would have a direct interest in the outcome of the case."); *People v. Leggans*, 253 Ill. App. 3d 724, 728 (5th Dist. 1993) ("The trial court recognized the needs of the defendant to have support, in that it allowed defendant's mother and father to remain with him in the courtroom during the testimony of the children."); *People v. Gambaiani*, 2016 IL App (2d) 140124-U, ¶ 18 ("The trial court noted that defendant's father was also in the courtroom pursuant to its prior ruling.") (see Appendix).

[2] *Burman*, 2013 IL App (2d) 110807, ¶ 61 ("More importantly, the trial judge ordered no existing spectator to leave, and defendant has presented no evidence that the court's ruling caused anyone to be denied access to the courtroom"); *People v. Niford*, 2016 IL App (2d) 140832-U, ¶ 70 ("There is no indication in the record before us that the trial court excluded anyone during I.G.'s testimony.") (see Appendix).

because the trial judge, after being informed of persons who likely had a direct interest in the case, exercised no discretion before removing the spectators. See also *People v. Revelo*, 286 Ill. App. 3d 258, 265 (2d Dist. 1996) (finding a public trial violation where the trial court failed to make an express finding concerning the interest of defendant's parents and siblings).

The State argues that defense counsel should have objected after the court barred Mr. Schoonover's family. (St. Br. 19) However, as argued earlier, section 115-11 does not require the defendant to make an objection to invoke its protections—it is a rule that is placed upon the court. 725 ILCS 5/115-11. Moreover, the State is incorrect in asserting that defense counsel did not make an objection. The trial judge, who was personally in the courtroom, understood and acknowledged on the record that the court was removing spectators over defense counsel's objection. (Vol. XIX, R. 11) Neither the State nor defense counsel challenged this finding. (Vol. XIX, R. 11) The State provides no reason why this Court should not give deference to the trial court's understanding of whether defense counsel objected.

The trial court was aware that Mr. Schoonover wished for members of his family to be present during M.L.'s testimony. (Vol. XIX, R. 11) Objecting again would have been foolishly redundant as the trial court had already denied the same objection and noted it for the record. See, *e.g.*, *Fullerton v. Robson*, 61 Ill. App. 3d 93, 97–98 (1st Dist. 1978) ("After the court has denied an objection properly made, the objection need not be repeated thereafter as to matters covered by the prior objection and ruling. It was therefore unnecessary for [defendant] to repeat its objection and, '[s]uch conduct on the part of counsel for defendant would have been improper, and no right was lost by failing to adopt such a course.'") (citing *Chicago Union Traction Co. v. Lauth*, 216 Ill. 176 (1905)).

It should also be noted that Mr. Schoonover raised this issue as plain error, see *infra*, Argument I.D, which allows a reviewing court to excuse a defendant's procedural default and correct substantial errors that "'may be noticed although they were not brought to the attention of the trial court.'" *People v. Sebby*, 2017 IL 119445, ¶ 48; Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Accordingly, for the purposes of this appeal, a formal objection by defense counsel was not necessary to preserve the issue for review.

The State argues that to prove a section 115-11 violation, the defendant must prove that persons with a direct interest in the case were actually excluded during the minor's testimony. (St. Br. 21) To support its position, the State cites *Radford*, where this Court considered the partial closure of the courtroom during jury selection. *People v. Radford*, 2020 IL 123975, ¶ 26, *reh'g denied* (Sept. 28, 2020), *cert. denied sub nom. Radford v. Illinois*, 20-6869, 2021 WL 666738 (U.S. Feb. 22, 2021). However, *Radford* is distinguishable from the instant case.

Radford did not consider a section 115-11 violation. *Radford*, 2020 IL 123975, ¶ 26. Accordingly, the trial court was expected to analyze the partial courtroom closure using the *Waller* test. *Id.* ¶¶ 25–26. A contemporaneous objection was more important in *Radford* because the court was not exercising its authority under a statutory provision. There are numerous factors involved in the *Waller* analysis and a trial court cannot be expected to address every conceivable objection a defendant may have. As this Court noted, "if there is no objection at trial, there is no opportunity for the judge to develop an alternative plan to a partial closure or to explain in greater detail the justification for it." *Id.* ¶ 37.

Here, however, the trial court was operating under the statutory authority of section 115-11. As failure to comply with section 115-11 engenders constitutional

concerns, strict compliance with the requirements of the statute is paramount. The trial court must follow the law and comply with the statute even when there is no objection. Section 115-11 specifically states that the court may exclude from the proceedings all persons who "in the opinion of the court" do not have a direct interest in the case. 725 ILCS 5/115-11. Plainly, if the statute speaks of the court's opinion, then the court has to exercise discretion as to who does and does not have an interest in the case. Indiscriminately removing Mr. Schoonover's family, after being put on notice of their presence, exercises no discretion and is a plain and obvious violation of the court's statutory duty to exercise discretion. The State completely ignores the court's violation of this clear duty while implicitly and wrongly arguing that it is defense counsel's duty to enforce section 115-1 by objecting.

Additionally, the court in *Radford* exercised discretion and made findings as required by *Waller*. The court determined that there was an overriding interest for a partial closure during jury selection because "'emotions [were] running high' due to the 'nature of the case'" and the court was concerned about a mistrial if "members of the public reacted or expressed emotion in a way that impacted the venire." *Radford*, 2020 IL 123975, ¶ 39. Further, the trial court was aware that the case would require a large venire in order to find a suitable jury and there were not a sufficient number of seats to accommodate the venire and the public. *Id.* The court allowed two family members from each side to remain in the courtroom during jury selection. *Id.* ¶ 40. In the instant case, the trial judge exercised no discretion. He simply stated to Mr. Schoonover's family: "Out." (Vol. XIX, R. 3)

The State also argues, without any citation, that "a closure exceeds [section] 115-11's scope when it actually excludes the media or persons who have a direct interest in the outcome of the case." (St. Br. 21) However, the statute does not require a showing on the record that a person with a direct interest was actually

excluded. 725 ILCS 5/115-11. As the appellate court recognized, the statutory requirement calls for the trial court to exercise discretion before excluding spectators from the courtroom. See *Schoonover*, 2019 IL App (4th) 160882, ¶ 35. Here, the trial court violated its statutory authority when, acting *sua sponte*, it removed spectators without making any inquiry into their interest.

The State argues that there could be a "myriad" of valid reasons that can support the trial court's decision to close proceedings. (St. Br. 22) The State, contradictorily, argues that there is a lack of certain proof as to the identity of Mr. Schoonover's excluded family, but now speculates about matters not on the record. The State's argument is a red herring. To support its claim, the State cites several out-of-state and federal cases where the trial court *did not* violate the law because the courtroom was closed in a constitutionally acceptable manner. See, *e.g.*, *United States v. Sherlock*, 962 F.2d 1349, 1359 (9th Cir. 1989) ("In sum, we find that the court met the procedural requirements imposed by Supreme Court and Ninth Circuit precedent in imposing a partial closure of the proceedings."). The instant case, however, does not concern the many possible situations that can support a proper courtroom closure—it specifically concerns a courtroom closure which was conducted in violation of section 115-11.

The State also argues that in some cases a defendant may not want to have a public trial. (St. Br. 22) This concern is again a red herring because in the instant case the court recognized an objection from defense counsel. (Vol. XIX, R. 11) The record shows that Mr. Schoonover was not seeking to exclude his family or the public from the trial. (Vol XIX, R. 3–18) In any case, section 115-11 does not give defendants the authority to request a trial closure; courtroom closures under section 115-11 are entirely an exercise of the trial court's discretion. See 725 ILCS 5/115-11.

Defendants do not have the right to a closed trial. See *Press-Enter. Co.*, 478 U.S. at 504–05, 512–13 (recognizing the public's right to attend a trial even where the defendant did not oppose the exclusion of the public).

For these reasons, the trial court did not comply with section 115-11 where the court failed to exercise its discretion before barring family members who potentially had a direct interest in the case. The appellate court majority properly found that the trial court abused its discretion and violated section 115-11.

B. The appellate court majority correctly determined that the trial court's failure to comply with section 115-11 was reversible error.

The State argues in the alternative that strict compliance section 115-11 is not necessary for a courtroom closure if the trial court otherwise complies with the constitutional requirements for a public trial. (St. Br. 12–15) The appellate court majority did not analyze this case under the more stringent constitutional requirements. *Schoonover*, 2019 IL App (4th) 160882, ¶¶ 37–38. It determined that the trial court committed reversible error by violating section 115-11. *Id.* ¶ 29. The court also determined that the error amounted to structural error—a public trial violation—that was reviewable under the second prong of the plain error rule. *Id.* ¶ 37.

The State argues that section 115-11 is "permissive" and that "nothing in the statute suggest that a court may never order a courtroom closure" where constitutional requirements have been met. (St. Br. 14) The State is correct that a trial court is free to order a courtroom closure through other means so long as its decision to do so is constitutional. However, that is irrelevant to what occurred here. The trial court specifically invoked section 115-11 in closing the courtroom. (Vol. XIX R. 11) Therefore, the court is obligated to follow the procedures required by the statute.

While, this Court has not explicitly held that a trial court may violate section 115-11 and instead rely on the constitutional *Waller* test, this Court has stated that the constitutional standards are more stringent that the statutory provisions. *Falaster*, 173 Ill. 2d at 228. This suggests the failure to meet the statutory provisions would also result in failing to meet the constitutional test. Even if it is possible for a court to fail the statutory requirements of section 115-11 but meet the constitutional public trial requirements, this Court should find that a statutory violation alone requires reversal.

This Court should construe section 115-11 similar to the way the Illinois Speedy Trial Act is interpreted. 725 ILCS 5/103-5 (2020). Like section 115-11, Illinois courts are bound by statutory and constitutional speedy trial requirements. *People v. Staten*, 159 Ill. 2d 419, 426 (1994). This Court has recognized that the statutory right to a speedy trial is not same as the constitutional right. *Staten*, 159 Ill. 2d at 426–27. However, defendants who rely on the statutory right are "not required to show prejudice resulting from . . . other factors that are part of the burden of establishing a violation of the constitutional right to a speedy trial." *Id.* Accordingly, a statutory speedy trial violation in itself is sufficient to require reversal. *Id.*

Citing *People v. Flores*, 104, Ill. 2d 40, 50 (1984), the State argues that construing section 115-11 as "supplanting or constraining" the trial court's authority to manage its courtroom would raise separation of powers concerns. (St. Br. 14) Therefore, the State suggests that this Court must interpret section 115-11 as permissive to avoid finding the statute unconstitutional. As the State did not raise this argument in the appellate court, this Court should consider the argument forfeited. *People ex rel. Waller v. 1989 Ford F350 Truck*, 162 Ill. 2d 78, 90–91(1994) ("Issues not raised and argued before a lower court are considered waived and

cannot be argued for the first time on appeal to this court."). However, even if this Court chooses to consider the forfeited argument, the State's argument fails.

Flores concerned section 115-4.1 of the Code of Criminal Procedure of 1977 which could arguably be interpreted as requiring a trial court to wait two days to continue a trial when the defendant "willfully absents himself." *Flores*, 104 Ill. 2d at 46. The trial court held that the statute was an unconstitutional infringement on the authority of the courts under the separation of powers doctrine. *Id.* at 45. This Court, however, held that section 115-4.1 was constitutional because the statute was permissive, not mandatory. *Id.* at 50.

Flores, however, did not make every restriction upon the courts permissive. Not every legislative action which governs court procedure is an unconstitutional legislative encroachment on the rulemaking powers of the judicial branch. *Id.* at 49. For example, this Court distinguished the bifurcated-trial procedure of the Illinois Marriage and Dissolution of Marriage Act and the 120-day speedy trial provision of the Speedy Trial Act from section 115-4.1. *Id.* at 50. This Court explained:

> "We believe that both the bifurcated-trial and 120-day speedy-trial provisions are distinguishable from section 115-4.1. A trial judge is aware in advance of the bifurcated-trial situation and the speedy-trial provision. A trial judge can plan ahead to accommodate those cases on his call. However, with the instant case, the court cannot plan ahead. If the defendant chooses to walk out once his trial has commenced, his act can cause complete disruption of the court's docket. A judge would not know from case to case whether the defendant would appear or walk out during trial. A defendant should not benefit from his own defiance of the criminal justice system." *Id.*

Section 115–11 is more like the bifurcated-trial or the 120-day speedy trial provision because the trial court can plan ahead for the procedure. Unlike section 115-4.1, complying with section 115-11 would not cause a "complete disruption" of the court's docket. *Id.*

It should also be noted that the issue in *Flores* was that the trial court refused to comply with a statutory provision and instead deemed it unconstitutional. *Id.* at 46 ("The sole issue before this court is whether the trial court erred in holding as unconstitutional that portion of section 115-4.1."). To the contrary, here, the trial court was relying on section 115-11 to close the courtroom. (Vol. XIX, R. 11) Accordingly, the statute does not "supplant" or "constrain" the trial court. The court could have ignored section 115-11 completely and closed the courtroom through another constitutionally permissible method. See *Waller*, 467 U.S. at 48. However, the trial court may not rely on statutory authority of section 115-11 to close a courtroom and then ignore the requirements of the statute.

C. Alternatively, the trial court also failed to comply with the constitutional public trial requirements.

Even if the statutory guidelines for section 115-11 are permissive, reversal would still be required because the trial court failed to comply with the constitutional public trial requirements. Under *Waller*:

> "[(1)] [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [(2)] the closure must be no broader than necessary to protect that interest, [(3)] the trial court must consider reasonable alternatives to closing the proceeding, and [(4)] it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48.

Here, the trial court did not meet these requirements. The court made no findings to support its closure of the courtroom and the record does not show that the court advanced an overriding interest. (Vol XIX R. 3–18) In fact, it made no findings to support the closure. Furthermore, the court did not take any actions to ensure the scope of the closure was limited to be "no broader the necessary" to protect the overriding interest, nor did it, with regards to Mr. Schoonover's family, make reasonable alternatives to closing the proceedings. Instead, the court employed

a blanket exclusion on any spectators that were present on behalf of Mr. Schoonover. (Vol. XIX R. 3–18) Therefore, the court's actions did not comply with the *Waller* test.

The State argues that the *Waller* test does not apply to partial courtroom closures. (St. Br. 24–25) However, as previously stated, the *Waller* court did not distinguish between complete and partial closures of trials. *Simmons*, 797 F.3d at 413 (citing *Waller*, 467 U.S. at 47). Nonetheless, several United State Circuit Courts have distinguished between a complete and partial closure of the courtroom. *Simmons*, 797 F.3d at 413. These courts have modified the *Waller* test "so that the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure, but the other three factors remain the same." *Id.* In the instant case, this change in standard would make no difference to the analysis. The trial court did not make any finding as to the reason for a courtroom closure. (Vol XIX R. 3–18) Accordingly, the court would not be able to meet the lesser "substantial reasons" standard. It should be also be noted that this Court and other state supreme courts have not adopted the "substantial reason" standard for partial closures. See *Holveck*, 141 Ill. 2d at 100 (applying the "overriding interest" test from *Waller* in a partial closure setting); see also *Turrietta*, 308 P.3d at 970; *Jones*, 96 N.Y.2d at 219; *Mahkuk*, 736 N.W.2d at 685.

The State asserts that this Court in *Radford* declined to apply the *Waller* test to a partial closure where the defendant had not objected. (St. Br. 25) The State's assertion misrepresents the *Radford* decision. In *Radford*, the defendant argued that the trial court did not provide an "adequate justification" to satisfy *Waller's* "overriding interest test." *Radford*, 2020 IL 123975, ¶ 26. The trial court had, however, conducted a *Waller* analysis in a manner sufficient to satisfy the defendant's Sixth Amendment right to a public trial. *Id.* ¶¶ 40–42 ("Under these

circumstances, we find the partial closure of the courtroom did not constitute clear or obvious error by depriving defendant of his sixth amendment right to a public trial.") (citing *Waller*, 467 U.S. at 46). Specifically, the court allowed two of the defendant's family members to remain in the courtroom during jury selection. *Id.* ¶ 40.

The defendant in *Radford* was unsatisfied with the decisions made by trial court while applying the *Waller* test; however, the defendant never presented these objections to the court. *Id.* ¶¶ 36–37. In the instant case, defense counsel made an objection to Mr. Schoonover's family being excluded. (Vol. XIX R. 3, 11) The trial court barred Mr. Schoonover's family over defense counsel's objection. (Vol. XIX R. 3, 11) However, the court did not conduct the *Waller* analysis before applying a blanket exclusion policy on Mr. Schoonover's family.

The State also argues that the court's invocation of section 115-11 demonstrates that it was intending to "further the compelling interest in minimizing psychological and emotional harm" to M.L. (St. Br. 27) The United States Supreme Court has recognized that while "safeguarding the physical and psychological well-being of a minor" is a compelling interest, it does not justify a "*mandatory* closure rule" and that "the circumstances of a particular case may affect the significance of the interest." *Globe Newspaper Co.*, 457 U.S. at 607–08 (emphasis in original). The Supreme Court stated that trial courts should determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. The court should weigh factors such as "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.* at 608. Here, the trial court weighed none of these factors; it merely stated "Out." (Vol. XIX R. 11) Accordingly, even

if this was a compelling interest to justify closure, the trial court did not exercise discretion and determine the appropriate bounds for closure.

The State asserts that there is no evidence that the "'potential harms flowing from a courtroom closure came to pass.'" (St. Br. 29) However, public trial rights are "structural" and not subject to a harmless error analysis. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). Moreover, there were potential harms involved with the denial of Mr. Schoonover's right to a public trial. The protections of the public trial guarantee were violated because the witness was not discouraged from perjury. The potential for perjury was compounded due to M.L.'s grandmother, father, and step-father being present for her testimony. (Vol. XIX R. 11–18) This placed a lot of pressure on M.L. to repeat the statement she previously gave to her family, even if that may not have been the complete truth. Accordingly, Mr. Schoonover was potentially harmed by the denial of his public trial rights.

D. The appellate court correctly found that Mr. Schoonover's claims were properly addressed under the doctrine of plain error.

Mr. Schoonover's acknowledged that trial counsel did not preserve this issue for appellate review because he failed to raise it in a posttrial motion. *Schoonover*, 2019 IL App (4th) 160882, ¶ 13. Nonetheless, the appellate court properly reviewed the issue for second-prong plain error and found that a structural error occurred here. *Id.* ¶¶ 40–45.

The plain error doctrine allows this Court to grant relief if (1) the evidence is closely balanced; or (2) regardless of whether the evidence was close, the error was so serious that it affected the fairness of the trial and the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598, 613–14 (2010); *People v. Herron*, 215 Ill. 2d 167, 178–79, 186–87 (2005); Ill. S. Ct. R. 615(a).

Second-prong plain-errors have been compared to structural errors; thus, when a structural error occurs, it is reversible as plain error, regardless of any forfeiture and regardless of the strength of the State's evidence. See *Thompson*, 238 Ill. 2d at 612, 613–14 (discussing second-prong plain-error as structural error when defendant did not object).The denial of the right to a public trial has been identified by the Supreme Court as a "structural error." See *id.* at 609 (listing structural errors identified by the Supreme Court, including denial of the right to a public trial) (citing *Washington v. Recuenco*, 548 U.S. 212, 218 n. 2 (2006)). "Structural errors are systemic, serving to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Thompson*, 238 Ill. 2d at 608–09 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197–98 (2009)) (internal citations omitted). Consequently, structural errors are one of a very few types of error subject to automatic reversal. *Glasper*, 234 Ill. 2d at 197–98.

The appellate court correctly found that the trial court's error amounted to a structural error. *Schoonover*, 2019 IL App (4th) 160882, ¶ 45. Accordingly, the court found that Mr. Schoonover established second-prong plain error, requiring reversal. *Id.* The trial court committed structural error when it improperly closed the proceedings under Section 115-11 or, alternatively, the more stringent constitutional requirements established by the United States Supreme Court in *Waller*. The appellate court correctly determined that the trial court committed plain error. Accordingly, this Court should affirm the decision of the appellate court to vacate Mr. Schoonover's conviction and remand for a new trial.

II. Defense counsel's ineffective assistance of counsel deprived Hayze Schoonover a fair trial.

Defense counsel provided ineffective assistance of counsel when (1) he opened the door to otherwise inadmissible testimony which was barred by a motion *in limine*, and (2) when he failed to object to the introduction of irrelevant hearsay evidence which was prejudicial. The cumulative effect of counsel's ineffective assistance denied Mr. Schoonover a fair trial.

Standard of Review

Determining whether defense counsel provided ineffective assistance involves a bifurcated standard of review, wherein the reviewing court defers to the trial court's findings of fact unless they are against the manifest weight of the evidence, but makes a *de novo* assessment of the ultimate legal issue. *People v. Rivera*, 227 Ill. 2d 1, 11 (2007), *aff'd sub nom*. *Rivera v. Illinois*, 556 U.S. 148 (2009). As the facts surrounding this claim are not disputed, this Court should review this issue *de novo*.

Authorities and Analysis

Every felony defendant is entitled to the effective assistance of counsel at trial. U.S. Const. amends. VI, XIV; Ill. Const. art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In order to prevail on a claim of ineffective assistance, a defendant must show: 1) that counsel's representation fell below an objective standard of reasonableness; and 2) that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687, 694; *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). The prejudice component of *Strickland* is not an "outcome-determinative test"; rather, the question is whether counsel's performance rendered the proceeding fundamentally unfair or undermined confidence in the outcome of the trial. *People*

v. Richardson, 189 Ill. 2d 401, 411 (2000); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); see also *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003) (defendant has established prejudice "even if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent . . . so long as the chances of acquittal are better than negligible").

A. Defense counsel unreasonably opened the door to prejudicial statements M.L. made to A.G. which had been excluded through a motion *in limine* and counsel failed to object to Cashonna's hearsay testimony.

An effective attorney "embraces . . . the use of established rules of evidence and procedure to avoid, when possible, the admission of incriminating statements." *People v. Moore*, 279 Ill. App. 3d 152, 159 (5th Dist. 1996). Here, Mr. Schoonover's attorney did the opposite by opening the door to prejudicial testimony that had been excluded by the court through a pretrial motion *in limine*. While not specifically addressed by this Court, the appellate court has held that trial counsel provides ineffective assistance when he opens the door to otherwise inadmissible testimony. See *People v. Dupree*, 2014 IL App (1st) 111872, ¶¶ 39–56 (reversing Dupree's conviction where defense counsel opened the door to an otherwise inadmissible prior consistent statement); *People v. Valentine*, 299 Ill. App. 3d 1, 3–4 (1st Dist. 1998) (reversing Valentine's conviction where defense counsel opened to door to cross-examination about his criminal history); but see *People v. Harris*, 182 Ill. 2d 114, 143 (1998) (denying a claim of ineffective assistance of counsel for opening the door to otherwise inadmissible testimony where the admission of the testimony did not prejudice the defendant).

The prejudicial testimony relevant to this issue concerned a statement A.G. made to her mother Cashonna Berger. Cashonna testified about the content of

A.G.'s statement at the Section 115-10 hearing to admit M.L.'s statements. (Vol. IX, R. 14); 725 ILCS 5/115-10 (2016). At the hearing, Cashonna explained the circumstances which led to her arranging a family meeting to talk with M.L. (Vol. IX, R. 16–18) Cashonna stated that she was driving home from Walmart with A.G. (Vol. IX, R. 16) Cashonna asked A.G. if there was anything she needed to tell her about Mr. Schoonover. (Vol. IX, R. 16) A.G. then described an incident that occurred during the summer of 2014. (Vol. IX, R. 18) A.G. stated that Mr. Schoonover followed her into the bathroom and began talking to her about sex. (Vol. IX, R. 18) Mr. Schoonover then showed her a sex toy. (Vol. IX, R. 18) A.G. told Cashonna that it would be a good idea for her to talk to M.L. because she had more to say. (Vol. IX, R. 19)

Prior to trial, counsel filed a motion *in limine* to prohibit the admission of statements made by M.L. to A.G. (C. 165–66) The court granted the motion *in limine*. (Vol. XIX, R. 7–8) A.G. was not on the State's witness list and was not expected to testify. (C. 180) Further, the State did not a file a Section 115-10 motion to admit the hearsay statement A.G. made to Cashonna. At trial, the State called Cashonna as a witness. (Vol. XIX, R. 53) On direct examination, the State did not elicit any testimony about the substance of A.G.'s conversation with Cashonna. (Vol. XIX, R. 54–55) Cashonna only testified that she had a conversation with A.G. and based on her conversation she set up a family meeting to talk to M.L. (Vol. XIX, R. 54–55)

On cross-examination, defense counsel began questioning Cashonna about the substance of A.G.'s conversation. (Vol. XIX, R. 62–63)

> "[MR. ALLEGRETTI (Defense Counsel)]: Okay. So [A.G.] never told you about—volunteered any of this information?

> [CASHONNA]: No.
>
> Q: And nothing that [A.G.] described involved [M.L.] or [Mr. Schoonover] having physical contact; is that correct?
>
> [MR. LARSON (ASSISTANT STATE'S ATTORNEY)]: Objection to anything that [A.G.] said, your Honor. That was the whole purpose of his motion.
>
> [THE COURT]: He may ask if he wants.
>
> * * *
>
> [MR. ALLEGRETTI]: Was there anything about the conversation you had with [A.G.] in the car involving contact, physical contact with [M.L.] and [Mr. Schoonover]?
>
> [CASHONNA]: Nothing specific about physical contact between [Mr. Schoonover] and [M.L.] that day, no."(Vol. XIX, R. 62–63)

On redirect examination, the State began questioning Cashonna about the substance of her conversation with A.G. (Vol. XIX, R. 70–72) Defense counsel objected to this line of questioning but the court ruled that defense counsel had opened the door. (Vol. XIX, R. 70–72) The State was permitted to question Cashonna as to the following:

> "[MR. LARSON]: [S]o based on conversation [*sic*] you had with your husband, you then spoke to your daughter?
>
> [CASHONNA]: Yes.
>
> Q: Okay. And then what did your daughter tell you?
>
> * * *
>
> [CASHONNA]: There was a time when I was at work and my husband and my three children were visiting Sarita and [Mr. Schoonover] at their house. They have a big tub, we didn't have a big tub, so Sarita's daughter, my niece, other niece, had taken [A.G.] into the bathroom to share a big swimming tub, and apparently [Mr. Schoonover] had followed her into the bathroom and began a conversation about sex, including sex toys, and he brought out sex toys and showed my daughter.
>
> [MR. ALLEGRETTI]: Objection, Judge; speculation.

> [MR. LARSON]: Your Honor, he has opened the door to this with his questioning.
>
> [COURT]: The objection is overruled.
>
> * * *
>
> [MR. LARSON]: Based on that, why did you decide to have a meeting with [M.L.]?
>
> [CASHONNA]: Because then after she had explained that to me, I had asked her if [M.L.] had ever told her anything that we needed to be concerned about with her—with her relationship between [M.L.] and [Mr. Schoonover].
>
> [MR. ALLEGRETTI]: Objection, Judge; hearsay.
>
> [MR. LARSON]: He has once again opened the door to this, Your Honor.
>
> [COURT]: Mr. Allegretti, you asked a question about this conversation. I will allow redirect on it.
>
> [MR. LARSON]: Thank you, Your Honor. I'm sorry. If you—so after your daughter told you about the incident with the sex toy, and then you asked her about [M.L.], what did she say to you?
>
> [CASHONNA]: She said that it would be a good idea to speak with [M.L.] because she believed that much more had happened between [Mr. Schoonover] and [M.L.]" (Vol. XIX, R. 70–72)

A.G.'s statements to Cashonna are inadmissible hearsay as they are out of court statements offered for the truth of the matter asserted. Ill. R. Evid. 801 (eff. Oct. 15, 2015), 802 (eff. Jan. 1, 2011). Cashonna testified about two different statements; the first was regarding M.L.'s statement to A.G. (Vol. XIX, R. 70–72) Cashonna testified that A.G. stated "it would be a good idea to speak with [M.L.] because she believed that much more had happened between [Mr. Schoonover] and [M.L.]" (Vol. XIX, R. 72) This statement is double hearsay and the court had barred its admission in a motion *in limine*. (C. 165–66; Vol. XIX, R. 7–8) Defense counsel, however, opened the door to this statement by asking Cashonna whether A.G. described any physical contact between M.L. and Mr. Schoonover. (Vol. XIX,

R. 63)

The second statement concerned an alleged incident where Mr. Schoonover followed A.G. into the bathroom and began a conversation with her about sex and showed her sex toys. (Vol. XIX, R. 70–71) Defense counsel objected to Cashonna testifying on the basis of speculation. (Vol. XIX. R. 70–71) The State argued that defense counsel had opened the door to this testimony and the trial court overruled the objection without specifically providing a reason. (Vol. XIX, R. 71) The State was incorrect and defense counsel had not opened the door to this testimony. When defense counsel asked Cashonna about A.G.'s statements, his questions concerned only the statements M.L. made to A.G. (Vol. XIX, R. 63) The State's questions on redirect go beyond the scope of defense counsel's cross-examination. *People v. Garner*, 91 Ill. App. 2d 7, 15 (2d Dist. 1968) (citing *People v. Berardi*, 332 Ill. 295, 299 (1928)) ("Generally, both cross and redirect examination are limited to the scope of the preceding examination."); *People v. Sanchez*, 73 Ill. App. 3d 607, 610 (3d Dist. 1979).

A.G.'s statement about the alleged incident in the bathroom is inadmissible hearsay. Ill. R. Evid. 801, 802. The statement did not fall under any hearsay exceptions and the court did not deem it admissible under Section 115-10. Moreover, the substance of A.G.'s statement was not relevant to the charged offense. (C. 1–4) A.G.'s conversation with Cashonna was only relevant to establish a foundation for the family meeting. Defense counsel, however, did not raise the proper objection to Cashonna's testimony; counsel objected on the basis of speculation as opposed to hearsay, relevance, or beyond the scope. (Vol. XIX, R. 71); *Johns-Manville Products Corp. v. Indus. Comm'n*, 78 Ill. 2d 171, 179 (1979) ("It is well established that an objection must specify the grounds for the objection and that no other grounds

than those stated will be considered on appeal").

Accordingly, based on these two errors, counsel's performance was deficient and satisfied the first prong of *Strickland*. See, *e.g.*, *People v. Moore*, 356 Ill. App. 3d 117, 122 (1st Dist. 2005) ("Defense counsel's failure to object to this argument demonstrated ineffective assistance of counsel and cannot be excused as mere trial strategy.").

Admitting A.G.'s statement about the sex toys also permitted the State to ask Sarita Taylor, Mr. Schoonover's ex-wife, whether there were any sex toys in the house. (Vol. XIX, R. 103–04) Sarita described the sex toys in great detail:

> "[MR. LARSON]: Can you describe [the sex toys], please?
>
> [SARITA]: There was a small pink one. It had a small tip. It bulged out and then it got thinner towards the bottom. There was a purple one that had two sides for it for double penetration. There was [*sic*] a couple that looked more realistic in different sizes, and there was one that was extremely huge, big enough that you couldn't even pick it up, like you had to put it on the ground to use it.
>
> Q: Who purchased those items?
>
> A: [Mr. Schoonover]." (Vol. XIX, R. 103–04)

Because counsel did not correctly object to A.G.'s statement, the State was able to elicit testimony that would not have been otherwise relevant.

Counsel's questions which opened the door to A.G.'s statements and his decision not to object on the basis of hearsay cannot be considered reasonable trial strategy. During redirect examination, defense counsel objected when the State questioned Cashonna about A.G.'s statements. (Vol. XIX, R. 70–72) Further, defense counsel filed a pretrial motion to keep the jury from hearing A.G.'s statements. (C. 165–66) This shows that defense counsel did not intend to have A.G.'s statements presented to the jury. Further, as discussed in more detail below, A.G.'s statements

are incredibly prejudicial and it would not be a reasonable trial strategy for counsel to have allowed their admission.

The second prong of *Strickland* requires a defendant to prove that the deficient performance prejudiced the defense in that absent counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004) (citing *Strickland*, 466 U.S. at 687). Here, the State's case relied primarily on the testimony of one child witness, M.L. (Vol. XIX, R. 19–52; 139–42) However, M.L.'s statements were not spontaneous as they were only provided after being questioned by other adults. (Vol. XIX, R. 76–77) While other witnesses testified at trial, their testimonies were primarily retelling statements made by M.L. (Vol. XIX, R. 53–95; 143–87)

The only other evidence presented were: (1) A.G.'s statements, (2) the black notebook, and (3) Sarita's testimony. However, as argued in Argument II.C, the black notebook was, in part, inadmissible. There was no forensic evidence of the contact and there were no eyewitnesses to the alleged contact. Sarita provided some additional corroborating evidence; however, Sarita was also recently divorced from Mr. Schoonover. (Vol. XIX, R. 97–138) Defense counsel established evidence of Sarita's bias which the jury could have used to discredit her testimony. (Vol. XIX, R. 122–136) Further, if not for counsel's deficient performance, the State would have been barred from admitting Sarita's testimony regarding the sex toys.

If not for counsel's deficient performance, the State would have been barred from admitting the substance of A.G.'s statement. By opening the door and failing to properly object to inadmissible testimony, the State was able to elicit testimony that was not relevant, highly prejudicial, and portrayed Mr. Schoonover as a sexual deviant. See, *e.g.*, *People v. Stanbridge*, 348 Ill. App. 3d 351, 357 (4th Dist. 2004)

(finding testimony about prior incidents of sexual abuse to be highly prejudicial). A.G.'s statement detailed potential sexual abuse that was not part of the charged offense. Admitting A.G.'s testimony also carried constitutional implications because A.G. did not testify and was not subject to cross-examination. See *People v. Dabney*, 2017 IL App (3d) 140915, ¶ 18, *appeal denied*, 94 N.E.3d 637 (Ill. 2018) (citing *People v. Kitch*, 239 Ill. 2d 452, 469 (2011)) ("In a prosecution for a sex offense committed against a child, for an out of court statement of the child victim to be admissible at trial, the statement must comply not only with the requirements of section 115-10 of the Code but must also satisfy the requirements of the confrontation clause."). Without this highly prejudicial evidence, there is a reasonable probability that the State would not have been able to prove their case.

Mr. Schoonover has satisfied both prongs of the *Strickland* analysis by showing that his counsel's performance was deficient and he was prejudiced by the statements. *Strickland*, 466 U.S. at 687, 694. The admission of A.G.'s testimony and testimony about sex toys denied Mr. Schoonover a fair trial; defense counsel was ineffective for opening the door to this otherwise inadmissible testimony. Accordingly, this Court should vacate Mr. Schoonover's conviction and grant him a new trial.

B. Defense counsel failed to object to prejudicial testimony that was not relevant to the offense.

Evidence is relevant 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. R. Evid. 401 (eff. Jan. 1, 2011). Evidence that is not relevant is not admissible. Ill. R. Evid. 402 (eff. Jan. 1, 2011). Relevant evidence may also be excluded if its "probative value if its

probative value is substantially outweighed by the danger of unfair prejudice." Ill. R. Evid. 403 (eff. Jan. 1, 2011).

In this case, the State presented evidence of M.L.'s interview with Mary Bunyard at the Child Advocacy Center ("CAC"). (Vol. XIX, R. 181–88) A video of the interview was played for the jury. (Vol. XIX, R. 188) In the video M.L. states that she "is not doing so well in school right now because of the issues." (Exhibits Envelope, P. Ex. C1, 2:30-2:33) She then states: "I mean, I know I can do way better. I know I can, but it's just really hard with all the people that bully me." M.L.'s statement is inadmissable because it is not relevant to the charged offense. (C. 1–4) M.L. being bullied at school *after* the alleged offense occurred does not make it "more probable" that [Mr. Schoonover] committed the offense.

The State moved to admit the video pursuant to Section 115-10 and the court granted the State's motion. (C. 19–20; Vol. XI, R. 13) The video was played for the jury. (Vol. XIX, R. 188) Defense counsel argued that the CAC video should not be admitted pursuant to Section 115-10. (Vol. XI, 10–11) However, counsel did not object to the video being played nor did he request that the video be edited to exclude any irrelevant material. (Vol. XIX, R. 188) Defense counsel provided ineffective assistance of counsel when he failed to object to irrelevant portions of the video being shown to the jury. See, *e.g.*, *People v. Simpson*, 2013 IL App (1st) 111914, ¶ 18 (finding counsel's performance deficient when he failed to object to video containing inadmissible evidence being published to the jury). Defense counsel's decision not to object presented no reasonable trial strategy as admitting the statement provides no positive benefit to Mr. Schoonover. Further, trial counsel had attempted to bar the video from being played on other grounds. (Vol. XI, R. 10–12)

The prejudice prong of *Strickland* requires a defendant to prove that the

deficient performance prejudiced the defense in that absent counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 220 (citing *Strickland*, 466 U.S. at 687) Here, M.L.'s statement about being bullied at school due to the alleged offense is prejudicial to Mr. Schoonover because it is an improper appeal to the emotions of the jurors. See, *e.g.*, *People v. Hope*, 116 Ill. 2d 265, 277 (1986). Similar to what this Court stated in *Hope*, the statement here had no relevance to Mr. Schoonover's guilt or innocence. *Hope*, 116 Ill. 2d at 277 ("The only purpose these questions could serve is to prejudice the defendant in the eyes of the jury, 'and to arouse in them anger, hate and passion.'"). Further, as argued *supra* in Argument II.A, there were weaknesses in the State's case against Mr. Schoonover. Without this highly prejudicial evidence that appealed to the juror's emotions, there is a reasonable probability that the State would not have been able to prove their case.

Mr. Schoonover has satisfied both prongs of the *Strickland* analysis by showing that his counsel's performance was deficient and he was prejudiced by the deficient performance. *Strickland*, 466 U.S. at 687, 694. Defense counsel was ineffective for failing to object to prejudicial testimony that was not relevant to the offense. Accordingly, this Court should vacate Mr. Schoonover's conviction and grant him a new trial.

C. Defense counsel failed to object, on hearsay grounds, to the admission and publication of a black notebook containing inadmissible hearsay statements.

The trial court allowed the State to admit as evidence a black notebook that purported to contain a conversation between M.L. and Mr. Schoonover. M.L.'s written statements in the notebook were inadmissible hearsay. (Vol. XIX, R.

113–119, 139–141) Although defense counsel objected to admitting the notebook into evidence, counsel failed to make a specific hearsay objection. (Vol. XIX, R. 113–119) Counsel failed to preserve the error by failing to make a specific hearsay objection. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

"Illinois courts have long held that hearsay includes written out-of-court statements." *In re Jovan A.*, 2014 IL App (1st) 103835, ¶ 27 (citing *People v. Carpenter*, 28 Ill. 2d 116, 121 (1963)). Hearsay is an out of court statement offered for the truth of the matter asserted and it is generally inadmissible. Ill. R. Evid. 801, 802. Hearsay evidence can be admitted if it falls under certain hearsay exceptions; however, these exceptions did not apply to M.L.'s statements. See Ill. R. Evid. 802, 803 (eff. Apr. 26, 2012). Under 725 ILCS 5/115-10 (2016), hearsay statements of a minor victim may also be admissible under certain circumstances. While the court, in the instant case, allowed some of M.L.'s statements to be admissible under Section 115-10, evidence of the black notebook was never presented at the Section 115-10 hearing. (Vol. IX, R. 49–70) Accordingly, the statement could not have been admitted under Section 115-10. 725 ILCS 5/115-10 ("[Section 115-10] 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 . . . .").

As M.L.'s written statements in the black notebook did not fall under a hearsay exception, they should have been deemed inadmissible. Counsel's performance was deficient for not objecting on the proper hearsay grounds. Counsel's decision to not object to the evidence on hearsay grounds was also not reasonable trial strategy as admitting the notebook did not provide any positive benefit to Mr. Schoonover. Moreover, counsel objected to the black notebook being admitted

on other grounds. (Vol. XIX, R. 115, 179)

Mr. Schoonover was prejudiced by the admission of the notebook due to highly inflammatory statements that were purported to be from M.L. and Mr. Schoonover. Hearsay statements can be unreliable—especially statements from minor children. See, *e.g.*, *People v. Miles*, 351 Ill. App. 3d 857, 865–67 (4th Dist. 2004). Hearsay exceptions provide safeguards to admit otherwise inadmissible evidence because the statements fit into "one of the firmly established hearsay rules or by 'a showing of particularized guarantees of trustworthiness.'" *People v. Peck*, 285 Ill. App. 3d 14, 23 (4th Dist. 1996) (quoting *Idaho v. Wright*, 497 U.S. 805, 814 (1990)). Here, the reliability of the admitted statements were not established and admitting them prejudiced Mr. Schoonover. Mr. Schoonover was further prejudiced by the evidence because the jurors were permitted to receive a copy of the black notebook during deliberations. (Vol. XX. R. 63)

Further, as argued *supra* in Argument II.A, there were weaknesses in the State's case against Mr. Schoonover. The State primarily relied on M.L.'s non-spontaneous statement to make their case. The only other additional evidence corroborating M.L.'s statement was the black notebook and Sarita's testimony. As argued *supra* in Argument II.A, defense counsel showed that Sarita was biased against Mr. Schoonover which the jury could have used to discredit her testimony. Therefore, a major piece of corroborating evidence is the black notebook. The State used the black notebook extensively in closing argument and read a majority of its contents to the jury. (Vol. XX, R. 18–22) For example, in closing the State said:

> "State: As [M.L.] told you, he starts with the talking and then he progressed forward. And we know exactly how he talked to her. He didn't talk to her like an uncle; he talked to her like a boyfriend. How do we know this? Because he screwed up. This notebook here. . . . He forgot about the notebook. The notebook was hidden under the

> papers on the kitchen counter and stayed there hidden until Sarita's daughter felt like scribbling, felt like drawing, and her mom said she needed to look at it first, and what she saw inside in the defendant's handwriting is a written confession of the things he did, how he did them, things he did to [M.L.] in the past, and the things he wanted to do to her in the future. You should take your bra and underwear—take off your bra and underwear. And look, she pushed back a little, right? Not yet. I don't have to ask. You already did. Ha ha. This is a conversation not between an adult and a child. This is between the defendant manipulating this girl." (Vol. XX, R. 18)

Therefore, the black notebook was a major portion of the State's case, and defense counsel was ineffective for not properly objecting to its admittance.

Mr. Schoonover has satisfied both prongs of the *Strickland* analysis by showing that his counsel's performance was deficient and he was prejudiced by the deficient performance. *Strickland*, 466 U.S. at 687, 694. Defense counsel was ineffective for failing to object to inadmissible hearsay evidence. Accordingly, this Court should vacate Mr. Schoonover's conviction and grant him a new trial.

D. The cumulative prejudice of defense counsel's ineffective assistance denied Mr. Schoonover a fair trial.

The second prong of *Strickland* requires a defendant to prove that the deficient performance prejudiced the defense in that absent counsel's deficient performance there is a reasonable probability that the result of the proceeding would have been different. *People v. Evans*, 186 Ill. 2d 83, 93 (1999) (citing *People v. Mahaffey*, 165 Ill. 2d 445, 466).

Even if this Court finds that trial counsel's deficiencies did not individually require reversal, this Court should find the cumulative prejudice from each individual deficiency is sufficient to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Evans*, 186 Ill. 2d at 93 (citing *Mahaffey*, 165 Ill. 2d at 466). The cumulative prejudicial effect of trial counsel errors may be used to satisfy

Strickland's prejudice prong. See, *e.g.*, *People v. Bolden*, 2014 IL App (1st) 123527, ¶¶ 46, 55 *as modified on denial of reh'g* (Aug. 6, 2014) ("Bolden made a substantial showing that his trial counsel committed unprofessional errors . . . . [W]e find that Bolden has substantially shown that he suffered prejudice due to trial counsel's errors.); *People v. Bell*, 152 Ill. App. 3d 1007, 1011 (3d Dist. 1987) ("[W]e are compelled to find that due to the cumulative effect of trial counsel's errors, his duty to his client was inadequately discharged and that Bell was sufficiently prejudiced to be entitled to a new trial.")

Here, trial counsel erred by: (1) opening the door to A.G.'s statement, (2) not objecting to A.G.'s hearsay statements, (3) not properly objecting to portions of the CAC video being admitted, and (4) not properly objecting to the black notebook being admitted. See *supra* Argument II.A, II.B, II.C. As discussed above, multiple trial errors created a pervasive pattern of unfair prejudice in Mr. Schoonover's case. The State's evidence primarily relied on the non-spontaneous testimony of M.L. (Vol. XIX, R. 19–52; 139–42) The State colored this testimony with inadmissible and prejudicial testimony: A.G.'s statement, portions of the CAC interview, and the black notebook. The combined effect of this inadmissible evidence was incredibly prejudicial because it portrayed Mr. Schoonover as a bad person who sexually abused other children and as a sexual deviant who bought and used sex toys. The inadmissible evidence also appealed to the jurors emotions because it described the effects of the alleged offense which had no relevance to Mr. Schoonover's guilt or innocence. See, *e.g.*, *Hope*, 116 Ill. 2d at 277. Further, the black notebook included highly prejudicial statements which the State relied on extensively in closing arguments. (Vol. XX, R. 18–22) The evidence was not subject to any limiting instructions and the jury was not instructed on the proper use

of other crimes evidence. (Vol. XX, R. 2–16)

Notably, counsel's errors resulted in none of the challenged errors being preserved for appeal; defense counsel was ineffective for failing to include these errors in Mr. Schoonover's motion for a new trial. (C. 245–250); See *Martinez v. Ryan*, 566 U.S. 1, 12 (2012) ("Effective trial counsel preserves claims to be considered on appeal[.]") (citing Fed. R. Crim. P. 52(b)); *People v. Owens*, 384 Ill. App. 3d 670, 673 (1st Dist. 2008) (finding defendant prejudiced on appeal by counsel's failure to properly preserve sentencing issue in post-sentencing motion). As argued above, each of these errors individually satisfy the prejudice prong; however their combined effect further prejudices Mr. Schoonover. See *People v. Johnson*, 208 Ill. 2d 53, 64–65 (2003) (finding that overlapping error has a "synergistic" effect, where each error reinforces the others, such that the combined effect is *greater* than the sum of each individual error).

Accordingly, Mr. Schoonover has satisfied both prongs of the *Strickland* analysis by showing that his counsel's performance was deficient and he was prejudiced by the deficient performance. *Strickland*, 466 U.S. at 687, 694. Therefore, defense counsel was ineffective for failing to object to inadmissible hearsay evidence. Accordingly, this Court should vacate Mr. Schoonover's conviction and grant him a new trial.

E. The cumulative prejudice of the trial errors denied Mr. Schoonover a fair trial.

Even if this Court finds that defense counsel's trial errors did not individually require reversal under *Strickland*, this Court should find that the cumulative trial errors denied Mr. Schoonover a fair trial. Mr. Schoonover has acknowledged that these errors were not preserved for review; however, these errors error are

reviewable under the plain-error doctrine. See Ill. S. Ct. R. 451(c) (eff. Apr. 8, 2013) ("[S]ubstantial defects [in jury instructions] are not waived by failure to make timely objections thereto if the interests of justice require."); Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."); see also *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (explaining that Rule 451(c) and Rule 615(a) are coextensive and construed identically).

Under the plain-error doctrine, a clear and obvious error, though unpreserved, may be considered if: (1) "the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant" or (2) the error "is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Further, although "individual trial errors may not require a reversal, those same errors considered together may have the cumulative effect of denying defendant a fair trial." *People v. Speight*, 153 Ill. 2d 365, 376 (1992). Here, the following errors occurred: (1) A.G.'s hearsay statements were admitted, (2) Sarita's irrelevant testimony about sex toys was admitted, (3) irrelevant testimony about bullying was admitted as part of the CAC interview video, and (4) hearsay statements from the black notebook where admitted. See *supra* Argument II.A, II.B, II.C.

This case involves both types of plain error. First, the evidence in this case is closely balanced because the State's evidence primarily relies on the non-spontaneous testimony of one child witness. See *supra* Argument II.A. The trial errors in this case resulted in otherwise inadmissible being admitted and this evidence was used to corroborate M.L.'s testimony. Absent the inadmissible evidence M.L.'s testimony was largely uncorroborated and the State's case rested primarily

on the credibility of M.L.'s statement. See *People v. Sebby*, 2017 IL 119445, ¶ 63 (quoting *People v. Naylor*, 229 Ill. 2d 584, 606–07 (2008)). Further, the court erroneously admitted and published the black notebook to the jury; this notebook included highly prejudicial statements which the State relied on extensively in closing arguments. (Vol. XX, R. 18–22) No outside evidence corroborated M.L.'s allegations; there was no forensic evidence or eyewitnesses testimony supporting M.L.'s allegations. See *Sebby*, 2017 IL 119445, ¶ 63 (citing *Naylor*, 229 Ill. 2d at 607); see also *People v. Boling*, 2014 IL App (4th) 120634, ¶ 131 ("We hesitate to add weight to [the complainant's] claims simply because they were repeated through the testimony of four other witnesses."). As the State's case relies on the credibility of M.L.'s statement, the evidence was closely balanced. See *Sebby*, 2017 IL 119445, ¶ 63 (citing *Naylor*, 229 Ill. 2d at 608).

Second this case satisfies the second prong of the plain-error rule because it "erode[s] the integrity of the judicial process and undermine[s] the fairness of the defendant's trial." *People v. Sargent*, 239 Ill. 2d 166, 190–91 (2010). The denial of the right to a fair trial impacts the integrity of the judicial process and, as a result, courts should take corrective action when errors occur. *People v. Blue*, 189 Ill. 2d 99, 138 (2000) ("[W]hen a defendant's right to a fair trial has been denied, this court must take corrective action so that [it] may preserve the integrity of the judicial process."). As discussed above, multiple trial errors created a pervasive pattern of unfair prejudice in Mr. Schoonover's case.

Here, the trial errors allowed the jury to convict Mr. Schoonover based on incredibly prejudicial and inadmissible statements of A.G. which were not subject to any limiting jury instruction. This evidence portrayed Mr. Schoonover as a bad person who sexually abused other children and as a sexual deviant who bought

and used sex toys. The inadmissible evidence also appealed to the jurors' emotions because it described the effects of the alleged offense which had no relevance to Mr. Schoonover's guilt or innocence. See, *e.g.*, *Hope*, 116 Ill. 2d at 277. Therefore, the cumulative trial errors in this case satisfy the both prongs of the plain-error rule. Accordingly, this Court should vacate Mr. Schoonover's conviction and grant him a new trial.

Conclusion

Defense counsel provided ineffective assistance of counsel when (1) he opened the door to otherwise inadmissible testimony which was barred by a motion *in limine*, and (2) when he failed to object to the introduction of prejudicial irrelevant and hearsay evidence. Each individual aspect of counsel's deficient performance prejudiced Mr. Schoonover such that there is a reasonable probability that the result of the proceeding would have been different. Moreover, the cumulative prejudice from trial counsel's errors would create a reasonable probability that the results of the proceedings would have been different. Alternatively, the cumulative effect of the trial errors in this case denied Mr. Schoonover a fair trial and reversal is required under either prong the plain-error rule. Accordingly, even if this Court reverses the appellate court's decision as to Argument I, for these reasons, this Court should still vacate Mr. Schoonover's conviction and grant him a new trial.

III. The trial judge abused its discretion when it applied a personal sentencing policy and failed to consider a statutory mitigating factor.

In announcing the sentence, the judge stated that it is "the nature of child molesters" to use good deeds as a "disguise" to cover up what they do in private with children. (Vol. XXI, R. 29–30) Accordingly, the judge applied a personal sentencing policy that "child molesters" are not capable of doing good deeds. Additionally, the court failed to consider and give proper weight to two statutory mitigating factors: excessive hardship to dependents and lack of criminal history. Accordingly, the court abused its discretion when it sentenced Hayze Schoonover. If this Court reverses the appellate court's decision as to Argument I, this Court should still vacate Mr. Schoonover's 85-year sentence and remand this case for a new sentencing hearing.

Standard of Review

A reviewing court may not alter a defendant's sentence absent an abuse of discretion by the trial court. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010)

Authorities and Analysis

Mr. Schoonover acknowledges that the trial court is in the best position to craft an appropriate sentence and is given considerable discretion to do so. That discretion, however, is not absolute. See *People v. O'Neal*, 125 Ill. 2d 291, 298 (1988) ("[T]he mere fact that the trial court has a superior opportunity to make a determination concerning final disposition and punishment of a defendant does not imply that a particular sentence imposed is always just and equitable"). Courts are subject to a constitutional mandate to balance the goals of retribution and rehabilitation and must fashion a sentence designed to return offenders to useful citizenship. Ill. Const. 1970, Art. 1, § 11; see, *e.g.*, *People v. Cooper*, 283 Ill. App.

3d 86, 95 (1st Dist. 1996); *People v. Center*, 198 Ill. App. 3d 1025, 1032–33 (1st Dist. 1990).

Consequently, reviewing courts are empowered by both Supreme Court rule and decisional law to intervene in sentencing matters when the trial court has abused its discretion. *O'Neal*, 125 Ill. 2d at 297–98; Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967). On appeal, a reviewing court will not re-weigh the aggravating and mitigating factors, nor will it engage in a cross-comparison analysis of sentences in other cases. *People v. Fern*, 189 Ill. 2d 48, 62 (1999); *People v. Hunzicker*, 308 Ill. App. 3d 961, 966 (3d Dist. 1999). That does not mean, however, that a reviewing court cannot look to the reasoning of other cases, and it does not relieve a court of its duty to meaningfully review a claim of excessive sentencing, even in cases in which the sentence is within the authorized range. *Fern*, 189 Ill. 2d at 62; *People v. Neither*, 230 Ill. App. 3d 546, 551 (1st Dist. 1992), *abrogated on other grounds* by *Fern*, 189 Ill. 2d at 62; *Center*, 198 Ill. App. 3d at 1032 (sentence within the statutory range is still an abuse of discretion when it is greatly at variance with the purpose and spirit of the law).

While the most important factor in determining a sentence is the seriousness of the offense, a court must consider all factors in aggravation and mitigation. *O'Neal*, 125 Ill. 2d at 300–01; *People v. Evans*, 373 Ill. App. 3d 948, 967–968 (1st Dist. 2007). The lack of a significant criminal history and excessive hardship to dependents are statutory mitigating factors. *People v. Blackwell*, 171 Ill. 2d 338, 361 (1996) ("The lack of a significant criminal history is a statutory mitigating factor."); *People v. Young*, 250 Ill. App. 3d 55, 65 (2d Dist. 1993) ("That defendant's imprisonment would entail excessive hardship to his dependants is a mitigating factor under the Code."); 730 ILCS 5/5-5-3.1 (2016). A defendant's age, background,

and rehabilitative potential are also relevant mitigating factors. *Evans*, 373 Ill. App. 3d at 968.

In sentencing Mr. Schoonover, the trial court stated the following:

> "The Court has considered the report prepared by Court Services, considered the testimony presented both by the prosecution and by the defense, considered the packet of mitigation provided on behalf of the Defendant. The Court's considered the statutory factors in aggravation, as well as the statutory factors in mitigation.
>
> As to the statutory factors in mitigation, with the exception of the DUI charge in [2007], the Defendant has no prior criminal history. He has a minimal criminal history as set forth in this report. *Technically, not a statutory factor in mitigation*, but, nonetheless, it is a mitigating factor.
>
> The Defendant is relatively a young man. He's only 29 years of age. He's got his high school diploma. He's employable. Based upon the testimony presented, the documentation on behalf of the Defendant, he appears to be a talented young man.
>
> The—quite frankly, the only statutory factor in aggravation is the deterrent factor.
>
> * * *
>
> The Defendant's family, his friends have submitted letters and indicated what a good person he is, but that is *the disguise of a sexual predator*. They don't wear a sign around their neck. They don't have some indication that I am a child molester. They're otherwise good people. They're solid citizens. They have jobs. They have an education. *All of which is to cover what they do in private with a child or with children.* So the fact that family members think highly of the Defendant and are having a hard time understanding either what he did or whether or not he did it, *that is the nature of child molesters*. What they do, they do in private. It's not done in public. They're not easily identifiable. As a matter of fact, they're hardly ever identified until after the fact has been—after they've been arrested and/or charged. So the sentence imposed today has to act as an appropriate deterrent factor for all the other molesters who are out there.
>
> Again, there is mitigation in this record, *not necessarily statutory mitigation*, but there is mitigation, and I have considered that mitigation in fashioning of the sentence." (Vol. XXI, R. 28–30) (Emphasis added).

The trial court sentenced Mr. Schoonover to nearly five times the minimum sentence for his first felony conviction. (Vol. XXI, R. 30); 720 ILCS 5/11-1.40(b) (2016). In doing so, the trial court abused its discretion by (1) applying a personal sentencing policy and (2) failing to consider and give proper weight to statutory mitigating factors.

A. The court abused its discretion when it applied a personal sentencing policy.

In issuing Mr. Schoonover's sentence, the trial judge expressed a personal sentencing policy that "child molesters" could not, apart from their offense, be good people or do good things. (Vol. XXI, R. 28–30) The court stated that any good acts done by "child molesters" were disguises used to cover up "what they do in private with a child." There is no statutory exception that disallows courts from considering mitigating evidence for child sex offenders. Under the judge's blanket policy, any good act performed by a child sex offender was at best disregarded or at worst considered as aggravating evidence.

A similar situation occurred in *Bolyard*. In that case, Bolyard was convicted of indecent liberties with a child. *People v. Bolyard*, 61 Ill. 2d 583, 585 (1975). Although probation was an available sentence, the trial judge refused to consider that option, stating that he personally "subscribe[d]" to the policy that defendants who committed crimes of sexual violence should not receive probation. *Bolyard*, 61 Ill. 2d at 585. This Court held that the trial judge abused his discretion by arbitrarily denying probation simply because the defendant "fell within the trial judge's category of disfavored offenders." *Id.* at 587. This Court remanded the case for a new sentencing hearing before a different judge. *Id.* at 589; see also *People v. Miller*, 2014 IL App (2d) 120873, ¶ 39 (remanding for resentencing where

the sentence was based on the court's personal belief that a defendant should not get First Offender Probation if they went to trial); *People v. Clemons*, 175 Ill. App. 3d 7, 13-14 (1st Dist. 1988) (remanding for resentencing where the trial judge expressed a personal policy of refusing to modify a sentence without the approval of the victim); and *People v. Wilson*, 47 Ill. App. 3d 220, 221–22 (4th Dist. 1977) (remanding for a new sentencing hearing where the trial court denied probation based on its personal policy that defendants convicted of drug trafficking offenses should not be given probation).

Likewise, the court's personal policy here deprived Mr. Schoonover of the requisite individualized sentencing determination. See *People v. Lang*, 366 Ill. App. 3d 588, 589 (1st Dist. 2006) (judge are "compelled to consider each defendant's *individual* rehabilitative potential") (emphasis added). Mr. Schoonover was sentenced based on the class he belonged to.

B. The court abused its discretion when it failed to consider and give proper weight to mandatory sentencing factors.

The trial court abused its discretion in finding no statutory mitigating factors. (Vol. XXI, R. 28) The statutory mitigating factor of "excessive hardship upon dependents" applied and this mitigating factor was raised by defense counsel.(Vol. XXI, R. 23); 730 ILCS 5/5-5-3.1(a) (2016).

Evidence was presented which showed that after his children were born, Mr. Schoonover left the workforce and became the primary caretaker of his children as a stay-at-home dad. (Vol. XXIII, D. Ex. A1, A3, A4; C. 255) Due to the cost of daycare, a long incarceration would have presented excessive hardship on Mr. Schoonover's dependents. Further, the incarceration of a parent imposes a substantial hardship on children.

While the trial court enjoys considerable discretion in reaching sentencing decisions, "that discretion is not unfettered." *People v. Maldonado*, 240 Ill. App. 3d 470, 485 (1st Dist. 1992). The Illinois Constitution dictates that "[a]ll penalties [must] be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11; see also 730 ILCS 5/1-1-2(d) (2016). This mandate "calls for the balancing of the retributive and rehabilitative purposes of punishment," and:

> "[R]equires careful consideration of all factors in aggravation and mitigation, including, *inter alia*, the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and [the] defendant's conduct in [its] commission." *Center*, 198 Ill. App. 3d at 1033–35 (citing *O'Neal*, 125 Ill. 2d at 291).

In reaching its sentencing decision, a trial court may not ignore or refuse to consider mitigating evidence. See *Hitchcock v. Dugger*, 481 U.S. 393, 398–99 (1987); *People v. Maxwell*, 148 Ill. 2d 116, 147 (1992). Where the trial court fails to take account of mitigating factors it abuses its discretion, and remand for a new sentencing hearing is appropriate. *Markiewicz*, 246 Ill. App. 3d at 56.

The judge in this case was clear that he found that no statutory mitigating factors applied.[3] (Vol. XXI, R. 30) However, as discussed above, the evidence reveals the excessive hardship upon dependents is a statutory mitigating factor which should have applied in considering Mr. Schoonover's sentence. This factor was also raised by defense counsel. (Vol. XXI, R. 23) The judge never mentions or considers excessive hardship to defendants as a mitigating factor. (Vol. XXI, R. 28–30)

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[3] While the judge stated that Mr. Schoonover's lack of criminal history was a mitigating factor, he erroneously stated that it was "[t]echnically, not a statutory factor in mitigation."(Vol. XXI, R. 28); 730 ILCS 5/5-5-3.1(a).

In light of the excessive hardship to Mr. Schoonover's dependants, the trial court abused its discretion in sentencing Mr. Schoonover to his 85-year sentence. Accordingly, if this Court reverses the appellate court's decision as to Argument I, this Court should still vacate Mr. Schoonover's 85-year sentence and remand this case for a new sentencing hearing.

CONCLUSION

For the foregoing reasons, Hayze L. Schoonover, defendant-appellee, respectfully requests that this Court affirm the appellate court's judgment. However, if this Court reverses the appellate court's judgment, this Court should still vacate Mr. Schoonover's conviction and remand for a new trial based on Argument II, or, alternatively, vacate Mr. Schoonover's 85-year sentence and remand for a new sentencing hearing based on Argument III.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 49 pages.

/s/Akshay Mathew
AKSHAY MATHEW
Assistant Appellate Defender

APPENDIX TO THE BRIEF

2016 IL App (2d) 140124-U
No. 2-14-0124
Order filed July 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GRANT GAMBAIANI, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 08-CF-1861 Honorable Daniel P. Guerin, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court, with opinion.
Justices Zenoff and Spence concurred in the judgment and opinion.

ORDER

¶ 1 *Held*: Defendant's convictions for child pornography (possession) are reversed, since the trial court abused its discretion when it refused to instruct the jury concerning voluntariness; defendant's convictions for predatory criminal sexual assault and child pornography (manufacture) are affirmed, despite defendant's claims of error.

¶ 2 This case comes before us a second time following a retrial. In 2008, then-10-year-old D.G. reported to his parents, and later to investigators, that he had been involved in a months' long sexual relationship with his 24-year-old cousin, defendant Grant Giambaiani. Defendant often babysat for D.G. (his apartment was near D.G.'s parent's home) and would spend time

with D.G. on family trips. In July 2008, defendant was arrested and police officers, armed with a search warrant, seized his cellular phone and desktop computer from his apartment. Defendant later gave a statement to the police and was charged by indictment with four counts of predatory criminal sexual assault of a child (PCSA) (three of the counts involved oral sex; one count was based on sexual penetration of the victim's anus), one count of aggravated criminal sexual abuse of a minor, and one count of manufacturing child pornography. All of the charged sex acts occurred in the victim's bedroom in Illinois, between March 2008 and June 2008. The child pornography (manufacturing) count arose as a result of a lewd photograph of D.G. taken by defendant with his cell phone.

¶ 3 After his arrest, defendant was admitted to bail and posted bond. At no time did defendant file a speedy-trial demand. In July 2009, before a hearing on one of defendant's motions to suppress, the State represented to the court that it had offered defendant a plea agreement, which defendant had rejected, and that new and additional charges would be filed concerning the child pornography images found in the "thumb cache" (a term we'll discuss below) on defendant's desktop computer. In September 2009, fourteen months after the initial charges, the State charged defendant by information with 18 counts of child pornography (possession) based on the images found on his desktop computer. (Three of the counts were for aggravated possession based on the estimated age of the children depicted (under 13), but for convenience we refer to all 18 counts as a single group.)

¶ 4 While the suppression motions were still being litigated, in January 2010, the State filed a motion *in limine* to admit at trial evidence of prior sex acts between defendant and victim under 725 ILCS 5/115-7.3 (West 2012), which provides for the admission of uncharged "other crimes" to show a defendant's propensity to commit certain charged sex offenses. According to the

State's motion, some of the other-crimes sex acts between defendant and the victim allegedly occurred during a family trip to Florida, during a trip to Ohio, in the victim's bedroom, and in defendant's apartment. The State's motion additionally sought to introduce the child pornography found on defendant's desktop computer as other-crimes evidence.

¶ 5 Prior to trial, defendant moved to sever the 18 child pornography (possession) counts for trial. After an evidentiary hearing, the trial court denied defendant's motion explaining that the original six offenses and 18 additional offenses were related. That is, that defendant had "groomed" the victim by showing him child pornography and by suggesting that they act out what they saw together. The trial court further noted that even if the additional child pornography counts had been severed for trial, evidence related to offenses would be admissible under 725 ILCS 5/115-7.3.

¶ 6 At defendant's first trial, a jury found him guilty of all of the charges and the trial court sentenced defendant to an aggregate 43-year term of imprisonment. On appeal, however, we reversed defendant's convictions and sentences finding that the State had violated the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose material and potentially exculpatory evidence, and remanded the case for a new trial. *People v. Giambaiani*, 2012 IL App (2d) 101246-U, ¶¶ 35-36. In addition, since the issue was likely to crop up on retrial, we also addressed defendant's contention that the 18 additional child pornography charges should not have been permissively joined at trial. We disagreed with defendant, explaining that the trial court did not abuse its discretion in joining the charges for trial because "similar *** evidence linked the offenses." *Id.* ¶ 44.

¶ 7 On remand, defendant was represented by a new attorney who filed a motion seeking leave to "personally inspect and photograph" the victim's bedroom and the adjacent areas in his

family's residence. The trial court denied the motion, but ordered the police to take new photographs of the victim's bedroom and encouraged counsel to speak with the police about the photographs counsel felt he needed. Counsel spoke with the police and the police took new pictures. At a subsequent hearing, counsel renewed his request to inspect the victim's residence, stating that the new photos were also insufficient and emphasizing that "where *** things are located" in the victim's family's house was "an intricate part of the [defendant's trial] defense." The trial court denied the renewed request.

¶ 8 After a second jury trial, defendant was found guilty on all charges save for one count of predatory criminal sexual assault (one of the oral sex counts). Defendant filed a posttrial motion, which the trial court denied. The trial court then sentenced defendant to an aggregate 34-year term of imprisonment; 28 years for the sex offenses plus a six-year term for the manufacture of child pornography. The trial court also sentenced defendant to 18 five-year terms on each of the child pornography possession counts to run concurrent to his six-year sentence for manufacturing. Defendant appeals and raises several issues. Ultimately, we find the majority of defendant's arguments are unpersuasive, save for his improper jury-instruction claim.

¶ 9 Defendant's first contention is that his trial attorney was ineffective for failing to file a speedy trial demand pursuant to the speedy trial statute, 725 ILCS 5/103-5(b) (West 2012). According to defendant, had his attorney filed a speedy trial demand, the State would not have been able to file the 18 additional child pornography charges in September 2009 based on the compulsory joinder statute, which requires the State to "prosecute all known offenses within the jurisdiction of a single court in a single criminal case 'if they are based on *the same act*.' 720 ILCS 5/3-3(b) (West 2008)." (Emphasis added.) *People v. Hunter*, 2013 IL 114100, ¶ 10.

¶ 10 There are a number of assumptions in defendant's argument—*e.g.*, that the State would not have been able to bring the possession charges within the applicable 160-day period following his demand, or that the possession offenses were "known" by the State within that period—but we need not consider them because the charges in this case were not based on the same act. As our supreme court has said, "[j]oinder is required where the defendant is engaged 'in only one continuous and uninterrupted act.' " *Hunter*, 2013 IL 114100, ¶ 18 (quoting *People v. Quigley*, 183 Ill. 2d 1, 11 (1998)). In other words, joinder is required in cases where an offender "simultaneously possesses" an additional item of contraband (*e.g.*, *Hunter*, 2013 IL 114100, ¶ 19; *People v. Dismuke*, 2013 IL App (2d) 120925, ¶ 14; *People v. Hiatt*, 229 Ill. App. 3d 1094, 1097 (1992)), or where the new and additional charges are essentially just a recharacterization of the initial charges (*e.g.*, *People v. Williams*, 204 Ill. 2d 191, 201 (2003); *Quigley*, 183 Ill. 2d at 10; *People v. McGee*, 2015 IL App (1st) 130367, ¶ 43). Conversely, joinder is *not* required where the offenses are based on separate and distinct criminal acts, despite their interrelationship. See, *e.g.*, *People v. Gooden*, 189 Ill. 2d 209, 219-20 (2000) (home invasion with a firearm and criminal sexual assault (same victim)); *People v. Mueller*, 109 Ill. 2d 378, 384 (1985) (murder and concealment of homicidal death (same victim)); *People v. Albanese*, 104 Ill. 2d 504, 528-33 (1984) (separate murders). Thus, joinder boils down to an issue of classification, *i.e.*, whether the offenses are classified as a single act or as several acts.

¶ 11 Here, the 18 additional child pornography (possession) charges were not based the same act as the initially charged offenses. Defendant's alleged possession of child pornography on his computer was a separate act from the acts that comprised the first set of charged offenses—*i.e.*, sexual penetration, sexual conduct, and the manufacture of child pornography (of a separate image). Therefore, since compulsory joinder did not apply to the 18 additional possession counts,

they likely would not have been dismissed on speedy trial grounds and defendant's counsel was therefore not ineffective for not filing a demand. *People v. Staten*, 159 Ill. 2d 419, 432 (1994).

¶ 12 Defendant next claims that no rational jury could have found him guilty of one count of predatory criminal sexual assault (penis to anus). If he is correct, we would be required to reverse this conviction. *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 13 With respect to the challenged conviction, defendant concedes the element of age, *i.e.*, that he was over 17 and that the victim was younger than 13 at the time of the alleged offense. 720 ILCS 5/11-1.40(a) (West 2012). However, defendant disputes whether there was sufficient evidence of "sexual penetration" between his penis and D.G.'s anus. Relevant here, the jury was instructed that "sexual penetration" is defined as "any contact, however slight between the sex organ *** of one person [and the] anus of another person ***." Illinois Pattern Jury Instructions, Criminal, No. 11.65E (4th ed. 2000) (hereinafter IPI Criminal 4th, No. ____); 720 ILCS 5/11-0.1 (West 2012). Defendant initially argues that there was no medical evidence to prove sexual penetration of D.G.'s anus, but medical evidence is not required since the definition of sexual penetration includes even slight sexual contact which may not result in medically detectable evidence. *People v. Le*, 346 Ill. App. 3d 41, 50 (2004). Thus, a victim's testimony alone may be sufficient evidence to persuade a reasonable jury of the defendant's guilt of a sex offense. See, *e.g.*, *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009); *People v. Hillier*, 392 Ill. App. 3d 66, 69 (2009), *aff'd*, 237 Ill. 2d 539 (2010).

¶ 14 Here, there was sufficient evidence of actual contact between defendant's penis and the victim's anus. At defendant's trial, D.G. testified that one day in his bedroom in June 2008, defendant had D.G. sit on his penis which, according to D.G., initially went "*almost* into [his]

butt hole" and "once it hit, it really hurt[.]" Defendant emphasizes D.G.'s use of the word "almost" and argues that what D.G. meant by "hit" was ambiguous. Generally, evidence that the defendant's sex organ only touched an area near the complainant's anus is insufficient to establish sexual penetration (*People v. Atherton*, 406 Ill. App. 3d 598, 609 (2010); *People v. Oliver*, 38 Ill. App. 3d 166, 170 (1976)), but D.G.'s testimony did not end there. In his very next answer, D.G. explained that defendant's penis "hurt [his] butt hole"; that it made contact with his anus for "[t]en, fifteen seconds" before they had to stop because "it hurt." D.G. testified that his anus hurt and that he had a rash on his anus for the following week. One week later, when defendant asked D.G. to "try" anal sex again with him, D.G. said no citing his rash and that "it really hurt." Based on this testimony alone, a reasonable jury could find defendant guilty of predatory criminal sexual assault (penis-to-anus) beyond a reasonable doubt.

¶ 15 Our conclusion is not diminished by the fact, as defendant points out, that D.G. was impeached with his testimony from the first trial that defendant's penis "went in the crack" but did not make contact with his anus. As the State notes, D.G. was several years younger at the time of defendant's first trial and may not have understood the question; although that suggestion is somewhat tempered by the fact that D.G. manifested little difficulty when speaking to an investigator years before defendant's first trial. In any event, the resolution of this inconsistency in D.G.'s testimony was for the jury to determine, not us. The jury's verdict represents their resolution of that issue and we cannot say that it was unreasonable. *Id*.; see also *Siguenza-Brito*, 235 Ill. 2d at 228 ("[i]t remains the firm holding of this court that the testimony of a single witness, if positive and credible, is sufficient to convict, even [when] it is contradicted"). We note too that D.G.'s testimony concerning sexual penetration was corroborated by defendant's own statement to the police. In fact, a number of critical details were the same. According to the

investigator, when asked about anal penetration, defendant replied that "it only happened one time" when they were in D.G.'s bedroom; that D.G. sat on his penis and that his "penis penetrated [D.G.]'s anus for 10 to 15 seconds"; however, "it was very uncomfortable for both of them, so they stopped." Thus, whether D.G.'s testimony is considered alone or alongside the evidence of defendant's statement, the evidence was sufficient to sustain defendant's conviction.

¶ 16 Defendant next contends that the trial court denied him his constitutional right to a public trial when it closed the courtroom during D.G.'s testimony. 725 ILCS 5/115-11 (West 2012) provides that in certain sex-offense cases, while the victim is testifying, the court may exclude "all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media." The State notes that when it asked the trial court to close the courtroom for the victim's testimony pursuant to 725 ILCS 5/115-11, defense counsel agreed to the closure, stating "Well, we'd ask that John [(defendant's father)] remain", which the court allowed. We agree with the State that counsel's statement acquiescing to the courtroom's closure, waived the issue for review. This is distinct from the ordinary forfeiture of a claim. A forfeiture is basically an oversight in preserving a claim (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial") (emphasis in original)), which we can overlook to review the underlying claim for plain error; but waiver is a deliberate decision to abandon a right, and that we cannot overlook. *United States v. Olano*, 507 U.S. 725, 732-34 (1993); *People v. Townsell*, 209 Ill. 2d 543, 548 (2004); *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004).

¶ 17 Even if we could consider this issue, there is simply no merit to defendant's contention that he was denied his sixth amendment right to a public trial. In *People v. Falaster*, 173 Ill. 2d 220, 228 (1996), our supreme court held that the closure of a courtroom is constitutional so long

as it complies with 725 ILCS 5/115-11 (West 2012). This is so because, unlike a complete mandatory closure, which indiscriminately excludes the general public and so is unconstitutional (*e.g.*, *Waller v. Georgia*, 467 U.S. 39 (1984), *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)), 725 ILCS 5/115-11 (West 2012) is limited in scope; it applies only to the victim's testimony in sex-offense cases, and does not exclude the media and those directly interested in the case. *Falaster*, 173 Ill. 2d at 228 (citing *People v. Holveck*, 141 Ill. 2d 84, 103-04 (1990)). Here, the trial court complied with 725 ILCS 5/115-11 (West 2012)—at least nominally, as we explain below—and defendant has not shown that anyone was excluded erroneously. Accordingly, none of the evils of a closed trial were implicated in this case. *Falaster*, 173 Ill. 2d at 228.

¶ 18 That said, we have some concerns with *how* the courtroom closure was handled in this case. After D.G. took the stand but before he was sworn in, the lead prosecutor stated, "I forgot to clear the courtroom, but I think there's only one gentleman besides the lady." The court then asked the lead prosecutor to speak with "the lady" and determine whether she was "with the press." The "gentleman" was the trial court judge's law clerk, and the lead prosecutor said, "I'll tell him to leave." "Yeah. All right," the court responded. The trial court noted that defendant's father was also in the courtroom pursuant to its prior ruling. After a short break, the lead prosecutor explained that "the lady" was a student. The trial court stated that she "left," but the record does not indicate whether she was asked to leave or left of her own accord. The court then asked the lead prosecutor to tell "the deputies *** not to let anybody in[.]" From the transcript, it is not clear whether only some, all, or none of this conversation occurred in front of the jury.

¶ 19 This was not the ideal way to handle the courtroom's closure. As we have recently said, ordering bailiffs to completely bar the public from entering a courtroom during testimony, even

testimony under 725 ILCS 5/115-11 (West 2012), is highly objectionable. See *People v. Burman*, 2013 IL App (2d) 110807, ¶ 57. "Closing a public hearing like a trial should not be done lightly, and the proper course would have been to direct the bailiff to signal if anyone attempted to enter and then determine on a case-by-case basis whether the person should be permitted to enter." *Id.* We must clarify what we said in *Burman* as to who must make this determination. Recall that 725 ILCS 5/115-11 (West 2012), provides that the court may exclude those who "*in the opinion of the court*, do not have a direct interest in the case, except the media." (Emphasis added.) Thus, during testimony subject to 725 ILCS 5/115-11 (West 2012), while a bailiff may determine whether a person is a credentialed member of the media, it is for the trial court judge to determine whether a would-be spectator is directly interested in the case and may sit in the gallery or not. See, *e.g.*, *People v. Revelo*, 286 Ill. App. 3d 258, 265 (1996). Had the trial court followed this procedure and handled these matters personally, it would have been unnecessary to effectively deputize the lead prosecutor to question the spectators and to instruct the bailiffs. Although defendant does not raise the issue, we are compelled to note that a prosecutor is a natural authority figure before a jury (*People v. Blue*, 189 Ill. 2d 99, 137 (2000)); thus, to allow the prosecutor to be responsible for courtroom order "would cloak the state's attorney with the authority to be judge as well as prosecutor" (*People v. Grimm*, 74 Ill. App. 3d 514, 517 (1979) (Stouder, J., dissenting)), and in another case that could easily be a bridge too far.

¶ 20 Defendant's next contention concerns the testimony of Dr. Thomas Rizzo, a child psychologist. In June 2008, D.G. made an outcry statement to his parents, reporting defendant's sexual abuse. Because defendant was their nephew, D.G.'s parents took him to see Rizzo. Rizzo met with D.G., but only briefly; after D.G. made several disclosures, Rizzo, a mandated reporter (325 ILCS 5/4 (West 2012)), stopped the session and contacted the authorities. On

cross-examination, the first question Rizzo was asked was whether "from time to time" "children make up stories" or "fantasize" about sexual abuse. This same question was asked two additional times. Each time Rizzo generally replied that he was aware of the possibility and that, while he had not seen any examples in his own practice, "in the literature there are examples." On redirect, Rizzo testified that he was trained to focus on several factors including the consistency of the child's statement and the child's demeanor relative to his or her expected level of sexual maturity. Those answers lead to the following exchange:

> "Q. [Assistant State's Attorney:] Was there anything about [D.G.'s] story that was inconsistent with what your training was or what he was saying to you?
>
> A. [Rizzo:] No.
>
> Q. How about his demeanor?
>
> A. That was consistent with a kid telling the truth."

There was no objection. The State then tendered Rizzo and the defense declined to re-cross him.

¶ 21 Defendant now contends that Rizzo's testimony—that D.G.'s demeanor "was consistent with a kid telling the truth"—was improper in that it vouched for D.G.'s credibility. As the State notes, defendant did not object to Rizzo's testimony at trial and so the issue has been forfeited. *Enoch*, 122 Ill. 2d at 186. Accordingly, the issue may be reviewed only for plain error. *Townsell*, 209 Ill. 2d at 548.

¶ 22 Defendant's forfeiture is not a stand-alone reviewability problem however; it also affects our review of the merits of his claim. That is, because defendant did not object to now-challenged testimony, he deprived the State of an opportunity to cure the alleged defect at trial. In effect then, defendant's argument is that the trial court erred in failing to strike Rizzo's answer about D.G.'s demeanor *sua sponte*. Even if we were to say that the evidence in this case was closely balanced and review this issue for plain error, we would find no plain error. Whether

it is the prosecution or the defense, the general rule is that "*counsel* should not ask one witness to comment on the veracity of the testimony of another witness." (Emphasis added.) *United States v. Sullivan*, 85 F.3d 743, 750 (1st Cir. 1996). Here, defense counsel's questions to Rizzo on cross-examination thrice insinuated that D.G. was lying because children often "make up stories" or have "fantasize" sexual abuse. This was little different than the famous (and famously improper) question "Did you think the witness was lying?" See *id.* Considerably more foundation was required to make that line of questioning proper, yet it was the defense's first question of Rizzo on cross. Accordingly, once *the defense* broached the subject of D.G.'s veracity, it opened the door for the State to challenge the insinuation. See, *e.g.*, *People v. Denson*, 2013 IL App (2d) 110652, ¶ 29, *aff'd*, 2014 IL 116231; *People v. Bakr*, 373 Ill. App. 3d 981, 989 (2007); *People v. Longstreet*, 2 Ill. App. 3d 556, 559 (1971). To that end, we note that the State's final question on redirect was limited and concerned Rizzo's evaluation of D.G.'s "demeanor"; despite Rizzo's answer, the State's question did not call for his opinion on D.G.'s ability to tell the truth.

¶ 23 We determine that Rizzo's testimony simply was not plain error because, given the evidence, there is no reasonable probability that the outcome of defendant's trial would have been different had Rizzo's final answer been stricken. See *People v. Sparkman*, 68 Ill. App. 3d 865, 871 (1979) (no plain error where trial court did not *sua sponte* strike officer's testimony after State's question elicited officer's opinion on credibility of a key defense witness).

¶ 24 Next, defendant contends that the trial court abused its discretion when it denied defendant's counsel's renewed request to "personally inspect" the victim's bedroom. Although the issue was preserved in defendant's posttrial motion, we find it has no merit. The trial court made a thorough record when it weighed the probity of counsel's inspection against the victim's

family's right to privacy. The court further considered that nearly 5 years had elapsed between the timeframe of the alleged offenses and the time of counsel's request. So, the trial court crafted a compromise and ordered the police to take additional photographs of the victim's bedroom and house, as well as to collaborate with defendant's counsel. Although counsel deemed those photographs insufficient and renewed his request, at trial, the defense introduced 11 large, glossy 15" x 23" photographs of the victim's bedroom and the surrounding area in the home. Those exhibits provided more than enough perspective concerning the interior geography of the victim's bedroom and the adjacent interior spaces (although they were taken roughly 5 years after the offenses were committed). In light of these facts, we cannot say the trial court abused its discretion when it denied counsel's request to inspect the victim's bedroom. See, *e.g.*, *People v. Poole*, 123 Ill. App. 3d 375 (1984) (finding the trial court did not abuse its discretion when it refused to grant defense counsel access to the bedroom of the complaining witness (a ten-year-old girl) for the purpose of taking photographs at night (so as to reproduce the lighting conditions of the alleged assault)).

¶ 25 Next, defendant contends that the trial court erred when it allowed D.G.'s mother to remain in the gallery after she testified and during the testimony of several other witnesses. Defendant also did not preserve this issue in his posttrial motion, but this was not error let alone plain error. *People v. Hillier*, 237 Ill. 2d 539, 549 (2010). No statute or rule requires the exclusion of witnesses when not testifying; it is a courtroom-management matter entirely within the trial court's discretion. *People v. Adams*, 41 Ill. 2d 98, 101 (1968); *People v. Chennault*, 24 Ill. 2d 185, 187 (1962); *In re H.S.H.*, 322 Ill. App. 3d 892, 896 (2001). Critically, defendant does not allege any prejudice resulted to him from D.G.'s mother's continued presence in the courtroom, likely because he would have to concede that his father's continued presence was

reciprocally prejudicial to the State. Nevertheless, we determine that defendant's failure to allege prejudice is dispositive. See *U.S. ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956) (" 'it is not asking too much that the burden of showing [the] essential unfairness [from a person's continued presence in the courtroom] be sustained *** not as a matter of speculation but as a demonstrable reality.' *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 281 (1942)").

¶ 26 That brings us to the final issue in this case—the jury instructions concerning the child pornography (possession) charges. At defendant's second trial, Detective Daniel Ragusa of the Naperville police department testified that he found the child pornography images on the hard drive of defendant's desktop computer. Ragusa recovered the images as "thumbnails" from the computer's "thumb cache." Generally, thumbnails, Ragusa explained, are reduced-size images that are used to represent a larger image or a video file in the operating system's explorer view. Thumbnails are created automatically by the computer's operating system (in this case, Windows Vista), and the "thumb cache" is where those thumbnail images are stored. This process decreases load times when large icons are viewed. See also *Wikipedia*, "Windows Thumbnail Cache," https://en.wikipedia.org/wiki/Windows_thumbnail_cache. Ragusa testified that in order for a thumbnail image to be cached, the original image would have to be "introduced to the computer in some fashion"—either (1) from an external source such as a cell phone or a USB drive, or (2) downloaded from the internet—and then "viewed through Windows Explorer." Ragusa did not find the original full-size images on defendant's computer, or other images in defendant's temporary internet files, which are stored in the browser cache. The only images Ragusa found were thumbnail files in the thumb cache.

¶ 27 Ragusa also noted that defendant had "torrent software" on his computer. Ragusa explained that torrent programs, such as BitTorrent, eMule, and uTorrent, are peer-to-peer

file-sharing programs that are used to download music, images, and videos. Ragusa testified that it is "extremely common" to see such programs on computers associated with child pornography, but he gave no explanation as to why that association was stronger than any other type of downloading activity.

¶ 28 The jury was later instructed on the definition of "possession"—that it may be actual or constructive—and on the issues and elements of child pornography (possession). Illinois Pattern Jury Instructions, Criminal, Nos. 4.16, 9.29, 9.30 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. __). Defendant claims that the trial court erred however when it refused to instruct the jurors using his three proposed, non-pattern instructions.

¶ 29 The first and second proposed instructions purported to rely on the First District's decision in *People v. Josephitis*, 394 Ill. App. 3d 293 (2009)—a decision that this court subsequently adopted in *People v. Gumila*, 2012 IL App (2d) 110761. Taken together, these cases, along with *People v. Scolaro*, 391 Ill. App. 3d 671 (2009), recognize the common-sense proposition that unique from other types of contraband possession, such as guns or drugs, files may unintentionally "pop up" on a person's computer, or be uploaded onto a person's computer, and thereafter be automatically "cached" or etched into the computer's digital memory without the user being any the wiser. Thus, this court and others have said that the possession of cached child-pornography files alone is insufficient; that in order to show *knowing* possession of child pornography, the ultimate question is whether the defendant reached out for and controlled the images at issue. *Josephitis* is one such example.

¶ 30 At the instructions conference, based on his reading of *Josephitis*, defendant proposed to instruct the jury both that (1) "mere[ly] viewing" child pornography was insufficient to constitute " 'possession' " and that (2) the mere "presence of child pornography in [defendant's

computer's] cache" was also insufficient to constitute possession. With respect to the first proposed instruction, what the court said in *Josephitis* was that the "mere viewing" of child pornography *might* not constitute possession "under certain factual scenarios, for example a patron [accidentally] attending a theater showing a film containing child pornography ***." *Josephitis*, 394 Ill. App. 3d at 301. To instruct the jury on the insufficiency of "mere viewing" as a blanket legal proposition and without any additional context, as defendant proposed to do here, would have been incomplete, misleading, and highly argumentative. The same is true of defendant's second proposed instruction. The court in *Josephitis* stated that the mere presence of child pornography on a person's computer is insufficient *standing alone*; that there must be additional evidence of "both the intent and capability to control the [images]" such as circumstantial evidence showing that the defendant knew that the images were stored in his browser cache, or evidence of the defendant's internet search history thus showing that he intentionally sought out the images in the first place. *Id*. at 299. The core concept in that statement—that constructive possession requires "both the power and the intention to exercise control" over an object—was adequately communicated to the jury in IPI Criminal 4th No. 4.16, which is the instruction defining possession. Accordingly, there was no need to issue defendant's misleading and argumentative proposed non-pattern instructions. *People v. Gacy*, 103 Ill. 2d 1, 90 (1984); *People v. Gardner*, 282 Ill. App. 3d 209, 219 (1996); *People v. Walters*, 211 Ill. App. 3d 102, 105 (1991); see also *People v. Valentin*, 135 Ill. App. 3d 22, 31 (1985) (holding that trial court properly refused defendant's proposed instruction "that mere presence in the vicinity of the heroin or mere knowledge of the physical location, however, does not constitute possession under the statute").

¶ 31 We cannot however reach the same conclusion concerning defendant's third proposed instruction. The offense of child pornography (possession) has two components. The first is that the offender's possession of any lewd image, video, or depiction involving children must be "with knowledge of the nature or content thereof[.]" 720 ILCS 5/11-20.1(a)(6)(West 2012). 720 ILCS 5/11-20.1(b)(5) (West 2012), sets forth the second component as follows:

> "The charge of child pornography does not apply to a person who does not voluntarily possess a film, videotape, or visual reproduction or depiction by a computer in which child pornography is depicted. Possession is voluntary if the defendant knowingly procures or receives a film, videotape, or visual reproduction or depiction for a sufficient time to be able to terminate his or her possession."

Neither the issues nor the elements instruction for the offense of child pornography (possession) discusses the voluntariness component set forth in 720 ILCS 5/11-20.1(b)(5). See IPI Criminal 4th, No. 9.29, 9.30.

¶ 32 At the jury instruction conference, defendant tendered a non-pattern instruction that recited the language in 720 ILCS 5/11-20.1(b)(5) verbatim. Defendant's counsel pointed out that Ragusa had testified the thumbnails recovered from defendant's computer were cached automatically but the original images were not found, which raised the question as to whether defendant had knowingly *and voluntarily* possessed the original images specifically. Counsel asserted that under 720 ILCS 5/11-20.1(b)(5), involuntariness was a defense to the charge, and that the jury should be instructed on it because Ragusa's testimony had raised the issue.

¶ 33 The State objected, and argued as follows:

> "[Assistant State's Attorney]: *** I believe for any instruction to be given, there has to be at least some or slight evidence of—to support it, and this is, this statute [720 ILCS 5/11-20.1(b)(5)] is for those unfortunate people who have computers where some friend—or not friend—e-mails them something that's child pornography, and they delete it right away; or someone, somehow sends them a virus; and as soon as they become aware, they take steps to delete it so that you cannot say that they voluntarily possessed it.
>
> In this case, first of all, we have no evidence of any of that. We have the

> defendant's statements. We have it on his computer. We have the expert testimony. There's been no evidence at all of anything like that by the defense.
>
> The evidence is that it was saved on his computer and downloaded to his computer, by the defendant, by his own admission, and by the fact he showed Dominic these things in his room."

Afterwards, the trial court declined to issue the instruction. We determine that the trial court abused its discretion when it failed to do so.

¶ 34 Unlike knowledge or intent, "voluntariness" is not a mental state; it is a legal conclusion that is a component of every offense. 720 ILCS 5/4-1 (West 2012). But generally, voluntariness is only at issue when an unconscious act, such as automatism or involuntary physical movement (*People v. Grant*, 71 Ill. 2d 551, 558 (1978)), *or* when an automated process is implicated. See, *e.g.*, *People v. Martino*, 2012 IL App (2d) 101244, ¶ 15 (finding defendant not criminally responsible for involuntarily causing injury to a police officer while defendant was being tased). As Professor LaFave has pointed out, involuntariness "is a defense of the failure of proof variety." Wayne LaFave, 1 SUBSTANTIVE CRIMINAL LAW § 9.1 (2d ed. 2003-date).

¶ 35 Professor LaFave also notes that voluntariness takes on a particular dimension in possession cases:

> "For legal purposes other than criminal law—*e.g.*, the law of finders[-keepers]—one may possess something without knowing of its existence, but possession in a criminal statute is usually construed to mean *conscious possession*. So construed, knowingly receiving an item or retention after awareness of control over it could be considered a sufficient act or omission to serve as the proper basis for a crime. *This knowledge or awareness, however, concerns only the physical object and not its specific quality or properties*; one may be said to be in possession of narcotics even when he believes that the substance is not a narcotic, although this belief might well bar conviction because the required mental state is lacking." (Footnotes omitted.) LaFave, 1 SUBSTANTIVE CRIMINAL LAW § 6.1(e).

For this reason, Illinois law holds that for all possession offenses, not just child pornography (possession), possession is a voluntary act if and only if the contraband was "knowingly

procured or received" or the offender "was aware of his control thereof for a sufficient time to have been able to terminate his possession." 720 ILCS 5/4-2 (West 2012)

¶ 36 As *Josephitis*, *Scolaro*, and *Gumila* make clear, the risks of involuntary possession are particularly high when computers, and specifically automated computer functions such as caching, are involved. The legislature was keenly sensitive to the issue: Why else would it use specifically the language in 720 ILCS 5/4-2 applicable to all possession offenses in 720 ILCS 5/11-20.1(b)(5) if it were not concerned with a computer's ability to automatically sweep up child-pornography evidence?

¶ 37 Consequently, we reject the State's arguments that an instruction under 720 ILCS 5/11-20.1(b)(5) is only available "[to] those unfortunate people who have computers where some[one] e-mails them something that's child pornography, and they delete it right away;" or that the instruction could only be given if there had been "evidence at all of anything like that by the defense." Those arguments stand the instruction issue on its head. The defendant is entitled to jury instructions that fully and fairly set forth the applicable law concerning his theory of the case. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008); *People v. Davis*, 213 Ill. 2d 459, 478 (2004); *People v. Jones*, 175 Ill. 2d 126, 132 (1997); *People v. Everette*, 141 Ill. 2d 147, 156 (1990); *People v. Lockett*, 82 Ill. 2d 546, 553 (1980). The only question was whether there was slight evidence—even *very* slight evidence—to support defendant's claim of involuntariness, regardless of which party introduced that evidence, and regardless of whether evidence is contradicted by defendant himself. *Id*. In other words, the State's evidence was not a hurdle the defendant had to clear in order to have the jury instructed on involuntariness. And it was not the province of the trial court to weigh the evidence and determine the issue of defendant's voluntariness during the instructions conference. The trial court's duty was simply to determine

whether slight evidence had been presented on the issue of voluntariness, and to instruct the jury accordingly. See *Lockett*, 82 Ill. 2d at 553.

¶ 38 Here, there was slight evidence suggesting that defendant's possession of the cached images was unknowing and involuntary because it was the result of an automated computer function. In fact, the State's argument, both at the instruction conference and on appeal, misstates the critical evidence on this point. At the instruction conference, for example, the prosecutor stated the evidence showed the child pornography "was saved on [defendant's] computer and downloaded to his computer, by the defendant." In its appellate brief, the State again asserts that "the evidence presented was that the images would not have been in the thumb cache unless they were both opened and *saved*." (Emphasis in original.) But that was not a fair characterization of the State's evidence, which came primarily from the testimony of detective Ragusa. On redirect, for example, Ragusa was again asked about the automatic caching of thumbnails on defendant's computer:

> "Q. How did, in your opinion, how did the images that you saw on the defendant's computer get into the thumb cache, in your opinion? What would that user have had to have done?
>
> [***]
>
> A. With the presence of a file[-]sharing program on there that you can download child pornography with by searching for it, they would have been downloaded to the machine in a way and then once they are downloaded, they would have been downloaded to the machine in a way and then once they are downloaded, they are opened and viewed through Windows Explorer, which would cache them to the [thumb cache] folder.
>
> Q. So one is downloading off the internet, right?
>
> A. Yes.
>
> Q. What is another way?

> A. Sticking a thumb drive into the computer, attaching an external hard drive or any other source of media to the computer and viewing them through Windows Explorer.
>
> Q. Like a DVD?
>
> A. Yes.
>
> Q. Like a CD?
>
> A. Yes."

Thus, Ragusa testified there were *two* possible scenarios that accounted for how the images ended up in defendant's thumb cache and *neither* scenario necessarily involved *retaining* the image after it was initially opened or viewed. Thus, as defense counsel argued at the instructions conference, Ragusa's failure to recover the *original* images from defendant's computer provided slight evidence that defendant *did* terminate his possession of the original images despite the lingering presence of the thumbnails recovered in the thumb cache. That was defendant's defense, and because there was slight evidence to support it, he was entitled to have the jury instructed on it.

¶ 39 The State argues that this jury-instruction error was harmless and that the result of defendant's trial on the child pornography (possession) charges would have been the same either way, but we disagree with the State. There was to be sure evidence of other child pornography in this case, which may show defendant's propensity to possess child pornography generally (see 725 ILCS 5/115-7.3); however that evidence was not specific to the 18 images defendant was found guilty of possessing. More importantly, here the jury was never instructed on, and thus was never called upon to decide, the critical issue of whether defendant voluntarily possessed the images that were automatically cached by his computer. The error takes on particular significance given that throughout defendant's trial the State repeatedly shifted its emphasis as to

whether defendant was charged with possessing the thumbnails, the original images, or both. Moreover, we observe that the State introduced no additional evidence, such as search terms, download logs, or other digital history, to show that defendant knowingly and voluntarily possessed the images at issue. See, *e.g.*, *State v. Kirby*, 156 Conn. App. 607, 615 (2015) (finding possession where defendant altered an image in the thumb cache). *State v. Schuller*, 287 Neb. 500, 509, 843 N.W.2d 626, 633 (2014) (search history; download history); *United States v. Buchanan*, 485 F.3d 274, 277 (5th Cir. 2007) (download logs); *In re Welfare of J.E.M.*, 2012 WL 1380400, at *6-7 (Minn. Ct. App. Apr. 23, 2012) (unpublished order) (download logs; contemporaneous internet search queries).

¶ 40 Accordingly, we reverse defendant's convictions for child pornography (possession). As there was sufficient evidence supporting those convictions, we determine that double jeopardy would not preclude a retrial. See *People v. Lerma*, 2016 IL 118496, ¶ 35.

¶ 41 We close with a brief observation. It may well be that "[b]orrowing [analog] concepts from drugs and weapons [possession] cases" (*Gumila*, 2012 IL App (2d) 110761, ¶ 41) is analytically ill suited to the crime of child pornography (possession), especially in what is an increasingly digital world. Other jurisdictions have responded to this imprecision by criminalizing the act of accessing or viewing child pornography, which does not require an offender to "possess" it. See, *e.g.*, 18 U.S.C. § 2252A(a)(5)(B); Alaska Stat. Ann. § 11.61.127 (West 2012); Va. Code Ann. § 18.2-374.1 (West 2012). Whether a change in the law is in order is not for us to say; rather, we simply apply the law as written. See *In re C.C.*, 2011 IL 111795, ¶ 41 ("We apply the statutes of this state as written, and do not carve out exceptions that do not appear in the statute simply because we do not like how the statute applies in a given case").

¶ 42 The judgment of the circuit court of Du Page County is affirmed with respect to defendant's convictions for PCSA and child pornography (manufacturing). The judgment is reversed in part with respect to defendant's child pornography (possession) convictions and this cause is remanded to the trial court for a new trial on those charges.

¶ 43 Affirmed in part; reversed in part, and remanded.

2016 IL App (2d) 140832-U
No. 2-14-0832
Order filed December 12, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRANDON NIFORD, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 13-CF-877 Honorable Karen M. Simpson, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved defendant was guilty of predatory criminal sexual assault beyond a reasonable doubt; the trial court did not abuse its discretion by barring impeachment of I.G. with evidence of uncharged conduct; and the court did not abuse its discretion by employing special procedures during I.G.'s testimony at trial. Affirmed.

¶ 2 Defendant, Brandon Niford, was charged by indictment with the offense of predatory criminal sexual assault of a child, pursuant to section 12-14.1 of the Criminal Code of 1961 (720 ILCS 5/12-14.1 (West 2006) (now 720 ILCS 5/11-1.40(a)(1) (West 2012)), in that he, "a person 17 years of age or over, knowingly committed an act of sexual penetration with I.G., a child under the age of 13, in that he placed his penis in the anus of I.G." A jury found defendant

guilty, and the trial court sentenced him to 15 years imprisonment. On appeal, defendant contends: (1) the State failed to prove him guilty of predatory criminal sexual assault beyond a reasonable doubt because the State failed to show that defendant's sex organ sexually penetrated I.G.'s anus; (2) the trial court abused its discretion by barring impeachment of I.G. with evidence of uncharged conduct; and (3) the trial court abused its discretion by employing special procedures during I.G.'s testimony. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Around April 12, 2013, when I.G. was 12 years old, she wrote a note that her uncle, defendant, raped her when she was about 5 or 6 years old. I.G. stated that the incident occurred while defendant was babysitting her and two of her younger siblings at defendant's apartment on Lilac Lane in Aurora. Defendant asked her siblings to leave the bedroom, and he pulled down I.G.'s pants and his pants and put his penis in her anus. I.G. wrote the note while she was at Mercy Behavioral Center (Mercy) for behavioral issues. She handed the letter to a staff member, who turned it in to DCFS. Defendant was interviewed by investigators on May 13, 2013, and he reported that, when I.G. was around 7 years old, he took her into his room when he was living on Lilac Lane in Aurora. Defendant stated that, while he was alone in his room with I.G., he pulled down her pants and his pants, stood behind her, and put his penis on her butt. Defendant thought his penis got hard after he placed it on her butt. Defendant was charged by indictment on September 18, 2013, with predatory criminal sexual assault.

¶ 5 A. Pretrial Motions

¶ 6 Before trial, both parties filed various motions. The State filed a motion seeking to employ special procedures during I.G.'s testimony during trial, including restrictions on the language and manner of questioning, the use of leading questions on direct examination, and

closure of the courtroom. The trial court granted this motion. The State also filed a motion *in limine* in which it sought to bar "irrelevant and prejudicial evidence and to prohibit improper impeachment" of I.G. Among the evidence the State sought to bar included evidence that I.G. stole money from defendant's car, that she stole money from a neighbor's purse and then denied it until the police came, and that she beat the family's dog.

¶ 7 Defendant sought to impeach I.G. with the incidents of stealing because he believed it bolstered his defense. Defendant theorized that these incidents "could turn out to be criminal charges" and therefore, were relevant to the victim's bias, motive, and ability to curry favor with the State. The State responded that, under *People v. Santos*, 211 Ill. 2d 395 (2004), I.G. could not be impeached with a specific act of which she had not been convicted. Following a hearing, the court granted the State's motion and barred any reference to stealing money from defendant's car. The court also barred the incidents relating to stealing the neighbor's purse and beating the family dog unless defendant could present supporting case law or show how it was relevant.

¶ 8 Prior to the start of trial, defendant filed a motion to reconsider and presented the court with case law tending to refute the holding in *Santos*. The court found the cases factually distinguishable because none dealt with sex offense allegations or a minor victim who was a witness.

¶ 9 B. Trial

¶ 10 The first witness to testify at trial was Jay Dunn, who had been a patrol officer with the Aurora Police Department and had been assigned as a special investigator with the Child Advocacy Center (CAC). He and Audrey Lenchner, a Department of Child and Family Services (DCFS) investigator, spoke with defendant at his work on May 10, 2013. Defendant asked them if they were there to speak with him about the allegations made by I.G., which he had heard

about from his sister, Juanita, who is I.G.'s mother. Defendant said that nothing happened and I.G. probably made up those allegations because she was angry with him.

¶ 11 Dunn and Lenchner met with defendant again at the Kane County Judicial Center on May 13, 2013. As defendant got into Dunn's car, defendant told him: "Jay, I'll be straight with you, there was one time when I pulled down [I.G.'s] pants and got behind her and [I.G.] said something to the effect 'Uncle Brandon, what are you doing?' " Defendant told Dunn that he stopped when he realized that he was doing something wrong.

¶ 12 That same day, defendant was taken into custody and interviewed again at the Kane County Sheriff's Office, with Lenchner present. During the interview, which was not recorded, defendant told the investigators that, when I.G. was about 7 years old, he took her to his room, pulled down her pants, and pulled down his pants. Defendant stated that he put his hard penis on her butt and attempted to put it inside, but I.G. turned around and asked what he was doing. Defendant thought, "whoa, whoa, whoa," and knew it was wrong. He told I.G. to put on her clothes and said he was sorry, that it would never happen again. Defendant knew it was a mistake and was wrong. He was living on Lilac Lane at the time with his wife, Jessica Bunsee, and her brother, Wesley. About four months before the May 13 interview, I.G. told defendant that she was going to tell her mother, but she never did. Defendant thought maybe that was why I.G. was having the problems she had.

¶ 13 Dunn testified that he had gone to Mercy on April 18, 2013, to retrieve the note written by I.G. while she was hospitalized there. He met with I.G. on January 31, 2014, and she confirmed that she had written the note.

¶ 14 The prosecution next presented Laurie Riehm, a licensed clinical social worker at StillWaters Behavioral Health Center. She was an expert in the field of the "dynamics of child

sex abuse, including disclosures." Riehm testified that child and adolescent sexual abuse victims disclose incidents of abuse in different ways. Younger children often make accidental disclosures while adolescents are more likely to make more purposeful disclosures. Disclosure becomes more difficult when the abuser is a family member because the child still may have affection for the abuser, the child and family may be dependent on the abuser, or there may be "backlash" against the child where the family may blame the child. Other family members go through stress and loss, and a child's placement in the home may be threatened.

¶ 15 Riehm testified that about 37% of child sex abuse victims will make an outcry within the first 48 hours, 75% will wait at least one year, 18-20% will wait at least five years, and as many as 30% will never report the abuse. She stated that it is not uncommon for there to be a delay if the offender is a family member. Children do not anticipate the difficulty after an outcry is made; the child often faces humiliation and alienation from the family, and normalcy is affected due to the stress of any investigation.

¶ 16 Over objection, Riehm testified that at least half of the children she works with will recant their allegations at least in part, and about 25% will recant fully. She suggested that the research was consistent with her experience. She further suggested that a child may recant because the child wants to minimize the intention of the abuser, protect the offender, or reinterpret the offender's intentions. The child may recant because the child may experience fear or alienation from the family because of the allegations, or the stress from the investigation and talking about the sexual experience. Even when the allegations of abuse can be confirmed, Riehm stated that a percentage of children will still recant and deny any abuse. A child may also recant because the allegations are untrue.

¶ 17 Immediately prior to I.G.'s testimony, the prosecutor told the court that Ms. Patricoski, a victim advocate from the CAC, would sit next to I.G. during her testimony. Defendant renewed his objection to the special procedures imposed during I.G.'s testimony.

¶ 18 I.G., who was 13 years old at the time of trial, testified that she has four younger siblings, one brother and three sisters. I.G. stated that her grandmother is Jessica, that she has three aunts, Deborah, Wanda, and Corinthian, and that defendant is her uncle. When I.G. was at Mercy, she wrote a note and gave it to Laura Buskirk.

¶ 19 In answering the prosecutor's questions, I.G. explained that she was at defendant's house and that he lived there with his wife, Jessica. I.G. remembered that her mother had to go somewhere, so she left her and two of her sisters at defendant's house. I.G. was alone in defendant's room with defendant. She thought her sisters were in the bathroom or outside playing. When asked what happened while she was in the room with her uncle, I.G. answered: "He raped me." I.G. stated that defendant pulled down her pants and she "guess[ed]" his pants were pulled down too. After that, he raped her. The prosecutor asked if any part of his body touched her body and what part did it touch. I.G. responded that his penis touched her butt; "the part poop comes out." She did not know what made him stop. I.G. testified that defendant did not say anything to her while this was happening, but the next day he apologized to her while he walked her to school. The prosecutor asked if I.G. said anything to defendant when he did this to her and I.G. responded that all she said was, "Uncle, what are you doing?"

¶ 20 I.G. did not tell anyone after this happened because she was scared, she was worried about her family, and she felt they would be worried about her. I.G. testified that her family would get together about once a month and that defendant would be there too. Defendant lived

with them two summers ago and he punished her once. I.G. said defendant yelled at her, but she denied that defendant called her a name or that he ever hit her.

¶ 21 I.G. explained that she was at Mercy for two weeks the previous April for cutting herself. She was not trying to kill herself and she had been hospitalized before but did not write any notes during previous hospitalizations. She wrote the note because she wanted people to know what happened and to know the truth. I.G. claimed that everything in the note was true.

¶ 22 I.G. did not remember telling Dunn and Lenchner that defendant stopped when her sisters came into the bedroom. Nor did she recall telling them defendant promised never to do it again or that defendant walked her to school the next day and apologized. I.G. stated again that she was worried about her family and sisters, but she did not ask what was going to happen to them or to defendant.

¶ 23 I.G. testified that she did not remember telling Dunn, Lenchner, or investigator Tracy Newcomer that defendant called her a "B" or a "ho." But she did remember that defendant called her names and she remembered telling her mother that she hated defendant because of the alleged offense but for no other reasons. I.G. told Newcomer that she was angry with defendant for disrespecting her and that he would say unkind things to her. When I.G. learned defendant had to go to jail because of her note, she felt bad. She told Newcomer that the note was not the truth and that defendant did not touch her inappropriately, that no one was pressuring her to say that, and she felt bad for lying when she realized how much trouble it caused defendant. However, at trial, I.G. stated all of that was a lie.

¶ 24 I.G. denied that Newcomer had identified herself as an investigator for defendant's attorney and she denied agreeing to tell Newcomer the truth. I.G. did not tell Newcomer she would lie because everyone was pressuring her. I.G. denied lying to the prosecutors.

¶ 25 I.G. was scared of defendant during the time between the alleged offense and the trial, but she never told her mother or grandmother. When she wrote the note at Mercy and the family learned about what had happened, they were worried about her.

¶ 26 I.G. stated that she recalled promising her mother that the allegations were a lie and that defendant did not do anything. She lied so the fighting in the family about her and defendant would stop. I.G. did not remember telling her mother that defendant only tried to touch "down there." She did not recall telling a friend, while they were walking with her cousin Raymond, that her uncle raped her. She did not recall telling Raymond that she made up the whole story because she wanted people to feel sorry for her. I.G. admitted that she told her grandmother that "he didn't do it," but that was a lie. I.G. stated that defendant never threatened her or told her not to mention it.

¶ 27 Laura Buskirk, a mental health counselor at Mercy in the child and adolescent unit, testified that, on April 12, 2013, she was working when I.G. gave her the note. Buskirk read the note and said there was enough information in the letter to contact DCFS. Buskirk explained that I.G. was at Mercy for self-injurious behavior and depression.

¶ 28 Marty McLaughlin, a case manager at Mercy, met with I.G. on April 16, 2013, to discuss the letter and the claim of sexual abuse. McLaughlin did not know exactly what had been said, but I.G. had told her that her uncle sexually abused her when she was 6 years old by anally penetrating her.

¶ 29 Harry Reed, an Illinois State Police retired interviewing specialist, assisted interviewing defendant at the CAC on May 13, 2013. Defendant admitted to Reed that one time he had asked I.G. to remove her clothing and he stood behind her. Defendant told him that I.G. was lying face down on the bed, and defendant rubbed his penis against her buttocks or "butthole area," but he

said that he did not penetrate her. However, when Reed asked if defendant penetrated I.G., defendant said "it was possible," but he did not remember doing that. Reed admitted that he "offered up" the possibility of penetration. He asked defendant, "is it possible," and defendant answered "yes, it is possible."

¶ 30 Timothy Bosshart, a Carpentersville police officer assigned to the CAC, testified that, on May 13, 2013, he "became aware" that Dunn was interviewing defendant. Because Dunn was alone, Bosshart went to the interview room. However, he admitted that the DCFS investigator and Reed were present. Bosshart heard Dunn tell defendant he could have a cigarette and defendant, Bosshart, and Dunn stood outside the front door while defendant smoked. As they were making small talk, a marked squad car arrived. Defendant asked if the squad car was there for him and Bosshart replied he did not know. Defendant told Bosshart that he knew he was going to jail because he had to pay for mistakes he made in the past.

¶ 31 Dr. Darryl Link examined I.G. on June 12, 2013. He was able to examine I.G.'s anus. Link found no visible tears, fissures, or scarring. However, Link stated that a normal examination did not rule out sexual abuse and he could not conclude I.G. had been anally penetrated or that defendant penetrated I.G. The State rested.

¶ 32 The first witness to testify for defendant was Audrey Lenchner, the DCFS investigator. She and Dunn had interviewed I.G. on April 18, 2013. This interview was recorded and the recording was played for the jury, along with a written transcript of the recording.

¶ 33 Juanita, I.G.'s mother and defendant's sister, testified that she and her children lived on Lilac Lane for about a month. She was aware of I.G.'s allegations. Juanita testified that the whole family would get together every weekend. I.G. would play, laugh, and argue with defendant and she never appeared uncomfortable or afraid of him.

¶ 34 Juanita testified further that she lived on Locust since August of 2012 with her children and Clifford Evans. Defendant and her sister, Corinthian, lived with them for a couple of months. Defendant would discipline her children by sending them to their rooms. Juanita stated that I.G. would appear angry when defendant disciplined her and she would tell Juanita how she felt about defendant. I.G. and defendant had a niece/uncle relationship; sometimes there was respect and sometimes not.

¶ 35 Juanita placed I.G. at Mercy for behavioral issues. Juanita was shocked to learn about the allegations. While I.G. was still at Mercy and after DCFS approached defendant at Juanita's house, she spoke with defendant about the allegations. To her, defendant looked like he was in shock. After I.G. was released from Mercy, she spoke to defendant again and he cried. During the summer of 2013, Juanita spoke with I.G. about the allegations. Juanita stated that they spoke about six or seven times.

¶ 36 Raymond, I.G.'s cousin, testified that he was walking with I.G. and two of her friends seven months before trial. Afterward, I.G. told him that their uncle really did not do anything to her; she just wanted people to feel badly for her. Raymond thought his cousin was untruthful "most of the time." Raymond stated that he loved both his uncle and his counsin and did not want to see his uncle in trouble.

¶ 37 Corinthian testified that, during the time I.G. was six to eight years old, the family would gather for barbecues, Sunday dinners, birthday parties, and "the like." Defendant and I.G. both attended the gatherings. To her, I.G. did not seem uncomfortable around defendant. Corinthian denied offering anything to I.G. to persuade her to change her story. Corinthian described defendant as sad and depressed. She frequently observed him under the influence. Corinthian thought her niece was not very truthful.

¶ 38 Jessica, defendant's mother and I.G.'s grandmother, testified that she dearly loved her son and granddaughter. Before I.G. made the allegations, there were family gatherings and outings. Both defendant and I.G. would be present, and everyone appeared comfortable. She stated that I.G. told her that defendant "didn't do that." Jessica asked her why she made up the allegations and I.G. said it was because she was angry and wanted defendant to leave because "[h]e was mean to me." After I.G. told her that, Jessica arranged for the defense investigator to come to the house. Jessica testified that she did not pressure I.G. to change her mind or talk about the allegations. She was not angry with I.G. for making the allegations, but Jessica wanted I.G. to "take them back" if they were untrue. She believed that I.G. was often untruthful.

¶ 39 Following deliberation, the jury found defendant guilty of predatory criminal sexual assault, and the trial court subsequently sentenced him to 15 years' imprisonment. Defendant timely appeals.

¶ 40 II. ANALYSIS

¶ 41 A. Sufficiency of the Evidence

¶ 42 Defendant first claims the State failed to prove him guilty of predatory criminal sexual assault beyond a reasonable doubt because the State failed to prove beyond a reasonable doubt that defendant's penis sexually penetrated I.G.'s anus.

¶ 43 In pertinent part, section 12-14.1 of the Criminal Code (720 ILCS 5/12-14.1 (West 2006) (now 720 ILCS 5/11-1.40(a)(1) (West 2012)) provides:

> "(a) The accused commits predatory criminal sexual assault of a child if:
>
> (1) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed."

Sexual penetration is defined as:

> "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration. Evidence of emission of semen is not required to prove sexual penetration." 720 ILCS 5/12-12 (West 2006) (now 720 ILCS 5/11-0.1 (West 2014)).

The legislature has defined sexual penetration more broadly than its ordinary and common meaning. *People v. Maggette*, 195 Ill. 2d 336, 347 (2001). The definition includes two broad categories of conduct. The contact clause "includes any *contact* between the sex organ or anus of one person by an object, the sex organ, mouth[,] or anus of another person." (Emphasis in original.) *Id*. The intrusion clause "includes any *intrusion* of any part of the body of one person or of any animal or object into the sex organ or anus of another person." (Emphasis in original.) *Id*.

¶ 44 Defendant asserts a sufficiency-of-the-evidence argument, claiming the State failed to prove beyond a reasonable doubt the element of sexual penetration. In defendant's words, "the trial evidence tended to show only that [he] put his penis on I.G.'s buttocks, possibly near the anus." During the jury instruction conference, defense counsel did not object to the instruction submitted to the jury, which mirrored the meaning of "sexual penetration," as set forth in the statute.

¶ 45 In the present case, sexual penetration may be shown under either clause of the statute. The definition of sexual penetration is met if the evidence shows "any contact, however slight, between the sex organ or anus of one person and *** the sex organ *** of another person," such as contact between defendant's penis and I.G.'s anus. The definition can alternatively be met if

the evidence shows "any intrusion, however slight, of any part of the body of one person *** into the sex organ or anus of another person, including, but not limited to, cunnilingus, fellatio or oral penetration." 720 ILCS 5/11-0.1 (West 2014).

¶ 46 Although the State included the "placed his penis in the anus" language in the indictment, it does not mean that intrusion becomes an essential element and that contact would not spport a conviction. The type of penetration in the indictment is mere surplusage and the State is not required to prove defendant's penis intruded into I.G.'s anus. This is because the *type* of sexual penetration is not an essential element of the offense of predatory criminal sexual assault. See, *e.g.*, *People v. Giles*, 261 Ill. App. 3d 833, 846 (type of sexual penetration not an essential element of the offense of aggravated criminal sexual assault).

¶ 47 Here, the evidence was sufficient to show intrusion and contact between defendant's penis and I.G.'s anus. The letter written by I.G., which she gave to her counselor, stated that defendant "put his thing in my butt hole." During her interview with law enforcement, I.G. stated that defendant put his penis "inside me in my butt." At trial, I.G. testified that defendant's penis touched the part of her "butt;" "[t]he part poop comes out." On cross-examination, she testified that defendant put his penis in her butt. Additionally, I.G.'s statements were corroborated by defendant's admissions to Dunn and Reed. Specifically, defendant told Reed that he rubbed his penis against I.G.'s buttocks or butthole area and it was possible that there was penetration.

¶ 48 When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry defendant. *People v. Howard*, 2012 IL App (3d) 100925, ¶ 8. Rather, the relevant question is " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt.' " *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact has the responsibility to assess the credibility of the witnesses, weigh their testimony, resolve inconsistencies and conflicts in the evidence, and draw reasonable inferences therefrom. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). A reviewing court will not substitute its judgment for that of the trier of fact on issues of the credibility of witnesses or the weight of the evidence. *People v. Jasoni*, 2012 IL App (2d) 110217, ¶ 19. We will not reverse a guilty verdict unless the evidence, viewed in the light most favorable to the prosecution, was so palpably contrary to the verdict, so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Lamon*, 346 Ill. App. 3d 1082, 1089 (2004). If any rational trier of fact could have reached the fact-finder's conclusion, a reviewing court should not substitute its judgment or reverse a verdict finding the defendant guilty. *People v. Harre*, 155 Ill. 2d 392, 397-98 (1993).

¶ 49 Defendant relies on *People v. Oliver*, 38 Ill. App. 3d 166 (1976), in support of his argument that I.G.'s testimony and statements were insufficient to show an act of sexual penetration involving his sex organ and I.G.'s anus. In *Oliver*, the complaining witness did not testify specifically to penis-anus touching and made an out-of-court statement that the defendant's penis " 'went along her cheeks.' " *Id*. at 170. Because the complaining witness did not testify precisely, the appellate court concluded that the evidence did not establish an act of sexual penetration to prove the defendant guilty of deviate sexual assault beyond a reasonable doubt. *Id*. Here, in addition to I.G.'s testimony specifically indicating that defendant's penis touched and entered her anus, the consistent repetition by the victim concerning penis-anus contact and corroboration by defendant distinguishes this case from *Oliver*.

¶ 50 Defendant points out the various inconsistencies in I.G.'s story, which cast doubt on I.G.'s allegations. Defendant comments on the inconsistencies of her testimony, the inconsistencies between her note and her statements to Dunn and Lenchner, the lack of unusual interaction with defendant from the time of the alleged incident and I.G.'s outcry, her motives for making the allegations, and I.G.'s prior recantation. These are issues of credibility which intrude upon the province of the jury who heard and considered the evidence. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 51 Defendant acknowledges that questions regarding credibility and the resolution of inconsistencies in the evidence are matters for the jury to decide. However, he argues that the determination by the jury may still be overturned where the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. We will not usurp what in this case was entirely within the province of the jury.

¶ 52 It was for the jury to find that I.G.'s testimony was sufficiently consistent throughout the trial to support defendant's conviction. It likewise was for the jury to resolve the discrepancies that appeared during trial and defendant's attacks upon I.G.'s character. See *Id*. at 229. We note that the issue of penetration is a question of fact to be determined by the jury. *People v. Herring*, 324 Ill. App. 3d 458, 464 (2001). Any lack of detail in the victim's testimony affects only the weight of the evidence. *Id*. "[T]he trier of fact is entitled to draw all reasonable inferences from both direct and circumstantial evidence, including an inference of penetration." *People v. Raymond*, 404 Ill. App. 3d 1028, 1041 (2010). After reviewing the entire record in the light most favorable to the prosecution, we conclude there was sufficient evidence for a rational trier of fact to find that the State met its burden of proving penetration.

¶ 53 B. Impeachment

¶ 54 Defendant next argues that the trial court improperly limited his cross-examination of the victim by prohibiting him from questioning her about two incidents involving theft and one involving cruelty to the family dog. Defendant asserts that these incidents, which "could turn out to be criminal charges," denied him the opportunity to impeach I.G. on matters of bias, motive, and ability to curry favor with the State.

¶ 55 The parties disagree as to our standard of review. The State contends that we should view deferentially the court's decision to exclude this evidence. Defendant maintains that the trial court applied an erroneous rule of law by improperly limiting his impeachment of I.G., which subjects us to a *de novo* review. Reviewing courts generally use an abuse-of-discretion standard to review evidentiary rulings rather than review them *de novo*. *People v. Childress*, 158 Ill. 2d 275, 296 (1994).

¶ 56 At the hearing on the State's motion *in limine* to prohibit improper impeachment of I.G., the court asked if I.G. had been convicted of theft. The State responded that I.G.'s criminal history showed only a station adjustment for theft in 2013. Defense counsel responded that, "if there is a crime alleged, whether it's pending or not," a witness may "believe they're currying the favor of the State" and he should be given a wide latitude to attempt to show bias on cross-examination. Without comment, the court granted the State's motion *in limine* to bar impeachment of I.G. with evidence of conduct.

¶ 57 "The decision whether to admit evidence cannot be made in isolation. The trial court must consider a number of circumstances that bear on that issue, including questions of reliability and prejudice." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001) (citing *Childress*, 158 Ill. 2d at 295-96). In this case, the trial court ruled based on relevance and whether these were attempts by defendant to impeach on collateral matters. Thus, the trial court exercised discretion

in making these evidentiary rulings, *i.e.*, the court based these rulings on the specific circumstances of this case and not on a broadly applicable rule. Furthermore, the record does not support defendant's contention that the court's exercise of discretion was frustrated by its application of an erroneous rule of law, that "the court erroneously considered the law not to permit the introduction of a pending charge for purposes of bias impeachment." Accordingly, we reject defendant's argument and review these evidentiary rulings with deference to the trial court.

¶ 58 Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion. *People v. Reid*, 179 Ill. 2d 297, 313 (1997). 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. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 59 Cross-examination to show bias, interest, or motive to testify falsely is a matter of right. *People v. Triplett*, 108 Ill. 2d 463, 475 (1985). This right, however, is not unfettered. When impeaching by showing bias, interest, or motive, the evidence used must give rise to the inference that the witness has something to gain or lose by his testimony and, therefore, the evidence used must not be remote or uncertain. *Id*. at 475-76.

¶ 60 As set forth above, defendant's sole argument is that the incidents of theft and cruelty to the family dog are relevant to show I.G.'s bias, motive, and ability to curry favor with the State concerning these potential charges. Defendant points to a 2013 station adjustment as evidence. But nothing in the record indicates when, at least, the theft from defendant occurred. Nothing in the record shows that I.G. had any contact with the police or that any charges were pending when I.G. made her outcry, and defendant made no offer of proof.

¶ 61 In *People v. Schnurr*, 206 Ill. App. 3d 522, 529-30 (1990), we found that it was not error to limit cross-examination of a witness who voluntarily approached the police and who cooperated during the investigation of the defendant. *Id*. at 530. We observed that the defendant was "grasping at straws" when she attempted to question the witness about his probation because no charges were pending against the witness. With no charges pending, the police had no leverage over the witness when he reported the defendant's crime, and therefore, the possibility of bias or motive was not evident. Like in *Schnurr*, the police had nothing to offer I.G., and she had no motive to report the crime to curry favor with the State.

¶ 62 At trial, even though I.G. may have been under conditions of a station adjustment, there is no evidence that any violations were pending. Defendant asserts that the prosecution had leverage over I.G. because it could have filed juvenile petitions for two of the alleged criminal offenses, which could have been considered a violation of the station adjustment conditions for the third alleged offense. The impeachment value of this evidence was, at best, speculative. Questions about this would have revealed nothing of value. *People v. Tayborn*, 254 Ill. App. 3d 381, 389 (1993). Defendant cites *People v. Balayants*, 343 Ill. App. 3d 602 (2003), and *People v. Paisley*, 149 Ill. App. 3d 556 (1996), in support of his argument, which are distinguishable. In both cases, the defendants were precluded from questioning witnesses about pending charges. *Balayants*, 343 Ill. App. 3d at 605-06; *Paisley*, 149 Ill. App. 3d at 560. Also, in *Balayants*, the evidence was not remote and the possibility of bias or motive was evident. *Balayants*, 343 Ill. App. 3d at 606. That is not the situation here, where no charges were pending against I.G. when she wrote her outcry note or when she testified at trial.

¶ 63 While it is at least arguable that defendant should have been allowed to question I.G. about the theft from defendant as it related to her general bias against him, any potential error in

barring cross-examination would have been harmless. The evidence against defendant, including his admissions, was strong and, without any evidence of reputation, the trial court allowed defendant to impeach I.G. by presenting testimony from her family that I.G. previously recanted and was a liar. Thus, this potential error would have been harmless.

¶ 64 C. Special Courtroom Procedures

¶ 65 Defendant last argues that the trial court abused its discretion by granting the State's motion to employ the following special procedures during I.G.'s testimony: (1) closing the courtroom to spectators; (2) requiring the attorneys to use age-appropriate language; and (3) allowing the State to ask leading questions "to the extent necessary to develop the child's testimony." Defendant argues that he was deprived of a fair trial because the trial court gave no specific reasons for its decision to grant the State's motion for these special procedures.

¶ 66 It is well-settled that a trial court's decision on a motion *in limine* will not be reversed unless the trial court abused its discretion. *People v.* Caffey, 205 Ill. 2d 52, 89 (2001). 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. *Illgen*, 145 Ill. 2d at 364.

¶ 67 1. Closing Courtroom

¶ 68 Section 115-11 of the Criminal Code of 2012 (725 ILCS 5/115-11 (West 2012)) permits a limited closure of a courtroom during the testimony of minors who are the victims of certain sex crimes. It provides that, in a prosecution for a criminal offense defined in section 11-1.40 (725 ILCS 5/11-1.40 (West 2012)), where the alleged victim of the offense is a minor under 18 years of age, the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media. The

State moved prior to trial for special procedures for child testimony including closing the courtroom during I.G.'s testimony. It argued that section 115-11 permitted exclusion of any uninterested spectators other than the media without compliance with the strict limitations prescribed by the United States Supreme Court. Over objections by defendant to certain paragraphs, the court granted the State's motion. Before I.G.'s testimony, the court cleared the courtroom.

¶ 69 In *People v. Falaster*, 173 Ill. 2d 220, 226 (1996), the Illinois Supreme Court held that an exclusionary order under section 115-11 is valid if it meets the requirements of the statute, and it does not need to meet the more stringent limitations established by the United States Supreme Court. The *Falaster* court noted that the courtroom was not completely closed, as only certain people were excluded, and the press was never excluded. *Id*. at 228. Thus, as long as a trial judge does not impose restrictions on attendance by the media, it need only comply with section 115-11 in restricting public access to a defendant's trial. In his appellate brief, defendant failed to cite *Falaster*, despite the fact that the holding rebuts his argument.

¶ 70 Here, I.G. was 13 years old at the time of trial and the closure of the courtroom occurred only during her testimony. There is no indication in the record before us that the trial court excluded anyone during I.G.'s testimony. It was defendant's burden to show error, and defendant made no record or offer of proof as to whom, if anyone was excluded. Therefore, we must presume that the trial court followed the requirements of the statute. Because we presume that the requirements of section 115-11 were met, defendant's right to a public trial was not violated. See *People v. Burman*, 2013 IL App (2d) 110807, ¶ 55 (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)). Accordingly, the trial court did not abuse its discretion by ordering temporary closure of the courtroom during I.G.'s testimony.

¶ 71 2. Limiting Language

¶ 72 Defendant claims that the trial court abused its discretion by requiring that the attorneys use age-appropriate language when questioning I.G. because it had a "chilling effect" on the type of cross-examination he could employ where there was no showing that I.G. needed these accommodations.

¶ 73 Defendant cites no authority requiring the trial court to make a particularized finding of special needs. More importantly, defendant does not state specifically how he was prejudiced by this ruling; *i.e.*, how he would have cross-examined I.G. differently or more effectively absent the *in limine* order. While we believe the trial court would have been better served by withholding its ruling on this order until I.G. testified, and by making specific findings on the record, defendant points to nothing that would show the ruling was prejudicial. As such, any error was harmless.

¶ 74 3. Leading Questions

¶ 75 Defendant last takes issue with the trial court's decision permitting the State to ask I.G. leading questions "to the extent necessary to develop the child's testimony." The trial court allowed the State to ask leading questions as long as they were not suggestive. Defendant acknowledges that the trial court limited its decision by prohibiting the use of suggestive questions and admits that the cases relied upon by the State illustrate the trial court's discretion to permit the use of leading questions. Nevertheless, defendant contends that the trial court abused its discretion by allowing the State to use leading questions without a showing that I.G. had difficulty answering the State's questions.

¶ 76 Here, like the last issue, we believe that the trial court would have been better served by withholding its ruling on asking leading questions until I.G. testified, and by making specific

findings on the record, but defendant fails to show how he was prejudiced by the court's decision; he does not point to any specific instances of misuse. Thus, any error was harmless. Nonetheless, based on our review, when I.G. was describing the acts of sexual abuse, the State did not improperly employ leading questions.

¶ 77 III. CONCLUSION

¶ 78 For the preceding reasons, we affirm defendant's conviction of predatory criminal sexual assault. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 79 Affirmed.

No. 124832

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant, -vs- HAYZE L. SCHOONOVER, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-16-0882. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 15-CF-1388. Honorable Thomas J. Difanis, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 28, 2021, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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