2018 IL App (5th) 140456-U

NO. 5-14-0456

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 13-CF-353
	)	
MICHAEL FOXWORTH,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Moore and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court's Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) questions to the jury during *voir dire* were not in compliance with the requirements of the rule, the court committed error. Where the defendant did not object to the court's Rule 431(b) questions, but the evidence in this case was closely balanced, we find that the plain error rule applies, and the defendant's conviction and sentence are reversed and the case is remanded for a new trial.

¶ 2 The defendant, Michael Foxworth, was found guilty of criminal sexual abuse and was sentenced to three years and three months in prison. The victim was a female child who was 12 years of age on the dates of the alleged crimes. The victim was the defendant's granddaughter.

¶ 3 FACTS

¶ 4 The defendant timely filed this direct appeal. This court has jurisdiction pursuant to Illinois Supreme Court Rules 603 and 606, as well as article VI, section 6, of the Illinois Constitution. Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013); Ill. Const. 1970, art. VI, § 6.

¶ 5 On March 7, 2013, the State charged the defendant with the following four charges: two counts of predatory criminal sexual assault of a child in violation of section 11-1.40(a)(1) of the Criminal Code of 2012 (penetration of vagina with finger between May 1, 2012, and May 31, 2012; and penetration of the child's mouth with a penis between December 1, 2012, and January 13, 2013); and two counts of aggravated criminal sexual abuse in violation of section 11-1.60(c)(1)(i) of the Criminal Code of 2012 (placing hand on child's breast between May 1, 2012, and May 31, 2012; and directing the child to grip his penis between May 1, 2012, and May 31, 2012). 720 ILCS 5/11-1.40(a)(1), 11-1.60(c)(1)(i) (West 2012).

¶ 6 The May 2012 alleged events took place in the victim's home, while the December 2012 and January 2013 alleged events took place in the defendant's home. Throughout this order, the events are grouped into three incidents. The first set of incidents occurred at the end of the school year in May 2012 at the victim's home when the defendant stayed with the victim and her family in order to help with a painting project. The second set of incidents occurred over Christmas break at the defendant's home in December 2012. The third set of incidents occurred over a holiday weekend in January 2013 at the defendant's home.

¶ 7 The defendant's case was tried before a jury in late February 2014. Several witnesses, including the victim, testified. The defendant did not testify.

¶ 8 Testimony of M.F.

¶ 9 M.F. is the victim's sister and was 20 years old on the date that she testified. M.F. verified that the defendant visited in May 2012 and stayed at their home, and that she did not see the defendant again until December 2012 when he permanently moved to Belleville. On January 15, 2013, she and the victim were out shopping. As they were departing the store, the victim told her that she needed to tell her something—that their grandfather had touched her. Specifically, she told M.F. that there was oral contact between her mouth and the defendant's genitals during one of the stays at his Belleville home. M.F. told the victim to tell either their mother or their grandmother.

¶ 10 The next day, M.F. witnessed the victim talking with their mother. Following that conversation, M.F., their older sister Mi.F., and her brother K.F. sat down with their mother to discuss what should be done. They decided that the victim needed to be taken to the hospital for an examination, and so they went to Memorial Hospital in Belleville.

¶ 11 On cross-examination, M.F. acknowledged that the victim did not tell her that anything inappropriate happened in May 2012 or in December 2012.

¶ 12 Testimony of J.F.

¶ 13 J.F. is the victim's mother. The defendant is J.F.'s father and the victim's grandfather. J.F. confirmed that the defendant was at her home in May 2012 for approximately one week to do some painting for her. She also confirmed that the defendant moved to Belleville in December 2012 and that the victim and her brother,

K.F., stayed with him over Christmas break and over a weekend in January 2013. J.F. testified that on January 16, 2013, the victim approached her and said that she had to tell her something. The victim told her that the defendant "touched" her multiple times—the first time in April or May 2012 at their house, when the defendant put his hand "down there," pointing to her vaginal area. J.F. testified that the victim did not specify whether the touching was over or under the clothing. The victim told J.F. that grandpa told her that it would not happen again. She told J.F. that the next time he touched her was in December 2012 and that he touched her breast, again not specifying whether the touching was over or under her clothing. J.F. stated that the victim also told her that in December, the defendant approached her in the kitchen of his home, pulled down her pants, and put his "thing" in her behind. The victim explained that the "thing" was the defendant's penis, but provided no detail about whether or not penetration occurred. J.F. testified that the victim told her that in January 2013, the defendant touched her breasts; tried to put his "thing" in the victim's mouth, but she resisted; and tried to touch her vaginal area with his mouth by attempting to remove her pants.

¶ 14 J.F. testified that she took the victim to the hospital the night of this conversation. At a later date, she took the victim to the St. Clair County Child Advocacy Center. At the end of January 2013, she took the victim to Cardinal Glennon Children's Hospital in St. Louis for an appointment with a physician.

¶ 15 On cross-examination, J.F. confirmed that the victim did not tell her that the defendant touched her breast in the May 2012 incident.

¶ 16 Testimony of Officer Jacquelyn Laminack

¶ 17 Officer Laminack works for the Belleville Police Department. She was called in on this case because of her past relationship with the victim. She was the victim's DARE officer at her Belleville grade school in the fall of 2011. Officer Laminack last saw her at the DARE graduation ceremony in December 2011.

¶ 18 Officer Laminack interviewed the victim at the hospital at about 1:30 a.m. The victim told her about three incidents of sexual contact. The first incident was in May 2012. The victim told Officer Laminack that she was asleep on the sofa in her home and woke up with the defendant's hands on her breasts and under her underwear. Officer Laminack testified that in the second incident in December 2012, the victim stated that she was in a bedroom at the defendant's home and was asleep. The victim told Officer Laminack that the defendant woke her up, forced her to open her mouth, and inserted his penis in her mouth. The third incident took place in January 2013 at the defendant's home in the kitchen. Officer Laminack testified that the victim told her that the defendant tried to pull down her pants, that she refused, and that the defendant pulled down his pants and put his penis in her "backside." The next day, the defendant licked the victim's ear, she shoved him and told him to stop, and the defendant dropped to his knees and licked the outside of her pants while attempting to pull her pants down.

¶ 19 Testimony of the Victim

¶ 20 The victim testified at trial. She identified the defendant as her grandpa. In May 2012, her grandpa came for a visit to their Belleville home. She confirmed that her grandpa had sexually touched her on several occasions.

¶ 21 The first incident occurred in the evening during May 2012, while her mother was working at night. She was at home with her grandpa, her sister, M.F., and her brother, K.F. That night, she heard a sound in the kitchen that frightened her, and so she climbed onto the sofa next to her grandpa. She fell asleep but woke up and heard heavy breathing and determined that her grandpa had his hands under her shirt and was touching her breasts. He then placed his hand under her underwear and touched her vaginal area. In response, she made a sound to make him think that she was waking up, and he removed his hand and asked her if she was awake. The victim testified that he told her not to tell anyone what just happened. After this occurred, she told a friend what her grandpa had done, but also told her friend that it could have been a dream. She testified that she told her friend that it may have been a dream because she was fearful that her friend would tell her mother.

¶ 22 The second incident occurred when she and her brother stayed with the defendant for six to seven days around Christmas in 2012. She was in the defendant's bedroom and fell asleep while watching television on his bed. She woke up and heard the defendant's heavy breathing. She was facing the defendant in the bed and felt the defendant's hand inside her pants and touching her vaginal area. He then forced his penis into her mouth and after she coughed, he withdrew from her mouth and asked her if she was okay. The victim went into the bathroom to spit out her saliva because of the "nasty" taste. One day later, the defendant told her not to tell her mother because he might have to kill himself. Later that day, the defendant asked the victim if he could touch himself and then sat next to her and asked her to grab his penis. The victim testified that the defendant asked her

about the size of his penis, told her he was horny, and placed her hand inside his pants so that she could squeeze his penis. Thereafter, he told the victim that she did not need to tell her mother what had happened because he would never do this again.

¶ 23 The third incident occurred during a weekend in January 2013 at the defendant's home. The victim testified that late Saturday evening, she went to the defendant's kitchen to make a sandwich. The defendant came into the kitchen, pulled her towards a chair, unzipped his pants, pulled down her pants, and put his penis in her buttocks. The victim stated that she told the defendant to stop. In response, the defendant told her to "hush" and then he left the kitchen.

¶ 24 The victim testified that she went home after this visit but did not tell her mother as she was afraid of what her mother might do to the defendant. At school, she told multiple friends in order to get their opinions on what to do. Finally she told both of her sisters in separate conversations. She acknowledged that she did not tell her sister M.F. everything that happened. Then, the victim told her mother. During that conversation, she told her mother that the defendant touched her breasts and her vaginal area. She did not tell her mother everything that happened because she did not want to go into the details.

¶ 25 The victim testified about her conversation with Officer "Jackie" Laminack at Memorial Hospital. She stated that she did not tell Officer Jackie all of the facts "because at the time I didn't remember."

¶ 26 Testimony of Carolyn Hubler

¶ 27 The State next called Carolyn Hubler to testify at trial. Hubler is the executive director at the St. Clair County Child Advocacy Center. Hubler was qualified as an expert

in forensic interviewing techniques. Hubler testified that the center is a "child friendly place for children to come after an allegation of *** sexual abuse, physical abuse or child witnesses to violent crime." Hubler interviewed the victim in January 2013. She stated that the victim was in an "active state of disclosure" in that she was not tentative and was ready to talk. The interview of the victim was videotaped.

¶ 28 Hubler testified that the victim told her that the defendant put his penis in her mouth, touched her breasts and her vaginal area with his hands, forced her to touch his penis, and masturbated in front of her. During her interview, she had the victim complete anatomical drawings to further detail the body parts involved in these sexual acts. Hubler authenticated the videotape of the interview that was then played for the jury.

¶ 29 The Victim's Videotaped Interview of January 22, 2013

¶ 30 The victim began the interview by stating that "Grandpa did things that weren't right." She described the events at issue out of time order.

¶ 31 She explained that the most recent incident occurred in his bedroom. He pulled his zipper down, pulled out his "thing," and pushed it into her mouth. She also stated that the defendant was licking the area of her private parts over her clothes while trying to remove her pants.

¶ 32 The second incident occurred around Christmas when she stayed at the defendant's home for six to seven days. In his bedroom, he tried to touch her while sleeping and pushed his penis in her mouth. Additionally, late on a Saturday night in his kitchen, he pulled down his pants and put his thing in her behind. The defendant told her

not to tell her mother, promised that it would never happen again, told her he was horny, and asked if he could touch himself in front of her.

¶ 33 The first incident occurred at the end of the school year. She was sleeping on the floor but became scared and went to sit next to the defendant on the sofa. The victim stated that while she was asleep, his hand was inside her underpants and touched the inside and outside of her private parts. She also stated that the defendant touched her breasts under her clothing.

¶ 34 Testimony of Timothy Kutz, M.D.

¶ 35 Dr. Kutz is a pediatrician employed by St. Louis University and is the director of the Child Protection Team. On January 31, 2013, he performed a sexual assault examination and assessment on the victim. His verbal interactions with the victim were limited to clarification of what contact occurred in her anal area. Dr. Kutz testified that his examination of the anal/vaginal areas was normal. However, the lack of evidence of an injury does not necessarily mean that there was no sexual assault. Dr. Kutz explained that the sexual contact could have been more in the nature of sexual abuse or a healed wound. He testified that he did not collect a sexual assault kit because the cutoff for doing so is 72 hours after the assault. On cross-examination, he testified that based upon his review of medical records, he did not believe that any injuries were found during the more immediate physical exam at Memorial Hospital.

¶ 36 Jury Deliberation

¶ 37 The jurors began deliberation at about 3:37 p.m. on February 25, 2014. At 8:07 that evening, the trial judge asked the foreperson whether or not the jurors wanted to

continue to deliberate, or if they wanted to come back in the morning. The jurors decided to come back the next day. The following morning, the jurors resumed deliberation at 8:56 a.m. At approximately 10:20, the jurors returned the following question to the court: "Is it possible to see the testimony transcript for Officer [Laminack] and My[ ]?" The court sent an instruction back to the jury room that all evidence was before them and that they needed to rely upon their individual and collective memories of the testimony. The jurors continued deliberations until approximately 2:38 p.m. when they returned to the courtroom. The jury had reached verdicts on three of the four counts, and in response to questions by the judge, the foreperson admitted that she doubted the jury would be able to reach a verdict on the fourth count. The court found that the jury was hung on the fourth charge. The jury found the defendant guilty of aggravated criminal sexual abuse by placing his hand on the child's breast, but not guilty of predatory criminal sexual assault of a child by penetration of the child's vagina with his finger, and not guilty of aggravated criminal sexual abuse for directing the child to grip his penis. The jury did not reach a verdict on predatory criminal sexual assault by penetration of the child's mouth with his penis.

¶ 38 Sentencing

¶ 39 The defendant was sentenced to three years and three months in the Department of Corrections.

¶ 40 LAW AND ANALYSIS

¶ 41 Compliance with Illinois Supreme Court Rule 431(b)

¶ 42 The defendant argues that the trial judge committed error in failing to comply with the requirements of Illinois Supreme Court Rule 431(b) in asking the potential jurors questions about legal principles. We review this issue on a *de novo* basis. *People v. Wilmington*, 2013 IL 112938, ¶ 26, 983 N.E.2d 1015.

¶ 43 Illinois Supreme Court Rule 431(b) is a codification of the supreme court's decision in *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984). Rule 431(b) requires that the trial judge ensure that all potential jurors can both understand and apply four principles of law. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). The purpose of the rule is to ensure that all potential jurors are qualified to serve. *People v. Thompson*, 238 Ill. 2d 598, 610-11, 939 N.E.2d 403, 411-12 (2010). More specifically, the rule is used to confirm that potential jurors are not prejudiced against the four core principles of criminal law. *Id.*; *Zehr*, 103 Ill. 2d at 477. The four fundamental principles set forth in *Zehr* are that "(1) the defendant is presumed innocent; (2) the defendant must be proved guilty beyond a reasonable doubt; (3) the defendant is not required to produce any evidence; and (4) the defendant's failure to testify cannot be held against him." *People v. Davis*, 405 Ill. App. 3d 585, 588-89, 940 N.E.2d 712, 717 (2010) (citing *Zehr*, 103 Ill. 2d at 477).

¶ 44 The precise language of Rule 431(b) is as follows:

> "(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before

a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 45 In this case, the trial judge instructed the potential jurors to raise their hands if they did not understand or disagreed with any of several propositions of law. The trial judge stated:

"Okay, I am now going to read to you some premises of the law. If you are actually chosen and serve, at the end of the case, I will read in more detail to you what the law is that you will have to apply to the case. But there are some issues that—that I need to go over.

So, I'm going to give you the premise of the law. If you don't understand it, raise your hand, I'll try to explain it [in] more detail. And if you disagree with it, then I need to know. If you don't raise your hand, I will assume that you understand it and that you agree with it.

So, you may not use sympathy, bias or prejudice in reaching your decision. If you quarrel with that, raise your hand.

Seeing no hands.

You must wait until you hear all the evidence, all the arguments of the lawyers and my instructions on the law before you make up your mind about this case.

Anybody quarrel with that, or not understand it, raise your hand.

Seeing no hands.

You must follow the law as I give it to you, even if you disagree with it.

Anybody disagree with that?

Thank you. Seeing no hands.

You may consider evidence in light of your own observations and experiences in life. This means you may use your common sense in reaching a decision.

Anybody disagree with that?

No hands.

As a juror, you must operate under the premise that a person accused of a crime is presumed to be innocent of the charge against him. In this case, Mr. Foxworth is presumed innocence [*sic*]—is presumed innocent and that innocence stays with him throughout the trial and is not overcome unless from all the evidence, you believe the State has proved Mr. Foxworth guilty beyond a reasonable doubt.

Anybody disagree with that?

This further means that the State of Illinois, the People of the State, have the burden of proving Mr. Foxworth's guilt beyond a reasonable doubt, Mr. Foxworth does not have to prove his innocence.

Anybody disagree with that?

And, finally, Mr. Foxworth is not required to testify unless he chooses to do so and is not required to present evidence unless he chooses to do so. If he chooses not to produce evidence or not testify, you are still held to the same burden of judging the case on what is presented, not what is not presented. So you should not hold that decision of Mr. Foxworth not to testify or not to present a case against him if that happens.

Anybody quarrel with that? Thank you."

¶ 46 First, we note that the trial court's pronouncement of "premises of the law" sufficiently set forth the four requirements of Rule 431(b): that the defendant is presumed innocent; that the State must prove the defendant's guilt beyond a reasonable doubt; that the defendant does not need to offer any evidence on his own behalf; and that if the defendant does not testify on his own behalf, that this failure cannot be held against him. Although the trial court's recitation to the jury contained all four principles of law, the four principles were not individually set out. Instead, the trial court combined the four principles in three propositions.

¶ 47 Combining the four components of Rule 431(b) does not necessarily equate to error, as the substance of the trial court's instruction clearly outweighs the form utilized. Additionally, case law supports the conclusion that combining the elements is not

necessarily erroneous. See *People v. Davis*, 405 Ill. App. 3d 585, 590, 940 N.E.2d 712, 718 (2010); *People v. Ware*, 407 Ill. App. 3d 315, 355-56, 943 N.E.2d 1194, 1228 (2011). More critical to compliance with Rule 431(b) is whether the trial court adequately asked the potential jurors, individually or as a group, if they both agreed with and understood the legal principles. "The rule requires questioning on whether the potential jurors both understand and accept each of the enumerated principles." *Thompson*, 238 Ill. 2d at 607.

¶ 48 Here, the trial judge began his recitation of legal principles by telling the potential jurors that they needed to raise their hands if they did not understand and agree with the stated principles. Then, the trial judge started with four principles of law that are not part of Rule 431(b). The judge stopped after each of these principles, alternatively asking the jurors if they had any "quarrel" with and did not understand the principles, or simply if they disagreed with the principles. No jurors raised their hands. Then, the judge shifted to the Rule 431(b) principles of law. After each of the combined three propositions, the judge provided the potential jurors with an opportunity to respond. Twice, the judge asked if anyone disagreed with the proposition. On the third occasion and presumably using the word, "quarrel" as an alternate word for "disagree," the judge asked if anyone had a quarrel with the proposition. Again, no potential juror responded.

¶ 49 The defendant argues that the trial judge erred in failing to ask the prospective jurors if they both understood and agreed with the Rule 431(b) legal principles. The State counters that the trial judge substantially complied with Rule 431(b) because the judge prefaced his recitation of legal principles by informing the potential jurors that they

needed to notify the court if they did not understand and agree with them. The State's argument is that the initial statement, that included both mandatory components of Rule 431(b), cured any later defects when the trial judge simply asked if the potential jurors disagreed with the principles. We do not agree with the State's contention. After the preliminary directions, the trial judge began announcing other legal principles not required under Rule 431(b). After a passage of time, and without reviewing the requirements that the potential jurors both understand and agree with the Rule 431(b) principles, the trial judge presented the three combinations of the four required principles. After each combined proposition, the judge simply asked the potential jurors if they disagreed with the principles. The judge never asked the potential jurors if they understood the mandated principles. As the supreme court stated in *People v. Wilmington*, "[w]hile it may be arguable that the court's asking for disagreement, and getting none, is equivalent to juror *acceptance* of the principles, the trial court's failure to ask jurors if they *understood* the four Rule 431(b) principles is error in and of itself." (Emphasis in original.) *People v. Wilmington*, 2013 IL 112938, ¶ 32, 983 N.E.2d 1015.

¶ 50 While the potential jurors tacitly implied their agreement with the legal principles, we find no basis in law or in fact to assume that the potential jurors also understood the legal principles. *Thompson*, 238 Ill. 2d at 607 (where the supreme court held that the trial judge violated Rule 431(b) by only questioning whether potential jurors understood the legal principles and not whether the potential jurors agreed with the legal principles); see also *People v. Belknap*, 2014 IL 117094, ¶ 46, 23 N.E.3d 325.

¶ 51 We conclude that the trial judge committed error by failing to comply with Illinois Supreme Court Rule 431(b) by not confirming that the potential jurors both understood and agreed with the legal principles.

¶ 52 Plain Error

¶ 53 The defendant did not preserve the Rule 431(b) issue for appeal as he did not object during *voir dire* and did not raise the issue in a posttrial motion. Therefore, the defendant forfeited the issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1129-30 (1988).

¶ 54 A Rule 431(b) error is not a structural error, and is not considered a *per se* reversible error because a trial judge's failure to comply does not necessarily result in jury bias. *Belknap*, 2014 IL 117094, ¶ 47 (citing *Thompson*, 238 Ill. 2d at 610-11). However, in a plain error closely balanced evidence case, after a Rule 431(b) error has been established, the only question the court must resolve is whether the evidence is closely balanced. *People v. Sebby*, 2017 IL 119445, ¶ 69, 89 N.E.3d 675. The defendant is not required to additionally establish that the error was prejudicial. *Id.*

¶ 55 The defendant asks this court to consider the issue as plain error. The plain error doctrine can be used in criminal cases to review an unpreserved error "if either [1] the evidence was closely balanced or [2] the error was of such magnitude that the defendant was denied a fair trial." *People v. Hindson*, 301 Ill. App. 3d 466, 473-74, 703 N.E.2d 956, 962-63 (1998) (citing *People v. Petitt*, 245 Ill. App. 3d 132, 139, 613 N.E.2d 1358, 1365 (1993)); *Thompson*, 238 Ill. 2d at 613 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410 (2007)). In plain error review, the defendant bears the burden of

persuasion. *Thompson*, 238 Ill. 2d at 613 (citing *People v. McLaurin*, 235 Ill. 2d 478, 495, 922 N.E.2d 344, 355 (2009)).

¶ 56 The defendant argues that the evidence in this case was closely balanced and that, therefore, a new trial is necessary.

¶ 57 Closely Balanced Evidence

¶ 58 Having found that the trial judge committed error during *voir dire* in this case, we must next determine whether that the evidence in this case was closely balanced and that, therefore, the defendant is entitled to a new trial. When error occurs in a close case, we must " 'err on the side of fairness, so as not to convict an innocent person.' " *Piatkowski*, 225 Ill. 2d at 566 (quoting *People v. Herron*, 215 Ill. 2d 167, 193, 830 N.E.2d 467, 483 (2005)). "[The] defendant must meet his burden to show that the error was prejudicial—in other words, he must show that the quantum of evidence presented by the State against the defendant rendered the evidence 'closely balanced.' " *Id.*

¶ 59 The determination of whether evidence in a criminal case is "closely balanced" is necessarily based on fact. The reviewing court must consider and evaluate the totality of the evidence presented "and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53 (citing *Belknap*, 2014 IL 117094, ¶¶ 52-53). Accordingly, a reviewing court must assess all evidence on the elements of the charged offense as well as all evidence regarding witness credibility. *Id.*

¶ 60 The defendant claims that the evidence was closely balanced in this case because there was no confession, no physical evidence, no corroborating eyewitness accounts, and conflicting disclosures provided by the victim. The defendant also cites to the jury

requests to review testimony involving these conflicting disclosures. Finally, the defendant asserts that his acquittal on two charges and a hung jury on a third charge, coupled with over eight hours of deliberations, supports his claim that the jurors had difficulties with the victim's credibility in light of her conflicting disclosures to family members and law enforcement officials.

¶ 61 We begin our analysis by reviewing the charge of which the defendant was convicted: aggravated criminal sexual abuse. The State alleged that the defendant placed his hand on the victim's breast in May 2012. To prove this charge, the State had to prove that the defendant committed that act in May 2012, and that when the offense was committed, the defendant was over 17 years of age and the victim was under 13 years of age. At trial, the State produced evidence of the victim's age, but did not produce evidence of the defendant's age. However, the defendant does not argue this point on appeal. Therefore, the only evidence at issue in this closely-balanced analysis is whether the defendant placed his hand on the victim's breast in May 2012.

¶ 62 In this case, the victim did not tell her sister that the defendant touched her breast; told her mother that the defendant touched her breast in December 2012 but did not specify if the touch was over or under her clothing; told Officer Laminack that the defendant touched her breast in May 2012; and told child advocate Hubler that the defendant touched her breast in May 2012. Finally, the victim testified that the defendant touched her breast in May 2012.

¶ 63 During deliberations, the jurors asked if they could review transcripts of the testimony of the victim's sister, and of Officer Laminack. That request was denied. The

defendant contends that this request indicates the closely-balanced nature of the evidence. As the State charged the defendant with four separate charges, we have no way of concluding that the testimony the jury requested was needed to assist the jurors on the matter of whether the defendant touched the victim's breast—as opposed to one of the other charges.

¶ 64 We note that generally lengthy deliberations and a note or statement that the jury cannot reach a conclusion are factors to consider in determining if the evidence was closely balanced. *People v. Rottau*, 2017 IL App (5th) 150046, ¶ 78, 83 N.E.3d 400 (citing *People v. Gray*, 406 Ill. App. 3d 466, 474, 941 N.E.2d 338, 345 (2010)). But, the amount of time a jury deliberates, without more, is not an accurate indicator of whether the evidence is closely balanced. *Id.* (quoting *People v. Walker*, 211 Ill. 2d 317, 342, 812 N.E.2d 339, 353 (2004)).

¶ 65 The State contends that the victim's testimony, as well as the testimony of others she told, serves to prove the charge in this case. With careful consideration of the victim's young age and descriptive accounts of the alleged sexual assaults, her testimony was problematic in that it was inconsistent with other disclosures she made. Even if we isolate the charge that the defendant touched her breast from the other charges, we have inconsistencies about whether the event occurred in May 2012 or December 2012, and whether or not the touching was over or under her clothing. Additionally, the victim testified that she told a friend that she may have dreamed that the defendant touched her. Even though the victim's testimony at trial was partly replicated by what she told her family members and law enforcement officials, we would hesitate to find that these other

accounts bolstered the victim's claims. See *People v. Boling*, 2014 IL App (4th) 120634, ¶ 131, 8 N.E.3d 65 (finding that the evidence was closely balanced and declining to add weight to the victim's claims simply because the victim repeated the claims to four other witnesses).

¶ 66 Consistency of the victim's testimony is especially important in this case because there was no physical evidence, no medical evidence, no eyewitnesses, and the defendant did not admit to the alleged actions. The State does not cite any factually-similar cases, and we have found none in our research. See, *e.g.*, *People v. Gilliam*, 2013 IL App (1st) 113104, 1 N.E.3d 985 (evidence not closely balanced where the two victims were sisters; their mother testified that she witnessed the two girls replicating sexual acts when they were four and two years of age; and the defendant acknowledged some of the sexual allegations); *People v. Marcos*, 2013 IL App (1st) 111040, 995 N.E.2d 446 (evidence not closely balanced where the victim's accounts to others were considered in addition to the defendant's admission to the victim's mother and the defendant's confession); *People v. Garcia*, 2012 IL App (1st) 103590, 981 N.E.2d 1025 (evidence not closely balanced where the victim testified to the abuse; three other people she told corroborated the victim's accounts; and the defendant made a statement to the police admitting to the sexual abuse); *People v. Sargent*, 239 Ill. 2d 166, 940 N.E.2d 1045 (2010) (evidence not closely balanced where the two victims provided statements of the sexual assaults and the defendant confessed); *People v. Raymond*, 404 Ill. App. 3d 1028, 938 N.E.2d 131 (2010) (evidence not closely balanced where there was no medical evidence, the victim did not testify, the defendant did not confess, but two police officers witnessed the sexual act

occurring between the victim and the defendant); *People v. Hindson*, 301 Ill. App. 3d 466, 703 N.E.2d 956 (1998) (evidence not closely balanced where two victims testified; the victims' mother who participated in the sexual abuse corroborated the victims' accounts; and an expert testified that one of the victims sustained physical injuries consistent with that victim's accounts).

¶ 67 We find that the evidence in this case was closely balanced. Although the factual evidence was one-sided in that the jury only heard from the victim and versions of that account provided to family members and law enforcement officials, the State had the burden of proving the defendant's guilt beyond a reasonable doubt. Our supreme court has found that when the guilt or innocence of a defendant comes down to a credibility contest, no error should be allowed to intervene. *People v. Emerson*, 97 Ill. 2d 487, 502, 455 N.E.2d 41, 47 (1983); see also *Sebby*, 2017 IL 119445, ¶¶ 62-63 (evidence was closely balanced where there was no corroborating evidence to conflicting testimony from the police officials and the defendant and his witnesses). As the court recently stated in *Sebby*:

> "It is not inevitable that a jury who receives faulty instructions on the *Zehr* principles is biased [citations], but it is possible. And if it is possible, it is also possible that those faulty instructions contributed to the result. The seriousness of the risk that they may have done so 'depends upon the quantum of evidence presented by the State against the defendant.' [Citation.] As in *Herron*, we conclude that, because the evidence was so closely balanced, the trial court's clear instructional error alone may have tipped the scales in favor of the State. We

choose to err on the side of fairness and remand for a new trial." *Sebby*, 2017 IL 119445, ¶ 78 (quoting *Herron*, 215 Ill. 2d at 193).

¶ 68 While we hold that the evidence in this case was closely balanced and that the defendant's conviction and sentence must be reversed, after thorough review of the record on appeal, we also conclude that the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt. As a result, "prosecution of the defendant on remand will not violate principles prohibiting double jeopardy." *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 42, 37 N.E.3d 347. Furthermore, we make no conclusion about the defendant's guilt or innocence that would be binding on retrial. *Id.*

¶ 69 CONCLUSION

¶ 70 For the foregoing reasons, we reverse the defendant's conviction and sentence, and remand for a new trial.

¶ 71 Reversed; cause remanded.