2016 IL App (1st) 133528-U

FIRST DIVISION
FEBRUARY 1, 2016

No. 1-13-3528

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. 12 CR 5147
	)	
RYAN HAMPTON,	)	Honorable
	)	Noreen Valeria Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Liu and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's failure to seek clarification or provide a substantive response to the jury's question suggesting its confusion regarding the distinction between greater and lesser included sexual assault offenses amounted to plain error, especially as the trial court and counsel had repeatedly acknowledged the confusing nature of the jury instructions at issue.

¶ 2 Defendant-appellant Ryan Hampton appeals from his conviction for the offense of aggravated sexual assault based on bodily harm. We find that the confusing nature of the jury

instructions, compounded by the court's failure to attempt to address the jury's expressed confusion, amounted to plain error warranting reversal and remandment for a new trial.

¶ 3 BACKGROUND

¶ 4 This appeal arises from the defendant's conviction for the January 2012 sexual assault of a 23-year-old woman, N.P. In August 2013, the State proceeded to trial on three counts: aggravated sexual assault with bodily harm (Count 1); aggravated sexual assault perpetrated during the commission of a kidnapping (Count 2); and kidnapping.

¶ 5 At trial, N.P. testified regarding the events leading up to the sexual assault. On the night of January 18, 2012, she and a friend, Julie Enright, drove together to a bar called Caps in Villa Park, Illinois. At the bar, N.P. and Julie recognized Jacinta Mitchell, a former high school classmate, and began a conversation.

¶ 6 Later that evening, three men—Fernando Valdivia, Brian Maturen, and the defendant — arrived at Caps and joined the three women. N.P. and Enright had not met the men before, but Mitchell was a friend of Valdivia. The group began talking and drinking. At some point, the group decided to leave the bar. The group left in Valdivia's minivan to go to the site of a business owned by Valdivia's family, the Anjeli Flower Shop. According to N.P., the defendant repeatedly attempted to kiss her in the minivan while she resisted his advances. On the way to the flower shop, the group stopped at a gas station, where the group purchased beer and Mitchell bought cocaine from an unidentified individual.

¶ 7 Valdivia parked in a garage located several feet from the flower shop. The group proceeded to a basement area beneath the flower shop that included couches and a table. There, the group conversed, drank beer, and used cocaine. N.P. acknowledged she did "about two lines" of cocaine. According to N.P., the defendant continued to make advances towards her

while the group was in the basement. At some point, N.P. told Valdivia and Mitchell that the defendant was bothering her, and so they "told him to back off and to leave [her] alone."

¶ 8 Later in the evening, N.P. left the basement and went outside to smoke a cigarette. She testified that the defendant followed her outside, to an area near the garage. The defendant again attempted to kiss her, but she resisted him. According to N.P., the defendant responded by accusing her of being "a racist and that [she] didn't like him because he was black." N.P. testified that she responded: "That's not why I don't want to kiss you. I am just not that way. I am not that kind of girl."

¶ 9 N.P. testified that the defendant then grabbed her by the wrist, pulled her into the garage, and forced her to the ground. N.P. testified that as the defendant held her by the upper arm, he unzipped his pants, removed N.P.'s pants, and "stuck his penis in [her] vagina." N.P. testified that she repeatedly told the defendant to stop as she was assaulted. After about three to five minutes, she heard the four other members of the group emerge from the flower shop and said "help me." The defendant got off of her when the other group members came to the garage. N.P. heard Valdivia tell the defendant "to get out of here," and the defendant left the scene.

¶ 10 N.P. testified that, "panicked and in shock," she returned to the flower shop basement with the remaining members of the group. Mitchell gave her a beer, which N.P. drank. The group stayed in the basement for approximately another hour, until Valdivia drove N.P. and Enright back to the bar, where N.P.'s car was parked. N.P. then drove to Enright's house, where they talked for a time before N.P. drove to her parents' home in the morning of January 19, 2012.

¶ 11 N.P. testified that she showered and laid in bed all day on January 19. The following day, January 20, she went to a hospital and reported the sexual assault. At the hospital, nurses examined her and took swabs for a "rape kit." N.P. testified that she suffered bruises on her

knees, her wrist, upper arm, and back. At N.P.'s request, the hospital contacted police. N.P. later identified the defendant in a photographic array shown to her by police.

¶ 12 On cross-examination, N.P. testified she had consumed "maybe three" alcoholic drinks at the bar and admitted that she may have told police that she was "highly intoxicated." She acknowledged that she used cocaine in the basement and may also have used marijuana. With respect to her injuries, N.P. indicated that the bruises on arms and back were approximately two centimeters in size. She acknowledged that the hospital's examination found no injuries to her vagina. N.P. also testified that she had not contacted police earlier because she had been scared.

¶ 13 On redirect examination, N.P. stated that she remembered the assault despite her alcohol consumption. She also testified that as a result of the assault she had injuries to her knees, soreness in her vagina, and that the bruises on her arm were about the size of a person's fingers.

¶ 14 The jury next heard testimony from Maggie Perez, a hospital nurse who had examined N.P. on January 20, 2012. Perez stated that she was experienced in examining victims of sexual assault and that she usually began such examinations "with a narrative, the patient's story" to help "guide[] her exam." The State then asked "what did [N.P.] tell you happened?" After defense counsel objected and was overruled, Perez testified:

> "[N.P.] came in, and she said that she had gone to a bar, and it was – she went with her friend. They had a couple of drinks, and then a friend of [N.P.'s] *** drove them to a flower shop in Elmwood Park.
>
> [N.P.] said that *** she is really bad under peer pressure, and her friend talked her into doing a line of coke. And she said

> that she had only done it [on] one other occasion. It was a small amount *** and so she wasn't used to it.
>
> And she said that a guy came up to her because when they got to the flower shop, they went to the basement of the flower shop so it was Francisco, her friend, and two other guys."

¶ 15 At that point, defense counsel "object[ed] to this rolling narrative." The court sustained the objection. The State then asked Perez: "what did she tell you next?" Perez testified:

> "A: She told me that *** one of the guys *** asked her if she wanted to take a smoke outside so they stepped outside, and the guy attempted to kiss her.
>
> And she said, 'I don't want to kiss you.' And he said, 'It's because, you know, your race?' And she said, 'No, I am not that kind of girl. I like to get to know someone before I kiss them.'
>
> Q: After that, what did she tell you?
>
> A: She said that there was a – there was an attached garage that was open, and he pushed her in there, and he put her on the ground, and he was holding her down. ***
>
> And he kept – he kept holding her down. He pulled off his leggings, and he penetrated her. And she said the whole time she said, you know, 'It took three to five minutes but I kept saying help me, help me. I don't want this. ***'
>
> And finally someone heard her. They ran in, and the two guys — she said she was crying, and she was very upset. Two

> guys came back to her, and they said 'Don't worry. We chased him off.' "

At that point, defense counsel again objected to Perez's testimony as hearsay, and the court then ordered a sidebar.

¶ 16 The defense counsel moved for a mistrial for permitting "double hearsay" in a "rolling narrative." The court denied the motion, stating that most of the testimony "goes to this nurse being able to determine what the treatment for her is going to be." The court offered to instruct the jury "that they are not to consider anything that [N.P.] says that [defendant] said to her," but ruled that "everything else" was relevant to N.P.'s treatment. The court thus offered to "give the jury a limiting instruction to disregard anything that [N.P.] indicated to the nurse regarding what those guys said or did." Defense counsel declined, stating that a limiting instruction would only "highlight" that testimony.

¶ 17 Perez proceeded to testify that on N.P.'s left upper arm "by the tricep she had a purple bruise, and right above it she had a small, pinkish-reddish bruise, and right below that two smaller, reddish-pinkish bruises," as well as a bruise in the "mid-upper back area." Perez testified that the tricep bruise was "a couple centimeters by a couple centimeters" and that the other bruises were smaller, "approximately a half centimeter to 2 half centimeters." Perez testified that the bruise on N.P.'s back was "four centimeters in length and about half a centimeter in width." Perez also testified that she took oral and vaginal swabs as well as fingernail scrapings from N.P. The parties later stipulated that the Illinois State Police Forensic Science Center identified no semen in the swab samples collected from N.P.

¶ 18 On cross-examination, Perez acknowledged that she did not observe any lacerations or other damage to N.P.'s vagina consistent with sexual assault. However, Perez testified that the absence of such injuries does not indicate that sex was consensual.

¶ 19 Following Perez, the State called Valdivia, who testified that he had known the defendant for many years. On the night of January 18, 2012, he had driven the defendant and another friend to a bar where Valdivia planned to meet with Mitchell. At the bar, they met with Mitchell, N.P. and Enright. The group later decided to leave in Valdivia's mini-van.

¶ 20 Valdivia testified that he drove the group to a convenience store, where they purchased alcohol. The group proceeded to Valdivia's family's flower shop, which he stated had "an apartment-type place in the basement."

¶ 21 Valdivia testified that, while the group was in the basement, N.P. said something to him about the defendant. Valdivia testified that he "got a bad sense so I just told [the defendant] to calm down." He recalled that N.P. and the defendant later "went outside to have a cigarette." After about nine or ten minutes, Valdivia testified, the group went outside to look for them.

¶ 22 The group found the defendant and N.P. in the garage. Valdivia testified that he saw the defendant "on top of [N.P.]," that N.P. was on her back, and that they were "lying face-to face." Valdivia also testified that "they were getting off the floor," "[N.P.] was pulling up her pants" and the defendant was "pulling up his pants." Asked to describe N.P.'s facial expression, Valdivia answered: "Well, it could mean a couple things, you know. Like either embarrassed or scared, you know."

¶ 23 Valdivia testified that he "didn't know what was going on" after finding the defendant and N.P. in the garage: "[A]fter it got a little strange, you know, it's either you catch someone having sex, you know, or something bad actually happened." Valdivia further testified that he "didn't

know who was telling me the truth." Valdivia claimed not to remember exactly what he had said to the defendant, but recalled that the defendant left after Valdivia asked him to go home.

¶ 24 Valdivia also testified equivocally when the State asked him about particular statements he had made to police. He acknowledged that he may have told detectives that N.P. looked "scared and upset" in the garage. Valdivia also acknowledged that he had told detectives that on the night of the incident, he had told the defendant "what the f*** are you doing," "we don't do this kind of s*** here," and "you better hope that she is lying." Valdivia also acknowledged that he may have told police that, in a subsequent conversation on January 21, 2012, the defendant had told him that he had "f***ed" N.P.

¶ 25 The State then showed Valdivia his written statement to police, which he acknowledged that he had signed. Defense counsel objected, arguing the written statement could not be used for impeachment. The court overruled the objection.

¶ 26 Following Valdivia's testimony, Detective Glen Mieszala testified that he had met with Valdivia and had typed a statement based on Valdivia's description of the incident. He testified that Valdivia told him that the defendant had been "all over" N.P. and was "putting too much pressure" on her. Detective Mieszala testified that Valdivia told him that on the night of the incident, he told the defendant "what the f*** are you doing" and the defendant stated that he had "f***ed" N.P. Valdivia also reported to Detective Mieszala that on January 21, 2012, the defendant again stated that he had "f***ed" N.P.

¶ 27 N.P.'s friend Julie Enright also testified about the night in question. Enright recalled that at Caps bar, Mitchell introduced Enright and N.P. to Valdivia, Maturen, and the defendant. When it was "closing time" at the bar, the group left. Enright recalled that in the basement of the flower shop, the group conversed, listened to music, and used cocaine. At some point N.P. and

the defendant went outside to have a cigarette. After five or ten minutes, Enright told the other members of the group "maybe we should go check on them."

¶ 28 When the group found N.P. and the defendant in the garage, Enright saw N.P. "on her back with her pants down to her ankles crying, and [the defendant] was to the side." After the defendant left, the group returned to the basement, but Enright stated that N.P. looked "sick," "frantic," and "antsy." Valdivia eventually drove her and N.P. back to Caps bar. Enright and N.P. drove to Enright's house before N.P. went to her parents' home.

¶ 29 On cross-examination, Enright testified that she and N.P. arrived at Caps about 9 p.m., and admitted that she and N.P. were drinking until the bar closed at approximately 12:30 a.m. Enright also admitted that she and N.P. had ingested cocaine at the flower shop. The State rested after Enright's testimony.

¶ 30 Outside the presence of the jury, the State argued that the portions of Valdivia's police statement that were addressed in his trial testimony should be admitted as substantive evidence. Defense counsel responded: "Fine, but as long as the actual written statement isn't going in." Shortly thereafter, the State requested admission of its exhibits, including Valdivia's written statement. The court admitted all such exhibits into evidence.

¶ 31 The defendant elected to testify in his own defense. He stated that Valdivia drove him to Caps bar, where they met Mitchell, N.P., and Enright. The defendant stated that the three women were "kind of drunk" when he arrived at the bar.

¶ 32 The defendant testified that when the group left in Valdivia's van, N.P. was sitting on his lap. The defendant testified that the group stopped at a store to purchase alcohol and made a separate stop to purchase cocaine before the group arrived at the flower shop.

¶ 33 The defendant denied using cocaine but testified that Mitchell and N.P. used cocaine. The defendant testified that N.P. was "flirting" with him in the basement. According to the defendant, N.P. went upstairs to smoke, and ten or fifteen minutes later he also went upstairs to smoke a cigarette. The defendant claimed that he and N.P. were smoking together, before they entered the garage.

¶ 34 The defendant stated that N.P. went into the garage first. He testified that he kissed N.P. in the garage, but that "she told me to get away." He testified that the other two men arrived and told him to leave, and he went home. The defendant denied grabbing N.P.'s arms, removing her clothes, or sexually assaulting her.

¶ 35 On cross-examination, the defendant denied that he was flirting with N.P. The defendant further testified that after he had kissed N.P. in the garage, she had kissed him back, and that they were standing and kissing for "five or ten minutes." He denied touching N.P. in any other way or removing her clothes. The defendant claimed that he eventually "stopped because I got tired of kissing her" before the other men told him to go home. The defendant also denied ever speaking to Valdivia after the incident.

¶ 36 The defendant also admitted on cross-examination that he had told police that N.P. had followed him outside. He also admitted telling police that N.P. had removed his pants and had pulled down her own pants. However, he denied telling police that he had sex with N.P.

¶ 37 Following the defendant's testimony, the court and the attorneys for the State and the defendant had extensive discussions regarding jury instructions outside the presence of the jury. The court and the parties' counsel spent a great deal of time discussing the appropriate concluding instructions regarding Count 1 (aggravated sexual assault based on bodily harm) and

Count 2 (aggravated sexual assault perpetrated during a kidnapping), especially because both contained the same lesser included offense of criminal sexual assault.

¶ 38 The court, as well as the State and the defendant's counsel, relied heavily on the Illinois Pattern Jury Instructions (IPI). The court and the parties' attorneys recognized that instruction 26.01R of the IPI provides for the submission of three verdict forms where an offense includes a lesser offense. IPI 26.01R provides, in relevant part, that the jury is to be instructed:

> "[1] The defendant [is] charged with the offense of [greater offense]. Under the law, a person charged with [greater offense] may be found (1) not guilty of [greater offense] and not guilty of [lesser offense]; or (2) guilty of [greater offense]; or (3) guilty of [lesser offense].
>
> [2] Accordingly, you will be provided with three verdict forms [as to each defendant] pertaining to the charge of [greater offense]: 'not guilty of [greater offense] and not guilty of [lesser offense],' 'guilty of [greater offense],' and 'guilty of [lesser offense].'
>
> [3] From these three verdict forms you should select the one verdict form that reflects your verdict [as to each defendant] and sign it as I have stated. Do not write on the other two verdict forms [as to that defendant]."
>
> Illinois Pattern Jury Instructions, Criminal, No. 26.01R (hereinafter IPI 26.01R).

¶ 39 The State recognized that providing three verdict forms with respect to each of Counts 1 and 2 would result in a total of six verdict forms, including two duplicate verdict forms reflecting guilt of criminal sexual assault, a lesser included offense of both counts. The attorneys for the State recognized the potential for jury confusion and thus asked the court to clarify the instructions for Counts 1 and 2:

> "MS. DICKLER [State's attorney]: ***. So we thought that you would instruct the jury possibly to keep like the three [verdict forms] for the bodily harm [Count 1] together and the three for the kidnapping [Count 2] together so that they don't confuse the criminal sexual assault guilty verdict forms.
>
> MS. LEUIN [State's attorney]: "Because we can't have two general criminal sexual assault verdict forms. It looks strange. They're going to be presented with a not guilty for both or a guilty for agg[ravated] crim[inal] sex[ual] assault bodily harm, or guilty of crim[inal] sex[ual] assault.
>
> And then when you get to the kidnapping [Count 2] they're also going to get a same guilty of crim[inal] sex[ual] assault. So it's confusing. So we thought we could at least maybe just paper clip them together for each three groups."

¶ 40 The defense counsel objected to the submission of two verdict forms reflecting guilt for the lesser included offense of criminal sexual assault. Instead, the defendant's counsel suggested that the instructions include a single verdict form for the lesser included offense with respect to both counts.

¶ 41 The State's attorney responded that it was improper to include a single verdict form for the lesser included offense "because there are two counts to consider." The State argued that IPI 26.01R calls for the use of three verdict forms for each count: "[A] not guilty for the greater and lesser, a guilty for the greater and guilty for the lesser. So, if you just tender one guilty for the lesser, it's completely confusing and goes against the concluding instruction for the jury." Thus the State urged that the jury "need[s] three verdict forms for each charge they're considering."

¶ 42 After reviewing IPI 26.01R, the court agreed with the defense counsel that "you can't have two guilty verdict forms on the crim[inal] sexual assault" and thus there should only be one verdict form for that lesser included offense for both Counts 1 and 2. The court instructed the parties' attorneys to modify the concluding instructions set forth in IPI 26.01R "so that [the jurors] understand that regarding the -- the agg[ravated] criminal sexual assault kidnapping [Count 2] and the one bodily harm [Count 1] that they will receive only one guilty verdict form regarding criminal sexual assault."

¶ 43 The attorneys for the State and the defendant then debated how to clearly instruct the jury that they would receive a single verdict form for the lesser included offense for both Counts 1 and 2. The defendant's counsel suggested drafting a single paragraph on both counts that "enumerate[s] all the verdict forms and indicate[s] a number" of total verdict forms.

¶ 44 The court agreed to that approach, but remarked that it was going to be "confusing no matter what":

> "THE COURT: You know, to be honest with you I don't – it doesn't really – I mean it's going to be confusing no matter what. Because, to be honest with you, the jury instruction itself is confusing.

> But I think to make it less confusing I really think you have to kind of put those two paragraphs [for Counts 1 and 2] together. Then after that list what the verdict forms are going to be ***."

¶ 45 The State, while noting its objection, drafted modified concluding instructions to reflect the court's ruling. Those instructions, which were later submitted to the jury, describe the possible verdicts for Counts 1 and 2 as follows:

> "The defendant is charged with the offense of aggravated criminal sexual assault based on bodily harm. Under the law, a person charged with aggravated criminal sexual assault based on bodily harm may be found (1) not guilty of aggravated criminal sexual assault based on bodily harm and not guilty of criminal sexual assault; or (2) guilty of aggravated criminal sexual assault based on bodily harm; or (3) guilty of criminal sexual assault.
>
> The defendant is also charged with the offense of aggravated criminal sexual assault perpetrated during the course of the commission of a kidnapping. Under the law, a person charged with aggravated criminal sexual assault perpetrated during the course of the commission of a kidnapping may be found (1) not guilty of aggravated criminal sexual assault perpetrated during the course of the commission of a kidnapping and not guilty of criminal sexual assault; or (2) guilty of aggravated criminal sexual assault perpetrated during the course of the commission of a kidnapping; or (3) guilty of criminal sexual assault.

Accordingly, you will be provided with five verdict forms for these two charges: [1] 'not guilty of aggravated criminal sexual assault based on bodily harm and not guilty of criminal sexual assault,' [2] 'not guilty of aggravated criminal sexual assault perpetrated during the course of the commission of a kidnapping and not guilty of criminal sexual assault,' [3] 'guilty of aggravated criminal sexual assault based on bodily harm,' [4] 'guilty of aggravated criminal sexual assault perpetrated during the course of the commission of a kidnapping,' and [5] 'guilty of criminal sexual assault.'

From these five verdict forms, you should select the verdict form that reflects your verdict and sign it as I have stated. Do not write on the other verdict forms.

If you find that the State has proved the defendant guilty of both aggravated criminal sexual assault based on bodily harm and criminal sexual assault, you should select the verdict form finding the defendant guilty of aggravated criminal sexual assault based on bodily harm and sign it as I have stated. Under these circumstances do not sign the verdict form finding the defendant guilty of criminal sexual assault when considering this particular charge.

If you find that the State has proved the defendant of both aggravated criminal sexual assault perpetrated during the course of

> the commission of a kidnapping and criminal sexual assault, you should select the verdict form finding the defendant guilty of aggravated criminal sexual assault perpetrated during the course of the commission of a kidnapping and sign it as I have stated. Under these circumstances, do not sign the verdict form that the defendant is guilty of criminal sexual assault when considering that particular charge."

As the defendant was also charged with kidnapping, the jury was also instructed to select from two additional verdict forms (guilty or not guilty) for that charge.

¶ 46 The court asked the defendant's counsel if he had any objection to these instructions. The defendant's counsel responded that "other than the verbiage being very confusing, I think it is legally correct." The court agreed: "Yes, it's confusing when it comes straight from the IPI."

¶ 47 Separately, the defendant's counsel also sought an instruction on unlawful restraint, as a lesser included offense of sexual assault. Defense counsel urged that the jury could find "that he grabbed her in the garage and no sexual act occurred. That's unlawful restraint." The State argued that the jury could not reasonably find that the defendant "merely detained" N.P. without also finding sexual assault. The court denied the defendant's request.

¶ 48 The court's instructions to the jury thus explained that five verdict forms would be submitted for both Counts 1 and 2:

> "[Y]ou will be provided with five verdict forms for these two charges. [1] Not guilty of aggravated criminal sexual assault based on bodily harm, and not guilty of criminal sexual assault. [2] Not guilty of aggravated criminal sexual assault perpetrated during

> the course of the commission of a kidnapping, and not guilty of criminal sexual assault. [3] Guilty of aggravated criminal sexual assault based on bodily harm, [4] guilty of aggravated criminal sexual assault perpetrated during the course of the commission of a kidnapping. And [5] guilty of criminal sexual assault. Those five forms.
>
> From these five verdict forms you should select the verdict form that reflects your verdict and sign it as I stated."

With respect to the separate kidnapping charge, the court also instructed the jury to choose from either a "guilty" or "not guilty" verdict form.

¶ 49 On August 14, 2013, the jury retired to deliberate. Jury deliberations continued into the next day, August 15, 2013. That morning, the jury submitted the following question to the court:

> "For Count 2 [aggravated criminal sexual assault perpetrated during the course of a kidnapping] if we find him guilty of criminal sexual assault but not guilty of kidnapping do we sign the guilty of criminal sexual assault form at the same time of finding him guilty of Count 1 [aggravated criminal sexual assault based on bodily harm]?"

¶ 50 Upon receiving the question, the court remarked: "As I read this I think I know where the jury is headed." The court stated: "My take would be to, again, refer them to the instructions, because the instructions clearly state of the five verdict forms that they have sign only the one form that reflects their verdict."

¶ 51 The court subsequently stated: "If I'm understanding this correctly, what they're indicating is if we find him guilty of Count 1 but as to Count 2 we don't find as to kidnapping and we find him guilty of the criminal sexual assault do we sign for that count form." The court further stated: "However, that is not what the instructions indicate, because they have five forms ***. So of those five forms they would sign only one form." The court thus responded to the question by referring the jury to the instructions previously given. Neither the State nor the defendant's counsel objected to this approach.

¶ 52 Shortly thereafter, the jury announced that it had found the defendant guilty of aggravated criminal sexual assault based on bodily harm (Count 1), and not guilty on the charge of kidnapping. However, the jury did not announce any verdict with respect to the charge of aggravated criminal sexual assault perpetrated during the course of a kidnapping (Count 2).

¶ 53 The court conducted a sidebar with the parties' counsel and acknowledged that a verdict for Count 2 was "missing." With the agreement of counsel, the court instructed the jury to continue to deliberate with respect to Count 2 and to return a verdict on that count only.

¶ 54 After the jury left to resume deliberations, the State pointed out that, based on the wording of the verdict forms, inconsistent verdicts would result whether or not the jury convicted the defendant of Count 2. The State noted that because the jury had already found the defendant not guilty of kidnapping, the jury could not logically find him guilty of aggravated sexual assault perpetrated during a kidnapping. Furthermore, inconsistent verdicts would also result if the jury found him not guilty of Count 2, because the only "not guilty" verdict form provided to the jury stated that the defendant was "not guilty of aggravated criminal sexual assault perpetrated during the course of the commission of a kidnapping *and not guilty of criminal sexual assault*."

(Emphasis added). However, that finding would be inconsistent with the jury's guilty verdict on Count 1, aggravated criminal sexual assault with bodily harm.

¶ 55 The defendant's counsel stated "the problem is legally you have a blatant inconsistent form." The court agreed, and concluded that the phrase "and not guilty of criminal sexual assault" should not have been included in the not guilty form for Count 2. The court again remarked that the instructions were "confusing" and that the not guilty verdict form submitted to the jury for Count 2 "should have never been given."

¶ 56 Defense counsel suggested that "the most expeditious way" to handle the dilemma would be for the State to *nolle prosequi* Count 2. The State agreed, and Count 2 was dismissed. Accordingly, the court informed the jury that further deliberations were no longer necessary. The court subsequently entered judgment on the jury's verdict finding the defendant guilty of Count 1, aggravated criminal sexual assault based on bodily harm.

¶ 57 On September 11, 2013, the defendant submitted a motion for new trial. However, that motion did not specify any error with respect to jury instructions or evidentiary rulings. On November 1, 2013, the court denied the defendant's motion for new trial. On the same date, the court sentenced the defendant to six years in the Illinois Department of Corrections. The defendant filed his notice of appeal on the same date.

¶ 58 ANALYSIS

¶ 59 We note that we have jurisdiction as the defendant perfected a timely notice of appeal. See Ill. S. Ct. R. 606 (a),(b) (eff. Feb. 6, 2013).

¶ 60 The defendant asserts four separate arguments seeking reversal, two concerning evidentiary rulings and two concerning jury instructions. First, he claims that the court erred in admitting out-of-court statements by N.P. to nurse Perez that did not pertain to medical

treatment. Second, he argues that Valdivia's prior statements to police were improperly admitted.

¶ 61 The defendant also raises two claims of error relating to jury instructions. He contends that the court erred by refusing to instruct the jury on the lesser included offense of unlawful restraint. Finally, he argues he was denied a fair trial by the failure to give the jury two separate verdict forms for criminal sexual assault, a lesser included offense of Counts 1 and 2. As we find that the last argument warrants reversal, we do not address the first three arguments raised by the defendant. Specifically, as set forth below, we conclude that the manner in which the jury was instructed — compounded by the court's failure to seek clarification of the jury's question or to otherwise address the jury's obvious confusion – amounted to plain error.

¶ 62 The defendant argues on appeal (contrary to the position taken by his counsel at trial) that the jury should have received six rather than five verdict forms for Counts 1 and 2. The defendant notes that IPI 26.01R specifies three possible verdict forms where a jury is instructed on an offense with a lesser included offense: (1) not guilty of the greater offense and not guilty of the lesser offense; (2) guilty of the greater offense, and (3) guilty of the lesser offense.

¶ 63 The defendant reasons that since he faced two different counts of aggravated criminal sexual assault, both of which included a lesser offense, "the trial court was required to give three verdict forms for both Counts One and Two, for a total of 6 verdict forms." Thus, he contends the jury should have received *two* verdict forms for the same lesser included offense of criminal sexual assault. The defendant suggests that as a result, the jury did not understand that they had the option of finding the defendant guilty of this lesser included offense with respect to *either* Count 1 or Count 2, and may have convicted him only of "a lesser charge for Count One if they knew that was a possibility."

¶ 64 The defendant also asserts that the jury's question "demonstrated their confusion and that they did not know that criminal sexual assault was also a lesser included [offense] for Count One" and the trial court "did not alleviate this confusion." He thus argues that the "failure to provide two lesser verdict forms create[d] substantial confusion depriving [him] of a fair trial."

¶ 65 Before we may analyze the merits of this claim, we must determine whether the issue is reviewable. Notably, as emphasized by the State, it was the defendant's trial counsel (which is not his counsel on appeal) that requested the use of five verdict forms. The defendant does not dispute that his trial counsel "consented to giving only one verdict form for the lesser included [offense of] criminal sexual assault." Moreover, the defendant's posttrial motion did not assert this error. "Generally, a defendant forfeits review of any putative jury instruction error if the defendant does not object to the instruction or offer an alternative instruction at trial and does not raise the instruction issue in a posttrial motion." *People v. Carter*, 389 Ill. App. 3d 175, 180 (2009) (quoting *People v. Herron*, 215 Ill. 2d 167, 175 (2005)).

¶ 66 Nevertheless, the defendant contends that we may review the issue as plain error. The reviewability of plain errors that would otherwise be forfeited is established in the rules of our supreme court. Supreme Court Rule 615(a) states that in criminal appeals, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615 (a). "Under the plain error rule, issues not properly preserved may be considered by a reviewing court under two limited circumstances: (1) where the evidence is closely balanced ***; or (2) where the alleged error is so substantial that it affected the fundamental fairness of the proceeding, and remedying the error is necessary to preserve the integrity of the judicial process." (Internal quotation marks omitted.) *Carter*, 389 Ill. App. 3d at 180. Further, Supreme Court Rule 451(c) "provides that 'substantial defects' in

criminal jury instructions 'are not waived by failure to make timely objections thereto if the interests of justice require.' " *Herron*, 215 Ill. 2d at 175 (quoting 177 Ill. 2d R. 451 (c)).

¶ 67 Nonetheless, the State contends that "[p]lain error review is unwarranted" in this case because the defendant "affirmatively acceded to the trial court's ruling" with respect to the jury instructions at issue. The State argues that "[a]ffirmative waiver principles and the doctrine of invited error disallow defendant from now asking the reviewing court to discern alleged error where counsel directly participated in its creation." As support, the State cites this court's decision in *People v. Major-Flist*, 398 Ill. App. 3d 491 (2010) and our supreme court's decision in *People v. Villarreal*, 198 Ill. 2d 209 (2001).

¶ 68 On the other hand, the defendant maintains that plain error review is proper, relying on our decision in *People v. Carter*, 389 Ill. App. 3d 175 (2009).

¶ 69 Moreover, we acknowledge that, following the filing of our original Rule 23 order in this case on December 7, 2015, the State filed a petition for rehearing containing additional argument on the reviewability of the asserted errors in this case. In that petition, the State urges that our Rule 23 order "overlooked the invited error rule and estoppel principles by permitting defendant to argue a position which is directly contrary to the position taken by his trial counsel." To support its position that plain error review is inapplicable to this case, the State's petition for rehearing relies heavily on *People v. Hughes*, 2015 IL 117242, a decision of our supreme court that was filed after our original Rule 23 order in this appeal. We withdrew our initial Rule 23 order, as we wished to address the State's petition and further explain why the jury confusion in this case cannot be dismissed as unreviewable "invited error," but is subject to plain error review.

¶ 70 First, we conclude that the State's reliance on *Major-Flist*, a sexual assault case where the alleged victim was a seven-year-old child, is inapposite. The *Major-Flist* defendant argued that

the trial court erred in admitting certain out-of-court statements by the child, pursuant to a statutory hearsay exception allowing such evidence if the child testifies. *Id.* at 499-500 (citing 725 ILCS 5/115-10 (West 2006)). Although the child had testified at trial, the defendant asserted that the child's testimony was not sufficient to trigger the hearsay exception. *Id.* at 499. Our court found that the defendant was estopped from making this argument because it was "inconsistent with the position defendant took in the trial court." *Id.* at 500-01 (noting the issue "goes beyond mere waiver because defendant took the position at trial that [the child] did testify."). However, *Major-Flist* did not address the plain error doctrine.

¶ 71 The State's citation of *Villarreal*, 198 Ill. 2d 209, is more factually analogous to this case. In *Villarreal*, the defendant was charged with two counts of first degree murder and one count of second degree murder. *Id.* at 212. The State initially proposed to instruct the jury to choose from only three possible verdict forms. *Id.* at 223-24. However, the parties later agreed to jury instructions proposed by the defendant, under which the jury was told that the defendant was charged with two types of first degree murder, "Type A" for "strong probability murder" and "Type B" for felony murder. *Id.* at 224. The jury was instructed to choose one of three verdict forms for "Type A" and also to choose from two additional forms for "Type B" murder. *Id.*

¶ 72 During deliberations, the jury sent a note asking: "How many of the forms do we fill out, all or just one we decided on?" *Id.* at 225. With the agreement of the parties, the court responded by instructing the jury to "pick one of the three verdict forms" for "Type A" murder, and select one of two verdict forms for "Type B." *Id.* The jury found the defendant not guilty of first degree murder, but guilty of second degree murder. *Id.* at 226.

¶ 73 The appellate court reversed, finding that defendant had been denied a fair trial due to the lack of a general "not guilty" form to "reflect[] the absence of culpability of any of the charged

offenses." *Id.* Before our supreme court, the State argued that the "defendant should be barred from challenging the propriety of the verdict forms on appeal, because defense counsel submitted the forms that were used." *Id.* at 227. Our supreme court agreed, explaining:

> "[w]here, as here, a party acquiesces in proceeding in a given manner, he is not in a position to claim he was prejudiced thereby. [Citations and internal quotation marks omitted.] Active participation in the direction of proceedings, as in this case, goes beyond mere waiver. To allow defendant to object, on appeal, to the very verdict form he *requested* at trial, would offend all notions of fair play. See *People v. Smith*, 71 Ill. 2d 95, 104 (1978) (noting that normally neither Rule 615(a), allowing parties to raise '[p]lain error,' nor Rule 451(c), which overrides waiver when 'the interests of justice so require,' is applicable 'where the instruction of which defendant complains on review is one which he himself tendered in the trial court.') It is well established that an accused may not ask the trial court to proceed in a certain manner and then contend in a court of review that the order which he obtained was in error. [Citations.]" (Emphasis in original and internal quotation marks omitted.) *Id.* at 228.

¶ 74 The decision in *Villarreal* contained no other discussion of the plain error doctrine. Moreover, after accepting the State's estoppel argument, the court proceeded to conclude that the verdict forms were "appropriate" and "the manner in which the trial court instructed the jury was wholly correct." *Id.* at 228.

¶ 75 We acknowledge that the facts of this case bear similarities with *Villarreal.* Specifically, in this case the defendant's trial counsel requested the use of a single verdict form for the lesser included offense of criminal sexual assault. If the asserted error in this case was limited to the number of forms submitted —and did not also implicate a failure to address the jury's expressed confusion—we might well find that defendant would be estopped pursuant to *Villarreal*. However, we find that *Villarreal* does not preclude plain error review under the particular facts of this case. Significantly, in this case, the basis for the claimed error is not limited to the initial jury instructions, but also arises from the jury's question regarding those instructions and the court's response (or lack thereof) to that question. Our concern in this case does not focus on the use of five or six verdict forms, but is specifically focused on the confusion evidenced by the jury's question and the trial court's response to the jury's confusion. We thus find that this case is distinguishable from *Villarreal.*[1]

¶ 76 Furthermore, the State's petition for rehearing relies largely on our supreme court's recent decision in *People v. Hughes*, 2015 IL 117242, arguing that estoppel principles preclude our review of the jury instructions and the trial court's response to the jury's question in which it expressed confusion. In *Hughes*, the supreme court referred to concepts of waiver, forfeiture, and invited error, holding that, in reviewing a motion to suppress a confession, our appellate court had erred in relying upon factual assertions that were different from those presented in the trial court. However, as set forth below, we do not find that *Hughes* precludes our review of the errors in this case.

[1]Although the jury submitted a question in *Villareal*—"How many of the forms do we fill out, all or just one we decided on?" (198 Ill. 2d at 225), that question was much simpler and clearer than the question presented in this case. Moreover, unlike this case, the trial court in *Villarreal* directly answered the jury's question to address any confusion.

¶ 77 In *Hughes*, the 19-year-old defendant had been apprehended by police in Michigan in connection with two shooting deaths in Chicago. *Id.* ¶¶ 6-7. The defendant remained handcuffed while detectives drove him back to Chicago for interrogation. *Id.* ¶ 7. Detectives interrogated him over the course of several hours, until he admitted to the shootings. *Id.* ¶¶ 8-9.

¶ 78 The defendant moved to suppress his statements to police. *Id.* ¶ 10. Although the written motion generally argued that he had been subject to "coercion," at the hearing on the motion to suppress, his defense counsel made only two limited arguments as to why his statements were involuntary: first, that the detectives "cuffed defendant too uncomfortably" during the drive from Michigan; and second, that the detectives questioned him during the drive without informing him of his *Miranda* rights. *Id.* ¶¶ 10-11. The trial court denied the motion to suppress. *Id.* ¶ 15. After the State elicited the defendant's statements at trial, he was convicted of both murders. *Id.* ¶ 22.

¶ 79 On appeal, the defendant challenged the denial of the motion to suppress with respect to his admission to shooting one of the victims. *Id.* ¶ 25. In arguing that his confession was not voluntary, however, his appeal asserted various grounds that had *not* been asserted in the trial court, such as his age and lack of education, his lack of sleep and food during the prolonged interrogation, his emotional distress due to his grandfather's death, and that his substance abuse made him more "susceptible to suggestion" by the police. *Id.*

¶ 80 On appeal, the State argued the defendant should be estopped from such claims due to his " 'affirmative waiver of these issues where he did not present these reasons at his motion to suppress in the trial court.' " *Id.* ¶ 26. However, the appellate court held that the admissibility of the defendant's confession was reviewable under the plain error doctrine and proceeded to find that the defendant's confession was involuntary, warranting a new trial. *Id.* ¶ 27.

¶ 81 The State appealed to our supreme court, contending that the defendant had "affirmatively waived those arguments raised on appeal that were not raised before the trial court" and that "intentional waiver" applies "when arguments are deliberately not made." *Id.* ¶ 33. The State argued that the situation was analogous to "the invited error rule, wherein a party cannot complain of error that it brought about or participated in." *Id.* (citing *Villareal*, 198 Ill. 2d at 227-28).

¶ 82 The supreme court agreed with the State, citing "concerns motivating the doctrines of forfeiture and waiver." *Id.* ¶ 40. The supreme court noted that the defendant's "reasons for suppression in the trial and appellate courts *** are almost wholly distinct from one another." *Id.* The *Hughes* decision noted that in the trial court, the defendant had "presented no evidence and produced no argument as to sleep deprivation, food deprivation, the defendant's education, his age, his grief at the loss of his grandfather," or other factors relied upon by the appellate court. *Id.* ¶ 41. Thus, the trial court did not have "the opportunity to consider the bulk of these arguments" and "the State was never given the opportunity to present evidence or argument that the defendant's confession was voluntary even as against these challenges." *Id.* ¶ 44. "[B]ecause defendant's contentions regarding voluntariness at trial and on appeal were almost entirely distinct," the supreme court found that the "defendant did not adequately preserve these claims." *Id.* ¶ 45. The *Hughes* court concluded that "[b]ecause defendant failed to produce an adequate record for the appellate court to review voluntariness under these new theories, the appellate court ought not to have decided these factual issues anew." *Id.* ¶ 46.

¶ 83 Nevertheless, we do not find that *Hughes* precludes our review of the trial court's conduct in this case. The supreme court's concern in *Hughes* arose from the fact that the defendant's appellate arguments relied upon numerous factual grounds for the involuntariness of his

confession that were not presented in the trial court. Thus, the trial court had lacked an opportunity to address the factual contentions that the appellate court later relied upon.

¶ 84 This aspect of *Hughes* is inapplicable to the circumstances of this case. The principle articulated in *Hughes*, that an appellate court should not review facts that the trial court did not have the opportunity to consider, is inapposite. Here, the parties' arguments on appeal do not rely on facts that were not presented to the trial court. Rather, the asserted errors concern jury instructions and a jury question that were explicitly discussed by the trial court. Thus, the contention by the State in its petition for rehearing that "we cannot be confident in the adequacy of the record to address the new argument now presented" is unfounded.

¶ 85 We further emphasize that this is *not* a case of invited error, notwithstanding the fact that the defendant's trial counsel requested the use of five verdict forms. Our determination of this appeal is not based on the narrow issue of the number of forms. If the error asserted in this appeal was limited to that issue, we would agree that the concept of invited error would bar our review. However, the issues presented by the facts of this case are not so simple. The asserted error is not limited to the content of the initial instructions. Rather, the appeal is complicated by the jury's *expressed confusion* in understanding the instructions, compounded by the court's lack of a response to the jury's question.

¶ 86 Our supreme court's 1994 decision in *People v. Childs*, 159 Ill. 2d 217 (1994), illustrates the distinction between an error in the content of jury instructions and a trial court's error in failing to adequately respond to a jury's question. Notably, the principles stated in *Childs* regarding a trial court's obligations in this situation were relied upon by our court in *People v. Carter*, 389 Ill. App. 3d 175 (2009), which is cited by the defendant to support plain error review in this case. We thus review both cases.

¶ 87 In *Childs*, the defendant was charged in connection with the shooting death of a security guard during an attempted grocery store robbery. 159 Ill. 2d at 220-21. The jury instructions, which had been agreed upon by the parties, included two packets of verdict forms. *Id.* at 225. "The first packet contained four verdict forms: 'Guilty of Murder,' 'Guilty of Voluntary Manslaughter,' 'Guilty of Involuntary Manslaughter,' and 'Not Guilty of The Murder, Voluntary Manslaughter, and Involuntary Manslaughter of [the deceased].' " *Id.* A second packet "contained two verdict forms: 'Guilty of Armed Robbery' and 'Not Guilty of Armed Robbery.' " *Id.*

¶ 88 During deliberations, the jury submitted the question: " 'Can the defendant be guilty of armed robbery and voluntary or involuntary manslaughter or must murder be the only option with armed robbery?' " *Id.* Without consulting either the State or the defendant's counsel about the question, the trial court instructed his deputy to respond to the jury: " 'You have received your instructions as to the law, read them and continue to deliberate.' " *Id.*

¶ 89 The defendant's counsel subsequently objected to the trial court's failure to contact him concerning the jury's question and the court's response. *Id.* The trial court explained that it had chosen to respond by referring the jury to the original instructions because it had found the question "very difficult because I didn't quite know exactly what they were asking." *Id.* at 226. The court also indicated its belief that "as long as I was not responding to that question[,] it wasn't necessary for me to contact" counsel before responding to the jury. *Id.* The jury convicted the defendant of murder and armed robbery. *Id.*

¶ 90 The appellate court reversed and remanded for a new trial, finding that the "defendant was prejudiced by the trial court's *ex parte* response to the jury's question." *Id.* at 226-27. The supreme court agreed with the appellate court, recognizing that:

> "[J]urors are entitled to have their inquiries answered. Thus, the general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law ***. [Citation.] This is true even though the jury was properly instructed originally. [Citation.] When a jury makes explicit its difficulties, the court should resolve them with specificity and accuracy [citations]. If the question asked by the jury is unclear, it is the court's duty to seek clarification of it. [Citations.] The failure to answer or the giving of a response which provides no answer to the particular question of law posed has been held to be prejudicial error. [Citations.]" *Id.* at 228-29.

¶ 91 The supreme court in *Childs* rejected the State's argument that the defendant could not claim prejudice because the instructions had been "proper and agreed to by both sides." *Id.* at 230. Rather, the supreme court recognized that "whether the instructions were proper and/or agreed to by defense counsel is not the determinative inquiry. The issue is whether the instructions were clearly understandable to the jury. [Citations.] Apparently, they were not or the jury would not have asked the question it asked." *Id.* at 231.

¶ 92 The supreme court held that "the judge had the obligation to inform all parties of the question, seek clarification of it, allow counsel the opportunity to suggest an appropriate response, and then attempt to dispel the jury's confusion with a clear and specific answer." *Id.* at 232. Our supreme court recognized that "a jury is entitled to have its explicit legal questions answered" and that "the trial court has an obligation to seek clarification of the source of the

jury's confusion if the question is unclear, and to then attempt to clarify the matters of law about which the jury has manifested confusion." *Id.* at 233-34. The *Childs* court found reversal warranted, as the trial court "made no effort to seek clarification" of a question that it did not understand and "gave an answer which was tantamount to no answer in that it failed to provide the jury with any guidance for resolving the problem that prompted the question in the first instance." *Id.* at 234.

¶ 93 *Childs* illustrates why — independent from the purported "invited error" by defense counsel with respect to the number of verdict forms — there is an independent basis for error, due to the court's conduct with respect to resolving the jury's confusion in this case. Significantly, in its discussions with counsel, the court recognized and predicted the confusion which it failed to address, stating that the instructions would be "confusing" to the jury "no matter what." The jury's submitted question demonstrated that the trial court's prediction of confusion was accurate and, in fact, the jury was confused. Nevertheless, rather than offer any substantive guidance to address the jury's expressed confusion, the court referred the jury back to the original admittedly confusing instructions. As in *Childs*, the court's decision to answer the jury by referring the jurors to the original instructions was "tantamount to no answer in that it failed to provide the jury with any guidance for resolving the problem that prompted the question in the first instance." *Id.* at 234.

¶ 94 We thus emphasize that we reject the State's suggestion that any "invited error" by the defendant's trial counsel precludes our review, as our review is distinct and not based upon whether there were five verdict forms or six. Rather, it is based upon the trial court's failure to recognize its independent "obligation to seek clarification of the source of the jury's confusion if

the question is unclear, and to then attempt to clarify the matters of law about which the jury has manifested confusion." *Id.* at 234.

¶ 95 Although *Childs* does not discuss the concept of plain error, *Childs* was relied upon by our court's decision in another factually analogous case, *People v. Carter*, 389 Ill. App. 3d 175 (2009). In that decision, our court found that plain error had occurred where, as in this case, a trial court failed to answer a jury's question indicating their confusion with respect to instructions on greater and lesser offenses. The *Carter* decision is instructive.

¶ 96 The defendant in *Carter* was charged with six counts: "(1) possession with intent to deliver more than 100 grams, but less than 400 grams of *** cocaine; (2) two counts of possession with intent to deliver more than 15 grams, but less than 100 grams of *** cocaine; (3) possession of more than 100 grams, but less than 400 grams of *** cocaine; (4) possession with intent to deliver more than 500 grams, but less than 2,000 grams of *** cannabis; and 5) possession of more than 500 grams, but less than 2,000 grams of *** cannabis." *Id.* at 177. The trial court's instructions to the jury tracked Illinois Pattern Jury Instruction Criminal 4th No. 26.01, which specifies a verdict form of either "guilty" or "not guilty" for each given count. *Id.* at 182. Accordingly, for the six charged counts in *Carter*, the jury received 12 forms of verdict and was instructed to " 'select the one verdict form that reflects your verdict.' " *Id.*

¶ 97 During deliberations, the jury submitted the following question to the court: "Can Carter be guilty for under 100 grams and over 100 grams using the same evidence?" *Id*. at 179. "After conferring with the parties, the trial court's response to the jury was, 'You are to consider the evidence and the written instructions and continue to deliberate.' " *Id.*

¶ 98 The *Carter* jury subsequently returned inconsistent verdicts. Specifically, the jury found the defendant "guilty of possession with intent to deliver more than 100 grams, but less than 400

grams of *** cocaine and possession of cannabis with intent to deliver more than 500 grams ***. However, the jury found defendant not guilty of the lesser included offense of possession with intent to deliver more than 15 grams, but less than 100 grams of *** cocaine." *Id.* at 179.

¶ 99 On appeal, the defendant argued "that the trial court deprived him of a fair trial when it improperly instructed the jury on verdict forms by giving IPI Criminal 4th No. 26.01." *Id.* at 180. The defendant also urged that the "trial court compounded this error by refusing to answer the jury's question when it expressed confusion over the verdict forms." *Id.*

¶ 100 Although the State argued that the *Carter* defendant forfeited this issue by failing to raise it in his posttrial motion, our court determined that it was reviewable as plain error. *Id.* Although the first prong of the plain error doctrine did not apply because the evidence was "not closely balanced," we found that the second prong of the doctrine applied due to the severity of the alleged error. *Id.* at 181.

¶ 101 This court explained that under the plain error analysis, the relevant question "is whether a grave error has been committed, or, *** whether an error of such gravity or magnitude has occurred that the fundamental fairness of defendant's trial has been severely threatened." *Id.* at 181 (quoting *People v. Durr*, 215 Ill. 2d 283, 298 (2005)). We also recognized "the supreme court has held that a jury instruction error rises to the level of plain error only when it creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." (Internal quotation marks omitted.) *Id.*

¶ 102 We found that the trial court erred in relying on IPI Criminal 4th No. 26.01, which provides for only two verdict forms for each offense. *Id.* at 183. Instead, we agreed with the *Carter* defendant that the jury should have been instructed with IPI Criminal 4th No. 26.01*R*,

which provides for three verdict forms for each offense containing a lesser included offense: (1) not guilty of either the greater or lesser included offense; (2) guilty of the greater offense; and (3) guilty of the lesser offense. See *id.* at 183-84 (quoting IPI Criminal 4th No. 26.01R).

¶ 103 Our opinion in *Carter* explained that "[t]he purpose of an instruction on a lesser offense is to provide an important third option to a jury which, believing that the defendant is guilty of something but uncertain whether the charged offense has been proved, might otherwise convict rather than acquit the defendant of the greater offense." (Internal quotation marks omitted.) *Id.* at 184. We reasoned that the jury "was not told how to render a verdict when considering both a greater and lesser offense" but had "received a misleading instruction that it would 'receive 12 verdict forms' and 'it should select the one verdict form that reflects [its] verdict.' " *Id.* at 185. (noting that "[t]he given instruction was especially confusing because defendant was charged with two different types of offenses" for cocaine and cannabis). We held that "the jury should not have received two verdict forms" for each offense but "should have received one not guilty form for all related charges and then individual guilty forms for the greater offense and each of the lesser included offenses." *Id.* at 185.

¶ 104 The *Carter* decision then explained that a finding of error did not end the plain error analysis, but that the court must also "consider whether this error was so substantial as to have affected the fundamental fairness of defendant's trial." *Id* at 187. This court concluded that — particularly in light of the jury's expressed confusion— the error warranted reversal. We emphasized that the "record shows proof of the jury's confusion in considering greater and lesser included offenses where the jury sent out a question on this subject during its deliberations." *Id.* Specifically, the jury's question" "indicate[d] that the jury was considering whether it could find defendant guilty of the greater and lesser charged cocaine offenses." *Id.* However,"[r]ather than

correct its instruction error," the trial court had simply referred the jury back to the instructions and asked them to continue to deliberate. *Id.*

¶ 105 The *Carter* opinion emphasized: "The trial court has a duty to instruct the jury when clarification is requested, the original instructions are insufficient or the jurors are manifestly confused." (Internal quotation marks omitted.) *Id.* We then recited our supreme court's discussion in *Childs* as to when such clarification may, or must, be provided:

> " ' A trial court may exercise its discretion and properly decline to answer a jury's inquiries where the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or if the giving of an answer would cause the court to express an opinion which would likely direct a verdict one way or another. [Citation.] However, jurors are entitled to have their inquiries answered. Thus the general rule is that the trial court has a duty to provide instructions to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. [Citation.] *** If the question asked by the jury is unclear, it is the court's duty to seek clarification of it. [Citations.]' " *Id.* at 188. (quoting *Childs*, 159 Ill. 2d at, 228-29).

¶ 106 Applying these principles, our court in *Carter* reasoned that "[s]ince the original instructions were insufficient and the jury expressed its confusion concerning *** whether it

could find defendant guilty of both the greater offense *** as well as the lesser included offense ***, the trial court should have answered the jury ***." *Id.* at 188. We noted that "[t]he trial court's failure to answer the jury's question further compounded the error in the improper jury instructions, which culminated in the jury rendering conflicting verdicts." *Id.*

¶ 107 Our court rejected the State's argument that any such error was harmless. We explained: "when a defendant's right to a fair trial has been denied, this court must take corrective action so that we may preserve the integrity of the judicial process," and that "the court will act on plain error *regardless* of the strength of the evidence of defendant's guilt." (Internal quotation marks omitted and emphasis in original.) *Id.* at 189.

¶ 108 The *Carter* decision concluded that "[i]n light of the instruction error and the expressed confusion by the jury, we are not confident in their verdict." *Id.* We emphasized that this was "not a case where the reviewing court can only speculate" as to the effect of an improper instruction, as the facts "clearly demonstrate the jury's continued confusion over how to render its verdicts on greater and lesser included offenses. *** The cumulative effect of these errors rendered the verdict unreliable and denied defendant a fair trial." *Id.* at 190. We found that the jury instruction error "along with the trial court's failure to respond to the jury's question ***and the entering of inconsistent verdicts amount to plain error affecting the fundamental fairness of defendant's trial." *Id.* Thus, our court reversed and remanded the case for a new trial.

¶ 109 We find that the principles and analysis contained in *Carter* apply to this case. As in *Carter*, the record in this case shows clear proof of the jury's confusion with respect to instructions on lesser and greater offenses. Further, the trial court had already acknowledged that the instructions were "confusing" even before they were given to the jury. Our analysis of the jury's question—which itself was confusing — indicates multiple potential meanings as to

exactly what the jury sought to have explained. However, rather than request clarification from the jury, the trial court considered only a single possible meaning of the jury's question. That possibility assumed the defendant's guilt of the greater offense of Count 1.

¶ 110 The jury's question was:

> "For Count 2 [aggravated sexual assault committed in course of kidnapping] if we find him guilty of criminal sexual assault but not guilty of kidnapping do we sign the guilty of criminal sexual assault form at the same time of finding him guilty of Count 1 [aggravated sexual assault based on bodily harm]?"

Notably, the trial court remarked that it "kn[ew] where the jury is headed" and offered a speculation that *assumed* that the jury had already determined guilt as to Count 1: "If I'm understanding this correctly, *what they're indicating is if we find him guilty of Count 1* but as to Count 2 we don't find as to kidnapping and we find him guilty of the criminal sexual assault do we sign for that count form." (Emphasis added.) Due to this speculative assumption, the court believed that the jury's question was limited to asking how to decide Count 2. The State similarly argues that the "jury's question clearly indicates that they had found defendant guilty of aggravated criminal sexual assault based on bodily harm, but were confused by the jury instructions for count two."

¶ 111 The trial court's and the State's expressed interpretation of the meaning of the jury's question is certainly plausible. However, it was not the only plausible interpretation of the meaning of the question.

¶ 112 The defendant's argument on appeal suggests another possible meaning of the question.

The defendant argues that the jury's question shows the jury "believed that the lesser criminal sexual assault only applied to Count Two." In other words, the defendant suggests the question indicates that the jury did not understand that it had the option to find guilt for the lesser included offense of sexual assault for Count 1.

¶ 113 We agree with the defendant that the question can be interpreted as an indication of confusion as to the distinction between the lesser included offense of criminal sexual assault and the greater offense of aggravated sexual assault with bodily harm in Count 1. This is especially the case if one views the question without presuming—as the trial court apparently did—that the jury had already determined guilt of the greater offense in Count 1.

¶ 114 Specifically, the question suggests that the jury may have concluded that the defendant had committed a sexual assault, but does not necessarily indicate that the jury had found the additional element of bodily harm necessary to convict on the greater offense in Count 1. Further, the question suggests that the jury expressly considered finding the defendant guilty of *both* the lesser and greater offenses of this count.

¶ 115 The trial court erred in assuming that the *only* possible interpretation of the question was that the jury had already determined that the defendant was guilty of the greater offense in Count 1. The first part of the question: "For Count 2 if we find him guilty of criminal sexual assault but not guilty of kidnapping" – suggested, at most, that the jury had found that he committed "criminal sexual assault" – the lesser included offense. The question does not indicate one way or another that they found *bodily harm* as necessary for the greater offense of *aggravated* criminal sexual assault under Count 1.

¶ 116 The second part of the jury's question—"do we sign the guilty of criminal sexual assault form at the same time of finding him guilty of Count 1"—indicates the jury was considering

whether they could simultaneously find guilt on the lesser included offense "*at the same time of finding him guilty*" of a greater offense, Count 1. The jury's indication that they considered finding the defendant guilty of *both* a greater and lesser included offense indicates that they did not understand the relationship between these two offenses. See *Carter*, 389 Ill. App. 3d at 187 (noting that jury confusion was evident by jury note "indicat[ing] that the jury was considering whether it could find defendant guilty of the greater and lesser charged cocaine offenses.").

¶ 117 Thus, the question can also be read to suggest that the jury simply did not understand the distinction between returning a guilty verdict of the lesser offense of criminal sexual assault or the greater offense of aggravated sexual assault based on bodily harm. As we noted in *Carter*, an instruction on a lesser offense "provide[s] an important third option to a jury which, believing that the defendant is guilty of something but uncertain whether the charged offense has been proved, might otherwise convict rather than acquit the defendant of the greater offense." (Internal quotation marks omitted). *Id.* at 184. It is not clear at all that the jury in this case understood the significance of this "important third option."

¶ 118 Furthermore, to the extent the jury considered finding the defendant guilty of both the greater and lesser offenses, their question raises doubts about their understanding of the State's burden to prove the element of bodily harm to establish the greater offense in Count 1. We certainly cannot assume, as the trial court apparently did, that the jury would have found this element proven beyond a reasonable doubt. Notably, the evidence of bodily harm in this case was less than overwhelming, especially given the testimony regarding the lack of vaginal injuries to N.P. Although N.P. testified to bruises on her arms and back that were minor, we cannot assume that the jury would have found that such bruises were inflicted by the defendant or that they were otherwise sufficiently serious to constitute bodily harm beyond a reasonable doubt.

¶ 119 Although the jury's question itself was thus subject to more than one plausible interpretation, the trial court did not consider the possibility of jury confusion between the greater and lesser offense for Count 1. (Apparently, neither did the State or the defendant's counsel). Unfortunately¸ the court did not take the opportunity to seek clarification of the jury's inquiry. We find this was error: "If the question asked by the jury is unclear, it is the court's duty to seek clarification of it." *Carter*, 389 Ill. App. 3d at 188 (quoting *Childs*, 159 Ill. 2d at 228-29).

¶ 120 Not only did the trial court err in failing to seek clarification of the jury's question, the trial court responded only by referring the jury back to instructions that, by the trial court's own admission, were "confusing." Under the circumstances of this case, we find that the trial court's failure to offer any substantive response to the jury's question, which clearly showed confusion, amounted to plain error.

¶ 121 We recognize that a trial court is not obligated to give an answer every time a jury requests clarification. " 'A trial court may exercise its discretion and properly decline to answer a jury's inquiries *where the instructions are readily understandable* and sufficiently explain the relevant law.' " (Emphasis added.) *Carter*, 389 Ill. App. 3d at 187 (quoting *Childs*, 159 Ill. 2d at 228). However, "[t]he trial court has a duty to instruct the jury when clarification is requested, the original instructions are insufficient or the jurors are manifestly confused." (Internal quotation marks omitted.) *Id.* In this case the record shows that there was sustained confusion, by the attorneys as well as the trial court regarding the jury instructions. Yet, when the jury sought help in allaying its confusion the trial court did not help them.

¶ 122 Application of these principles obligated the trial court to respond to the jury's confusion in this case. As the record amply demonstrates, this is by no means a case where the instructions

were "readily understandable." Rather, despite good faith efforts by the parties and the court, the instructions were – by the attorneys' and the court's own admission – "confusing."

¶ 123 We acknowledge that the court and counsel for both parties clearly intended to comply with the IPI model instructions. Notably, Supreme Court Rule 451(a) provides that "[w]henever [the IPI] contains an instruction applicable in a criminal case ***, the IPI Criminal instruction shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 451(a) (eff. Feb. 6, 2013). Further, if the IPI "does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial, and free from argument." *Id.*

¶ 124 In this case, the parties and the court recognized that the concluding instructions in IPI 26.01R generally apply where a defendant is charged with an offense that includes a lesser offense, and is also charged with some other offense. In the defendant's case, he was tried on two charges that included a lesser offense (Counts 1 and 2), as well as the charge of kidnapping.

¶ 125 Under IPI 26.01R, the jury is instructed that "a person charged with [greater offense] may be found (1) not guilty of [greater offense] and not guilty of [lesser offense]; or (2) guilty of [greater offense]; or (3) guilty of [lesser offense]." IPI 26.01R thus instructs the jury that it will receive three verdict forms for each greater offense: (1) "not guilty of [greater offense] and not guilty of [lesser offense]"; (2) "guilty of [greater offense]"; and (3) "guilty of [lesser offense]." However, as recognized by the counsel for both the State and the defendant, those model instructions could not be easily adapted to the facts of this case, because the defendant was charged with *two* greater offenses, each of which contained the *same* lesser included offense. IPI 26.01R does not specify whether this situation requires a separate "guilty of [lesser offense]"

verdict form for each of the greater offenses, or if it is sufficient to submit a single verdict form for the lesser offense.

¶ 126 Recognizing this, the parties and the court struggled to craft the instructions in a way that remained faithful to the IPI but also accommodated the fact that the defendant was charged with two greater offenses which included the same lesser offense. Counsel for the State and the defendant took different positions as to which solution would be less confusing for the jury: six verdict forms (including two forms for guilt of the lesser included offense) or five verdict forms (including a single form for the lesser included offense). Both made plausible arguments as to why either option would be "confusing," illustrating the difficulty in providing clear instructions in this case.

¶ 127 We find it significant that, after deciding to implement five verdict forms, the trial court remarked that "it's going to be confusing no matter what. Because *** the jury instruction itself is confusing." After the revised instructions had been drafted, the court again remarked that "it's confusing when it comes straight from the IPI." In sum, despite their earnest efforts, both counsel for the parties and the trial court acknowledged that the instructions given to the jury were confusing.

¶ 128 The degree of confusion is further illustrated by the fact that—only after the jury returned a verdict on Count 1—the parties' counsel and the court realized that the instructions had erroneously instructed the jury to select only *one* verdict form for both Counts 1 and 2, resulting in a "missing" verdict for Count 2. To make matters worse, none of the possible verdict forms for Count 2 could be consistent with the verdicts the jury had already rendered on Count 1 and the separate kidnapping charge. Upon realizing this dilemma, the court acknowledged that the "not guilty" verdict form for Count 2 should "never have been given" and was "confusing."

¶ 129 Considering the ample evidence of confusion on the part of the State and the defendant's counsel as well as the trial court regarding the instructions at issue, it appears highly likely that the jury was manifestly confused when they submitted their question to the court for clarification. Given this background, the court should have at least attempted to provide some substantive guidance to the jury as to the relationship between the greater charged offenses and the lesser included offense. We find it implausible to expect that the jury's question could be resolved, and the jury would somehow reach clarity, by being told to refer back to instructions that everyone agreed were confusing in the first place.

¶ 130 Moreover, we find it significant that the jury's *question* itself was ambiguous and thereby demanded clarification. "If the question asked by the jury is unclear, it is the court's duty to seek clarification of it." *Carter*, 389 Ill. App. at 188 (quoting *Childs*, 59 Ill. 2d at 228-29). As explained above, the jury's question was subject to more than one interpretation. Yet, rather than seek clarification, the court determined that it "knew where the jury is headed" and assumed that the jury had already found the defendant guilty of Count 1.

¶ 131 As a result, as we stated in *Carter*, "we find that the combined effect of these errors affected the fundamental fairness of [the] defendant's trial. In light of the instruction error and the expressed confusion by the jury, we are not confident in their verdict." *Id.* at 189.

In particular, given the trial court's failure to either seek clarification of the jury's question, or to provide *any* response to their expressed confusion, we lack confidence that the jury understood the significance of the option to convict of the lesser included offense of criminal sexual assault.

¶ 132 The State argues that "[e]ven if the instructions were confusing to the jury, defendant has failed to show that any error *** was prejudicial, because the giving of two verdict forms for two separate lesser included sexual assault charges would not have changed the outcome of the trial."

The State contends that "[t]he jury's question clearly indicated that they had found defendant guilty of aggravated criminal sexual assault based on bodily harm [Count 1]."

¶ 133 First, as noted above, it is far from clear that the jury had determined guilt as to Count 1 when it submitted its question. Moreover, we need not speculate as to whether the jury would have otherwise acquitted the defendant of Count 1, as "[t]he failure to answer or the giving of a response which provides no answer to the particular question of law posed has been held to be prejudicial error." *Id.* at 188 (quoting *Childs*, 159 Ill. 2d at 228-29).

¶ 134 Moreover, as discussed in *Carter*, "prejudice to a defendant's case is not the sole concern that drives our analysis" because even a guilty defendant is entitled to a fair trial. (Internal quotation marks omitted.) *Id.* at 189. "[W]hen an error *** threatens the very integrity of the judicial process, the court must act to correct the error, so that the fairness and the reputation of the process may be preserved and protected. Critically, the court will act on plain error *regardless* of the strength of the evidence of defendant's guilt." (Emphasis in original and internal quotation marks omitted). *Id.*

¶ 135 Fundamental fairness and the integrity of the process demanded that the trial court make some effort to clarify what the jury was asking. Furthermore, the jury deserved clarification regarding instructions that, by the court's own admission, were confusing. Under the facts of this case, these failures amounted to plain error and warrant a new trial.

¶ 136 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand the case for a new trial.

¶ 137 Reversed and remanded.