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FOURTH DIVISION
February 24, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 97 CR 14196
)	
DAVID AGUAYO,)	Honorable
)	Marcus R. Salone,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Gallagher and Justice Pucinski concurred in the judgment

ORDER

Held: (1) State could reinstate nol-prossed counts conditionally dismissed in exchange for defendant’s guilty plea; (2) trial court's failure to comply with Rule 431(b) does not constitute plain error warranting reversal; (3) Mother could testify about her daughter’s outcry statement on redirect examination; (4) standard pattern instruction sufficiently advised jury to consider the witness’ ability and opportunity to observe; (5) conduct of the assistant state’s attorneys was well within the wide latitude accorded during closing argument; and (6) regardless of whether the court erroneously imposed mandatory consecutive sentences, it did not lack the inherent power to make or enter the particular order involved, and the sentencing order was not void.

Following a jury trial, defendant was found guilty of aggravated criminal sexual assault

and aggravated criminal sexual abuse in connection with incidents involving his minor daughter, A.A., between January 1, 1996 and April 30, 1997. The trial court sentenced defendant to consecutive terms of 13 years and 7 years' imprisonment, respectively. In this appeal, defendant raises a panoply of issues including several evidentiary matters and the propriety of the State proceeding on a handful of counts that had been previously nol-prossed. We affirm in all respects.

BACKGROUND

On May 19, 1997, defendant was charged by indictment with two counts of predatory criminal sexual assault, two counts of aggravated criminal sexual assault, and four counts of aggravated criminal sexual abuse. On November 13, 1998, defendant pled guilty to two counts of predatory criminal sexual assault in exchange for 14 years' imprisonment and the State nol-prossing the remaining six counts.

On June 3, 2002, defendant filed a *pro se* supplemental post conviction petition, alleging that his convictions and sentence should be vacated because the predatory criminal sexual assault statute was found to be unconstitutional by our supreme court in *Johnson v. Edgar*, 176 Ill. 2d 499 (1997), and its recodified version did not apply retroactively to offenses occurring before its effective date of May 29, 1996. On March, 10, 2004, the trial court granted defendant's petition and vacated his convictions and sentences.

On September 8, 2005, the State filed a motion to reinstate the six counts contained in the original indictment that were nol-prossed at the time of defendant's guilty plea, which the trial court later granted. Prior to trial, the State elected to proceed on two counts from the original

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indictment: one count of aggravated criminal sexual assault, alleging that defendant committed an act of sexual penetration on A.A. by placing his fingers in her vagina when he knew that she was unable to give knowing consent and caused bodily harm to her; and one count of aggravated criminal sexual abuse, alleging defendant committed an act of sexual conduct on A.A. by touching her breasts with his hands when A.A. was under the age of 18 and he was a family member.

The following evidence was introduced at trial:

A.A.'s Testimony

A.A. testified that on May 1, 1997, her brother was at his babysitter's house, where A.A. met their mother, Julia, after school. Julia asked her if defendant had been touching her inappropriately. A.A. started to cry, thanked her for asking her that, and told her that defendant was touching her inappropriately. A.A. did not tell her what specifically happened between her and defendant because, as she explained, "I didn't want to hurt her feelings. I didn't want her to know anything that was going on."

A.A. testified that the first time something happened between her and defendant was in May 1996 when she was 10 or 11 years old. Julia was at work. A.A. was naked in the bathtub with defendant sitting on the toilet. Defendant sat A.A. on his lap and then kissed her on the forehead, cheeks, and lips, telling her "that's how friends kissed." When he kissed her on the lips, "he put his tongue in [her] mouth and he touched [her] breasts" with his hand. Defendant also put his hands in A.A.'s vagina. Defendant told her "that every father did that to [his] daughter. That he was only doing it because he loved [her], and it was normal."

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A.A. described a second occurrence where she was sleeping in her room when defendant woke her up. A.A.'s mom was sleeping in another room. A.A. testified:

“He kissed my forehead, kissed my lips, he stuck his tongue in my mouth, and he touched my breasts and took my pants off and he told me he loved me and told me not to tell my mom because she wouldn't understand because she wasn't as open minded as he was. And that this was going to be our secret because I was a very special girl and tha[t] he loved me very much.”

A.A. further testified that defendant put his hands on her breasts and stuck his fingers in her vagina. A.A. then described other instances where defendant would rub what she later understood to be semen on her breasts and stomach and made her lick it off his hands.

From the first instance in 1996 until May 1, 1997, A.A. testified that these things would happen “[a]bout two times a week at least.” She continued, “Sometimes when I was not compliant with what [defendant] wanted me to do, he inserted his fingers in my vagina very hard and very fast and he called me names.” Defendant called her “slut,” “bad daughter,” “fat ass,” and told her that she was “worthless and that [she] deserved what he did to [her].” When A.A. would try to stop him, defendant would scream at her, call her names, hit her, and threaten to injure or kill her mother and brother if she told them anything about it.

On May 2, 1997, the morning after the police arrested defendant, A.A and her mother went to a hospital. A.A. told a female doctor what had happened between her and defendant, and the doctor then examined her.

A.A. testified that she first met ASA Darman in June 1997. ASA Darman asked her,

“And since that time have you been ready, willing, and able to come to court?” A.A. responded in the affirmative. Defense counsel objected, whereby the court sustained the motion and instructed the jury to disregard the question and the answer.

Dr. Lorand’s Testimony

Dr. Lorand, an expert in the area of child abuse and neglect, examined A.A. on the morning of May 2, 1997. Dr. Lorand testified that A.A. told her that a specific individual had been putting his hands on her pelvic area and on her labia and his finger into her vagina. A.A. told her these things had been going on for about a year, six or seven times a month, with the last time it happened about one month prior to her being in the emergency room. A.A. told her that when she told the individual to stop, he would stick his finger in her very hard and then pull it out very hard. The individual also pulled out her pubic hairs.

Dr. Lorand conducted a medical examination where she discovered a cleft on A.A.’s hymen, which she explained as “the leftovers of a tear to the hymen where the two edges of the hymen do not come together.” The cleft found on A.A. “fit with the history of penetrating trauma.” Dr. Lorand testified that this was not the type of injury that a child would normally inflict upon herself. Dr. Lorand diagnosed A.A. as being sexually abused, explaining that “[t]he physical findings definitely corroborated her history of penetrating trauma to her vaginal area.” It was Dr. Lorand’s opinion that “[b]ased upon [A.A.’s] physical exam and her history, it was consistent with what [A.A.] told [Dr. Lorand] of a finger being forcefully put into her vagina.”

Julia’s Testimony

Julia, A.A.’s mother, testified that A.A. was born in Mexico on April 19, 1985. Julia and

defendant married in 1993, and shortly thereafter, defendant adopted A.A. Julia, defendant, and A.A. moved to Chicago when A.A. was eight or nine-years-old. From 1993 to 1997, Julia and defendant separated on multiple occasions, but reconciled each time. During this time period, Julia attended marriage counseling at a church. On May 1, 2007, she received a call from her counselor asking her to meet that afternoon. When Julia arrived, she was surprised to see defendant talking to her counselor. After defendant left, Julia spoke with her counselor alone, learned some information that bothered her, and became concerned about her daughter.

On cross examination, Julia testified that she and defendant had marital problems, leading them to separate for a period of months beginning in March 1996. Defense counsel asked, “Now, during the time that you were away from [defendant], did [A.A.] ever tell you that anything happened between her and her stepfather while you were away from him?” Before Julia responded, the State objected and requested a sidebar. The assistant state’s attorney (ASA) explained the objection was based on the trial court’s previous ruling made pursuant to section 115–10 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115–10 (West 2006)) that Julia could not testify about A.A.’s outcry statement because her testimony was unreliable. During the sidebar, the court stated:

“I think that the question about this young lady complaining at a time when you would—when it is most convenient is not the right word, when it would appear that she has the maximum safeguards being away in terms of distance being some considerable distance from the Defendant did she outcry at that point, I think that’s a reasonable question. The answer is whatever the answer will be. If the answer is no, I also think it’s

reasonable to ask but she did outcry, didn't she.

* * *

And again depending on when they returned in June—in '96, the balance of '96 as well. That may be as I said the subject of recross but the essence of the question is that she did outcry and that should not be—the jury I believe should know that.”

* * *

Now there's a question. The question before this jury is did she have an opportunity to talk about misbehavior of the [d]efendant. Yes, she had that opportunity and she did not seize it but she did outcry to you, didn't she? Yes. What did she say? He touched me inappropriately. I believe that's appropriate.”

After the sidebar, defense counsel elicited that Julia and defendant moved in together at some point after September 1996 and before May 1, 1997, the date that Julia asked A.A if anything had happened between her and defendant. Defense counsel asked Julia about the time period from September 1996 to May 1, 1997, “did [A.A.] ever come to you and say that anything had happened between her and her father?” Julia responded, “No.”

On redirect examination, the State asked Julia, “When you met your daughter [on May 1, 1997], what did you say to her and what did she say to you?” Over defendant's objection, Julia responded:

“I told her that I loved her very much, that she was the best thing that had ever happened in my life but I was going to ask her a question and the answer would not change the way I felt about her. After that I asked her if [defendant] had touched her

inappropriately and she told me— well, she started to cry. She hugged me. She told me yes and she also said thank you for asking me because I couldn't take it anymore.”

The State then asked her, “At any point in time, * * * did you inquire of your daughter specifically as to what the nature of the inappropriate touching was?” Defense counsel objected and requested a sidebar, where the trial court determined that Julia was permitted to answer. Julia responded, “I didn't ask her then because at that time she was doing very badly.” Julia testified that at that point, she called the police and the Department of Children and Family Services (DCFS). Shortly thereafter, detective Day arrived at her house with other officers to investigate an allegation of sexual activity between a minor and her father.

Detective Day's Testimony

Detective John Day testified that his unit had received a DCFS hotline complaint, meaning the DCFS had been notified that a minor was victim to a crime. Typically after receiving a DCFS complaint, detective Day would visit the address where the incident occurred, investigate the incident, and interview the victim. Over defense counsel's objection, detective Day testified that the nature of his investigation “was an allegation of sexual activity between the minor and a household member, which I was told was her father.” The trial court then promptly instructed the jury, “I've permitted this answer[,] which you should receive as an explanation of this officer's investigation and nothing more. It is why he was there and what he did, whatever he says he did.”

Detective Day further testified that he typically interviewed the mother and the minor to determine if something happened “[a]nd because of the unique nature of dealing with minors,

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with children, you want to be sure that they are of average intelligence, they're aware of what the allegations are, they understand them, that they can articulate and understand what it is they're trying to articulate.” Detective Day testified that he believed both Julia and A.A. were reasonably intelligent and could articulate the circumstances of what had gone on. Detective Day further testified, over defense counsel's objection, that he had two choices with regards to how an investigation like this one would proceed. If detective Day did not believe there were grounds to proceed, he would have terminated his role in the investigation. On the other hand, detective Day stated, “Because I did believe that I had reasons to proceed with an investigation, I asked the officers to instruct the family what needed to be done regarding physical examinations and so on.”

Detective Day further testified that he learned from his conversation with A.A. and Julia that defendant would be returning home from work later that night. Detective Day returned to headquarters and agreed with his supervisor that they would return to the residence later that evening to attempt to locate defendant. When they returned, they arrested defendant and took him into custody.

After detective Day had reviewed the results of A.A.'s physical examination and the victim sensitive interview, he contacted ASA Vasquez, who later met him at the station. Detective Day and ASA Vasquez interviewed defendant for about an hour. Defendant said that incidents took place between him and A.A. from April 1996 to April 1997. On several occasions, defendant kissed A.A.'s vaginal hair and rubbed her breasts. In April 1997, A.A. was making breakfast when defendant started kissing her on the lips and rubbed her vagina with his

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hand. After the interview, defendant declined to memorialize his statement in writing or sign anything.

In a second interview with detective Day and ASA Vasquez defendant said in September 1996, he stayed up playing with A.A. and kissed her vaginal hair. In November 1996, defendant was in the bathroom when A.A. got out of the shower. A.A. slapped him on the back, so he pulled out one of her vaginal hairs to teach her a lesson. In February 1997, defendant rubbed A.A.'s stomach and then fondled her breasts and vagina. Defendant often found himself in bed with A.A. because she would come to sleep with him after his wife went to work. Defendant would kiss her and rub her vagina with his hands.

Defendant's Testimony

Defendant testified that in 1996 and 1997, defendant did not see A.A. a lot during the week because he was working two jobs. Defendant considered A.A. his daughter and had a good relationship with her. Defendant testified that he never saw her naked and did not kiss or touch her inappropriately.

After defendant was arrested and taken to the police station, he was told he was being accused of raping his daughter. Defendant testified the officers hit him multiple times during the interview when they got angry with him. Defendant testified that he did not make any incriminating statements to the officers or to ASA Vasquez.

After a jury trial, defendant was found guilty of one count of aggravated criminal sexual assault and one count of aggravated criminal sexual abuse. On August 15, 2008, the trial court sentenced defendant to consecutive terms of 13 years and 7 years' imprisonment, respectively.

ANALYSIS

Defendant first contends that the trial court erred by granting the State's motion to reinstate the six counts that it had previously nol-prossed before his guilty plea in 1998. Defendant argues that when his convictions for predatory sexual assault were vacated, no criminal charges remained pending against him, so the State was required to file a new indictment in order to reinstate the charges. Because this issue is purely a question of law, we review the record *de novo*. *People v. Stafford*, 325 Ill. App. 3d 1069, 1073 (2001). Defendant does not challenge the trial court's jurisdiction to reinstate the nol-prossed counts or raise any limitations issues.

“A *nolle prosequi* is the formal entry of record by the prosecuting attorney which denotes that he or she is unwilling to prosecute a case.” *People v. Norris*, 214 Ill. 2d 92, 104 (2005). “Thus, when a *nolle prosequi* is entered before jeopardy attaches, the State is entitled to refile the charges against the defendant. [Citation.] The State is not barred from proceeding upon a refiled charge ‘absent a showing of harassment, bad faith, or fundamental unfairness.’ ” *Norris*, 214 Ill. 2d at 104, quoting *People v. DeBlieck*, 181 Ill. App. 3d 600, 606 (1989). In *People v. Watson*, 394 Ill. 177, 179, our supreme court explained:

“ ‘A *nolle prosequi* is not a final disposition of the case, and will not bar another prosecution for the same offense. It is not an acquittal, but it is like a nonsuit or a discontinuance in a civil suit, and leaves the matter in the same condition in which it was before the commencement of the prosecution.’ [Citation.] Again, it has been said that the ordinary effect of a *nolle prosequi* is to terminate the charge to which it is entered

and to permit the defendant to go wherever he pleases, without entering into a recognizance to appear at any other time. If it is entered before jeopardy has attached, it does not operate as an acquittal, so as to prevent a subsequent prosecution for the same offense.”

In *People v. McCutcheon*, 68 Ill. 2d 101, 104 (1977), the defendant was indicted for the felony of indecent liberties with a child and the misdemeanor of contributing to the sexual delinquency of a child. Defendant pleaded guilty to the misdemeanor pursuant to a plea agreement, and the State nol-prossed the felony. *McCutcheon*, 68 Ill. 2d at 104. On appeal, the appellate court vacated the guilty plea and remanded. *McCutcheon*, 68 Ill. 2d at 104. The State then reinstated the felony count of indecent liberties; and after a jury trial, the defendant was convicted of both counts. *McCutcheon*, 68 Ill. 2d at 104. On appeal, the appellate court held that the reinstatement of the nol-prossed indecent liberties charge was barred by double jeopardy provisions, *McCutcheon*, 68 Ill. 2d at 104; however, our supreme court reversed the appellate court and affirmed the circuit court. *McCutcheon*, 68 Ill. 2d at 111. The supreme court differentiated between conditional and unconditional dismissals, explaining that “the nol-prossed felony charge of indecent liberties was pursuant to a plea agreement. The dismissal was conditioned on the defendant’s plea of guilty to the misdemeanor.” *McCutcheon*, 68 Ill. 2d at 111-12. The supreme court explained that jeopardy only attached to the crime pleaded to; because defendant was not tried on the indecent liberties count, he could not “claim an acquittal on that charge or protection by reason of prior jeopardy.” *McCutcheon*, 68 Ill. 2d at 106. The supreme court stated, “defendant’s first successful appeal of his guilty plea placed him in the

position he held prior to the plea or in the position he would have held had he been allowed to withdraw his pleas. *** [T]here was nothing to prevent the State from reinstating the greater charge. *** Fairness for the interests of the People demands that the State not be bound by a plea agreement, once a condition of that agreement (the guilty plea) is no longer valid.”

McCutcheon, 68 Ill. 2d at 106-07. The supreme court allowed the State to reinstate the felony charge, finding that “jeopardy did not attach to the dismissed felony charge of indecent liberties, that the State’s reinstatement of the felony was not vindictive, and that the nolle prosequi was conditional.” *McCutcheon*, 68 Ill. 2d at 112.

People v. DeBlieck, 181 Ill. App. 3d 600 (1989) is also instructive. There, the defendant was arrested for driving while under the influence of alcohol (DUI). *DeBlieck*, 181 Ill. App. 3d at 602. The trial court granted the defendant’s motion to quash the arrest and suppress evidence on the basis that the responding officer did not have the authority to arrest the defendant.

DeBlieck, 181 Ill. App. 3d at 602. The State then nol-prossed the DUI charge. *DeBlieck*, 181 Ill. App. 3d at 602. 15 days later, the State filed its motion for reconsideration and moved “that the People be allowed to reinstate the charge of Driving Under the Influence of Alcohol” and requested in its prayer for relief “that the court ‘grant the State leave to *refile*’ the DUI charge.” *DeBlieck*, 181 Ill. App. 3d at 603. The trial court denied the State’s motion. *DeBlieck*, 181 Ill. App. 3d at 603. The appellate court discussed *Watson* and observed that “a trend has apparently arisen in [the second district] criminal courts whereby the prosecutor brings a ‘motion to reinstate’ a charge after it has been nol-prossed.” *DeBlieck*, 181 Ill. App. 3d at 604. The court believed that “reinstatement of a charge after a *nolle prosequi* first requires that the *nolle*

prosequi be vacated.” *DeBlieck*, 181 Ill. App. 3d at 605. Nevertheless, despite the State clearly not vacating its *nolle prosequi*, the appellate court held that the trial court erred in denying the State’s motion seeking leave to refile the nol-prossed DUI charge because the “State should not be barred from proceeding on a refiled charge absent a showing of harassment, bad faith, or fundamental unfairness.” *DeBlieck*, 181 Ill. App. 3d at 607.

Here, as in *McCutcheon*, the grand jury indicted defendant on eight counts prior to the plea agreement. In exchange for defendant pleading guilty to two counts of predatory criminal sexual assault, the State nol-prossed the six remaining counts against defendant. The dismissal of those counts was conditioned on defendant’s plea of guilty, jeopardy did not attach to the nol-prossed charges, and the State’s reinstatement of those charges was not in any way vindictive. Once defendant was granted relief on his post conviction petition, a condition to the plea agreement was no longer in effect, and the State was permitted to pursue the same course open to it before the plea agreement. While the State did not vacate its *nolle prosequi* before reinstating the charges, we do not believe the State should be barred from proceeding on those charges where defendant has not established any harassment, bad faith, or fundamental unfairness.

Defendant relies on *Stafford*, 325 Ill. App. 3d 1069. There, a grand jury indicted defendant on two counts of first degree murder, five counts of attempted first degree murder, and five counts of aggravated discharge of a firearm. *Stafford*, 325 Ill. App. 3d at 1070. Before proceeding to trial, the State nol-prossed all of the counts except the two counts of first degree murder. *Stafford*, 325 Ill. App. 3d at 1070. After a bench trial, defendant was found guilty of

first degree murder and sentenced to 32 years in prison. *Stafford*, 325 Ill. App. 3d at 1070. Defendant successfully appealed his conviction and his case was remanded for a new trial. *Stafford*, 325 Ill. App. 3d at 1070. On the date jury selection commenced for the second trial, the State informed the trial court that it would be proceeding on the two first degree murder counts and five attempted murder counts, which the trial court allowed. *Stafford*, 325 Ill. App. 3d at 1071. The appellate court reversed, finding that because the State did not reindict defendant on the nol-prossed attempted murder charges, “[t]here were no attempted murder charges legally in existence at the point in time when the State proceeded to jury selection and trial in this case.” *Stafford*, 325 Ill. App. 3d at 1074.

This case is meaningfully distinguishable from *Stafford*. In *Stafford*, the State nol-prossed all but two counts against the defendant before proceeding to a bench trial. Here, the State nol-prossed all but two counts of the indictment in exchange for defendant pleading guilty to those two counts. In other words, the State’s entry of *nolle prosequi* was conditioned upon the defendant’s guilty plea. Also, in *Stafford*, the State did not inform the trial court or defendant until the day of jury selection that it was proceeding on the nol-prossed charges, but in this case, the State asked the trial court for leave to reinstate the nol-prossed charges nearly three years before the first day of jury selection.

Accordingly, because the State moved to reinstate the nol-prossed counts conditionally dismissed in exchange for defendant’s guilty plea, jeopardy had not attached, and there is no showing of bad faith, the trial court did not err in granting the State’s motion to reinstate those charges.

Defendant next asserts that the trial court failed to properly ask the venire whether they understood and accepted certain principles of law enumerated in Illinois Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007). The trial court instructed the venire on the first day of jury selection:

“Under the law, a defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict. It is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that the defendant is guilty. The defendant does not have to prove anything. The defendant does not have to testify on his own behalf. The State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case.”

After the jurors were duly sworn, the trial court proceeded, “The defendant does not have to prove anything on his own behalf. Are there any among you who have any problems with that proposition of the law?” The court indicated there was no response. The court proceeded, “Are there any among you who would have any problems with the fact the defendant chose not to testify should he choose to stand on presumption of innocence? Are there any among you who would have a problem with that?” The court again indicated there was no response.

The next day, the court informed the second venire:

“Under the law the [d]efendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this

case you are convinced beyond a reasonable doubt that the [d]efendant is guilty.

The State has the burden of proving the guilt of the [d]efendant beyond a reasonable doubt and this burden remains on the State throughout the case. The [d]efendant is not required to prove his innocence nor is he required to present any evidence on his own behalf. He may rely on the presumption of innocence.

Are there any among you who – who would expect to hear the [d]efendant testify on his own behalf?”

The court indicated there was no response, and continued, “If the [d]efendant choose[s] to rely on the presumption of innocence and not testify on his own behalf, are there any among you who would hold that against the [d]efendant?” When one juror raised her hand, the trial court asked her, “Is there anything about the nature of the charges that would prevent you from being fair and impartial to the [d]efendant as well as the State?” The court indicated there was no response.

Defendant asserts that the court erred in failing to provide each juror an opportunity to respond to specific questions regarding each *Zehr* principle. To preserve an issue for appellate review, a defendant must both object at trial and present the same issue in a written posttrial motion. *People v. Harris*, 394 Ill. App. 3d 28, 37 (2009). Defendant did not object to this claimed error at trial or in a written posttrial motion. Accordingly, defendant has forfeited his challenge that the trial court did not conform with Rule 431(b). Nonetheless, this court will review unpreserved error when a clear and obvious error occurs and: (1) the evidence is closely balanced; or (2) that error is so serious that it affected the fairness of the defendant's trial and

challenged the integrity of the judicial process. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008).

“In plain-error review, the burden of persuasion rests with the defendant.” *People v. Thompson*, No. 109033, slip op. at 11 (October 21, 2010).

In addressing defendant’s plain error contention, we must first determine whether there was any error at all. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Rule 431(b) is a codification of our supreme court’s decision in *People v. Zehr*, 103 Ill. 2d 472 (1984), which held that the trial court erred by refusing the defendant’s request to ask the venire about four fundamental principles of law. *Zehr*, 103 Ill. 2d at 476-78. The four *Zehr* principles are that (1) the defendant is presumed innocent; (2) the defendant must be proved guilty beyond a reasonable doubt; (3) the defendant is not required to produce any evidence; and (4) the defendant’s failure to testify cannot be held against him. *Zehr*, 103 Ill. 2d at 477. Pursuant to Rule 431(b), the trial court must address the *Zehr* principles, even in the absence of a specific request by the defendant and “shall ask each potential juror, individually or in a group, whether the juror understands and accepts” those principles. Official Reports Advance Sheet No. 8 (April 11, 2007, R. 431(b), eff. May 1, 2007). In addition, “the court’s method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section.” Official Reports Advance Sheet No. 8 (April 11, 2007, R. 431(b), eff. May 1, 2007). Our supreme court recently held in *Thompson*, No. 109033, slip op. at 6, “The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their

understanding and acceptance of those principles.”

Here, the trial court failed to comply with Rule 431(b). Most notably, the trial court did not question any of the prospective jurors on the second principle, whether they understood and accepted that the State must prove defendant guilty beyond a reasonable doubt. As in *Thompson*, the trial court’s failure to ask whether the potential jurors both understood and accepted each of the enumerated principles constitutes noncompliance with Rule 431(b). *Thompson*, No. 109033, slip op. at 6. This error, however, does not constitute a structural error requiring automatic reversal. *Thompson*, No. 109033, slip op. at 10. The *Thompson* court declined to adopt a bright-line rule of reversal for every violation of Rule 431(b). *Thompson*, No. 109033, slip op. at 14. Accordingly, we consider whether the error here rises to plain error.

Under the first prong of the test, we must determine if the evidence was closely balanced. Defendant argues in his brief that A.A.’s testimony was “questionable at best,” defendant denied A.A.’s allegations and denied making incriminating statements while in custody, Julia had a “motive to testify falsely against [defendant],” and that none of defendant’s alleged incriminating statements to police officers or assistant state’s attorneys were memorialized. In his brief, defendant suggests that “[s]ince this case came down to a credibility contest between [defendant] and the State’s witnesses, this court should find that the evidence was closely balanced.” We disagree. Among the State’s overwhelming evidence was the victim’s testimony directly implicating defendant, testimony from the victim’s mother and the responding officer, and testimony from the examining physician that the victim’s version of events was consistent with the physical injuries she sustained. The jury had the opportunity to

weigh the credibility of both the State's and defendant's witnesses. After our careful review of the record, we find that the evidence was not sufficiently close to constitute plain error.

Under the second prong of the plain error test, we must determine whether the claimed error is serious, regardless of the closeness of the evidence. The *Thompson* court determined, "Rule 431(b) does not indicate that compliance with the rule is now indispensable to a fair trial." *Thompson*, No. 109033, slip op. at 13 (October 21, 2010). Bias will not be presumed merely because the trial court erred in performing the Rule 431(b) questioning; rather, defendant carries the burden of showing that the jury was biased. *Thompson*, No. 109033, slip op. at 12-13.

After our review of the record, we are unable to find any meaningful deficiency in the court's communication of the *Zehr* principles to the jury. Each *Zehr* principle was addressed in some fashion. The prospective jurors were questioned on some, but not all, of those principles. Defendant has not established that the trial court's noncompliance with Rule 431(b) resulted in a biased jury that affected the fairness of his trial and challenged the integrity of the judicial process. We therefore cannot find that the trial court's failure to comply with Rule 431(b) constitutes plain error warranting reversal. We are unpersuaded that " 'the error caused a severe threat to the fairness' " of the trial. *Herron*, 215 Ill. 2d at 187, quoting *People v. Hopp*, 209 Ill. 2d 1, 12 (2004). Accordingly, no reversal is required here under the circumstances.

Defendant next contends that the trial court erred in allowing Julia to testify regarding A.A.'s outcry statement because it had already precluded its admission pursuant to section 115-10 of the Code and defendant did not invite the error. "[W]here the door to a particular

subject is opened by defense counsel on cross-examination, the People may, on redirect, question the witness to clarify or explain the matters brought out during the previous cross-examination.” *People v. Thompkins*, 121 Ill. 2d 401, 444 (1988). “The State may question a witness on redirect in such a way as to remove unfavorable inferences or impressions raised during cross-examination. *People v. Coleman*, 223 Ill. App. 3d 975, 998 (1991), citing *Thompkins*, 121 Ill. 2d at 444 “The decision to admit or exclude such evidence is within the discretion of the trial court.” *Coleman*, 223 Ill App. 3d at 998. “A trial court's decision is considered an abuse of discretion only when the decision is arbitrary, fanciful or unreasonable; or where no reasonable person would take the view adopted by the trial court.” *People v. Hammonds*, 399 Ill. App. 3d 927, 941 (2010).

In the present case, we find that the trial court did not abuse its discretion in permitting Julia to testify about her daughter’s outcry statement on redirect examination. Defendant specifically argues in his brief that Julia’s testimony regarding A.A.’s lack of an outcry to her in 1996 did not invite the testimony that A.A. made an outcry to Julia on May 1, 1997. We disagree. Defense counsel sought to inform the jury that A.A. did not make an outcry statement when she and Julia did not live with defendant from March 1996 to September 1996. This line of questioning was apparently part of defense counsel's strategy designed to show that A.A. was not credible because she failed to outcry to her mother for a period of months despite having the opportunity to do so. While the trial court previously ruled in the section 115–10 hearing that A.A.’s statements to her mother could not be introduced as an exception to the hearsay rule, in light of defense counsel’s line of questioning, the trial court properly allowed the State to ask

Julia on redirect if A.A. did make any outcry statement to her. In any event, because the evidence in this case is overwhelming, any claimed error would clearly have been harmless and does not constitute reversible error under these circumstances.

Defendant next contends that detective Day's testimony regarding A.A.'s outcry statement was inadmissible hearsay and that his testimony concerning the nature of his investigation was highly prejudicial opinion testimony. Defendant has forfeited this issue because he did not raise it in a posttrial motion. Under the plain error doctrine, we will review unpreserved error when a clear and obvious error occurred. As the analysis below will reveal, we find no such error occurred here.

We apply an abuse of discretion standard of review in analyzing a trial court's decision on whether a statement constitutes hearsay and whether that statement would still be admissible under an exception to the hearsay rule. *Hammonds*, 399 Ill. App. 3d at 941.

"To qualify as hearsay, an out-of-court statement must be offered to establish the truth of the matter asserted. [Citation.] Testimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement is not 'hearsay.' [Citations.]" *People v. Simms*, 143 Ill. 2d 154, 173-74 (1991). "[I]f a statement is offered, not for the truth of the matter asserted in its contents, but to explain the actions or steps that a police officer subsequently took during the course of an investigation, then the statement is not hearsay." *Hammonds*, 399 Ill. App. 3d at 943-44. "Such statements can be 'offered for the limited purpose of showing the course of a police investigation where such testimony is necessary to fully explain the State's case to the trier of fact.'" *People v. Peoples*, 377 Ill. App.

3d 978, 984 (2007), citing *Jura*, 352 Ill. App. 3d at 1085.

We conclude that the trial court did not abuse its discretion in permitting detective Day to testify regarding the nature of his investigation. Defendant suggests that detective Day's testimony that he "believed" he had reason to proceed with the case was improper because it suggested to the jury that he believed A.A.'s allegation that sexual activity had occurred between her and defendant. We disagree. Detective Day summarized the course of his investigation without revealing the substance of any of A.A.'s actual statements made to him during the conversation. Detective Day's statements were offered for the limited purpose of showing the course of his investigation. When detective Day stated that the nature of the investigation was "an allegation of sexual activity between the minor and a household member, which I was told was her father," the trial court promptly gave an accurate limiting instruction to the jury to the effect that detective Day's testimony was "receive[d] as an explanation of [his] investigation and nothing more. It is why he was there and what he did." Accordingly, we find no error under these circumstances.

Defendant also contends that defense counsel was ineffective because when he questioned detective Day about the circumstances under which an officer may make an warrantless arrest, he "opened the door" for the State to ask questions that resulted in the introduction of prejudicial evidence to defendant. Defendant failed to preserve this claimed error for review, so the issue is forfeited. We decline defendant's invitation to review this claimed error under the plain error doctrine. As previously addressed, we do not believe the evidence at trial was closely balanced. After our careful review of the record, we also do not

believe that the admission of this evidence was so serious an error as to deny defendant a fair trial.

Defendant next contends that the trial court erred when it failed to instruct the jury pursuant to section 115–10 regarding the weight and credibility to be given to Julia and detective Day’s testimony regarding A.A.’s outcry statements. Again, defendant has forfeited this issue because he did not object to this claimed error at trial, did not tender this instruction to the court during the jury instruction conference, and did not raise this issue in a posttrial motion. Under the plain error doctrine, we must first determine whether a clear and obvious error occurred.

Section 115–10(c) provides:

“If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, or the intellectual capabilities of the moderately, severely, or profoundly mentally retarded person, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.” 725 ILCS 5/115–10(c) (West 2006).

Section 115–10 corresponds with Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. 2000) (hereinafter IPI Criminal 4th), which defendant asserts should have been given to the jury as follows:

“You have before you evidence that [A.A.] made statements concerning the

offenses charged in this case. It is for you to determine whether the statements were made, and, if so, what weight should be given to the statements. In making that determination, you should consider the age and maturity of [A.A.] , the nature of the statements, and the circumstances under which the statements were made.”

The trial court did not provide IPI Criminal 4th No. 11.66 to the jury. The trial court did provide the more general jury instruction pursuant to IPI Criminal 4th No. 1.02:

“Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.”

Even if we were to assume the trial court’s failure to provide IPI Criminal 4th 11.66 constitutes a clear and obvious error, we find no plain error in this case. As previously addressed, under the first prong of the plain error test, the evidence was not sufficiently close to constitute reversible error. Under the second prong, defendant strenuously argues in his brief that the error was so serious that it affected the fairness of his trial. We disagree.

In *People v. Sargent*, 389 Ill. App. 3d 904, 916 (2009), the defendant argued that the trial court committed reversible error by failing to instruct the jury in accordance with section 115–10(c) of the Code. As in the present case, defendant forfeited that issue and asked the court to review his claimed error under the plain error doctrine. *Sargent*, 389 Ill. App. 3d at 916.

After the court determined that the trial court's failure to issue a section 115–10(c) instruction was error, the court proceeded to the plain error analysis and rejected defendant's argument that the evidence was closely balanced under the first prong. *Sargent*, 389 Ill. App. 3d at 918. Under the second prong, the court found that while failing to issue the instruction was error, it was not so fundamental to be considered plain error. *Sargent*, 389 Ill. App. 3d at 922. After discussing *People v. Mitchell*, 155 Ill. 2d 344 (1993) (finding that the defendant had satisfied the first prong of the plain error analysis without referencing the second prong), and its progeny, the court concluded that “*Mitchell* does not preclude the possibility that the general witness jury instruction tendered [] mitigated the trial court's failure to tender a section 115-10(c) instruction.” *Sargent*, 389 Ill. App. 3d at 922. There, the trial court issued the general jury instruction regarding the believability of witnesses. The court believed that the general jury instruction “mitigated the error to the extent that it is not subject to the plain-error doctrine.” *Sargent*, 389 Ill. App. 3d at 922.

In the case *sub judice*, as in *Sargent*, the trial court gave the general jury instruction. Even though the trial court did not include the optional phrase regarding the age of the witness, we believe that the standard pattern instruction advised the jury to consider the witness' ability and opportunity to observe. The jury could have considered any alleged problems with A.A.'s testimony, including her age. Accordingly, we find that the general instruction mitigated any claimed error to the extent that it was not so fundamental as to be considered plain error.

Defendant argues in the alternative that this court should find that defense counsel was

ineffective for failing to request IPI Criminal 4th No. 11.66. To determine whether a defendant received ineffective assistance of counsel, we apply the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). To prevail, defendant must show both that: (1) counsel's representation was so deficient as to fall below an objective standard of reasonableness, and (2) the deficient performance so prejudiced defendant as to deny him a fair trial. *People v. Perry*, 224 Ill. 2d 312, 341 (2007). If either prong of the *Strickland* test is not met, defendant's claim must fail. *Perry*, 224 Ill. 2d at 342.

In *People v. Walker*, 255 Ill. App. 3d 10, 18 (1993), the court found it was not ineffective assistance of counsel when defense counsel failed to request the section 115–10(c) instruction be given for a child witness in a sexual assault case. The *Walker* court explained:

“The standard pattern instruction given advised the jury to consider the witness' ability and opportunity to observe, and to consider the witness' memory. [Citation.] From this, the jury could have considered any alleged problems with the victim's testimony: her age, memory or any alleged “confusion” as to the timing of the incidents.

Although a section 115-10(c) instruction would have been appropriate, the jury was still instructed to consider possible flaws in the victim's testimony and defendant was not denied any substantial right. [Citation.]” *People v. Walker*, 255 Ill. App.3d at 18.

In *People v. Booker*, 224 Ill. App. 3d 542, 556 (1992), the court found that defense counsel was not ineffective because “[d]efendant ha[d] not shown how the instruction given, as opposed to the statutory instruction which should have be tendered, denied him a fair trial.” The court found

that the general instruction “adequately advised the jurors about relevant considerations it should include in making its decision” and “defendant was not prejudiced by the use of the standard instruction.” *Booker*, 224 Ill. App. 3d at 556.

Here, defendant has not established that he was prejudiced by the use of the standard instruction. The standard instruction given advised the jury to consider a witness’ credibility, and the jury could have considered any alleged problems regarding A.A.’s age. Accordingly, defendant was not denied effective assistance of counsel when defense counsel failed to tender the statutory jury instruction.

Defendant next contends that he was denied a fair trial when the State elicited irrelevant and highly prejudicial evidence from Julia and A.A. suggesting that defendant had purposefully delayed the trial, and thus delaying justice for the victim. In particular, defendant argues in his brief that the State elicited that both A.A. and her mother had met with the ASA 10 years earlier and since that time they both had been ready, willing, and able to testify. The trial court sustained defendant’s objections when the State elicited the testimony from A.A. and her mother. In addition, during A.A.’s testimony, the trial court instructed the jury to disregard both the question and answer. Defendant forfeited this issue for review by failing to raise it in a posttrial motion. Defendant requests that this court review the issue as a matter of plain error because the evidence at trial was closely balanced. As we have previously stated, we do not believe the evidence was closely balanced, and therefore, find no plain error under the circumstances.

Defendant next contends he was denied a fair trial because of improper remarks made by

the State during closing argument. Defendant asserts that the State repeatedly called him a liar, disparaged the defense by suggesting that defendant had been a well-coached witness, and misstated the law regarding the presumption of innocence. “The regulation of the substance and style of closing argument lies within the trial court's discretion, and thus the court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion. [Citation.] Defendant faces a substantial burden to achieve reversal of his conviction based upon improper remarks during closing argument.” *People v. Meeks*, 382 Ill. App. 3d 81, 84 (2008). Prosecutors are accorded wide latitude in the content of their closing arguments. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). Only those comments that cause substantial prejudice to the defendant will result in a reversal. *Ramos*, 396 Ill. App. 3d at 874. “Where there are allegations of prosecutorial misconduct, arguments of both the prosecutor and defense counsel must be reviewed in their entirety, and allegations of improper comment must be placed in their proper context.” *Meeks*, 382 Ill. App. 3d at 84.

After considering the State’s closing argument as a whole, we find that the trial court did not abuse its discretion in the manner in which it regulated closing arguments. The conduct of the assistant state’s attorneys was well within the wide latitude accorded during closing argument. The complained-of-statements fall short of causing the substantial prejudice required to warrant reversal under the circumstances.

In his petition for rehearing, defendant contends that the trial court improperly ordered him to serve consecutive sentences of 13 years’ imprisonment and 7 years’ imprisonment when he was convicted of aggravated criminal sexual assault and aggravated criminal sexual abuse,

respectively. Defendant contends that because the trial court did not comply with section 5–8–4 of the Criminal Code of 1961 (the Code) (730 ILCS 5/5–8–4 (West 1996)), which governs the imposition of consecutive sentences, defendant’s sentences are void. We ordered the State to answer defendant’s petition, in which it argued that defendant has forfeited any challenge to his consecutive sentences where the trial court did not exceed the scope of its statutory authority by imposing consecutive sentences.

Defendant did not object to this claimed error at the sentencing hearing but did move the trial court to reconsider his sentence in a posttrial motion, arguing in part that the sentences should have been concurrent and not consecutive. Because claimed errors must be objected to at trial and in a written posttrial motion, defendant has forfeited his challenge that the trial court did not conform with section 5–8–4 of the Code. *Harris*, 394 Ill. App. 3d at 37. Nonetheless, in his petition for rehearing, defendant contends that he attempted to raise this issue in a supplemental brief to the court but that we “erroneously denied leave to file a supplemental brief.” Defendant reasons that because the sentences were void and courts have an independent duty to vacate void orders, this court erred by denying him leave to file a supplemental brief. This circular reasoning requires us to first determine that the sentences were void before addressing whether we erred in denying defendant leave to file a supplemental brief on this issue. We thus turn to defendant’s contention that his sentences are void and are accordingly not subject to forfeiture.

Section 5–8–4 of the Code, subsequently amended, provided:

“(a) The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial

change in the nature of the criminal objective, unless, one of the offenses for which the defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury, or where the defendant was convicted of a violation of Section 12–13, 12–14, or 12–14.1 of the Criminal Code of 1961 [*i.e.*, criminal sexual assault, aggravated criminal sexual assault, and predatory criminal sexual assault of a child], in which event the court shall enter sentences to run consecutively.

(b) The court shall not impose a consecutive sentence unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record.” 730 ILCS 5/5–8–4 (West 1996).

“ ‘A void judgment is one entered by a court without jurisdiction of the parties or the subject matter or that lacks “the inherent power to make or enter the particular order involved.” ’ ” *People v. Land*, 304 Ill. App. 3d 169, 174 (1999), quoting *People v. Wade*, 116 Ill. 2d 1, 5 (1987), quoting *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 309 (1986). As in *Land*, the trial court in this case had jurisdiction over defendant during the sentencing hearing, and “within its discretion, *could have imposed* consecutive sentences pursuant to section 5–8–4(b) of [the Code] had it believed such sentences were necessary to protect the public. [Citations.]” (Emphasis in original.) *Land*, 304 Ill. App. 3d at 174. As in *Land*, “regardless of whether the court erroneously imposed mandatory consecutive sentences, it did not lack ‘the inherent power to make or enter the particular order involved,’ and the sentencing order here was

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not void.” *Land*, 304 Ill. App. 3d at 174. Accordingly, because defendant has forfeited this claimed error by failing to object during the sentencing hearing or raising it in his opening brief to this court, we conclude that the trial court did not err by sentencing defendant to consecutive sentences.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.