2020 IL App (2d) 170677-U
No. 2-17-0677
Order entered July 17, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. NOEL F. BUHAY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 14-CF-482 Honorable Donald M. Tegeler, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court erred by failing to comply with Supreme Court Rule 431(b) regarding instructing the venire, such error was not plain error because the evidence was not closely balanced; the State's two charges for predatory criminal sexual assault of a child did not violate the one-act, one-crime rule where the evidence showed at least two separate acts to support the charges. Trial court affirmed.

¶ 2 A jury found defendant, Noel F. Buhay, guilty of three counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)), and the trial court sentenced defendant to three prison terms of 15 years, to be served consecutively. Defendant argues that 1) he was denied a fair trial where the evidence was closely balanced and the trial court failed to properly

question the potential jurors about Supreme Court Rule 431(b) (eff. July 1, 2012) and our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472 (1984), and 2) one of defendant's convictions of predatory criminal sexual assault of a child based on mouth to penis contact cannot stand because it cannot be determined whether multiple convictions for identically charged conduct was carved from the same physical act. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with three counts of predatory criminal sexual assault of a child and one count of indecent solicitation of a child. A jury was selected on March 13, 2017. At that time, Supreme Court Rule 431(b) required the trial court to ask each potential juror, individually or in a group, whether the juror understands and accepts that (1) "defendant is presumed innocent of the charge(s) against him," (2) "before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt," (3) "the defendant is not required to present any evidence on" his behalf, and (4) "if the defendant does not testify it cannot be held against him." Ill. S. Ct. R. 431(b) (eff. July 1, 2012). We refer to these principles as the "*Zehr* principles."

¶ 5 During jury selection, the trial court informed the venire:

> "I am going to explain to you certain principles, and if you understand the principles, and accept those principles, please do not raise your hand. That will signify that you understand and agree with the principles I am going to read. If you don't understand or accept these principles and you don't agree with them, I would ask that you raise your hand in response to my questions."

¶ 6 The court then recited each principle followed by a different question: "Is there anyone who has any difficulty or disagreement with this proposition of law?" The court instructed the

venirepersons to raise their hands if they did. No hands were raised. Defense counsel did not object to the court's handling of the *Zehr* principles.

¶ 7 Defendant's trial took place from March 14 through 16, 2017.

¶ 8 Pamela Ely testified as follows. In 2005 Ely was a forensic interviewer and investigator with the Child Advocacy Center in Kane County. In 2005 an investigation began due to allegations that defendant sexually abused R.P. Ely did not work on this investigation. Ely did not know why the case was closed at that time, but in 2013 defendant's case was reopened because another minor, J.H., reported being sexually abused by defendant. In relation to J.H's allegations, Ely interviewed R.P. In 2014 the State brought charges against defendant regarding R.P.'s allegations.

¶ 9 During cross-examination, Ely testified as follows. The 2005 investigation into the allegations involving defendant was closed. During R.P's 2013 interview with Ely, R.P. refused to have the interview videotaped or audiotaped. Ely interviewed defendant's wife, Susan, who told Ely that she did not believe that defendant sexually abused R.P.

¶ 10 R.P testified as follows. R.P. was born on December 24, 1993, and was 23 years old at the time of the trial. R.P. spent the majority of his childhood in foster care and left foster care when he was 21 years old. From late February to early June 2004, defendant and, Susan, who had died before trial, were R.P.'s foster parents. They lived together in Aurora on Cottonwood Drive. R.P. had his own bedroom with a blue loft bed, and defendant had a "computer room" or home office with a futon. Susan was an "overall good person" and an "ideal mother." R.P.'s relationship with defendant was mostly "okay." R.P. and defendant did "a lot of father/son activities that [R.P.] had never done before." But there were parts of the relationship that were not good.

¶ 11 R.P. testified that three days after he moved into defendant's house, defendant escorted R.P. into his bedroom at bedtime, climbed into bed with him., and "perform[ed] oral sex on [R.P.]" The oral sex lasted approximately 20 minutes and happened every night R.P. lived in defendant's home. By "oral sex" R.P. meant that defendant put R.P's penis in his mouth. When R.P. asked defendant why he was "doing it," defendant told R.P. "because he loved me."

¶ 12 R.P. also testified that one time when he was suspended from school, defendant told R.P. to come into the computer room, which was down the hall from R.P's bedroom. Once R.P. was in the computer room, defendant "laid the futon out and he said, 'Do you want to do anything with that?' And [defendant] pointed to his penis." R.P. did not respond or did not respond "properly." Defendant then "pushed [R.P.] down, turned [R.P.] over, [on his stomach] and forced himself inside [R.P.]." Defendant moved R.P's legs apart "to go in." R.P. explained that defendant put his "penis in my behind – in my butt." R.P. felt defendant's penis in his "butt hole." Defendant's penis was "very hard." R.P. "squabble[ed]" and tried to get away and move but he could not because he was too small. When defendant "stopped white stuff came out of his penis." R.P. saw the white stuff on the back of his butt. R.P. now understood that the white stuff was semen. When defendant did this to R.P., he was under 13 years old. Once defendant offered R.P. $10 to perform oral sex on him. R.P. refused. R.P. testified that he told Susan "twice" and his Department of Children and Family Service (DCFS) caseworker, Vivian Thompson, what was happening, but they did nothing to help him.

¶ 13 R.P. also testified as follows. While he lived with defendant and Susan, he went on vacations with them and had a "good time." R.P. was not abused by defendant while they were on vacations. It was the first time in his life that R.P. had been on vacation. It was a "new experience." R.P. had never been on an airplane before these vacations. Photographs depicted

R.P. smiling while on vacations with defendant and Susan in Tulsa, Oklahoma; Louisville, Kentucky; and Orlando, Florida. One photograph showed R.P. hugging defendant.

¶ 14 R.P. testified that after a few months of living with defendant and Susan, he moved out of their home. First, R.P. moved to a foster home in Braidwood, Illinois, and then to the Rice Child Family Center. Defendant visited R.P. several times at these other placements during the first year after R.P. left defendant's home. R.P. did not hear from defendant until 2013 when R.P. was 20 years old and lived in an independent living program in Zion, Illinois. R.P. received messages from defendant through Facebook, text and email. In 2013 defendant and R.P. met at a restaurant near the Aurora train station. Defendant asked R.P. if he would rather have defendant as a father or a boyfriend. R.P. did not answer. After the restaurant, they went to a nearby dog park where they had "a conversation about oral sex." Next, in 2013 R.P. met defendant and Susan at Union Station in Chicago. Defendant told R.P. that he and Susan were trying to adopt a child and that some people would be coming to talk to R.P. Defendant told R.P. that his 2005 allegations were "makings things difficult for them and that [R.P.] should tell them that nothing happened." Defendant told R.P. that "when everything blew over," defendant would look into R.P. coming back to live with them again.

¶ 15 R.P. also testified that after the meeting at Union Station, in February 2013, he sent defendant a text message that read "i [*sic*] will lie about what u did to me even if that put [*sic*] u in jail and I need the money they said thay [*sic*] will give me money for a phoune [*sic*] and so I am goin [sic] 2." R.P. testified that he typed that message incorrectly and that the first part of it should have read, "I will *not* lie." (Emphasis added.) The grammatical errors occurred because of the voice-to-text technology and R.P. did not notice the errors until he had already sent the message. In the same text message conversation, R.P. told defendant, "Call and tell them what

you did. Okay." R.P. meant that he wanted defendant to tell the "advocacy office" that defendant molested him in 2004.

¶ 16 R.P. testified that in February or March 2013, police and investigators from the Child Advocacy Center came to speak with him. R.P. did not give an audio or video recorded statement to them because people from his transitional living program were also there, which made him feel uncomfortable, and he was concerned about his statement being posted on social media.

¶ 17 R.P. also testified that in March 2014 he met with prosecutors, police, and investigator Ely and the Kane County Children's Center and told them that he and defendant performed oral sex on each other in the dog park in Aurora in 2013 when R.P. was 20 years old. R.P. also testified that he did not recall telling them that he and defendant performed oral sex on each other at the dog park and did not recall if it occurred. The court took judicial notice that the defendant was indicted on June 18, 2014. In October 2016 R.P. met with prosecutors and investigators for trial preparation. R.P. told them that he refused defendant's attempt to perform oral sex on him at the dog park. R.P. continued to meet with defendant after he moved to another home because he still had hope of finding a family. R.P. did not recall telling police in 2015 that he would still love to live with defendant. R.P. denied making up his allegations against defendant because he felt abandoned in 2004 or to get revenge against defendant. R.P. testified that he was not sure if he knew J.H. or lived with him. R.P. never spoke with anyone else who claimed to be abused by defendant.

¶ 18 J.H. testified as a propensity witness pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (735 ILCS 5/115-7.3 (West 2016)). J.H. was born on December 8, 1998, and was 18 years old at the time of trial. J.H. first met defendant when he was six or seven years old. J.H. met defendant through his mother, who, at the time, was dating defendant.

Defendant and J.H.'s mother had a son together who was eight years old at the time of the trial. At the time of trial, a custody conflict existed between defendant and J.H.'s mother regarding their son. J.H. spent weekends at defendant's house for a couple of years while his mother was working during that time, and defendant became a father figure to J.H.

¶ 19 J.H. testified that while he stayed at defendant's house in 2004 and 2005, defendant, on multiple occasions, performed oral sex on J.H. by placing his mouth on J.H.'s penis. Defendant performed oral sex on J.H. in the basement on a couch, the top bunk of the boys' bedroom at night, the bottom bunk of the boys' bedroom during the day when one of defendant's nephews was asleep in the room and after defendant rubbed a lollipop on J.H.'s chest, the computer room after showing J.H. pornography, the living room after defendant made J.H. stroke defendant's penis until he ejaculated, inside defendant's bedroom, inside a hot tub in defendant's bathroom, inside defendant's walk-in closet, and in an outside hot tub that was on defendant's deck. No one else told J.H. that they were sexually abused by defendant.

¶ 20 J.H. also testified that, in January 2013 when he first reported his allegations against defendant, he went to the police station with his mother. J.H. made a written statement at the police station. The next day, J.H. spoke with investigator Jay Dunn at the Children's Advocacy Center. J.H.'s interview was videotaped. J.H. told Dunn that his mom's ex-boyfriend sexually assaulted him starting when he was seven years old. J.H. told Dunn that defendant sexually abused him in defendant's basement, living room, and car. J.H. did not tell Dunn or include in his written statement that defendant sexually abused him in the computer room, bathroom, walk-in closet, or hot tub on defendant's deck. J.H. told Dunn that there was never anyone else in the room during the sexual abuse. J.H. told Dunn that he never touched defendant's body, and

defendant never showed him pornography. J.H. testified that he did not tell Dunn about some of the incidents because he was "embarrassed."

¶ 21 J.H. testified that, during the time he spent with defendant, he wanted defendant to adopt him. J.H. spent with a lot of time with defendant and at defendant's house in the summer playing with defendant's nieces and nephews. J.H. communicated with defendant on the phone and through text messages. J.H. denied giving defendant any cards or notes but then acknowledged that he gave defendant a Father's Day card through his mother that read "Happy Father's Day. And I love you very much. Have a great Father's Day, Dad. From your son." J.H. also testified that in June 2008 he sent defendant a note that read

> "Dear Dad, I hope you have a great time on Father's Day. I love you so much. I hope I can come with you some place. I love you so much. I will never hate you. I love you so much. You are the greatest dad in the whole world. I love you."

¶ 22 DCFS investigator Carolyn Travis testified as follows. On April 5, 2005, the DCFS received a hotline report that R.P. had disclosed sexual penetration during a "group setting." In response to that report, Travis and Aurora police officer Kevin Convey interviewed R.P. on May 5, 2005. The interview was not recorded. During the interview, R.P. told Travis that he was sexually abused by defendant in the summer of 2004 when defendant would come into his bedroom every night and "suck his stuff." R.P. pointed to his genitals and said he meant "dick" when he said "stuff." According to Travis, R.P. was placed in defendant's home on February 27, 2004, and that R.P. was young enough at the time that she did not expect him to know the exact time that he was with defendant. R.P. also told Travis that defendant pulled R.P.'s pant down, "pushed" him over a couch and "stuck his dick in [R.P.'s] butt" in the computer room. R.P. felt his butt afterwards, and it was "white and wet." R.P. told Travis that defendant told R.P. not to tell anyone

because he would "get in trouble" and that defendant offered R.P. $10 to "suck [defendant's] dick" but R.P. refused. R.P. said that the abuse started three days after he was placed in defendant's house and it ended when he was removed from defendant's house.

¶ 23 Travis also testified that R.P. was removed from defendant's house after defendant threw a cereal bowl at him. R.P. was taking psychotropic medications because he had "bad behavior problems" and he was "suicidal," which were other reasons he was removed from defendant's house. Travis testified that she learned that R.P. had been diagnosed with oppositional defiance disorder, a component of vindictiveness, and an inability to adhere to rules of authority. Travis stated that, during R.P.'s interview, he did not appear to be under the influence of drugs and was "very coherent." R.P. told Travis that he did not tell anyone else about defendant's sexual abuse except those in his "group." R.P. did not tell Travis that he told Susan or his caseworker, Vivian Thompson, about the abuse. Travis testified that Thompson was a mandated reporter who was legally obligated to disclose reports of abuse. Convey did not collect material for a rape kit from R.P. because R.P. reported that the sexual abuse occurred a year ago so it "wasn't immediate." "Immediate" meant within 24 hours.

¶ 24 Aurora police officer Convey testified as follows. On May 25, 2005, Convey and Travis interviewed defendant about R.P.'s sexual abuse allegations. Defendant arrived to the interview voluntarily and was told that he was not under arrest and that he could leave at any time. Defendant told Convey that he was born in June 1967 and that R.P lived with him and Susan from February to June 2004 in Aurora. Defendant recently moved to Sugar Grove. Defendant told Convey that he believed he was being interviewed because R.P. wanted to move back in with defendant. Defendant told Convey that he had visited R.P. once in the hospital and that he had a

couple of phone conversations with R.P. since R.P. left defendant's house, but he never talked about sex with R.P.

¶ 25 Convey testified that defendant described R.P.'s sexual abuse allegations as "bizarre" and "appalling." Defendant denied the allegations and said that other children had recently slept over at his home without a problem. Defendant wished R.P. well and said that R.P. might be making up the allegations to try to get back at defendant or caseworkers who were not listening to R.P. about wanting to come back to live with defendant. Defendant told Convey that his D.N.A. would not be found in R.P.'s anus. Convey did not collect any D.N.A. because the alleged abuse had occurred a year prior to the interview.

¶ 26 At the close of the State's case, defendant moved for a directed verdict, which the trial court denied. Defendant then moved to waive his right to a jury trial and requested a bench trial. The trial court denied defendant's request, and defendant called his witnesses.

¶ 27 Rafael Buhay, defendant's nephew, testified as follows. Rafael was 20 years old at the time of trial. In April 2004, Rafael met R.P. during a family reunion in Tulsa, Oklahoma. Rafael spent summers at the defendant's home in Sugar Grove in 2005 and 2006 with other cousins, including Franco Buhay. During one summer, defendant introduced J.H. to Rafael as his son and Rafael's "new cousin." Rafael, Franco, and J.H. slept in the same bedroom. Rafael never saw defendant come into the bedroom when the boys slept or saw defendant climb into bed with J.H. J.H. never complained about defendant, and he and defendant appeared to have a father and son relationship.

¶ 28 Franco, defendant's nephew, testified as follows. Franco was 22 years old at the time of trial. He attended the family reunion in Tulsa in April 2004. R.P. kept to himself but seemed happy. Franco met J.H. when Franco spent summers at defendant's home in 2006 through 2010.

Franco, Rafael, and J.H. slept in the same bedroom. Franco never saw defendant get into bed with J.H. or do anything sexual with J.H. J.H. always slept in the top bunk and never complained about defendant.

¶ 29 Steve Langston testified as follows. Langston was nine years old when he met defendant, who was his neighbor at the time. Defendant was a "kind-hearted man" who gave the kids in the community a place to "play" and "enjoy a lot of his toys." Defendant did not have children but had a reputation for being kind to children, and he never did anything sexual with Langston. R.P. had a reputation for being untruthful. Langston had a prior felony conviction for delivery of a controlled substance.

¶ 30 During closing argument, the State argued that defendant performed oral sex on R.P. more than once, which meant that the jury should find defendant guilty of both counts charging that defendant placed his mouth on R.P.'s penis.

¶ 31 Prior to deliberations the court ordered the jury to enter a verdict of not guilty on the count of indecent solicitation of a child because the State brought the charge after the statute of limitations had expired.

¶ 32 During deliberations the jury sent two notes to the trial court. The first note asked:

> "We would like to confirm that the second count of the indictment (predatory criminal sexual assault of a child) refers to the same act (Defendant's mouth on [R.P.'s] penis) as the first count of predatory criminal sexual assault of a child, happening as a separate count (more than one time)." (Emphasis in original).

The trial court responded: "The State has alleged 2 separate counts of mouth to penis ([R.P.]) and 1 count of penis to anus ([R.P.]). You are to continue your deliberations." The second jury note

read: "May we have any and all written reports from the 2005 and 2013 investigations?" The court replied:

> "You have received all the exhibits which were entered into evidence. The evidence you should consider consists only of the testimony of the witnesses and the exhibits and judicially noticed facts which the court has received."

¶ 33 The jury found defendant guilty of all three counts of predatory criminal sexual assault of a child and not guilty of indecent solicitation of a child. Defendant filed a motion for a new trial which the trial court denied. On June 15, 2017, the court sentenced defendant to consecutive terms of 15 years on all three counts of predatory criminal sexual assault of a child. On July 13, 2017, defendant filed a motion for reconsideration of sentence, which the court denied on August 24, 2017. Defendant filed his notice of appeal on August 24, 2017.

¶ 34 II. ANALYSIS

¶ 35 A. *Voir Dire – Zehr* Principles

¶ 36 Defendant argues that the trial court's failure to comply with Rule 431(b) during *voir dire* requires a new trial. Rule 431(b) mandates trial courts to admonish and question each potential juror on the *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). The rule provides that the court "shall ask" each juror, either individually or in a group, whether he or she "understands and accepts" the *Zehr* principles. *Id.* In *People v. Thompson*, 238 Ill. 2d 598, 607 (2010), our supreme court made clear that the court must ask both whether the jurors understand and accept the principles.

¶ 37 In *People v. Dismuke*, 2017 IL App (2d) 141203, we held a trial court's similar attempt to instruct the venire regarding the *Zehr* principles, was insufficient. *Id.* ¶ 55. In *Dismuke*, the trial court first instructed the venire not to raise their hands if they understood, accepted, and agreed

with the *Zehr* principles. *Id.* ¶ 51. Then the court instructed the venire to raise their hands if they did not understand, accept, or agree with the principles. *Id*. Finally, the court recited each principle and asked whether any potential juror had any "difficulty" or "disagreement" with the principle. *Id*. We reasoned that the trial court's questioning was "convoluted" because it gave three different instructions to the potential jurors on what to do with their hands. *Id.* ¶¶ 54-55. We also determined that it was "problematic" that the trial court substituted "difficulty or disagreement" for "understand and accept." *Id.* ¶ 54. We explained, "Asking if they had any 'difficulty or disagreement' was not equivalent to asking if they understood." *Id.* ¶ 53.

¶ 38 Here, the State concedes that the trial court's *Zehr* instruction in this case is "nearly identical" to that in *Dismuke*. We agree. First the trial court told the venire that they should not raise their hands if they understood and agreed with the *Zehr* principles. See *Dismuke*, 2017 IL App (2d) 141203, Id. ¶ 51. Then the court instructed the venire to raise their hands if they did not understand, agree with, or accept the principles. See *id*. After reciting each principle, the trial court asked whether the any of the potential jurors had "any difficulty or disagreement" with the principle. See *id*. Thus, for the reasons stated in *Dismuke*, the trial court violated Rule 431(b).

¶ 39 Next, we address whether the error requires reversal and remand for a new trial. Defendant concedes that he forfeited this issue because he failed to object during *voir dire* and failed to raise the issue in his posttrial motion. See *People v. Sebby*, 2017 IL 119445, ¶ 48 (a defendant's failure to object to an alleged error at trial and raise it in a posttrial motion results in forfeiture of the issue on appeal). However, defendant asks us to review the issue as plain error.

¶ 40 The plain-error doctrine allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and (1) 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) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Sebby*, 2017 IL 119445, ¶ 48. A violation of Rule 431(b) is not cognizable under the second prong of the plain-error doctrine, "absent evidence the violation produced a biased jury." *Id.* ¶ 52.

¶ 41 Here, defendant argues that the evidence is so closely balanced that reversal of his conviction is required. Whether the evidence is closely balanced is a separate question from whether the evidence is sufficient to sustain a conviction against a reasonable-doubt challenge. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). In determining whether the evidence is closely balanced, we evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of the evidence within the context of the case. *Sebby*, 2017 IL 119445, ¶ 53. To accomplish this, we look at the evidence on the elements of the charged offenses along with any evidence regarding the witnesses' credibility. *Id.*

¶ 42 Here, defendant was convicted of three counts of predatory criminal sexual assault under section 11-1.40(a)(1) of the Criminal Code of 2012, which provides:

> "(a) A person commits predatory criminal sexual assault of a child if that person is 17 years of age or older, and commits * * * an act of sexual penetration, and:
>
> (1) The victim is under 13 years of age." 720 ILCS 5/11-1.40(a)(1) (West 2014).

¶ 43 The evidence in this case was not closely balanced. The ages of defendant and R.P. were not in dispute. The record reflects that, in 2004, defendant was over 17 and R.P. was 10 when the acts in question took place. R.P. testified that defendant put R.P's penis in his mouth, and defendant put his penis in R.P's "butt." Travis's testimony regarding her 2005 interview with R.P. was consistent with R.P.'s 2017 trial testimony. Further, J.H. testified that defendant had

established a similar father-like relationship with him and committed similar acts on him. In view of this testimony, we do not believe that the evidence was closely balanced.

¶ 44 Defendant contends that this case presents a "credibility contest" because he denied the allegations to Convey, and R.P. and J.H. lacked credibility. Defendant argues that R.P. was impeached because R.P. testified that he told his caseworker about the abuse and she was a mandatory reporter, R.P. texted defendant that he would "lie" about what defendant did to him, and Susan did not believe R.P.'s allegations. Defendant further notes that there were inconsistencies in R.P.'s testimony regarding oral sex with defendant in a dog park, R.P.'s diagnosis with oppositional defiance disorder that made him prone to vindictiveness, and the lack of physical evidence and eye witnesses.

¶ 45 Defendant notes minor inconsistencies in R.P.'s testimony and questions R.P.'s and J.H's credibility. But none of the inconsistencies and conflicts places doubt on the substantial evidence against defendant. R.P.'s testimony was fundamentally consistent with Travis's testimony and similar to J.H.'s testimony. While there were inconsistencies in R.P.'s testimony regarding the dog park incident, and while defendant denied the abuse allegations to Convey, we are reminded that we must make a commonsense assessment of the evidence. *Sebby*, 2017 IL 119445, ¶ 53. There is nothing in the record to suggest that R.P. had a motivation to lie. To the contrary, the record suggests that R.P. wanted a stable home rather than being moved around from placement to placement. R.P. testified that he met defendant at the dog park because he still had hopes of "finding a family." Further, there is no evidence to explain his knowledge of the sexual acts that he described to Travis. Common sense dictates that R.P. was being truthful to Travis about the abuse that occurred the prior year when he was 10. In addition, regarding the text message, R.P. explained that he meant to type that he would "*not* lie.

¶ 46 The consistency of R.P.'s statements to Travis in 2005 with R.P.'s testimony in 2017, and its similarity to J.H.'s testimony, "takes this case outside the realm of closely balanced evidence." *People v. Olla*, 2018 IL App (2d) 160118, ¶ 38. Therefore, while the evidence might not have been overwhelming, it was not closely balanced for purposes of plain error. *Id.*

¶ 47 Defendant argues that J.H.'s testimony is not credible because it stemmed from a bitter custody battle between his mother and defendant. However, this is mere speculation and has no basis in the record.

¶ 48 Defendant also contends that the case was closely balanced because the jury sent two notes to the court during deliberations. Defendant cites *People v. Lee*, 2019 IL App (1st) 162563, ¶ 67, for the proposition that "jury notes during deliberations demonstrate the closely balanced nature of the evidence in a case." However, the *Lee* court actually stated "lengthy jury deliberations and jury notes during deliberations, indicating that they had reached an impasse, demonstrate the closely balanced nature of the evidence in a case." *Id.* Here, nothing in the record indicates that the jury deliberations were "lengthy" or that they had "reached an impasse." Therefore, the jury notes in this case do not indicate that the case was closely balanced, and this case is accordingly distinguishable from *Lee*.

¶ 49 B. One-Act, One Crime

¶ 50 Defendant argues that one of his two convictions for predatory criminal sexual assault of a child (based on the act of defendant's mouth to R.P.'s penis) must be vacated because it cannot be determined whether the multiple convictions for identically charged conduct were carved from the same physical act.

¶ 51 A criminal defendant may not be convicted of multiple offenses when those offenses are all based on precisely the same physical act. *People v. Coats*, 2018 IL 121926, ¶ 11. Whether a violation of the rule has occurred is a question of law, which we review *de novo*. *Id*. ¶ 12.

¶ 52 In this case, to determine whether simultaneous convictions violate the one-act, one-crime rule, we determine if the offenses stem from multiple acts or a single act. *See People v. Miller*, 238 Ill. 2d 161, 165 (2010). "Multiple convictions are improper if they are based on precisely the same physical act." *Id*. An "act" is defined as any overt or outward manifestation that will support a separate conviction. *People v. Almond*, 2015 IL 113817, ¶ 47.

¶ 53 Applying those principles here, we agree with the State that defendant's separate convictions do not violate the one-act, one-crime rule. Here, counts I and II alleged that defendant "placed his mouth on the penis of R.P." between the time frame of January 1, 2004, and May, 21, 2004. R.P. testified that he lived with defendant and his wife from late February to early June 2004. R.P. also testified that defendant came into R.P.'s bedroom at bedtime and performed oral sex on him every night. R.P. testified that this began three days after he moved in with defendant in February 2004. In addition, Travis testified that R.P. told her that defendant performed oral sex on him "every night at bedtime."

¶ 54 Therefore, regarding counts I and II, we determine that the trial court did not err in entering convictions on both counts of predatory criminal sexual assault because the State's evidence described separate acts, which occurred during the time frames specified in the charges. Stated differently, counts I and II do not violate the one-act, one-crime rule because the State's evidence showed two separate acts for which defendant was convicted.

¶ 55 The defendant correctly points out that the counts I and II in the indictment failed to differentiate between the "mouth to penis" allegations supporting the predatory criminal sexual

abuse of a child charges. Defendant maintains that pursuant to *People v. Crespo*, 203 Ill. 2d 335 (2001), one of his convictions for predatory criminal sexual abuse of a child must be vacated.

¶ 56 In *Crespo*, the defendant stabbed the victim three times and was convicted of armed violence and aggravated battery. While acknowledging that each of the wounds could support a separate offense, the supreme court reversed the defendant's aggravated battery conviction because the indictment failed to apportion the three acts of stabbing among the offenses, and the State did not argue the separate offenses theory to the jury. The court concluded that "to apportion the crimes among the various stab wounds for the first time on appeal would be profoundly unfair" to the defendant. *Id*. at 343.

¶ 57 Here, in contrast, defendant acknowledges that during closing argument the State argued that it proved defendant committed predatory criminal sexual abuse (penis to mouth) as alleged in counts I and II, more than once. Further, the State distinguished the two counts of predatory criminal sexual abuse when it recounted that R.P. testified that defendant performed oral sex on him "on more than one occasion." See *In re G.A.T.*, 2017 IL App (3d) 160702, ¶ 34 (distinguishing *Crespo*, because during closing argument the State argued that respondent forced the victim to place his mouth on respondent's penis "'on three separate occasions'"). Also, in *Crespo*, all three stabbings occurred within a matter of minutes, while in this case, the acts of oral sex took place over a period of time, between late February and early June, 2004, "which more readily availed [the acts] of supporting separate" convictions. *Id*. In addition, unlike *Crespo*, the State did not wait until this appeal to apportion the crimes. Accordingly, this case is distinguishable from *Crespo*.

¶ 58 Defendant also cites *People v. Strawbridge*, 404 Ill. App. 3d 460 (2010), to support his argument. In *Strawbridge*, the State charged the defendant with, *inter alia*, two counts of

predatory criminal sexual assault alleging the same conduct against the same victim, but covering two disparate time periods: the first count covered June 24, 1999, through March 20, 2000, and the second count covered March 20, 2000. *Id*. at 461. The defendant was convicted on both counts and appealed, arguing that his convictions violated the one-act, one-crime rule. *Id*. On appeal, we noted that the victim testified to an encounter that occurred on March 17, 2000. *Id*. at 462. "The problem," as we saw it, was that "[we could not] tell what the jury based its verdict on." *Id*. at 463. We stated that, although we agreed with the State that there was "adequate evidence in the record to support convictions on multiple counts," we would not "place ourselves in the position of the jurors and try to determine how they reached their verdict." *Id*. In contrast to *Strawbridge*, in this case, R.P. testified that defendant performed oral sex on him "every night." Therefore, we can tell what the jury based its verdict on regarding counts I and II. Thus, *Strawbridge* is distinguishable from this case.

¶ 59 Defendant also argues that the jury instructions and the verdict forms did not distinguish count I from count II. Defendant contends that the jury was confused as indicated by a note sent during its deliberations that read:

> "We would like to confirm that the second count of the indictment (predatory criminal sexual assault of a child) refers to the same act (Defendant's mouth on R.P.'s penis) as the first count of predatory [criminal] sexual assault of a child happening as a separate event (more than one time)."

¶ 60 The note indicates that the jury understood that the State alleged two separate acts of "Defendant's mouth on R.P.'s penis," and were asking the court to "confirm." Further, the court, defense counsel, and the State understood the jury's note the same way. After reading the note to defense counsel and the State, the court stated, "I am taking that as they want to make sure that

you have charged two separate acts, not one act and they have a double thing." Defense counsel recommended that the court respond, Yes," to the note. The court responded, "The State has alleged two separate counts of mouth to penis ([R.P.]) and one count of penis to anus ([R.P.]). You are to continue your deliberations." Defense counsel responded that the court's response to the jury's note was acceptable. Thus, we determine that the jury's note, the court's response, and the jury's signing of guilty verdicts for counts I and II indicate that it was not confused and that it understood that the State alleged two separate acts.

¶ 61 III. CONCLUSION

¶ 62 The judgment of the circuit court of Kane County is affirmed.

¶ 63 Affirmed.