

**NOTICE**

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 150048-U

NO. 4-15-0048

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

September 2, 2015

Carla Bender

4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Pike County
JAMIE A. HAVENS,	)	No. 14CM20
Defendant-Appellant.	)	
	)	
	)	Honorable
	)	J. Frank McCartney,
	)	Judge Presiding.

---

JUSTICE STEIGMANN delivered the judgment of the court.

Justice Holder White concurred in the judgment.

Justice Turner specially concurred.

**ORDER**

- ¶ 1 *Held:* The appellate court affirmed defendant's conviction and sentence for sexual exploitation of a child, rejecting defendant's arguments that (1) he was denied a fair trial, (2) the State failed to meet its burden of proof, and (3) the trial court unduly limited his right to cross-examine witnesses.
- ¶ 2 In February 2014, the State charged defendant, Jamie A. Havens, with sexual exploitation of a child (720 ILCS 5/11-9.1(a)(1) (West 2012)). Following an October 2014 trial, a jury found defendant guilty of that charge. In December 2014, the trial court sentenced defendant to 24 months of probation.
- ¶ 3 Defendant appeals, arguing that (1) the State's improper closing argument denied him a fair trial, (2) the State failed to prove his guilt beyond a reasonable doubt, and (3) the trial court unduly limited his right to cross-examine a witness. We disagree and affirm.

¶ 4

## I. BACKGROUND

¶ 5 In February 2014, the State charged defendant with sexual exploitation of a child. Specifically, the State alleged that in summer 2013, defendant masturbated in the presence of J.D., a minor, knowing that J.D. would view this sexual act.

¶ 6 A. The Evidence Presented at Defendant's Trial

¶ 7 At defendant's October 2014 trial, the State presented the following evidence.

¶ 8 At the time of defendant's trial, J.D. (born July 30, 1997), lived in Mishawaka, Indiana, with his mother and stepfather. In the summer of 2013, J.D.—who was then 16 years old—lived with defendant and defendant's wife in Hannibal, Missouri. J.D. explained that his parents, who were then living in Hannibal, were in the midst of a divorce, and they agreed that J.D. could live with defendant until they resolved their marital issues. J.D. estimated that he lived with defendant and his wife for approximately six months. Because defendant mowed lawns for a living, J.D. routinely accompanied defendant to Pittsfield, Illinois, to mow lawns.

¶ 9 Defendant and J.D. were active members of their local church. As part of the church's youth ministry, defendant counseled many minors, including J.D. J.D. stated that defendant counseled him on "things of a sexual nature," which included masturbation. Defendant told J.D. about his sexual relations with his wife and homosexual encounters he had when he was younger. Defendant asked J.D. if he was a homosexual or if he ever had a sexual relationship with J.D.'s friend, Nathan Rose. On one occasion, defendant asked J.D. to measure J.D.'s penis. J.D. did so and reported the measurement to defendant. J.D. stated that his conversations with defendant regarding (1) masturbation, (2) defendant's sexual relations, (3) homosexuality, and (4) penis size made him uncomfortable. J.D. acknowledged that defendant had counseled him on numerous other general topics that J.D. found beneficial.

¶ 10 Sometime during summer 2013, J.D. was in the front passenger seat of defendant's truck as defendant drove home from Pittsfield. About 10 minutes into their approximately 30-minute commute, J.D. noticed that defendant began "touching [defendant's] penis with his pants on in ways that might be pleasurable to him." Although defendant's trousers were not undone and J.D. did not see defendant's penis, J.D. thought that defendant had an erection. Defendant continued fondling himself until just before they arrived home. Afterward, defendant told J.D. that he was "stressed out" and was fondling himself because it felt good. J.D. then left to visit Rose. Later that night, J.D. told Rose about the fondling incident.

¶ 11 The next day, Rose visited with J.D. and defendant as they worked near their church. Shortly thereafter, they began discussing the fondling incident. J.D. explained that during their conversation, defendant admitted that he "touched his penis on top of his pants to create pleasure for himself while he drove the truck home[.]" J.D. noted that defendant did not specifically apologize to him for his actions, but defendant's tone and attitude during his explanation to Rose was "apologetic."

¶ 12 Rose, who was a college freshman, testified that in summer 2013 he lived in Hannibal and was active in the local church, where he initially met J.D. Rose knew J.D. for about four years and considered J.D. his best friend. Rose also knew defendant, whom he respected as "one of the leaders in the church." In summer 2013, J.D. told Rose about the fondling incident in defendant's truck. A couple of days later, Rose approached J.D. and defendant outside their local church. Sometime thereafter, defendant asked Rose whether J.D. had spoken to him about "what happened." Rose interpreted defendant's reference to "what happened" to mean the incident in the truck that J.D. told Rose about a couple of days earlier. In particular, that defendant "began fondling himself in \*\*\* his truck on the way home from Pittsfield." In speaking about that inci-

dent, Rose was "pretty sure" that defendant apologized to him and J.D. Rose recalled that defendant said (1) he was sorry the incident happened and (2) Rose and J.D. should not let what happened affect their religious views.

¶ 13 Pike County deputy sheriff Jennifer Thompson testified that in November 2013, she interviewed defendant at his home. Defendant informed Thompson that in summer 2013 the following incident occurred:

"[Defendant] indicated that [defendant and J.D.] were driving back toward Missouri on [route] 106, [and] that a conversation had stirred up between him and [J.D.] in reference to masturbation, or something along that line, which caused him to pull the truck over near the horse statue which is located on [route] 106 in Pike County.

[Defendant] said that he was unsure exactly how everything got started, but that he came to a point where he was fondling himself outside of his clothing and he indicated, also, that [J.D.] was engaging in that same behavior."

Thompson noted that the "horse statue" is near Kinderhook, Illinois.

¶ 14 Defendant also told Thompson that (1) the fondling was over within 10 minutes, (2) neither he nor J.D. ejaculated, (3) the fondling was "inappropriate," and (4) he sometimes used masturbation as a coping mechanism when he was in a stressful situation. Defendant admitted speaking with J.D. and Rose about the fondling incident.

¶ 15 Defendant did not present any evidence.

¶ 16 B. The Jury's Verdict and the Trial Court's Sentence

¶ 17 Thereafter, the jury found defendant guilty of sexual exploitation of a child, and the trial court later sentenced defendant to 24 months of probation.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues that (1) the State's improper closing argument denied him a fair trial, (2) the State failed to prove his guilt beyond a reasonable doubt, and (3) the trial court unduly limited his right to cross-examine J.D. We address defendant's claims in turn.

¶ 21 A. Closing Arguments

¶ 22 Defendant argues that the State's improper closing argument denied him a fair trial. Prior to addressing defendant's argument, we first provide the following context.

¶ 23 During closing arguments, defense counsel questioned the accuracy of Thompson's report of her November 2013 interview with defendant based on Thompson's testimony that she could not remember when she wrote her report. Specifically, counsel highlighted that Thompson testified that she wrote her report on November 25, 2013, but her report was dated November 29, 2013. Defense counsel then made the following argument:

"I think [Thompson] made a very critical mistake when she interviewed [defendant]. \*\*\* [T]he most interesting thing and the easiest way to solve this whole thing is for [Thompson] to take a [\$15] Dictaphone and record what [defendant] said. That's the critical mistake. Because if [Thompson] records what [defendant] said as we're doing here (indicating), we know what was said. Then [this] trial doesn't become a he said/she said \*\*\* and you have proof be-

yond a reasonable doubt. But when you don't spend [\$15] to record a conversation with an alleged criminal, how can you ask a jury to believe \*\*\* testimony that [the State is] going to offer when we know it's wrong to begin with under one of the simplest of elements, the date of the offense."

¶ 24 In response to defense counsel's closing argument, the State argued, as follows:

"The way that a case works it[s] way through the system is not what's on trial here. [Defendant] is on trial here. If you want to concern yourself with the dates on the report [and] think there's a huge difference between the 25th and the 29th, then \*\*\* find [defendant] guilty—or not guilty. I don't think you're going to do that. None of it really matters.

[Defense Counsel] said \*\*\* Thompson could have easily remedied this issue had she just recorded the interview. [Defense counsel] never asked [Thompson] the question. You don't know if [Thompson] did or she didn't."

Immediately thereafter, defense counsel objected, alleging that the State's comments were a misstatement of the evidence because Thompson testified that she took notes during her interview with defendant. The trial court disagreed and overruled defendant's objection.

¶ 25 On appeal, defendant contends that the State's comments during its rebuttal closing argument concerning the lack of a video recording of Thompson's interview "substantially prejudiced [him] because it unilaterally shifted the burden to the defendant to prove his own innocence." In particular, defendant asserts that by overruling his objection, the trial court prohib-

ited him from commenting on the State's lack of a recorded statement. We disagree.

¶ 26 "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 419 (2009). "Reviewing courts will consider the closing argument as a whole, rather than focusing on selected phrases or remarks, and will find reversible error only if the defendant demonstrates that the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error." *People v. Runge*, 234 Ill. 2d 68, 142, 917 N.E.2d 940, 982 (2009). "The regulation of the substance and style of closing argument lies within the trial court's discretion; the court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion." *People v. Caffey*, 205 Ill. 2d 52, 128, 792 N.E.2d 1163, 1210 (2001).

¶ 27 We reject defendant's contention that the State's comments during its rebuttal closing argument concerning the lack of a video recording of Thompson's interview shifted the burden of proof from the State to defendant. The record clearly shows that during closing arguments, defense counsel stated that the jury should question the reliability of Thompson's interview report and her testimony as to what occurred during that interview because Thompson could not remember the date she authored her written report. Counsel then claimed that Thompson's "critical mistake" could have been resolved by recording her interview with defendant. The State responded to defendant's claim by arguing, in rebuttal, that (1) the date of Thompson's report was not relevant to defendant's guilt and (2) no evidence existed definitively showing that Thompson did not record her November 2013 interview with defendant. Defense counsel's claim during closing arguments essentially invited the State's response. As a result, defendant cannot now complain that the State's response denied him a fair trial. See *People v. Evans*, 209

Ill. 2d 194, 225, 808 N.E.2d 939, 957 (2004) (quoting *People v. Hudson*, 157 Ill. 2d 401, 445, 626 N.E.2d 161, 180 (1993)) ("[I]n the context of rebuttal argument, 'when defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial.' "). In considering the parties' closing arguments in their entirety, we conclude that the State's rebuttal did not directly or implicitly shift the burden of proof as defendant contends.

¶ 28 We also reject defendant's assertion that by overruling his objection during the State's rebuttal argument, the trial court prevented him from arguing the absence of evidence—namely, the lack of a video recording of his November 2013 interview with Thompson. As we have previously noted, during closing argument, defense counsel argued, without objection, that the jury should disregard Thompson's written report and testimony regarding her interview with defendant because she failed to videotape that encounter. We agree with the State that its response to defendant's claim, which the court allowed over defendant's objection, occurred after defendant had argued this point to the jury, which renders meritless his claim to the contrary.

¶ 29 B. Sufficiency of the Evidence

¶ 30 1. *The Applicable Statutory Provisions and the Standard of Review*

¶ 31 Section 11-9.1(a)(1) of the Criminal Code of 2012—the statutory provision under which defendant was convicted—provides, as follows:

"(a) A person commits sexual exploitation of a child if in the presence or virtual presence, or both, of a child and with knowledge that a child or one whom he or she believes to be a child would view his or her acts, that person:

(1) engages in a sexual act[.]" 720 ILCS 5/11-9.1(a)(1) (West 2012).



" 'Sexual act' means masturbation, sexual conduct[,], or sexual penetration[.]" 720 ILCS 5/11-9.1(b) (West 2012). " 'Child' means a person under 17 years of age." *Id.*

¶ 32 When reviewing a challenge to the sufficiency of the evidence, we determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Phillips*, 2014 IL App (4th) 120695, ¶ 19, 14 N.E.3d 1. In so doing, we allow all reasonable inferences from the record in favor of the State. *People v. Beauchamp*, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 323 (2011). "The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence." *People v. Burney*, 2011 IL App (4th) 100343, ¶ 25, 963 N.E.2d 430. "We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262, 267-68 (2005).

¶ 33 *2. Defendant's Sufficiency Claim*

¶ 34 Defendant argues that the State failed to prove his guilt beyond a reasonable doubt. Specifically, defendant contends that J.D. did not testify that defendant masturbated in his presence. We disagree, noting that the record directly refutes defendant's contention.

¶ 35 In this case, J.D. testified that sometime in summer 2013, he was a front-seat passenger in defendant's truck as defendant drove from Pittsfield, Illinois, to Hannibal, Missouri. Ten minutes into that approximately 30-minute trip, J.D., who was 16 years old at that time, saw defendant "touching his penis with his pants on in ways that might be pleasurable to him" until just prior to his arrival home. J.D. stated that (1) he thought defendant had an erection and (2) defendant admitted that he engaged in the touching to relieve stress.

¶ 36 To the extent defendant claims that the State failed to prove him guilty beyond a reasonable doubt of sexual exploitation of a child, we also reject that claim. In addition to J.D.'s testimony, Rose testified that after speaking to defendant in J.D.'s presence about the fondling incident, defendant apologized to both of them, adding that they should not let what happened affect their religious views. Defendant also admitted to Thompson that he (1) engaged in a sexual act in plain view of J.D., albeit under a different version of events; (2) spoke with J.D. and Rose about the fondling incident; and (3) used masturbation as a coping mechanism when he was in a stressful situation.

¶ 37 In reviewing a challenge to the sufficiency of the evidence, our role is not to retry the defendant. *People v. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007). Instead, we determine whether the evidence presented could have reasonably supported a finding of guilt beyond a reasonable doubt. *Id.* Because we conclude that evidence presented in this case was sufficient to support the jury's guilty verdict, we reject defendant's sufficiency claim.

¶ 38 C. Cross-Examination

¶ 39 Defendant argues that the trial court unduly limited his right to cross-examine J.D. We disagree.

¶ 40 "The extent of cross-examination with respect to an appropriate subject of inquiry rests in the sound discretion of the trial court." *People v. Stevens*, 2014 IL 116300, ¶ 16, 23 N.E.3d 344. "It is only in the case of a clear abuse of such discretion resulting in manifest prejudice to the defendant that a court of review will interfere." *Id.*

¶ 41 Because defendant's claim is based on an exchange that occurred during J.D.'s cross-examination, we quote the pertinent portions, as follows:

"[DEFENSE COUNSEL:] Okay. [Defendant] didn't have

his pants undone. You didn't see his penis. He didn't ejaculate.

[THE STATE]: Judge, Objection.

THE COURT: Sustained. Question. You're testifying.

Question.

[DEFENSE COUNSEL]: I'm not—I can ask leading question, that's what this is.

THE COURT: [Defense Counsel], [the court] understand[s] how it works. Ask a question.

[DEFENSE COUNSEL]: Did [defendant] have his pants undone?

[J.D.]: No.

[DEFENSE COUNSEL:] Did you see [defendant's] penis?

[J.D.]: No.

[DEFENSE COUNSEL]: Did [defendant] ejaculate?

[J.D.]: No.

[DEFENSE COUNSEL]: That's masturbation, isn't it?

[THE STATE]: Judge, [objection]. \*\*\* [C]alls for a conclusion. That's one of the [ultimate issues.]

THE COURT: Sustained."

¶ 42 Based on the aforementioned exchange, defendant challenges separately both objections raised by the State during J.D.'s cross-examination. First defendant contends that the trial court improperly prohibited him from soliciting testimony that, "[Defendant] didn't have his pants undone. You didn't see his penis. He didn't ejaculate." The court sustained the State's ob-

jection to this exchange because the court determined correctly that defendant was not asking questions but was, instead, uttering statements. Thereafter, as the record shows, defendant correctly posed three separate questions pertaining to the aforementioned topics, which the State did not challenge. Thus, J.D.'s responses to those questions were appropriately before the jury.

¶ 43 Defendant's second challenge concerns the trial court's decision to sustain the State's objection to his question, "That's masturbation, isn't it?" As defendant concedes in his reply brief to this court, by posing the three questions preceding his masturbation question, defendant was attempting to establish that defendant could not have been masturbating because he (1) was not exposed and (2) did not ejaculate. However, we agree with the State that a conviction under section 11-9.1(a)(1) of the Criminal Code does not require proof of exposure or ejaculation. See *People v. Ricky E. T.*, 405 Ill. App. 3d 98, 101, 939 N.E.2d 501, 503 (2010) ("The definition of masturbation does not require that a person stimulate his or her genital organ in any specific way; an act constitutes masturbation so long as the bodily contact erotically stimulates the genital organ.").

¶ 44 With regard to the aforementioned objections defendant challenges, we conclude that in both instances, the trial court exercised sound discretion by (1) correcting defendant's statements during his cross-examination and (2) limiting the scope of defendant's cross-examination with respect to the issue of masturbation. Therefore, we reject defendant's claim that the court unduly limited his right to cross-examine J.D.

¶ 45 III. CONCLUSION

¶ 46 For the foregoing reasons, we affirm the court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 47 Affirmed.

¶ 48 JUSTICE TURNER, specially concurring.

¶ 49 I agree with the majority's decision affirming the trial court's judgment. However, I write separately because I take exception to the State's response in rebuttal to defense counsel's reference to the lack of an audio recording of defendant's statement. As the State conceded at oral argument, if a recording of defendant's statement had been made, it would have been disclosed in discovery. I cannot condone the prosecutor purposefully causing the jury to infer a recording might have been made when the State knew otherwise. At orals, the State essentially agreed the prosecutor's remark in rebuttal was inappropriate. However, the State argued the error was harmless and did not affect the jury verdict or deprive defendant of a fair trial. Because I agree the improper response had no effect on the fairness or outcome of the trial, I specially concur in the majority order affirming defendant's conviction and sentence.