2015 IL App (3d) 120992-U

Order filed May 7, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
| | ) | of the 10th Judicial Circuit, |
| Plaintiff-Appellee, | ) | Peoria County, Illinois. |
| | ) | |
| v. | ) | Appeal No. 3-12-0992 |
| | ) | Circuit No. 09-CF-363 |
| STEVEN COLE, | ) | |
| | ) | Honorable |
| Defendant-Appellant | ) | James E. Shadid |
| | ) | Timothy M. Lucas |
| | ) | Judges, Presiding |

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JUSTICE O'BRIEN delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice Schmidt specially concurred.

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**ORDER**

¶ 1 *Held*: Defendant was denied a fair trial by the State's improper comments in its closing argument that shifted and diminished the State's burden of proof. Evidence was insufficient to sustain defendant's conviction for predatory criminal sexual assault of a child; defendant's conviction and sentence cannot stand.

¶ 2 Defendant Steven Cole was found guilty by a jury of predatory criminal sexual assault of a child, aggravated battery of a child, and aggravated criminal sexual abuse. The convictions resulted from the assault of a 20-month-old girl Steven was babysitting. The trial court

sentenced him to 25 years' imprisonment. He appealed his conviction and his sentence. We reverse the conviction and vacate the sentence.

¶ 3 FACTS

¶ 4 In March 2009, defendant Steven Cole was indicted on two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1), (2) (West 2008)); one count of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2008)); and one count of aggravated criminal sexual assault (720 ILCS 5/12-16(c)(1)(I) (West 2008)). The allegations for each count stated that Steven injured a child younger than 13 years of age. The State later dismissed one count of predatory criminal sexual assault of a child.

¶ 5 A jury trial took place. The victim's mother, Karissa Miles, testified. The victim, M.A., is her daughter. In January 2009, Miles and M.A. lived with a roommate, Jonathan Duncan. M.A. was 20 months old at the time. On January 7, Miles bought a car from a friend. She left M.A. alone with the friend's roommate for about 15 minutes while she examined the car. Later that afternoon, Miles brought the car to the home of Janet and Steven Cole. Miles described the Coles as second parents to her. They had been babysitting M.A. since the summer of 2008. Miles saw the Coles about three times a week. On January 7, both Steven and Janet were home when she arrived. Steven agreed to do some needed brake work on her newly-acquired vehicle and he drove her to work at 2:30 p.m. Before leaving, Miles changed M.A.'s diaper and did not notice anything unusual. She did not put a hobby horse toy in M.A.'s playpen.

¶ 6 The Coles picked her up from work at 9 p.m. M.A. was asleep in her car seat. M.A. did not appear to be in distress. The Coles drove Miles and M.A. home. M.A. remained asleep when Miles brought her inside so Miles decided not to change M.A.'s diaper for fear of waking her. Duncan was home and getting ready for work. Miles made a phone call, drank six to eight beers,

and went to bed around midnight. She took M.A. upstairs with her, where they shared a bed. Miles woke up around 7 a.m. and saw M.A. pulling on her diaper. When Miles changed the diaper, she noticed blood in it. She also noticed a tear in M.A.'s vagina. She called and texted Duncan at work and asked him to return home immediately. She also texted that there would be questions and it would be better if they answered them together. Miles did not call 911 because she did not think there was an emergency.

¶ 7 Miles and Duncan took M.A. to the emergency room. M.A. was admitted to the hospital, underwent surgery and stayed for four days. Miles testified she did not know what caused her daughter's injuries, but M.A. was not injured by Miles or while in Miles' care. She believed that M.A. was injured while in the care of the Coles. She called the Coles and asked what had happened to M.A. She described that Steven sounded angry and said something "to the effect of 'don't give them our names, don't get us involved.' " Miles never informed the police of her conversation with Steven. She first disclosed it in 2011 or 2012 in a conversation with an assistant state's attorney. She called Coles for several weeks after the injury to get her car back and her friend eventually had to get the keys from Steven.

¶ 8 Duncan testified that he was a CNA attending nursing school. On January 7, 2009, he got up at 10 p.m., left home at 10:30 p.m., and began a work shift at 11 p.m. When he left home, Miles was on the phone and M.A. was asleep on the couch. Miles texted him in the morning that there was an emergency at home. The text also said that Miles wanted him to come with her to the emergency room in case they questioned her. When he arrived home, he opened M.A.'s diaper and looked at her. He knew right away there was something wrong and that M.A. needed to go to the hospital. Miles had gathered gloves and Q-tips for him to examine M.A. but he did not use them. They left the diaper at home with the Q-tips in it when they went to the hospital.

Duncan returned home from the hospital with two police officers and an investigator from the Department of Children and Family Services (DCFS). The police took pictures and collected several diapers. Although he was a mandatory child abuse reporter, he did not notify DCFS of M.A.'s injuries.

¶ 9 Shawn Meeks, a Peoria police officer, spoke to Miles at the hospital on January 8, 2009. At that time, he was assigned to the Children's Advocacy Center (CAC) to investigate crimes involving children. Meeks testified that Miles seemed genuinely concerned about her daughter. Meeks accompanied Duncan, fellow officer Paul Tuttle, and a DCFS investigator to the Miles/Duncan residence. Miles told him a targeted area where she would have set the diaper. He collected one diaper, which he believed he found on top of the dishwasher in the kitchen area and put it in a sack. He could not recall if the diaper was open or closed when he collected it. He could not remember whether there were any Q-tips in it. He gave the diaper to Tuttle.

¶ 10 Paul Tuttle testified that he is a Peoria police officer. He collected nine diapers from the Miles/Duncan house including the diaper given to him by officer Meeks. Meeks told him that diaper was found on top of the dishwasher. Tuttle identified the diaper Meeks gave him as Diaper A and a diaper he found in kitchen trash can at the Miles/Duncan house as Diaper B. He took a photograph of the trash can, which showed several diapers in it. He collected two additional diapers from the Cole home.

¶ 11 Kevin Zeeb, a forensic scientist at the Morton Crime Lab, testified that he examined the sexual assault kit from M.A.'s examination at the hospital. There was no semen found on the vaginal, oral or anal swabs. Blood was found on the vaginal swab. He also examined Diapers A and B. Diaper A contained a baby wipe. He found blood on the diaper and the wipe, and a sperm cell on the wipe. He tested 11 areas on the diaper and found five areas positive for semen.

He did not find sperm in any of the 11 areas. Diaper B contained a baby wipe and two Q-tips. He found blood in the diaper but no semen. The testimony of Debra Minton, a forensic scientist, was entered by stipulation. Minton would testify that five DNA samples were extracted from Diaper A and the baby wipe but she could not use it to identify a particular DNA profile.

¶ 12 Janet Cole testified under a grant of use immunity. She was married to the defendant. Janet and Miles were good friends and Miles visited her often at the Coles' house. Janet had babysat M.A. since 2008. On January 7, 2009, Miles, her friend Doug, and M.A. came over in the afternoon. She and Steven were both home. Steven agreed to do brake work Miles needed on a used car she had just bought. Around 2:15 or 2:30, Miles changed M.A.'s diaper and put the baby down for a nap before Steven took her to work. M.A. awoke around 5:30 and Janet changed her diaper. She noticed M.A. had a "bad" bowel movement and her rear end and anus were red. When Janet cleaned M.A. with a baby wipe, M.A. flinched and said, "owie." She was not surprised or taken aback by what she saw and did not call her husband to look at M.A. She put Vaseline on the sore areas and notified Miles about it. She did not hurt M.A. Janet and Steven picked Miles up from work. M.A. woke up and Miles and M.A. played in the back seat. They dropped Miles and M.A. at their house.

¶ 13 Meeks was recalled as a witness and testified that he interviewed Janet on January 9. She told him that when she changed M.A.'s diaper, she was surprised and "taken aback" because M.A.'s anus was very red. She said, "oh my," and called her husband to look. Janet said they did not tell Miles and did not say M.A. woke and played in the car. He also interviewed Steven Cole on January 9. Steven said he and Janet were the only ones home on January 7. Before he took Miles to work, Miles put a "stick hobby horse toy-type thing" in M.A.'s playpen. M.A. was asleep when he returned home around 3 p.m. She woke from her nap around 6 p.m., and he

assisted Janet to change M.A.'s diaper. Steven could not recall anything unusual about the diaper change. He and M.A. played the "baby wipe game" and she did not seem to be in pain or discomfort. M.A. fell asleep on the drive to pick up Miles. The next morning, Miles called him to inform him there was blood in M.A.'s diaper and asked whether any injury occurred.

¶ 14 Channing Petrak, the medical director of the Pediatric Resource Center in Peoria, part of the Illinois College of Medicine, testified. The Center medically evaluates children where there is a suspicion of abuse or neglect. She first examined M.A. in the emergency room and recommended immediate surgery. She later examined M.A. in the operating room prior to surgery when the child was under anesthetic and performed a sexual assault examination. M.A. suffered significant perineal laceration. On a one-to-four scale, with four the worst, Petrak rated M.A.'s injuries as a three. In her opinion, the injury was not accidental and could have been caused by a penis, a finger or a multitude of other objects and was likely the result of sexual assault or abuse. M.A.'s mother provided a history but it did not include a recent accident. Because there were no signs of healing, Petrak estimated the injury would not have occurred several days earlier. It could have occurred as soon as two hours before M.A. arrived at the emergency room.

¶ 15 The evidence deposition of Amy Stanfill was played for the jury. Stanfill was a clinical assistant professor of surgery and pediatrics at OSF St. Francis Medical Center in Peoria. On January 8, 2009, she examined M.A. and scheduled surgery. On further examination in the operating room, she found a perineal laceration that included a tear of part of the vagina skin, torn muscles between the vagina and rectum, and a partial tear of the anal sphincter muscle. On a scale of one to four, the laceration was a third degree of tear. She performed surgery on M.A. and sutured the tears. In Stanfill's opinion, the injuries could have been accidental or non-

accidental. Accidental causes would include slipping on a bicycle, falling on the edge of a pool, and a car crash. Miles did not indicate any information about an accident when Stanfill took a history and the history is key to identifying a cause of injury. Stanfill could not provide a precise timeframe but estimated that the injury was not that old because there were no significant signs of healing. Meeks again testified, stating that Stanfill told him that the timeframe for the injury was "clearly less than forty-eight hours, but most likely between an eight and twenty-four hour period."

¶ 16 James Kenny also testified as a defense witness. He was a board certified urologist and an associate professor at the University of Illinois. The trial court deemed him an expert witness. Kenny never treated or examined Steven, except for a digital prostate exam, and relied on Steven's medical records for his testimony. He explained the vasectomy procedure and stated that Steven had one in 2009. Steven's records indicated the procedure was successful, which generally means that three consecutive samples of ejaculate are negative. There was no indication in the record that Steven followed up with the tests. Kenny assumed the doctor followed his usual procedure. Steven had some issues post-procedure, including a skin infection. Steven returned to the office in 2011 with testicle tenderness. He underwent a semen analysis to determine if there was a potential to output sperm. It consisted of the series of three monthly tests. The results indicated Steven was azoospermic, meaning he had no sperm in his semen. Kenny acknowledged that not all vasectomies are successful and recanalization may occur, albeit rarely. Recanalization involves emission of one or more sperm cells by a person who has undergone a vasectomy. There was no indication that recanalization had occurred in Steven. It was Kenny's medical opinion that Steven could not emit sperm and could not have done so in

January 2009 and that the sperm cell found on the baby wipe could not have been emitted by Steven.

¶ 17 The presentation of evidence was concluded and closing arguments took place. The State argued, among other points, the horrific nature of the injuries suffered by the 20-month-old victim, referring to the crimes as "disgusting" and stating that "We like to think those things don't happen, especially not in Peoria, right?" The State referenced the testimony of the defense expert, Kenny, and invited the jury to rely on other evidence if it did not believe Kenny's opinion that Steven could not emit sperm. It asked the jury if it was "more likely" or "more reasonable" to believe the sperm was produced by a man who had a vasectomy or by a "mystery person" who "somehow got rid of his 999 million other sperm and left only one." The State also asked the jury to speak for M.A., who could not speak for herself and to "tell everyone who committed this despicable crime" by returning guilty verdicts. The jury found Steven guilty of all three offenses.

¶ 18 A sentencing hearing took place. Before proceeding to sentencing, the trial court heard and denied Steven's motion for a new trial or a judgment notwithstanding the verdict. A presentence investigation (PSI) report indicated that Steven was 55 years old at the time of the offense and 59 years old at sentencing. He graduated from high school in 1971, earned 19 hours of college credit, and served in the Air National Guard from 1972 to 1978. He worked at Caterpillar from 1972 to 2007. He has been married three times; 1972 to 1988, 1992 to 1998, and 2007 to the present. He had two grown children. He had no prior convictions other than five traffic violations between 1985 and 1992. There were 21 letters appended to the PSI report attesting to Steven's good character and expressing disbelief that he committed the offenses. In allocution, Steven expressed sympathy and sorrow to M.A. and Miles but denied assaulting M.A.

¶ 19 The trial court went through the statutory sentencing factors. It found in mitigation that Steven had served in the military, had a significant and consistent history of employment, no criminal history, and strong family and community ties. In aggravation, the trial court found that M.A. suffered serious harm and that Steven was in a position of trust as her babysitter. The trial court imposed a 25-year term of imprisonment for predatory criminal sexual assault of a child and merged the other convictions. Steven thereafter moved for reconsideration of his sentence, which the trial court heard and denied. Steven followed with this appeal.

¶ 20 ANALYSIS

¶ 21 Steven raises four issues on appeal. He argues he was not proved guilty beyond a reasonable doubt of predatory criminal sexual assault of a child; that the State's comments in closing arguments denied him a fair trial; that the admission of irrelevant evidence served to deny him a fair trial; and that his 25-year sentence was excessive.

¶ 22 We begin with Cole's claim that he was denied a fair trial by the State's comments in its closing argument. Cole argues that the State's improper closing argument denied him a fair trial by appealing to the jurors' emotions, and shifting and minimizing the burden of proof.

¶ 23 Because Cole failed to object to the State's comments at closing or to raise this issue in a posttrial motion, review is only appropriate under the plain error doctrine. *People v. Wade*, 131 Ill. 2d 370, 375 (1989). Under the plain error doctrine, an unpreserved error may be reviewed when a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip of scales of justice against the defendant, or (2) the error is so serious that it affected the fairness of defendant's trial and threatened the integrity of the judicial process. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 34 (quoting *People v. Piatkowski*, 225 Ill. 2d

551, 564-65 (2007)). Accordingly, the first determination must be whether error occurred. *Jackson*, 2012 IL App (1st) 092833, at ¶ 34.

¶ 24 In closing arguments, the State has a wide latitude in commenting on the evidence and reasonable inferences from the evidence. *People v. Liner*, 356 Ill. App. 3d 284, 295-96 (2005). Comments made in closing argument must be considered in their entirety and within their proper context. *Liner*, 356 Ill. App. 3d at 296. Where the State's comments exceed the bounds of proper argument, the jury verdict will not be reversed unless the comments substantially prejudice the defendant, considering the content and context of the comments, their relationship to the evidence, and its effect on the defendant's right to a fair trial. *Liner*, 356 Ill. App. 3d at 296. The State cannot try to shift the burden of proof and imply that the defendant is required to demonstrate his innocence. *People v. Carbajal*, 2013 IL App (2d) 111018, ¶ 34.

¶ 25 Cole asserts that the State improperly shifted and minimalized the burden of proof. Specifically, Cole argues the State shifted the burden to him to prove he could not emit the sperm found on the baby wipe. The State criticized the defense's medical expert and presented the following argument:

> "The last line in his report was the Defendant cannot produce sperm. That was his report. That is what he submitted as his official report as an expert in this case, this very, very serious case. And that was his report. And it was wrong. The Defendant can produce sperm. He can. The Defendant can produce sperm and the doctor admitted it. And the very last question I asked him on cross-examination was: Doctor, isn't it possible that the Defendant emitted sperm? His answer was yes. No interview, no examination, report was wrong."

¶ 26 The State urged the jurors to consider the expert's credibility when weighing evidence he offered. It then stated:

> "Can you really trust fully his opinion? And if you can't, if you can't trust it, if you can't think I am sure, I am positive that he, the Defendant, could not have spit out that sperm that was in the diaper, if you can't be positive, then you have to go back to the other evidence. If you can't be sure, you have to go back to the other evidence. And what's the other evidence? The other evidence is the Defendant is guilty."

¶ 27 In rebuttal, the State told the jurors:

> "So is it more likely that somebody with a vasectomy only left one [sperm]? Or is it more likely that somebody without a vasectomy, some other unknown, no-evidence-supporting mystery person who doesn't have a vasectomy somehow got rid of his 999 million other sperm and only left one?
>
> Reasonableness, ladies and gentlemen. That is our standard. Beyond a reasonable doubt. It's not all doubt and it's not a hundred percent certainty. It's beyond a reasonable doubt. Is it reasonable to think that some other person who didn't have a vasectomy somehow got the rest of his sperm to disappear? Isn't it more reasonable that the guy postvasectomy left one?"

¶ 28 We consider that the State's comments constituted an attempt to shift and diminish the burden of proof. First, the State improperly argued that the jury must be "positive that he, the Defendant, could not have spit out that sperm" and that if it was not positive about that fact, it

had to go back to the other evidence that "Defendant is guilty." These comments suggest that it was Cole's burden to prove that he could not emit sperm. It was not Cole's burden to prove his innocence and it was improper of the State to suggest the burden was Cole's. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007) (quoting *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004)) (State has the burden to prove defendant guilty beyond a reasonable doubt).

¶ 29 Secondly, the State's comments improperly suggested that the jury could disregard the testimony of Kenny, Cole's expert witness. The State argued vigorously during closing argument at trial and on appeal that Kenny's report incorrectly stated Cole could not produce sperm. Kenny clarified while testifying that Cole could produce sperm but he could not emit sperm and could not have emitted the single sperm found on the baby wipe. The State failed to produce an expert to dispute Kenny's conclusion, opting instead to try to discredit him through cross-examination. The State may remind the jurors that it is the jury's burden to determine the weight of the evidence and decide the credibility of the witnesses on controverted questions of fact. *Chambers v. Rush-Presbyterian-St. Luke's Medical Center*, 155 Ill. App. 3d 458, 466 (1987). However, it may not urge that the jury is free to disregard expert testimony that is unrebutted. *In re Juan M.*, 2012 IL App (1st) 113096, ¶ 59 (quoting *In re F.S.*, 347 Ill. App. 3d 55, 64 (2004)). Kenny explicitly stated that it was his opinion to a reasonable degree of medical certainty that Cole could not emit sperm. While the jury could conceivably reject Kenny's credibility on other grounds, it was error for the State to attempt to rebut his opinion in closing argument without presenting contrary evidence during trial.

¶ 30 Thirdly, the State's comments about whether it was more likely that an "unknown, no-evidence-supporting mystery person" assaulted M.A. or "left one [sperm]" than Cole served to diminish the burden of proof. The State's burden was to prove beyond a reasonable doubt that

Cole assaulted M.A. By arguing that it was more likely Cole committed the offense than the "mystery person," the State improperly evoked the preponderance of the evidence standard. *People v. Brown*, 229 Ill. 2d 374, 385 (2008) (quoting *People v. Urdiales*, 225 Ill. 2d 354, 430 (2007)) (" 'A preponderance of the evidence is evidence that renders a fact more likely than not.' "). The preponderance of the evidence standard is a lesser standard than reasonable doubt. *People v. Johnson*, 2013 IL App (1st) 111317, ¶ 53.

¶ 31 We thus conclude that error occurred and next consider whether the unpreserved errors constitute reversible error under either prong of the plain error doctrine. Cole argues that the first prong applies, that the evidence was closely balanced, and that the errors tipped the scales of justice against him. We agree. The evidence was closely balanced: Cole's expert testified he could not emit the sperm found on the baby wipe; the State's evidence supported a timeframe indicating that Cole was the lone male with access to M.A. when the assault occurred. No physical evidence linked Cole to the offense, no one witnessed him assault M.A., and she was in the care of other persons besides Cole, including other men, during the State's timeline.

¶ 32 The State's comments improperly indicated to the jury that it could disregard the unrebutted testimony of Cole's expert, and that without that evidence, Cole could not prove his innocence. The State also inferred that the jury could convict Cole if it believed it was more likely he sexually assaulted M.A. than that a "mystery person" committed the assault. We are not convinced that the jury would not have reached a contrary verdict had the improper statements not been made. We find the errors substantially prejudiced Cole and denied him a fair trial.

¶ 33 We turn next to Steven's challenge to the sufficiency of the evidence. Steven argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt of predatory

criminal sexual assault of a child. He submits that the medical testimony did not establish M.A.'s injuries were intentional; there were no eyewitnesses to the assault and Steven did not offer an admission of guilt; the timeframe includes periods where M.A. was with other people besides Steven; and the defense expert established that the sperm cell found on the baby wipe could not be from Steven.

¶ 34 To prove predatory criminal sexual assault of a child, the State must demonstrate that the defendant was at least 17 years old and committed an act of sexual penetration on a child under the age of 13. 720 ILCS 5/12-14.1(a)(1) (West 2008) (n/k/a 720 ILCS 5/11-1.40 (West 2014)); see *People v. Stull*, 2014 IL App (4th) 120704, ¶ 58. Sexual penetration involves any contact or any intrusion between one person's sex organ or anus by another person's sex organ, mouth, anus, or by an object. 720 ILCS 5/12-12(f) (West 2008) (n/k/a 720 ILCS 5/11-0.1 (West 2012)); see *Stull*, 2014 IL App (4th) 120704, at ¶ 58.

¶ 35 The State must prove each element of an offense beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). The burden of proof remains with the State throughout the trial. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). A conviction may be based on direct or circumstantial evidence and to prove guilt beyond a reasonable doubt does not require the jury to disregard the normal inferences flowing from the evidence. *People v. Patterson*, 217 Ill. 2d 407, 435 (2005) (quoting *People v. Williams*, 40 Ill. 2d 522, 526 (1968)).

¶ 36 A conviction cannot be based on guess, speculation or conjecture, but must be based on evidence presented. *People v. Games*, 94 Ill. App. 3d 130, 131 (1981). Unrebutted expert medical testimony cannot be disregarded by the finder of fact. *In re Juan M.*, 2012 IL App (1st) 113096, § 59. Expert medical testimony and evidence by their nature are too complicated to be refuted by non-medical testimony. *In re Ashley K.*, 212 Ill. App. 3d 849, 889 (1991).

¶ 37 A reviewing court should not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it raises a reasonable doubt regarding the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When considering a challenge to the sufficiency of the evidence, this court determines whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found all the statutory elements of the offense were proved guilty beyond a reasonable doubt. *Collins,* 106 Ill. 2d at 261.

¶ 38 Based on our review of the record, we find the evidence so unsatisfactory that it creates a reasonable doubt of Steven's guilt. The State did not present any physical evidence tying the sperm or semen to Steven. Testing on the diapers and the baby wipe revealed several semen stains on one diaper and one sperm cell on the baby wipe. The DNA from the semen was too small for testing. The defense medical expert, Kenny, testified that Steven was azoospermic and that he could not have emitted the sperm. The State did not present any expert testimony to counter Kenny's medical expert opinion that Steven did not emit the sperm. The jury was not free to reject the uncontradicted medical testimony presented by Kenny, the sole medical expert to testify at the trial.

¶ 39 The State's case relied, in significant part, on its theory that the presence of only one sperm was indicative of Cole's guilt. It surmised that only one sperm was found because Cole's vasectomy had been unsuccessful. This theory was debunked by Kenny's testimony. By failing to counter Kenny's testimony, the State undermined its theory that the presence of only one sperm was proof that Cole committed the assault. Kenny's unrebutted testimony established that, to a reasonable degree of medical certainty, Steven could not have emitted the sperm found on the baby wipe.

¶ 40 With the physical evidence excluding Steven, we consider the other evidence offered by the State to determine its sufficiency to sustain the conviction. M.A. was in her mother's care from 9 p.m. on the evening before M.A. was taken to the hospital. Duncan said he was home asleep until 10 p.m. and then left for work at 10:30 p.m. We have only Miles' word that she and M.A. were home alone after Duncan left. Similarly, it was Miles' uncorroborated testimony that she did not change M.A.'s diaper for more than 10 hours and that M.A. was still wearing the same diaper as when she left the Coles. The diapers that were selected for collection were done so at Miles and Duncan's direction and many diapers in the home were left uncollected.

¶ 41 The DNA samples from the semen stains were inconclusive and the one sperm found on the baby wipe could not have been emitted by Cole. The diapers and baby wipe were retrieved from a home where a man lived. The sperm was found on a wipe not connected to M.A. physically or by testimony, and it could have been used by someone and then placed in the diaper. The diapers retrieved from the Coles' home did not contain either semen or sperm. Other than the fact that M.A. was undisputedly at the Coles' house, the State did not present evidence linking Steven to the offense any more than the other adults who had access to M.A. in the injury timeframe.

¶ 42 We find the State's evidence was not enough to sustain Cole's conviction. To prove predatory criminal sexual assault of child, the State was required to show that Steven was at least 17 years old and committed an act of sexual penetration against M.A., who was under 13 years of age. Considering the evidence in a light most favorable to the State, no rational trier of fact could have found that the State proved all the statutory elements beyond a reasonable doubt. The evidence established Steven was over 17 and M.A. was under 13, but the State did not prove that Steven committed an act of sexual penetration against M.A. Accordingly, we reverse Steven's

conviction and vacate his sentence. Due to our determination that the evidence was insufficient to sustain a conviction, we will not address the other issues Steven raises on appeal.

¶ 43 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and Cole's sentence is vacated.

¶ 44 Reversed.

¶ 45 JUSTICE SCHMIDT, specially concurring.

¶ 46 While I concur, I write separately to point out some additional factors that led me to conclude that defendant's conviction must be reversed outright. I note that before I reached this conclusion, I reviewed every page of the trial record, including the trial transcript, as well as all of the evidence, the video deposition, and exhibits.

¶ 47 While there is no doubt that we have the best legal system on earth, it is not perfect. Sometimes it fails, as it did here. Quite frankly, I believe that such a failure is more likely to happen when one is charged with such a heinous crime as the one involved here. The nature of the crime itself is bound to put blood in the eyes of good men and women. I believe that the good men and women who sat on the jury are entitled to a full explanation as to why their verdict is being reversed.

¶ 48 When a reviewing court reverses a criminal conviction, it is common to hear phrases such as, "Well, those judges reversed this on a technicality," "The defendant got away with the crime," or "Some critical evidence must have been suppressed." No such excuses apply here. No evidence was suppressed. In my view, the evidence in this case established Steven Cole's innocence, not his guilt.

¶ 49 This is the type of charge that will ruin a defendant's life, acquittal or no acquittal. After spending untold hours examining every piece of evidence in this case, I am left baffled as to why

the State even accused defendant of this crime. At trial, the jury was led down the primrose path as the result of a confluence of errors by the trial judge, prosecutors, and defense counsel. As a result of this perfect storm of errors, an innocent man stands convicted of an unspeakably heinous offense.

¶ 50 Steven and Janet Cole, through no fault of their own, have become characters in an American horror story that even Stephen King could not have written. I could go through the trial line-by-line and point out all of the defects, but that does not seem practical and Steven Cole has sat in prison long enough. I will, therefore, hit on some of the major points that have led me to my decision in this appeal.

¶ 51 In a nutshell, the State's case against Steven Cole is that because Karissa said the injury to M.A. did not occur during the 12½ hours before arriving at the hospital, it must have happened at the Coles' house.

¶ 52 As mentioned above, the child was torn literally from stem to stern. The tear went through her vagina, through muscles and tissue between her vagina and rectum, and stopped just short of her rectum, including a partial tear of the anal sphincter muscle. Karissa testified that when the Coles picked her up at work at 9 p.m., the child was sleeping and slept continuously from that point until 7 or 7:30 a.m. the next morning. So, the State's theory is that a 20-month-old with this kind of injury in an area exposed to urine (remember urine contains salt) slept quietly for at least 10½ hours without making a whimper. How do we know the victim behaved this way? Because Karissa said so.

¶ 53 Karissa also told hospital personnel that there was no alcohol in the house. Later, she testified that while she drank six to eight beers between the time she got home and when she went to bed at approximately 11:30 p.m., she was not intoxicated.

¶ 54 Karissa also testified that she took the child to bed with her at approximately 11:30 p.m. She could not recall what M.A. was wearing when she got home, but she did remember that whatever clothing M.A. was wearing was the clothing she slept in. Police never looked for that clothing. Karissa did not take the baby out of her clothes because the baby was sleeping and she did not want to awaken her. This was also the reason she did not change the baby's diaper for 10½ hours. When Karissa awakened, she noticed M.A. tugging at the back of her diaper as if something were wrong. She wondered what could be the problem, so she pulled the back of the diaper to see if perhaps the child had soiled the diaper. It was then that she observed blood. Think about that for just a second. What adult, assuming you have an adult who would leave a 20-month-old in a diaper for that long, would have to wonder if that diaper was soiled after 10½ hours?

¶ 55 Karissa states that once she found the injuries, she called Jonathan Duncan. He did not answer so she texted him. The text message indicated that M.A. needed to go to the hospital and there would undoubtedly be questions about the injury and it would be better if they answered them together. Karissa got surgical gloves and Q-tips ready for Duncan to use while examining M.A. upon his arrival home. Duncan testified that upon arrival at home, he took one look at M.A. and knew immediately that the child needed to go to the hospital. Both he and Karissa denied using the Q-tips. Photographs of the Q-tips in evidence make clear that someone had used them with the child.

¶ 56 Duncan testified he received the text at 8:18 a.m. That text explained that M.A. was injured, needed to go to the hospital, and Karissa wanted Duncan home before going to the hospital because she knew there would be questions. Duncan said he turned in some paperwork and left, arriving home between 8:30 and 8:40 a.m. He took one look at M.A. and told Karissa to

get dressed so they could leave for the hospital immediately. Yet, hospital records show that M.A. arrived at 9:26 a.m., approximately 45 minutes after Duncan said he arrived home. The time frame promoted by the State falls apart. This is without taking into account the fact that one would have to drive very slowly to take even 15 minutes to drive from the 2400 block of North Sheridan in Peoria to the OSF emergency department. It is a reasonable amount of time for one to leave the hospital, get to his car and make the drive from the hospital to 2403 North Sheridan. It would take no more than half that time to drive from the Sheridan address to the OSF emergency department. The testimony of the prosecution witnesses regarding their travel to the hospital simply is not believable.

¶ 57 Dr. Amy Stanfill, the surgeon who repaired M.A., testified by video evidence deposition that it would be impossible to determine the time of injury, although it was relatively recent because there were no signs of healing. It was defense counsel who not only allowed, but encouraged hearsay testimony from a police officer regarding the time of the injury. When cross-examining Officer Shawn Meeks, defense counsel elicited the following hearsay testimony:

"Q. Do you know when she was injured?

A. Upon speaking with a surgeon, I was told an approximate time.

Q. Being?

A. The time that I was given?

Q. Yes.

A. The surgeon advised me that she couldn't pinpoint an exact time. She said it was clearly less than forty-eight hours, but most likely between an eight and twenty-four hour period."

¶ 58 One can only wonder what defense counsel was thinking eliciting this needless hearsay testimony, which conflicts with the testimony given in court by the surgeon and suggests that the injury occurred at least eight hours before the surgeon saw M.A. (The surgeon first saw M.A. several hours after M.A. arrived at OSF.) This line of questioning did defendant no favors.

¶ 59 To be fair, the trial court made defense counsel's task difficult at times. Defense counsel attempted to question Karissa about her bias or motive to testify falsely. After Karissa testified that M.A. must have been injured at the Coles' house because it did not happen at her house, defense counsel successfully established that Karissa knew the police and DCFS were already involved in the matter. The following exchange then took place on cross-examination:

"Q. If it happened at your house, do you think you're going to be keeping [M.A.] there?

MS. HOOS [prosecutor]: Objection: argumentative.

THE COURT: Sustained."

This was an appropriate question, especially in light of the fact that the trial court allowed Karissa to testify that she thought the injury occurred at the Coles' house based on the fact that it did not happen at her house. Again, keep in mind that Karissa apparently drank six to eight beers (but was not intoxicated), and M.A., with this injury, slept all night without a peep. Importantly, Karissa noticed absolutely nothing unusual about M.A. from 9 p.m. until the time she looked in the diaper at approximately 7:30 the next morning. After discovering the horrific injury, she remained at home for another two hours. She thought it best to text Duncan to accompany her to

the hospital because she knew there would be questions. Duncan testified that he arrived home around 8:30 or 8:40 a.m., took one look at M.A., and told Karissa to get dressed because they had to rush to the hospital. They arrived to the hospital at 9:26 a.m. As noted earlier, this testimony about travel to the hospital makes no sense.

¶ 60 The State called Janet Cole, whom it also charged for this crime, to testify under subpoena and an offer of immunity. She testified that she changed M.A.'s diaper after the baby took a nap. At that time, she noticed a large diarrhea stool in the diaper and that the baby's anus was red. She testified that at some point she said, "Oh Mya!" The prosecutor grilled her on the stand over the fact that a police officer had testified that when she spoke to him the day after the incident, that she did not say "Oh Mya!" but, rather, "Oh my!" This led to further cross-examination about whether her memory was better when she spoke with the police officer or whether it was better today.

¶ 61 There were some other minor inconsistencies between her testimony regarding whether Steven was present during the diaper change and the testimony of a police officer as to what Steven told him. The prosecutor's theory was that Janet opened that diaper, saw this horrific injury and just closed the diaper up and left this child to bleed and, in the prosecutor's words, "Sent her on her way." There are a number of problems with that theory.

¶ 62 First of all, the police secured diapers from the Coles' house. The testimony was that Karissa had changed the diaper before she left for work and then Janet changed the diaper after the baby's nap. Karissa testified that there was nothing noteworthy about the diaper she changed. The police found two diapers at the Coles' house. Both were photographed. One exhibit shows a picture of the diaper that Janet changed. It was full of diarrhea. It seems that anyone would comment upon seeing that diaper. Whether the person said "Oh my" or "Oh

Mya" is irrelevant. The physical evidence absolutely supports Janet's testimony. The record shows that defense counsel failed to use that exhibit to bolster Janet's testimony. He never discussed it during closing. In fact, the only discussion I find of this exhibit was when it was offered by the State, and even then it was just mentioned in passing.

¶ 63 Furthermore, Janet testified that she changed the diaper at approximately 5:30 p.m. To accept the State's theory, one would have to believe that Janet and Steven Cole were two of the most evil and stupid people—and that M.A. was the most stoic baby—on the face of the earth. The State theorized that after Janet saw M.A.'s terrible injuries, she simply closed the diaper and sent the child home, hoping the injuries would go unnoticed. Sure enough (if you believe the State's theory) Karissa just so happened to wait 10 ½ hours before changing M.A.'s diaper and M.A. was so stoic as to never so much as whimper from her injuries.

¶ 64 This also brings up another egregious error by the trial court and the prosecutor that could only have misled the jury. At one point, referring to the diaper change, the prosecutor asked Janet, "Didn't you have your husband come over to look at the injury?" Defense counsel objected to the word "injury" because, up until that point, there had been no testimony or other evidence that the child was injured. The judge responded, "Well, she said look at 'it', from my recollection. 'It', whatever that is, I'm assuming 'it' is an open bottom at this point in time. It's overruled." The judge's statement that he was "assuming this is an open bottom at this point in time" signaled to the jury—in the absence of actual evidence—that the M.A.'s bottom must have already been torn open when Janet changed the diaper. (Talk about a crucial issue of fact.) Never mind that the diapers recovered from the Coles' house had no blood in them.

¶ 65 The prosecutor then proceeded to beat on Janet about the number of calls, or lack thereof, between her and Karissa during the days following M.A.'s hospitalization. This cross-

examination was based upon Karissa's recollection of trouble contacting the Coles after the incident. This recollection occurred two or three years after the incident and while Karissa was meeting with the prosecutor. During this meeting with prosecutors, Karissa also remembered that when she called the Coles from the hospital, Steven sounded angry and told her not to get them involved. This, too, had slipped Karissa's mind during the first two to three years after the incident. Remember that if Steven Cole is ruled out as a suspect or found innocent, the focus of the investigation turns squarely back to Karissa.

¶ 66 The prosecutors made a big deal of the fact that Steven Cole had a vasectomy. They attacked on two fronts. First of all, Dr. James Kenny, Steven's treating urologist and a defense witness, testified that while he did not perform the vasectomy or the follow-up study to establish whether the vasectomy was effective, he did review the records. He noted that the vasectomy was performed by the urologist who had trained him and, therefore, he was confident as to how it was performed. Regardless, follow-up semen analysis on three separate occasions showed that Steven was not emitting sperm in his semen. When these tests were done, the actual sperm analysis had been done at a lab at Methodist Hospital and not in the urologist's office. The State stipulated to the foundation for the reports and then spent a large amount of time assailing Dr. Kenny on the stand about his lack of knowledge as to exactly how the tests were performed at Methodist Hospital. This was despite the fact that Dr. Kenney had testified that these reports are routinely relied upon by urologists. The State's cross-examination on this point was the equivalent of stipulating to the foundation for X-rays so that an orthopedic surgeon could testify about the injury, then trying to impeach the orthopod on the basis that he is not an expert in radiology. Justice requires evidence, rather than smoke and mirrors. There was no evidence that any of the three tests performed at Methodist were unreliable.

¶ 67 Second, the State harped on the fact that only one sperm was found in the semen. Dr. Kenney testified that a normal male will have millions of sperm in a CC of semen. A standard semen sample would include several CCs. The State argued that since the Illinois State Police crime lab found only one sperm in the semen analysis, it can only lead to the conclusion that the person leaving that semen was post-vasectomy. The State's argument was improper and extremely prejudicial. No expert testimony supported any of these claims. Kevin Zeeb of the Illinois State Police crime lab testified that even though there were five areas where he identified semen on a diaper, he could not get enough to get a DNA profile. It does not take a CC of bodily fluid to get a DNA profile. The State had its expert on the stand and never asked him whether the existence of only one sperm found in the semen was indicative of the fact that the "donor" was post-vasectomy, as opposed to the fact that there was such a miniscule amount of semen. Zeeb testified that semen alone carried DNA and can be used to identify a DNA profile.

¶ 68 The fact that the State had an expert on the matter testify and did not ask that question of the expert suggests strongly that the answer would not be favorable. Regardless of improper motive or lack thereof on the part of the prosecution, the fact remains that there was no expert testimony as to the conclusion to be drawn by the finding of one sperm in a semen sample too small to allow identification of a DNA profile. Laypersons cannot be permitted to draw whatever conclusion they want on this subject, which is not a matter of common knowledge.

¶ 69 In what I consider to be an outrageous argument and prosecutorial misconduct in the State's initial closing argument, the prosecutor argued:

> "[I]f you can't think I am sure, I am positive that he, the Defendant, could not have spit out that sperm that was in the diaper, if you can't be positive, then you have to go back to the

> other evidence. If you can't be sure, you have to back to the other evidence. And what's that other evidence? The other evidence is that the Defendant is guilty."

It almost seems as if the prosecutor was *trying* to elicit an objection with these comments. Yet none came from defense counsel. This, after the prosecutor just told the jurors that if they were not positive that defendant could not have provided that sperm, then they had to find him guilty.

¶ 70 Another problem with the State's case is that Dr. Kenny made it clear that having a vasectomy is not the medical equivalent of having a third eyeball stuck in your forehead. They are quite common. When asked about the frequency of vasectomies in the Peoria area, in obvious hyperbole, Kenney testified, "I think we have done everyone in Peoria twice." There was no testimony as to whether Jonathan Duncan had a vasectomy. Nor was there any testimony as to whether any of Karissa's other male friends had had vasectomies.

¶ 71 Of course, there was no evidence as to whether any of Karissa's male friends had been over that night because there was no investigation into it. Police did not, for example, investigate whether the beer bottles found lying around the house had only Karissa's fingerprints on them. Remember, Karissa testified that earlier in the day, one of her male friends had given her a car. But the State found no reason to look into that because Karissa said she was home alone with M.A. after Duncan left for work. Despite the fact that Karissa's testimony, taken as a whole, was clearly incredible, prosecutors accepted it uncritically and built their entire theory of the case around it.

¶ 72 During closing argument, defense counsel appropriately argued that "the only person that's got more to lose than Steve Cole is Karissa." The State objected and, while the trial court overruled the objection, it did tell the jury that closing arguments are not evidence. Of course,

closing arguments are not evidence, but that seems like an inopportune time to make that statement to the jury. This is especially true because Karissa *did* have everything to lose.

¶ 73 On rebuttal during closing arguments, the prosecutor strenuously argued that Karissa had no motive to blame the Coles since they had been her friends and like parents to her. The prosecutor also argued that the sperm testing on Steven Cole through the hospital lab was unreliable. The State put on no expert testimony regarding the sperm tests, and it is improper, especially in a criminal case, for the State to simply try to confuse a jury. The prosecutor also argued that the reason M.A. slept for the 10½ hours when she was with Karissa was because she had obviously worn herself out from crying and screaming at the Coles' house. Somehow the jury bought that argument, notwithstanding the fact that Karissa testified that during the next 10½ hours with M.A., while drinking beer at home, she noticed absolutely nothing unusual about the child.

¶ 74 Again on rebuttal, the prosecutor made much mention of the fact that it was more likely that someone with a vasectomy only left one sperm. The prosecutor argued, "Or is it more likely that somebody without a vasectomy, some other unknown, no-evidence-supporting mystery person who doesn't have a vasectomy somehow got rid of his 999 million other sperm and only left one?" Again, there is no evidence that one would expect to find 999 million sperm in a semen sample that was so miniscule as to not be able to obtain a DNA profile. If the State wants to argue something like that, it needs scientific evidence to back it up. Furthermore, the entire vasectomy argument was a diversion because the State's evidence merely proved that defendant had a vasectomy, it did not prove that the other males who might have been around M.A.—such as Jonathan Duncan—did *not* have vasectomies, or that the evidence collected gives rise to the reasonable inference that whoever left it was post-vasectomy.

¶ 75 I am not suggesting that Duncan did this. I am suggesting that the evidence is at least as strong against him as it is against Steven Cole, if not stronger, because he was the last male whom Karissa says was in the house with M.A., and Karissa noticed nothing unusual about M.A. when she brought the child home. Would not a parent, or anyone else for that matter, notice something unusual about a sleeping child who had just cried and screamed herself to sleep from a horrific, traumatic injury? Red face? Red eyes? Flushed? Something? Nope! Karissa said the child seemed normal.

¶ 76 Also in rebuttal, the prosecutor pointed out to the jury that it got to see what a man did to a 20-month-old. After again inflaming the jury about the nature of M.A.'s injuries, the prosecutor threw in the *coup de grace*: "The Defense wants to make this about Steven Cole. It's not about Steven Cole." Defense counsel should have been on his feet and screaming! This argument was outrageous, yet no objection came. The prosecutor went on: "It's about [M.A.] and what she lost and what he took from her. He is the only one, ladies and gentlemen, the only one. And [M.A.] can't come in here and point the finger at him, but all of you can. Do it with a guilty verdict. Thank you."

¶ 77 As the majority opinion points out, the prosecutorial misconduct in this case was so far beyond the pale that had sufficient evidence to convict been offered, a new trial would have been required. However, the evidence in this case was simply insufficient for any reasonable trier of fact to find Steven Cole guilty of the crimes charged. It is beyond dispute that this was a horrific crime. For that reason, I cannot understand the State's Attorney's office charging Steven and Janet in light of the total lack of evidence to suggest that they actually committed this crime. Even had Steven been found not guilty, as he should have been, his life would have been ruined by the charge.

¶ 78 So why did the State charge Steven Cole? Because Karissa, with every motive in the world to lie to protect herself, said that nothing happened to M.A. after she brought her home from the Coles' house.

¶ 79 I also understand that the jury was unaware of evidence produced at sentencing. Steven Cole had been married twice before. He had served in the United States armed forces and had retired after a career at Caterpillar. The man has never had any trouble or even a suggestion of wrongdoing. It is normally the case that if you want to dirty a fellow up, find an ex-wife and she will often oblige. In this case, Steven Cole's ex-wives both wrote to the trial judge that there is no way this man could be guilty of this crime.

¶ 80 There is also no doubt that many pedophiles get away with their crimes undetected for years. However, when the opportunity came for someone with either evidence of prior misconduct or suspicions of these tendencies to come forward and speak out against Steven, there was nothing.

¶ 81 This evidence, put on at sentencing, has nothing to do with my finding that the evidence was insufficient to convict or that Steven is innocent. I must confess that it bolsters my firm conviction that Steven Cole is innocent. Had Steven had a criminal history, the State's evidence still failed to suggest, let alone prove, that he attacked M.A. I cannot understand how this man found himself charged, let alone sitting in a penitentiary convicted of this horrific crime.

¶ 82 During the trial, the prosecutors made a point, more than once, to remind the jurors that they represented the law-abiding citizens of Illinois. I suggest that the law-abiding citizens of Illinois, or anywhere else, have no interest in wrongful convictions. In an article published in Esquire Magazine in May of 1936, renowned trial lawyer Clarence Darrow observed that "the lawyer's idea of justice is a verdict for his client." Generally speaking, there is nothing wrong

with that in an adversarial legal system. However, prosecutors have a special place in the system and must be sure that they "should" charge someone with a crime, not just "can" they do it. I agree that prosecutors represent the law-abiding members of society. However, a wrongful conviction is not a "verdict for [their] client."

¶ 83 In my 12 years on the appellate court, I have never seen anything like this case. I hope I never do again.