

No. 1-09-0219

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FIFTH DIVISION
March 31, 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. 07 CR 18575
)	
RONALD BENNETT,)	
)	Honorable
Defendant-Appellant.)	Evelyn B. Clay,
)	Judge Presiding.
)	

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and Epstein concurred in the
judgment.

O R D E R

HELD: Although defendant's convictions and sentences under counts 8 through 13 must be vacated because they were based on the same physical acts that comprised his other convictions and sentences, defendant's convictions and sentences under counts 6 and 7 were not based upon the same physical act, and, accordingly, both convictions could stand; The State proved defendant guilty of criminal sexual abuse and aggravated criminal

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sexual abuse beyond a reasonable doubt; Defendant was not denied his right to effective assistance of counsel based on counsel's cross-examination of a State's witness; although parts of nurse Kocher's testimony regarding the victim's underwear amounted to impermissible hearsay, the error in admitting such testimony was harmless; and defendant was not denied his sixth amendment right to confront the witnesses presented against based on the victim's inability to recall the incident when called to testify at trial.

Following a bench trial, defendant Ronald Bennett was convicted of six counts of criminal sexual abuse (720 ILCS 5/12-15(a)(1), (a)(2) (West 2008)) and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)) and sentenced to 16 years in the Illinois Department of Corrections. On appeal, Bennett claims: (1) the trial court erred by sentencing him on eight counts when the court had orally merged all the counts into one under the one-act, one-crime rule; (2) the state failed to prove him guilty beyond a reasonable doubt; (3) he was denied his right to effective assistance of counsel; and (4) the trial court improperly admitted hearsay testimony. For the reasons set forth below, we affirm defendant's conviction and vacate a part of the sentence.

BACKGROUND

On September 5, 2007, defendant Ronald Bennett was indicted on 13 counts of sexual misconduct with D.C., a minor. Specifically germane to this appeal are counts 6 and 7.

Count 6 states:

"Ronald Bennett committed the offense of

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Aggravated Criminal Sexual Abuse in that he, being [17] years of age or over committed an act of sexual conduct upon [D.C.], to wit: Ronald Bennett intentionally or knowingly placed his penis between [D.C.'s] buttocks, for the purpose of sexual arousal or gratification of Ronald Bennett or [D.C.] and [D.C.] was under [13] years of age when the act was committed, in violation of Chapter 720[,] Act 5[,] Section 12-16(c)(1)(i) of the Illinois Compiled Statutes 1992 as amended and contrary to the Statute and against the peace and dignity of the same People of the State of Illinois."

Count 7 states:

"Ronald Bennett committed the offense of Aggravated Criminal Sexual Abuse in that he, being [17] years of age or over committed an act of sexual conduct upon [D.C.], to wit: Ronald Bennett intentionally or knowingly transmitted [semen] onto [D.C.'s] vagina, for the purpose of sexual arousal or gratification of Ronald Bennett or [D.C.] and

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[D.C.] was under [13] years of age when the act was committed, in violation of Chapter 720[,] Act 5[,] Section 12-16(c) (1) (i) of the Illinois Compiled Statutes 1992 as amended and contrary to the Statute and against the peace and dignity of the same People of the State of Illinois."

Under section 12-16(c) (1) (i) of the Criminal Code of 1961:

"The accused commits aggravated criminal sexual abuse if: (1) the accused was 17 years of age or over and (i) commits an act of sexual conduct with a victim who was under 13 years of age when the act was committed."
720 ILCS 5/12-16(c) (1) (i) (West 2008).

At trial, Mercy Hospital nurse Nancy Kocher testified that on December 1, 2004, D.C.'s mother and the police brought the child, then age 10, to the emergency room. Kocher testified that D.C. described how the events leading to her arrival at the hospital unfolded. Bennett, her mother's boyfriend, was babysitting her while her mother was out. Kocher testified that D.C. told her that while Bennett was on the couch in his underwear, he called her over to him, pulled her on top of his body and "humped" her. Kocher testified that D.C. told her that

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she was fully clothed while Bennett wore his boxer shorts and there was no sexual penetration. An external exam of D.C.'s genital area did not show signs of trauma.

Dr. Karen Doherty examined D.C. and had her remove her clothing, which she placed in a sealed bag, then into a rape kit also including a swab sealed in a container.

D.C. testified that she could not remember the events of December 1, 2004.

Assistant State's Attorney Melanie Fialkowski testified that just prior to trial, on July 31, 2008, she was present when another assistant state's attorney had a conversation with D.C. where D.C. remembered going to the hospital, removing her clothes and giving them to the doctor.

Illinois State Police forensic scientist Ryan Paulsen testified that he identified a semen stain in the crotch area of D.C.'s underwear and opined, within a reasonable degree of scientific certainty, that he identified a single sperm head in the underwear. Paulsen preserved the semen for DNA testing.

Illinois State Police forensic scientist Christine Caccamo profiled and analyzed the DNA collected from the sperm stain in the underwear along with DNA collected from oral swabs of D.C. and Bennett. Caccamo testified that there was a male and female DNA profile in the underwear and Bennett could not be excluded

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from the male profile.

The trial court found Bennett guilty of six counts of criminal sexual abuse and two counts of aggravated criminal sexual abuse under sections 12-15(a)(1), (a)(2), and 12-16(c)(1)(i) of the Criminal Code of 1961 (720 ILCS 12-15(a)(1), (a)(2), and 720 ILCS 5/12-16(c)(1)(i) (West 2008)).

The trial court stated:

"The evidence has clearly shown beyond a reasonable doubt that the defendant pulled the victim onto him, on top of him and *** he, in the words of the victim, humped her leaving his sperm in the crotch of her panties.

The sperm was tested and found to have contained his DNA, and his identification will [be] establish[ed] in this case scientifically through that DNA evidence, and the state has proven these charges counts 6 through 13 beyond a reasonable doubt, and the charges merge into one crime."

The trial court denied Bennett's motion to reconsider and motion for a new trial and sentenced him, without merging all the counts into one crime, to six years in prison for Count 6,

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aggravated criminal sexual abuse (intentionally placing his penis between D.C.'s buttocks), and six years in prison for Count 7, aggravated criminal sexual abuse (intentionally transmitting semen onto to D.C.'s vagina), with the sentences to be served consecutively. 720 ILCS 5/12-16(c)(1)(i) (West 2008). For counts 8 through 13, criminal sexual abuse, the trial court sentenced Bennett to four years in prison to be served concurrent with each other and consecutive to counts 6 and 7. 720 ILCS 5/12-15(a)(1), (a)(2) (West 2008). This appeal followed.

ANALYSIS

In this appeal, Bennett argues: (1) the trial court erred by sentencing him on eight counts when prior to sentencing the trial court had orally merged all the counts into one under the one-act, one-crime rule; (2) the state failed to prove his guilt beyond a reasonable doubt; (3) he was denied his right to effective assistance of counsel; and (4) the trial court improperly admitted hearsay evidence.

One-act, One-crime Rule

Bennett argues this court should vacate his convictions and sentences for all counts but Count 7, the greater offense, because these offenses merge into a single count, under the one-act, one-crime doctrine.

Here on appeal, the state concedes counts 8 through 13

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should be merged. We agree. Defendant's convictions and sentences on those counts should be vacated and the mittimus corrected. Therefore, we will forego analysis on counts 8 through 13 and respond to defendant's claims concerning counts 6 and 7.

Where, as here, the issues raised are ones purely of law, our review is *de novo*. *People v. Artis*, 232 Ill. 2d 156, 161 (2009).

Bennett acknowledges that his one-act, one-crime argument was not raised in the trial court and is therefore forfeited. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). However, forfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process. *Id.*

The State concedes that one-act, one-crime doctrine issues are reviewed under the plain-error doctrine. However, the State argues that counts 6 and 7 are separate acts and the convictions on those counts should stand.

Bennett argues counts 6 and 7 should merge because Count 7, the transmission of semen upon D.C., is based upon the same act as Count 6, the placing of his penis between D.C.'s buttocks.

However, based upon the definition of "sexual conduct," the key element under the crime of aggravated criminal sexual abuse

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(720 ILCS 5/12-16(c)(1)(i) (West 2008)), we do not find Bennett's argument persuasive.

Sexual conduct is defined under section 12-12(e) of the Criminal Code of 1961 as:

"[A]ny intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/12-12(e) (West 2008).

Thus, under section 12-12(e), there are essentially three scenarios for sexual conduct: (1) intentional fondling of the victim's sex organs either directly or through clothing, or (2) an intentional fondling of any part of the body of a child under age 13, or (3) any transfer or transmission of semen by the accused upon any part of the clothes or unclothed body of the victim, for the purpose of sexual gratification. 720 ILCS 5/12-12(e) (West 2008).

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The first scenario under section 12-12(e) is expressly listed in Count 6 of Bennett's indictment while the second scenario is expressly listed in Count 7. Therefore, we cannot say Bennett's aggravated criminal sexual abuse conviction under Count 7 for transmission of semen upon D.C. is based upon the same act listed in Count 6 of the indictment, the placing of his penis between D.C.'s buttocks, because the Criminal Code of 1961 defines the transmission of semen and the touching of a sex organ, as two separate and distinct acts. As such, Bennett's aggravated criminal sexual abuse conviction for placing his penis between D.C.'s buttocks is a single act because it does not require the transmission of semen. Likewise, Bennett's aggravated criminal sexual abuse conviction for the transmission of semen is a single act because it does not require Bennett to place his penis between D.C.'s buttocks because the Criminal Code of 1961 defines these acts as separate and distinct acts. 720 ILCS 5/12-12(e) (West 2008). Accordingly, Bennett's convictions under counts 6 and 7 are not based upon the same physical act, and both convictions can stand. See *People v. King*, 66 Ill. 2d 551, 566 (1977).

However, as previously stated, the convictions and sentences imposed for counts 8 through 13 are vacated because they are based on the same two physical acts as counts 6 and 7 and merge

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under *King*.

Proof Beyond A Reasonable Doubt

Bennett claims the State failed to prove his guilt beyond a reasonable doubt of criminal sexual abuse and aggravated criminal sexual abuse.

Due process requires a person may not be convicted in a criminal proceeding "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, the relevant inquiry 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. Woods*, 214 Ill. 2d 455, 470 (2005). A court of review will not overturn the fact finder's verdict unless "the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *People v. Sherrod*, 394 Ill. App. 3d 863, 865 (2009), citing *People v. Maggette*, 195 Ill. 2d 336, 353 (2001).

Bennett claims the State: (1) failed to show how a single

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head of his sperm appeared on D.C.'s underwear, (2) failed to define "humping," (3) failed to prove that he transmitted semen during the alleged sexual conduct with D.C. "where the evidence adduced at trial established that ejaculation did not occur," (4) failed to prove he used or threatened force, and (5) failed to prove that D.C. was unable to understand the nature of the sexual act.

Again, we will not analyze the sufficiency of the evidence regarding Bennett's convictions for criminal sexual abuse because we already found those convictions merge into aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)) under *King*.

To sustain Bennett's convictions for aggravated criminal sexual abuse, the prosecution was required to prove: (1) the defendant was 17 years of age or over, (2) the defendant committed an act of sexual conduct with a victim who was under 13 years of age when the act was committed. 720 ILCS 5/12-16(c)(1)(i) (West 2008).

There is no question that Bennett was over the age of 17 at the time of the offense. In regards to an act of sexual conduct, nurse Kocher testified that D.C. informed her that Bennett humped her. Based on this testimony we cannot say the trial court was unreasonable when it determined Bennett intentionally fondled the minor victim through her clothing. 720 ILCS 5/12-12(e) (West

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2008). The evidence also showed that Bennett's semen was found in D.C.'s underwear. Pursuant to section 12-12(e), the transfer of semen is sexual conduct. *Id.*

Bennett, however, claims the state failed to prove beyond a reasonable doubt that the semen found in D.C.'s underwear resulted from sexual conduct between D.C. and himself.

Bennett claims that the semen may have transferred onto D.C.'s underwear while it laid in a laundry basket or while she sat on her mother's bed.

However, section 12-12(e) defines sexual conduct as the transfer of semen and does not detail the mechanism for the transfer, merely that the semen was transferred. Here, the evidence shows that Bennett's semen transferred from his body to D.C.'s underwear, an occurrence that is sexual conduct under section 12-12(e).

The evidence shows that Bennett humped D.C. and his semen was later found in her underwear. We cannot say, based on this evidence, that "the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *Sherrod*, 394 Ill. App. 3d at 865.

Bennett raises additional issues, claiming the State failed to define humping and failed to prove that there was penis-to-buttocks contact. However, Bennett has not presented any

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authority that the State was required to define humping or that the trial court was required to express a definition of humping in order to make a reasonable determination. Furthermore, we cannot say that it was necessary for the State or the trial court to define humping. In addition, we cannot say Kocher's testimony that D.C. told her that Bennett pulled her on top of him and humped her, coupled with the scientific finding of Bennett's semen in D.C.'s underwear, is not evidence of penis-to-buttocks contact.

Thus, after viewing the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could find the essential elements of criminal sexual abuse beyond a reasonable doubt. *Woods*, 214 Ill. 2d at 470.

Ineffective Assistance of Counsel

Defendant claims his trial counsel was ineffective because on cross examination of nurse Kocher, he opened the door to testimony explaining that the underwear D.C. wore during the offense was the same underwear later analyzed for semen.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness, and that, without those errors, there was a reasonable probability his trial would have resulted in a

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different outcome; and (2) counsel's deficient performance prejudiced the defense. *People v. Ward*, 371 Ill. App. 3d 382 (2007); *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 446 U.S. at 689; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Mistakes in strategy or tactics alone do not normally amount to ineffective assistance of counsel nor does the fact that another attorney may have handled things differently. *Ward*, 371 Ill. App. 3d at 434, citing *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

Because a defendant's failure to satisfy either prong of the *Strickland* test will defeat an ineffective assistance of counsel claim, we are not required to "address both components of the inquiry if defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. Accordingly, we need not determine whether counsel's performance was actually deficient if we determine defendant suffered no prejudice as a result of his counsel's alleged deficiencies. *Edwards*, 195 Ill. 2d at 163, citing *Strickland*, 466 U.S. at 697. It is the defendant's burden to affirmatively prove prejudice. *Strickland*, 466 U.S. at 693.

Generally, counsel's trial decisions regarding the cross-examination of a witness will not support an ineffective

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assistance of counsel claim because those decisions are normally a part of counsel's trial strategy. *People v. Franklin*, 167 Ill. 2d 1, 22 (1995). The manner in which to cross-examine a particular witness "involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *People v. Pecoraro*, 175 Ill. 2d 294, 326-27 (1997). Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable. *Pecoraro*, 175 Ill. 2d at 327.

In Bennett's appellate brief, he claims that when his trial counsel cross-examined Kocher, he "invited testimony that D.C. told Kocher that she did not change her clothes after the incident and, therefore, the underwear analyzed for the presence of semen were the same underwear that D.C. wore during the offense." However, after review of the record, we cannot say Kocher's testimony on cross-examination "opened the door to evidence both contrary to [the defense] theory of the case and which proved to be the lynchpin in Bennett's conviction," as Bennett suggests in his appellate brief.

Bennett's trial counsel was not satisfied that Kocher's testimony established that the underwear D.C. wore at the hospital was the same underwear she wore during the offense.

In his closing argument, Bennett's trial counsel stated:

"We are just left to speculate, your Honor, that's the clothing that [D.C.] had on. How long did she have it on? Was it on for two days? Was it on for a half a minute? Was it wiped on anything? We know that she lived with her mother. Where did it come from? We don't know. And all you have to do is speculate. That's not enough, your Honor, to find this man guilty beyond a reasonable doubt of the crimes charged."

In addition to Kocher's testimony on redirect, the fact that D.C. was wearing the same clothes at the hospital as she wore during the offense may have been established by Kocher's earlier testimony on direct examination where she testified that D.C.'s mother and the police brought the child to the emergency room shortly after the offense occurred. We cannot say it was unreasonable for the trial court to deduce from this fact that D.C. wore the same clothes to the hospital that she wore during the offense.

In addition, the State commented on the underwear and the discovery of Bennett's DNA in the garment during opening statements and, according to their appellate brief, intended to introduce this evidence during trial.

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The record shows Bennett's trial counsel vigorously advocated for his client's innocence both prior to trial and at trial. Bennett's trial counsel was especially vigilant in attacking the chain of custody of the DNA sample linking Bennett to the sperm found in D.C.'s underwear. He refused to stipulate to the scientific findings of the State's witnesses and forced the State to bring in experts from out of town to testify at trial. He then vigorously cross-examined the State's witnesses at trial.

However, even if counsel's cross-examination opened the door to testimony establishing D.C. wore the same clothes to the hospital as during the offense, as Bennett suggests, defendant cannot satisfy the second prong of his ineffective assistance of counsel claim because he was not sufficiently prejudiced by his counsel's cross-examination of Kocher. As noted, under the second prong of the *Strickland* standard, the defendant must show that, "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

In *People v. Evans*, 209 Ill. 2d 194 (2004), our supreme court instructs:

"[A] reasonable probability that the

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result would have been different is a probability sufficient to undermine confidence in the outcome - or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220.

We cannot say that even if counsel had not discussed D.C.'s clothes on cross-examination that the result of the trial would have been different in light of the overwhelming evidence of Bennett's guilt. Nurse Kocher's testimony established that D.C. went to the hospital on the same day that the offense occurred. D.C. told Kocher that Bennett pulled her on top of him and humped her. Forensic experts testified that Bennett's semen and DNA was discovered in the crotch of D.C.'s underwear. As a result, we cannot say Bennett was prejudiced by counsel's cross-examination of Kocher.

A defendant's failure to make a requisite showing of either deficient performance or sufficient prejudice defeats an ineffective assistance of counsel claim. *Ingram*, 382 Ill. App. 3d at 1006. In this case, the defendant failed to prove the prejudice prong of the *Strickland* test. Thus, we cannot say that trial counsel's representation was ineffective.

Hearsay Testimony

Bennett argues that the admission of Kocher's testimony regarding statements D.C. made to her in the emergency room was inadmissible hearsay and deprived him of a fair trial.

Bennett failed to present this claim in a posttrial motion and has thus forfeited the claim. The Illinois Supreme Court has held that a "defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review." *People v. Woods*, 214 Ill. 2d 455, 470 (2005).

However, under the plain error doctrine, a reviewing court may consider unpreserved error when: (1) a clear or obvious error occurs, and the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant; or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 188-87 (2005). In order to find plain error, this court must first find that the trial court committed error. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008).

We review a trial court's decision as to the admissibility of evidence under an abuse of discretion standard. *People v.*

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Gonzalez, 379 Ill. App. 3d 941, 953 (2008). 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. Major-Flisk*, 398 Ill. App. 3d 491 (2010), citing *People v. Sharp*, 391 Ill. App. 3d 947, 955 (2009).

Hearsay is an out-of-court statement offered to establish the truth of the matter asserted; hearsay is generally not admissible in evidence. *People v. Williams*, 181 Ill. 2d 297, 312-13 (1998), citing *People v. Rogers*, 81 Ill. 2d 571, 577 (1980).

The Illinois Supreme Court has held that when reviewing the admissibility of a hearsay statement, an appellate court must determine, first, whether the statement met the statutory requirements of a hearsay exception. *People v. Spicer*, 379 Ill. App. 3d 441 (2007), citing *People v. Melchor*, 226 Ill. 2d 24, 34-35 (2007). Only if the court determines that the statement qualifies as a hearsay exception may the court then proceed to consider the sixth amendment issue. *Id.*

Under section 115-13 of the Code of Criminal Procedure of 1963:

"In a prosecution for violation of
Section 12-13, 12-14, 12-14.1, 12-15 or 12-16

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of the 'Criminal Code of 1961', statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule." 725 ILCS 5/115-13 (West 2008).

Bennett claims that D.C.'s statements to nurse Kocher do not fall under the hearsay exception of section 115-13 because they were not descriptions of the cause of symptom, pain or sensations and the State did not present evidence that D.C. came to the hospital for diagnosis or treatment. Bennett claims there also was no evidence that D.C. made any complaint to her mother or anyone else.

We agree with Bennett that D.C.'s statement to Kocher concerning her clothing was not "reasonably pertinent to [her] diagnosis or treatment." 725 ILCS 5/115-13 (West 2008). It was pertinent only to the chain of custody and foundation for introduction of potential evidence. Such statements do not fall within the purview of section 115-13.

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Since we find the trial court erred in allowing D.C.'s statement concerning her clothing to nurse Kocher at the emergency room into evidence under the medical diagnosis exception to the hearsay rule, we must next determine whether there was plain error.

Under the plain error doctrine, we cannot say the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant. Moreover, we cannot say Bennett was prejudiced by admission of the clothing evidence because the totality of the evidence established Bennett committed the crime of aggravated criminal abuse. The evidence shows Bennett overcame D.C., a minor, with superior size and strength, and humped her, and his semen and DNA was later discovered in her underwear. Bennett has not met his burden of showing he was prejudiced by the error under either prong of the plain error doctrine. *Herron*, 215 Ill. 2d at 182. Bennett has failed to show that the error rises to plain error; therefore, he has forfeited the issue.

Next Bennett claims that admission of all of D.C.'s statements to nurse Kocher violate his right to confront the witnesses against him. *Spicer*, 379 Ill. App. 3d at 451. We will review this issue under the plain error doctrine as well.

Whether the admission into evidence of Kocher's testimony

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concerning her conversation with D.C. at the hospital violated Bennett's right of confrontation is a question of law subject to *de novo* review. *People v. Sutton*, 375 Ill. App. 3d 889, 897 (2007).

Pursuant to the sixth amendment: "In all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const. Amend. VI. This part of the 6th amendment is known as the "confrontation clause" and applies to the states through the 14th amendment. *Spicer*, 379 Ill. App. 3d at 452.

In 2004, with *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court fundamentally altered its approach to confrontation clause analysis. *Spicer*, 379 Ill. App. 3d at 452. Prior to *Crawford*, the United States Supreme Court had held that the sixth amendment permitted the introduction of hearsay statements by unavailable declarants so long as the statements had "adequate indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *Spicer*, 379 Ill. App. 3d at 452.

In *Crawford*, the United States Supreme Court determined that the "indicia of reliability" rationale from *Roberts* had departed from the original common law principles underlying the confrontation clause by allowing the introduction of testimonial statements of witnesses that were never subject to cross-

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examination. *People v. Ingram*, 382 Ill. App. 3d 997, 1001 (2008), discussing *Crawford*, 541 U.S. at 60. As a result, if a court determines that an out-of-court statement is testimonial, that statement may not be admitted into evidence. *Ingram*, 382 Ill. App. 3d at 1001-02;

" 'Conversely, where nontestimonial hearsay is at issue, the Court held that "it is wholly consistent with the Framers" design to afford the States flexibility in their development of hearsay law as would an approach that exempted such statements from Confrontation Clause scrutiny.' " *People v. Leach*, 391 Ill. App. 3d 161, 169 (2009), quoting *Crawford*, 541 U.S. at 68.

Crawford did not define what accounts for a testimonial statement but noted a few possible definitions such as interrogation by police officers, prior testimony at a preliminary hearing, grand jury testimony, and testimony at a former trial. *People v. Stechly*, 225 Ill. 2d 246, 266 (2007), citing *Crawford*, 541 U.S. at 203. In *Davis v. Washington*, 547 U.S. 813 (2006), the court slightly expanded on what constitutes a testimonial statement to include statements made to police at the scene of a domestic altercation while ruling emergency calls to a 911 operator were not testimonial. *Davis*, 547 U.S. at 828-29.

The court stated in *Davis*:

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"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Davis, 547 U.S. at 822.

When a statement is made to a non-government official, a determination of whether that statement is testimonial begins with a focus on the declarant's intent, *i.e.*, whether it was a solemn statement made with the intent of establishing facts regarding past events. *Stechly*, 225 Ill. 2d at 288; *In re Rolandis G.*, 232 Ill. 2d 13, 31 (2008). Thus, we must determine whether nurse Kocher was acting as a representative of the police when she received D.C.'s statement in the emergency room. *In re Rolandis G.*, 232 Ill. 2d at 32.

D.C. arrived at the hospital a victim of sexual abuse and her intent was to give nurse Kocher information so she could be

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medically treated. The statements, other than those regarding her clothing, were made in the course of D.C.'s medical treatment. The objective circumstances would not lead a reasonable person to conclude that D.C.'s statements would be used for prosecution. Nurse Kocher is not a police officer and was not gathering information for prosecution, rather she was attempting to medically treat D.C. after the child had been sexually abused.

In addition, D.C. testified at trial and was available for cross-examination. Even though D.C. testified that she could not remember the events in question, we still cannot say she was unavailable for cross-examination because the trial court is in the best position to observe the child's demeanor and determine whether fear or some other factor is preventing the child from communicating in the courtroom. *Major-Flisk*, 398 Ill. App. 3d at 503. In this case, where the trial court was not asked to exercise its discretion and rule on D.C.'s availability, we do not believe that this court should make such a determination for the first time on appeal with the benefit of only the transcript of proceedings. *Id.*

In *Major-Flisk*, we noted that the United State's Supreme Court found that a witness's assertion of memory loss "is often the very result sought to be produced by cross-examination, and

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can be effective in destroying the force of the prior statement." *Id.*, quoting *United States v. Owens*, 484 U.S. 554, 562 (1988).

Moreover, in *Crawford* the court held that where "the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.*, quoting *Crawford*, 541 U.S. at 59).

We also noted in *Major-Flisk* that the Supreme Court prior to *Crawford* explained what it means to appear for cross-examination. In *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985), the Supreme Court found that the defendant's confrontation rights were not violated where the prosecution's expert witness could not recall the basis for his expert opinion. The Court stated, "[g]enerally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Major-Flisk*, 398 Ill. App. 3d at 504, quoting *Fensterer*, 474 U.S. at 20.

As a result, Bennet has failed to show that D.C.'s statements to nurse Kocher regarding the offense were in violation of *Crawford* and, thus, we cannot say plain error has occurred; Bennett has forfeited the issue.

CONCLUSION

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_____We affirm defendant's convictions for criminal sexual abuse and aggravated criminal sexual abuse. We vacate defendant's convictions and sentences on counts 8 through 13 based on the one-act, one-crime doctrine. We remand the cause to the trial court for the purpose of amending defendant's mittimus to reflect convictions on one count of criminal sexual abuse, and one count of aggravated criminal sexual abuse.

_____Affirmed in part, vacated in part, and remanded with directions.
