NOTICE
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2019 IL App (4th) 160767-U

NO. 4-16-0767

FILED
January 29, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
MARKEL R. BROWN,	)	No. 16CF184
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant failed to prove a speedy-trial violation and several trial errors, and the State's evidence was sufficient to find defendant guilty beyond a reasonable doubt of criminal sexual abuse.

¶ 2 In February 2016, the State charged defendant, Markel R. Brown, by information with one count of criminal sexual abuse (720 ILCS 5/11-1.50(a)(2) (West 2016)). The State later charged defendant with one count of criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2016)). After a July 2016 trial, a jury found defendant guilty of criminal sexual abuse but not guilty of criminal sexual assault. Defendant filed a motion for a new trial. At a joint September 2016 hearing, the Champaign County circuit court denied defendant's posttrial motion and sentenced him to three years' imprisonment for criminal sexual abuse.

¶ 3 Defendant appeals, contending (1) his statutory right to a speedy trial was violated, (2) the circuit court failed to properly admonish the jurors in accordance with Illinois

Supreme Court Rule 431(b) (eff. July 1, 2012), (3) the court erred by admitting into evidence two videos, (4) the State's evidence was insufficient to prove him guilty beyond a reasonable doubt, and (5) the prosecutor improperly misstated the evidence during closing arguments. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The State's information charging defendant with criminal sexual abuse alleged that, on February 3, 2016, defendant, knowing T.F. was unable to give consent, committed an act of sexual conduct with T.F. in that he knowingly touched or fondled the vagina of T.F. for the purpose of defendant's sexual gratification. On February 12, 2016, the circuit court arraigned defendant on the aforementioned charge. One week later, the circuit court appointed the public defender to represent defendant, and defendant entered a plea of not guilty.

¶ 6 At the March 15, 2016, pretrial hearing, defendant indicated he was ready for trial, and the State asked for a continuance. Defense counsel objected, and the circuit court denied the State's request for a continuance. On March 18, 2016, the State filed a written motion for a continuance, noting, *inter alia*, a kit containing alleged evidence of sexual conduct was sent to the crime lab on February 11, 2016, and it had not yet been tested. Jennifer Stafford, a forensic scientist, indicated the kit would hopefully be tested within the next month. At a March 28, 2016, hearing, the court continued the case to April 12, 2018, pursuant to section 103-5(c) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/103-5(c) (West 2016)) and over defendant's objection.

¶ 7 On April 11, 2016, the State filed another written motion for a continuance, stating forensic scientist Aaron Smith had verified the lab had the kit but the work was still not complete as of the day of the motion. The State also filed a motion for supplemental discovery

and a motion to consume evidence, requesting, *inter alia*, defendant submit to the taking of buccal swabs. At an April 12, 2016, hearing, the circuit court entered an order requiring defendant to submit to buccal swabs of his mouth. Pursuant to section 103-5(c) of the Procedure Code, the court over defendant's objection continued the case to May 31, 2016.

¶ 8 The State filed another motion for a continuance on May 31, 2016, noting the following: (1) the swabs containing samples of defendant's deoxyribonucleic acid (DNA) were delivered to the lab on April 22, 2016; (2) a forensic scientist identified possible DNA samples that were taken from the sexual assault kit on May 9, 2016; and (3) a comparison of defendant's DNA and the DNA obtained from the kit had not been completed. At a May 31, 2016, hearing, the circuit court again over defendant's objection continued the case to July 5, 2016, under section 103-5(c) of the Procedure Code. On July 5, 2016, the court set the case for a July 25, 2016, trial. The State noted it had not yet received the lab report but had spoken to lab personnel on the telephone about the results.

¶ 9 Before trial, the State filed a motion *in limine* to admit an audio-video recording of the alleged crime. The next day, defendant filed a motion *in limine* seeking to bar the video. The circuit court held a hearing and found the video would be admitted at defendant's trial if the foundational evidence was as the State described it. The State also filed an additional count against defendant, alleging he committed the offense of criminal sexual assault against T.F. on February 3, 2016. Specifically, the charge asserted defendant committed an act of sexual penetration with T.F. in that he placed his penis inside T.F's vagina and defendant knew T.F. was unable to give knowing consent.

¶ 10 On July 25, 2016, the circuit court commenced defendant's jury trial on the two charges against him, which was 165 days after he was taken into custody. The State presented

the testimony of the following witnesses: (1) T.F., the victim; (2) Wendy Adams, the girlfriend of defendant's brother; (3) Qwjae McFarland, a friend of T.F.; (4) Deshanti Craig, a friend of T.F.; (5) Susanne Robinson, an Urbana police officer; (6) Matthew McElhoe, an Urbana police officer; (7) Marcus Hancock, an Urbana police officer; (8) Jeremy Hale, an Urbana police officer; (9) David Smysor, an Urbana police detective; and (10) Tim McNaught, an Urbana police officer. Defendant presented the testimony of Steve Guess, an investigator for defense counsel.

¶ 11 T.F. testified she spent the night at the home of her friend Kendall Andrews and woke up at around 10 a.m. on February 3, 2016. After waking up, T.F. started drinking alcohol. T.F. and Andrews went to defendant's home to drink alcohol. T.F. knew defendant because he played dice in the hallways of her apartment complex with her ex-boyfriend. Defendant and T.F. had engaged in sexual intercourse on two prior occasions. T.F. identified defendant in a photograph (State's exhibit No. 1B) and testified the photograph was a fair and accurate depiction of what defendant looked like in February 2016. T.F. also identified defendant in court. When T.F. and Andrews arrived at defendant's home, defendant was not there. T.F. spoke to a woman outside of defendant's home, who stated defendant might be at Joseph Cotton's home.

¶ 12 T.F. and Andrews left defendant's house and went to Cotton's home. There, they went into a front room of the home. Cotton, defendant, and Gerald Jackson were also in the front room. T.F. drank alcohol in the front room. T.F. stayed in the front room for about an hour. She then went into Cotton's bedroom and sat on the floor. T.F. identified two photographs (State's exhibit Nos. 2A and 3A) as depicting Cotton's bedroom. T.F. found a bottle of alcohol on the floor and began drinking it. Everyone else in the room was sitting on the bed. T.F.'s next

memory after sitting down on the floor in Cotton's room was waking up in the hospital. T.F. did not recall Andrews leaving Cotton's home. T.F. testified she did not consent to having sexual intercourse with anyone on February 3, 2016.

¶ 13 Additionally, T.F. identified herself in three photographs (State's exhibit Nos. 2B, 3B, and 4B) taken from the videos (State's exhibit Nos. V1 and V2). She further testified the outfit she was wearing in the photographs is the one she wore to Cotton's house on February 3, 2016. She did not recall what the other individuals in the photographs were wearing on February 3, 2016. T.F. was not asked to identify the other individuals in the photographs.

¶ 14 Adams testified she went to defendant's home on February 3, 2016, to do laundry. Around the same time Adams arrived at defendant's home, T.F. arrived there. T.F. was specifically looking for defendant, and Andrews was with T.F. Adams described T.F. as being "geeked up" and not acting sober. T.F. and Andrews did not stay long at defendant's home. Adams remained at defendant's home and did her laundry.

¶ 15 At some point, Adams left to go to Cotton's home because his mother was her "auntie." When she arrived at Cotton's home, Adams observed T.F dancing in the front room. Adams also saw Andrews, defendant, Cotton, and Jackson at Cotton's home. After about 20 to 30 minutes, Adams returned to defendant's home to check on her laundry. Both T.F. and Andrews were in the front room of Cotton's home when she left. After about 40 minutes to an hour, Adams received a call from Cotton's sister asking Adams to return to Cotton's home. When Adams arrived back at Cotton's home, T.F. was nonresponsive. Adams watched Cotton carry T.F. and put her in a car. Adams got in the car with T.F. Adams testified T.F. was going in and out of consciousness during the car ride to T.F.'s apartment complex. When they arrived at the apartment complex, Cotton carried T.F. into the apartment building. Adams also testified

the State's exhibit No. 1B was a photograph of what defendant looked like on February 3, 2016.

¶ 16 McFarland and Craig both testified that, on February 3, 2016, they went to Cotton's home with Andrews. Craig testified they went there to get T.F. They both remained outside the home and saw T.F. being carried to a car. Both testified T.F. could not walk by herself.

¶ 17 Officer Robinson testified she responded to a possible sexual assault call around 2 p.m. on February 3, 2016, at the Prairie Green Apartments. Upon arrival, she found several people in the stairwell of the apartment building, including Andrews, Cotton, McFarland, and Craig. Officer Robinson learned the sexual assault victim was in a second-floor apartment, and she proceeded there. When Officer Robinson entered the apartment, she found T.F. passed out on the floor leaning against a couch. Officer Robinson requested her sergeant remain with T.F., while she went downstairs to talk to the people in the stairwell. Cotton showed Officer Robinson a video on his cellular telephone (cell phone) of an incident that occurred at Cotton's residence. Officer Robinson testified the State's exhibit No. V1 was the same video she saw on Cotton's cell phone. She did not notice any edits to the video. Additionally, Officer Robinson testified the clothing that the woman was wearing in the video was the same clothes that T.F. was wearing when Officer Robinson found her in the apartment.

¶ 18 Officer McElhoe testified he initially responded to the sexual assault call at Cotton's residence. When Officer Robinson asked for assistance at the Prairie Green Apartments, he went there. When Officer McElhoe arrived at the Prairie Green Apartments, Cotton was coming out of the apartment complex and holding a cell phone. Cotton indicated he had a video. It was around 2 to 2:15 p.m. at that time. Cotton showed Officer McElhoe the video, and Officer McElhoe observed two males in a bedroom with a female on the video. The

prosecutor cut Officer McElhoe off when he began to describe what the people in the video were doing. Officer McElhoe took the cell phone as evidence. The cell phone never left the custody of the Urbana police after that. Officer McElhoe testified the State's exhibit No. V1 was the video that Cotton showed him on Cotton's cell phone. The State's exhibit No. V1 did not appear to be altered or edited.

¶ 19 After Officer McElhoe seized the cell phone, he transported Cotton back to his residence. Once there, Cotton allowed Officers McElhoe and Hancock into his home. Officer McElhoe asked to see the video again, and Cotton entered a pass code into the cell phone, which allowed Officer McElhoe to watch the video. The video depicted an "extremely dirty bedroom." Officer McElhoe saw the room in the residence that matched the video. The bedroom was in the southwest corner of the residence and had a high chair near the bed. The males that were on the video were not at Cotton's residence when Officer McElhoe was there.

¶ 20 Officer Hancock testified he reported to Cotton's residence in response to the sexual assault call. Initially, he stayed outside the residence and made sure no one entered or left the residence. Officer Hancock entered the residence with Officer McElhoe and Cotton. Cotton had invited them into the living room, which was right inside the front door. Cotton allowed the officers to watch the video. Officer McElhoe held the cell phone while the video played. Officer Hancock testified the State's exhibit No. V1 was the same video he watched at Cotton's residence. The State's exhibit No. V1 did not appear to be altered or edited. On cross-examination, Officer Hancock admitted he only saw 20 seconds of the video at Cotton's residence.

¶ 21 While at Cotton's residence, Officer Hancock observed a bedroom that he recognized as the same bedroom in the video. Officer Hancock noted the bedroom had furniture

that was distinct. He also testified an orange-colored comforter was on the bed in the bedroom and it was quite wet. Officer Hancock noted the comforter was depicted in the video.

¶ 22 Officer Hale testified he went to Cotton's residence to process the evidence at the crime scene. He was the one who took the photographs of the bedroom at Cotton's residence. Officer Hale was at Cotton's residence for about 30 minutes before he started taking the photographs. Officer Hale first took pictures of the bedroom in the condition it was in when he arrived. After that, Officer Hale moved the comforter to show the wetness of the comforter.

¶ 23 Detective Smysor testified he received Cotton's cell phone on February 3, 2016, from Officer McElhoe at the Urbana police department. Detective Smysor secured the cell phone at his desk. He was unable to access the cell phone on that time because it was locked and needed a pass code. Cotton refused to open the cell phone. After trying more than 3000 different four-digit codes, Detective Smysor was able to open the cell phone. Once Detective Smysor opened the cell phone, he gave it to Officer McNaught, who was the department's electronic expert. After Officer McNaught processed the cell phone, Detective Smysor entered it into evidence at the police department.

¶ 24 Officer McNaught testified he specialized in computer forensics, digital mobile cell phones, and mobile device forensics. He had received training in those areas since 2010. In March 2016, he received a cell phone from Detective Smysor. According to Officer McNaught, the cell phone appeared to be in working condition, and he did not observe anything wrong with it. Officer McNaught further testified the data on the cell phone did not appear to be corrupted in any way. Officer McNaught ran a program on the cell phone that backed up the data from the cell phone onto a computer. The program did not pull up hidden or deleted data. After completing the backup, Officer McNaught compiled a report of the data on the cell phone.

During his analysis on the cell phone, Officer McNaught found two video files. He copied the two videos. Officer McNaught testified the State's exhibit Nos. V1 and V2 were the same videos he downloaded from the cell phone. The metadata for the State's exhibit No. V1 states 1339 central standard time (1:39 p.m.) on February 3, 2016, and the metadata for State's exhibit No. V2 states 1344 central standard time (1:44 p.m.) on February 3, 2016. After Officer McNaught explained the metadata, the court admitted the State's exhibit Nos. V1 and V2 over defendant's objection. Officer McNaught testified a video could be sent from one cell phone to another. He also acknowledged one of the videos appears to have a cut in it, which is not explained in McNaught's report.

¶ 25 Guess testified he spoke with T.F. at her home on April 20, 2016, and in the presence of her mother. T.F. denied having any type of dating or sexual relationship with defendant. Guess later talked with T.F. over the telephone, and she admitted she had sexual intercourse with defendant on two times before the incident. The last time was two weeks before the incident.

¶ 26 At the conclusion of the trial, the jury found defendant guilty of criminal sexual abuse but not guilty of criminal sexual assault. Defendant filed a timely motion for a new trial, asserting, *inter alia*, the circuit court erred by admitting the State's videos under the silent witness theory. On September 8, 2016, the court held a joint hearing on defendant's posttrial motion and sentencing. The court first denied defendant's posttrial motion and then sentenced him to a three-year prison term for criminal sexual abuse.

¶ 27 Defendant filed a motion to reconsider his sentence. After an October 21, 2016, hearing, the court denied defendant's motion to reconsider his sentence.

¶ 28 On October 24, 2016, defendant filed a timely notice of appeal from the denial of

his motion to reconsider sentence. On November 16, 2016, defendant filed a timely amended notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014). See Ill. S. Ct. R. 606(d) (eff. Dec. 11, 2014); R. 303(b)(5) (eff. Jan. 1, 2015). The amended notice of appeal listed the nature of the order appealed as defendant's conviction, sentence, and the denial of the motion to reconsider. Thus, we have jurisdiction of defendant's appeal under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 29 II. ANALYSIS

¶ 30 A. Speedy Trial

¶ 31 Defendant contends his speedy-trial right was violated because the State did not exercise due diligence in securing DNA testing. The State disagrees. In reviewing a speedy-trial issue, two standards of review apply. First, this court applies an abuse of discretion standard of review to the circuit court's determination of whether defendant agreed to, caused, or objected to a delay. *People v. Pettis*, 2017 IL App (4th) 151006, ¶ 17, 83 N.E.3d 422. That standard also applies to the circuit court's grant of an extension of the speedy-trial term under section 103-5(c) of the Procedure Code (725 ILCS 5/103-5(c) (West 2016)). *People v. Connors*, 2017 IL App (1st) 162440, ¶ 16, 87 N.E.3d 382. A "court abuses its discretion only when its decision is arbitrary, fanciful, or unreasonable, or when no reasonable person would take its view." *People v. Haiman*, 2018 IL App (2d) 151242, ¶ 20, 104 N.E.3d 559. Second, our review of the ultimate question of whether defendant's statutory right to a speedy trial has been violated is *de novo*. *Pettis*, 2017 IL App (4th) 151006, ¶ 17.

¶ 32 Section 103-5(a) of the Procedure Code (725 ILCS 5/103-5(a) (West 2016)) states, in pertinent part, that "[e]very person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into

custody unless delay is occasioned by the defendant ***." Section 103-5(c) of the Procedure Code (725 ILCS 5/103-5(c) (West 2016)) does provide extensions for DNA testing. That section states, in pertinent part, the following:

> "If the court determines that the State has exercised without success due diligence to obtain results of DNA testing that is material to the case and that there are reasonable grounds to believe that such results may be obtained at a later day, the court may continue the cause on application of the State for not more than an additional 120 days."

This court has held "[t]he speedy-trial statute must be liberally construed in a defendant's favor because it enforces a constitutional right." *People v. Colson*, 339 Ill. App. 3d 1039, 1047, 791 N.E.2d 650, 656 (2003).

¶ 33 In this case, defendant argues the State failed to exercise due diligence in obtaining DNA test results. The speedy-trial statute fails to define what constitutes due diligence or what the State must prove to establish due diligence. This court has declined to adopt the Fifth District's approach in *People v. Battles*, 311 Ill. App. 3d 991, 1002, 724 N.E.2d 997, 1005 (2000), which requires the State to follow a specific series of steps before getting a continuance for DNA testing. Instead, we apply the established rule that courts determine due diligence on a case-by-case basis. See *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 656. Moreover, this court has held "[t]he provision for DNA testing was not meant to provide an automatic continuance in every trial that involved DNA testing because the statute requires that the State must exercise 'without success due diligence to obtain results of DNA testing.' [Citation.]" *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 656. The State bears the burden of showing it exercised due diligence to obtain the DNA test results within the 120-day speedy-trial term.

Colson, 339 Ill. App. 3d at 1047, 791 N.E.2d at 656.

¶ 34 In *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 657, this court found the circuit court did not abuse its discretion by finding the State acted with due diligence in obtaining DNA test results. There, the crime lab did not receive the sexual assault evidence kit for the defendant's alleged crime and defendant's blood sample until nearly two months after the defendant's November 27, 2000, arrest. *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 657. The crime lab received the victim's boyfriend's blood for DNA analysis around a month after it received the kit and the defendant's blood sample. The lab completed the DNA testing on March 21, 2001, which was four months after the defendant's arrest. *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 657. This court found: "The State did not delay excessively in getting the DNA materials to the lab. The lab did not take an excessively long time in getting the results processed." *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 657. We also rejected the defendant's suggestion the State's request for a continuance was a ruse. *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 657.

¶ 35 In this case, the State sent the sexual assault kit to the lab before defendant's arraignment. Five weeks later and three days after defendant had demanded trial, the State had checked with the lab and learned the kit had not been tested and the lab hoped to test it within the next month. The next month, the State again contacted the lab and learned the kit had still not been tested. Even though the kit had not been tested and the existence of a DNA sample in the kit was still unknown, the State asked for defendant's DNA sample two months after his arraignment. The State delivered defendant's DNA to the lab on April 22, 2016, which was 10 days after it received an order approving it to take the sample. The DNA samples were recovered from the kit on May 9, 2016, but a comparison of the samples and defendant's DNA

had not been done when the State asked for its last continuance on May 31, 2016. On these facts, the State did not excessively delay in getting the DNA samples to the lab. First, the kit was delivered to the lab before defendant's arraignment. Then, the lab received defendant's DNA before the lab recovered DNA samples from the kit. If the kit had yielded no samples, then defendant's DNA would not have been needed. Thus, we agree with the State its request in April 2016 for defendant's DNA did not delay the ultimate test results in this case. Ideally, the lab could have processed the kit and done the comparison faster. However, the record shows the State was consistently checking on the lab's progression with the kit in this case.

¶ 36 We disagree with defendant this case is similar to the Fifth District's case in *Battles*, 311 Ill. App. 3d at 1001, 724 N.E.2d at 1005, where the reviewing court found the circuit court erred by finding the State exercised due diligence. There, the reviewing court noted the State took 104 days to decide whether it should even perform DNA testing, sent the sample to the wrong lab, did not decide to send the sample to the correct lab at the time of the hearing on the motion to continue, and never followed up with the lab or expedited the testing. *Battles*, 311 Ill. App. 3d at 1004-05, 724 N.E.2d at 1006-07. In this case, the State promptly sent the kit to the correct lab, sent defendant's DNA to the lab before it was known if DNA samples could be recovered from the kit, and consistently contacted the lab to see if the kit had been tested.

¶ 37 Accordingly, we find the circuit court did not abuse its discretion by finding the State exercised due diligence in obtaining the DNA test results.

¶ 38 B. Juror Admonishments

¶ 39 Defendant further contends the circuit court failed to properly admonish the prospective jurors on the principles stated in *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984), which are set forth in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Defendant

concedes he did not properly preserve this issue for review but requests we review the issue under the plain-error doctrine (see Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). The State contends the circuit court strictly complied with the *Zehr* principles. In the alternative, it argues that, if the circuit court erred, the error did not rise to the level of plain error.

¶ 40 The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

We begin our plain-error analysis by first determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059.

¶ 41 Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) requires trial judges to ask each potential juror whether the juror both "understands" and "accepts" the following four fundamental principles of criminal law: (1) the defendant is presumed innocent; (2) the State bears the burden of proving the defendant's guilt beyond a reasonable doubt; (3) the defendant

has no obligation to present any evidence; and (4) the defendant's decision to not testify cannot be held against him or her. Our supreme court has held a circuit court violates Rule 431(b) by failing to ask the prospective jurors whether they both understand and accept the four *Zehr* principles. *People v. Belknap*, 2014 IL 117094, ¶ 46, 23 N.E.3d 325. In this case, the circuit court asked the jurors if they "understand" the instructions and "will follow those instructions." Defendant claims the court erred by using "follow" instead of "accept." We disagree.

¶ 42 Rule 431(b) does not mandate the circuit court recite verbatim the principles therein. *People v. Atherton*, 406 Ill. App. 3d 598, 611, 940 N.E.2d 775, 787 (2010). In *Atherton*, 406 Ill. App. 3d at 611, 940 N.E.2d at 787, our sister court noted that asking potential jurors if they were " 'willing to follow' " the *Zehr* principles was just another way of asking the potential jurors if they accepted those propositions. Thus, the *Atherton* court found the circuit court's questions as to the *Zehr* principles complied with Rule 431(b). *Atherton*, 406 Ill. App. 3d at 611, 940 N.E.2d at 787.

¶ 43 Defendant contends *Atherton* is no longer good law based on our supreme court's later decision in *People v. Sebby*, 2017 IL 119445, 89 N.E.3d 675. There, the parties agreed the circuit court violated Rule 431(b) when it asked the jurors whether they " 'had any problems with' " or " 'believed in' " those principles. *Sebby*, 2017 IL 119445, ¶ 49. Since the parties agreed the circuit court erred, the supreme court never addressed whether a verbatim recitation of the principles was required. Moreover, the error was clear as neither question in *Sebby* addressed whether the jurors understood the four *Zehr* principles. We note that, in *People v. Wilmington*, 2013 IL 112938, ¶ 32, 983 N.E.2d 1015, which the *Sebby* court cites (*Sebby*, 2017 IL 119445, ¶ 49), the supreme court recognized it was "arguable that the court's asking for disagreement, and getting none, [was] equivalent to juror acceptance of the principles."

(Emphasis omitted.)

¶ 44 Accordingly, we find *Atherton* is still good law after *Sebby* and agree that asking jurors if they will follow the *Zehr* principles is just another way of asking if they accept those principles. Thus, we find no error occurred with the Rule 431(b) admonishments in this case.

¶ 45 C. Admissibility of Video Recordings

¶ 46 Defendant also argues the circuit court erred by admitting into evidence the State's videos, which were labeled State's exhibit Nos. V1 and V2. He insists Cotton's testimony was necessary to lay a proper foundation. The State asserts the court did not err. This court reviews a circuit court's admission of a videotape under the abuse of discretion standard. *People v. Taylor*, 2011 IL 110067, ¶ 27, 956 N.E.2d 431. A circuit court abuses its discretion when the "court's ruling is fanciful, unreasonable or when no reasonable person would adopt the [circuit] court's view." *Taylor*, 2011 IL 110067, ¶ 27.

¶ 47 Courts may admit videos as substantive evidence as long as a proper foundation is laid. *Taylor*, 2011 IL 110067, ¶ 32. Generally, video evidence is admitted under the "silent witness" theory. *Taylor*, 2011 IL 110067, ¶ 32. Under that theory, a witness need not testify to the accuracy of the image depicted in the video evidence "if the accuracy of the process that produced the evidence is established with an adequate foundation." *Taylor*, 2011 IL 110067, ¶ 32.

¶ 48 Our supreme court has found the following factors may be considered in determining the reliability of a video:

> "(1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the

> persons, locale, or objects depicted; and (6) explanation of any copying or duplication process." *Taylor*, 2011 IL 110067, ¶ 35.

However, it emphasized the aforementioned list of factors was nonexclusive and "[e]ach case must be evaluated on its own." *Taylor*, 2011 IL 110067, ¶ 35. Thus, "depending on the facts of the case, some of the factors may not be relevant or additional factors may need to be considered." *Taylor*, 2011 IL 110067, ¶ 35. Our supreme court held "[t]he dispositive issue in every case is the accuracy and reliability of the process that produced the recording." *Taylor*, 2011 IL 110067, ¶ 35.

¶ 49 While most cases involve automatic cameras or surveillance systems where the video is made from the system (*Taylor*, 2011 IL 110067, ¶ 32), this case involves an individual taking a cell phone video, turning the cell phone over to the police, and then becoming uncooperative with the police. In *In re D.Q.*, 2016 IL App (1st) 160680, ¶ 27, 65 N.E.3d 1012, the reviewing court applied *Taylor*'s "silent witness" theory to a video the father of the alleged victim had received on his cell phone and concluded the circuit court did not abuse its discretion in admitting the video into evidence. The respondent, who was the mother of the child, had told a Department of Children and Family Services (DCFS) investigator "the video was taken by 'someone who [the] [respondent] thought was her friend.' " *D.Q.*, 2016 IL App (1st) 160680, ¶ 26. Thus, the *D.Q.* court affirmed the admissibility of video taken by a person under the silent witness theory.

¶ 50 In explaining its conclusion, the *D.Q.* court noted the father and the DCFS investigator positively identified both the respondent and the victim as the woman and child in the video. *D.Q.*, 2016 IL App (1st) 160680, ¶ 28. Based on that testimony, the *D.Q.* court found "the camera used to record the video was clearly operational at the time and was able to record

sufficiently clearly so that the individuals in the video were identifiable, as were their actions." *D.Q.*, 2016 IL App (1st) 160680, ¶ 28. It noted our supreme court in *Taylor* found such evidence was sufficient to adequately demonstrate the camera was able to record and was generally operating properly. *D.Q.*, 2016 IL App (1st) 160680, ¶ 28 (citing *Taylor*, 2011 IL 110067, ¶ 39). The father also testified he received the video from the respondent's mother, viewed the video, and then took the video to the police department. Moreover, he testified "the video he received on his cell phone and the video played in court were 'the exact same video.' " *D.Q.*, 2016 IL App (1st) 160680, ¶ 28. The *D.Q.* court found the father's aforementioned testimony demonstrated the authenticity of the recording. *D.Q.*, 2016 IL App (1st) 160680, ¶ 28. Last, the reviewing court highlighted the juvenile court's finding the parties did not present any evidence "the video had been altered or tampered with such that it would be rendered unreliable or untrustworthy." *D.Q.*, 2016 IL App (1st) 160680, ¶ 28.

¶ 51 In this case, Cotton showed the video to Officers Robinson and McElhoe on his cell phone. Officer McElhoe testified he observed two males and a female in a bedroom, and his testimony was cut off by the prosecutor when he attempted to explain what it appeared the individuals were doing. From T.F.'s clothing, Officer Robinson was able to identify T.F. in the video. Moreover, Officer McNaught testified the cell phone was in proper working condition. Thus, the State showed the device was operational and of sufficient quality to observe the individuals and their actions.

¶ 52 Mobile device forensics revealed the videos had a time stamp of 1:39 p.m. and 1:44 p.m. on February 3, 2016, which is consistent with Adams's testimony about her observations of T.F. at Cotton's house on that day. The police responded to the call for a possible sexual assault at around 2 p.m. at T.F.'s apartment. Officer Robinson testified Cotton

showed her the video of the incident at his apartment about two to three minutes after arriving at T.F.'s apartment. Thus, Officer Robinson observed the video within 30 minutes of its time stamp. Officer McElhoe also viewed the video at T.F.'s apartment building within an hour of the time stamp and took custody of the cell phone that contained the video. Officer McElhoe testified the cell phone never left Urbana police custody after he took custody of the cell phone. Both Officers Robinson and McElhoe confirmed the State's exhibit No. V1 was the same video they viewed shortly after the incident. They did not observe any modifications of the video. As in *D.Q.*, 2016 IL App (1st) 160680, ¶ 28, Officers Robinson's and McElhoe's aforementioned testimony demonstrated the authenticity of the recording. Moreover, their viewing of the video shortly after the incident also constitutes evidence of the video's reliability.

¶ 53 In addition to Officer Robinson's testimony identifying T.F. in the video, T.F. testified the clothes she was wearing on February 3, 2016, were the same clothes she had on in the video. Officer McElhoe went to Cotton's residence after viewing the video and observed one of the bedrooms at the residence was the same bedroom depicted in the video. Officer McElhoe noted the high chair that was present in both the video and in Cotton's bedroom. Officer Hancock, who watched a portion of the video at the scene, testified one of the bedrooms had distinct furniture that made it clear it was the same bedroom as the one in the video. Defendant notes no one identified the two males in the video. However, we find the identifications of T.F. and the bedroom were sufficient to support the reliability of the video. Moreover, T.F. identified a photograph of defendant taken around the time of the incident. A comparison of the photograph and the males in the video indicates defendant was the man in the video wearing the black sweatshirt. Additionally, we note the Urbana police officers testified to the chain of custody of the cell phone after Cotton showed Officer McElhoe the video. Officer McNaught

also testified as to how he transferred the two videos from the cell phone to the computer. Further, Officer McNaught did not observe any data corruption.

¶ 54 Defendant claims the State cannot establish the competency of the operator. However, our supreme court has recognized not every factor would be relevant in every case. In *D.Q.*, 2016 IL App (1st) 160680, ¶ 9, the video was sent to the victim's father. There, the State presented no evidence regarding the identity of the person who took the video, the device on which the video was recorded, and the general recording process related to the video. Thus, the competency of the operator is not always a factor. Regardless, the video is taken in a fashion that generally presented a clear view of the activities in the bedroom at Cotton's home.

¶ 55 Here, the circumstantial evidence supporting the accuracy and reliability of the video is strong. In addition to the short time between the incident and the police obtaining the video, Adams testified she saw T.F. with defendant, Cotton, and Jackson at Cotton's house on the day of the incident. The incident occurred while Adams was gone from Cotton's home for 40 to 60 minutes. The video is of a bedroom in Cotton's home, which is identified based on distinct items located in the bedroom. Two males are with T.F. in the video and another person is taking the video. T.F. is unconscious in the video, and several witnesses observed her as being unconscious when Cotton carried her out of his home. Officer Robinson noted T.F. was wearing the clothes she had on in the video when Officer Robinson observed T.F. in the apartment. We recognize State's exhibit No. V2 has a skip in it, but that does not appear to change the accuracy and reliability of the video before the skip. Defendant is not seen in the video after the skip. Moreover, as in *D.Q.*, 2016 IL App (1st) 160680, ¶ 28, no evidence was presented the video had been altered in a way to render it unreliable or untrustworthy.

¶ 56 Accordingly, we find the circuit court did not abuse its discretion by admitting the

two videos.

¶ 57 D. Sufficiency of the Evidence

¶ 58 Next, defendant argues the State's evidence was insufficient to prove him guilty beyond a reasonable doubt of criminal sexual abuse. The State disagrees.

¶ 59 Our supreme court has explained the review of a defendant's challenge to the sufficiency of the evidence as follows:

> "In reviewing the sufficiency of the evidence in a criminal case, our inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. [Citation.] All reasonable inferences from the evidence must be drawn in favor of the prosecution. [Citation.] This standard of review does not allow the reviewing court to substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. [Citation.] [I]n weighing evidence, the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. [Citation.] This court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt. [Citation.]" (Internal quotation marks omitted.) *People v. Hardman*, 2017 IL 121453, ¶ 37, 104 N.E.3d 372.

¶ 60 Under the portion of the criminal sexual abuse statute applicable here, a person commits criminal sexual abuse when he "commits an act of sexual conduct and knows that the

victim *** is unable to give knowing consent." 720 ILCS 5/11-1.50(a)(2) (West 2016). Defendant contends the State failed to prove he committed an act of sexual conduct. Section 11-0.1 of the Criminal Code of 2012 (720 ILCS 5/11-0.1 (West 2016)) defines "sexual conduct," in pertinent part, as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused."

¶ 61 Based on T.F.'s and Adams's identification of the photograph of defendant at the time of the incident and a comparison of the photograph with the video, a reasonable inference is defendant is the male in the black sweatshirt on the video. In State's exhibit No. V2, the video shows T.F.'s nude buttocks and defendant's hand moving in between the cheeks of T.F.'s buttocks. It is a reasonable inference defendant's hand was contacting T.F.'s anus and vagina. Accordingly, we find the State's evidence was sufficient to find defendant guilty beyond a reasonable doubt.

¶ 62 E. Closing Arguments

¶ 63 Defendant last contends he was denied a fair trial because the prosecutor stated defendant was the male on the video smiling and pulling down T.F.'s pants. He claims that was a misstatement of the evidence. Defendant acknowledges he has forfeited this contention by failing to object at trial and raise the issue in a posttrial motion. Defendant requests we review this issue under the plain-error doctrine. The State contends no error occurred.

¶ 64 While prosecutors have wide latitude in closing arguments, their comments must be based on evidence admitted at trial or on any reasonable inferences therefrom. *People v. Williams,* 333 Ill. App. 3d 204, 214, 775 N.E.2d 104, 112-13 (2002). "A fact not based upon evidence in the case may not properly be argued to the jury ***." (Internal quotation marks omitted.) *Williams*, 333 Ill. App. 3d at 214, 775 N.E.2d at 113 (quoting *People v. Whitlow*, 89

Ill. 2d 322, 341, 433 N.E.2d 629, 637-38 (1982)).

¶ 65 As we have explained with prior issues, T.F. identified a photograph of defendant that resembled what defendant looked like at the time of the incident. A comparison of that photograph and the video yields a reasonable inference defendant is the male in the video wearing the black sweatshirt. The male in the black sweatshirt did smile and pull down T.F.'s pants. Accordingly, we find no misstatement of evidence on the part of the prosecutor.

¶ 66 III. CONCLUSION

¶ 67 For the reasons stated, we affirm the Champaign County circuit court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 68 Affirmed.