2020 IL App (4th) 180338-U

NO. 4-18-0338

FILED
July 7, 2020
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DEMARIEL T. CUNNINGHAM, Defendant-Appellant.	))))))))	Appeal from the Circuit Court of Macon County No. 17CF565 Honorable Jeffrey S. Geisler, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the State presented sufficient evidence by which the jury could find defendant committed the offense of armed robbery as charged in count IX of the information, (2) defendant forfeited his claim suggesting the State misstated the law during its closing argument and that forfeiture could not be excused under the plain-error doctrine, (3) any misstatement of fact during the State's closing argument was immaterial and harmless, (4) defendant forfeited his claim suggesting the State elicited inadmissible hearsay and that forfeiture could not be excused under the plain-error doctrine, (5) defendant failed to show he was prejudiced by his counsel's failure to request a limiting instruction, and (6) defendant was barred from arguing the trial court misstated the law in answering a question from the jury where he invited the alleged error.

¶ 2 Following a jury trial, defendant, Demariel T. Cunningham, was found guilty of one count of aggravated battery, one count of aggravated unlawful restraint, two counts of aggravated criminal sexual assault, and two counts of armed violence and sentenced to a total of 50 years' imprisonment.

¶ 3 Defendant appeals, arguing (1) the State failed to prove him guilty beyond a reasonable doubt of armed violence as charged in count IX of the information, (2) the State misstated both the law and the facts during its closing argument, (3) the State elicited inadmissible hearsay from a detective concerning an accomplice's statement reporting an alleged sexual assault and then used that hearsay during its closing argument to bolster the victim's statement indicating she was sexually assaulted, and (4) the trial court misstated the law in answering a question from the jury during deliberations. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Charges

¶ 6 In April 2017, the State charged defendant by information with two counts of aggravated kidnapping (720 ILCS 5/10-2(a)(3) (West 2016)) (counts I and II) and two counts of aggravated battery (720 ILCS 5/12-3.05(a)(1), (f)(1) (West 2016)) (count III and count IV). The charges stemmed from an incident occurring that same month at the home of defendant's uncle, Charles Hill.

¶ 7 In July 2017, the State charged defendant by an additional information with three counts of aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(1), (a)(2) (West 2016)) (counts V, VI, and VII), one count of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2016)) (count VIII), and two counts of armed violence (720 ILCS 5/33A-2(a) and 5/33A-3(a-5), 5/33A-2(a) and 5/33A-3(b) (West 2016)) (counts IX and X). The additional charges also stemmed from the April 2017 incident.

¶ 8 The State ultimately proceeded against defendant on counts III, V, VI, VII, VIII, IX, and X. Those counts specifically alleged as follows.

¶ 9 Count III alleged defendant committed the offense of aggravated battery in violation of section 12-3.05(a)(1) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/12-3.05(a)(1) (West 2016))

> "in that the said defendant, in committing a [b]attery *** without legal justification, knowingly caused great bodily harm to [M.M.] in that the said defendant repeatedly struck [M.M.] about the head, legs, and body and burned [M.M.] with a heated piece of metal."

¶ 10 Count V alleged defendant committed the offense of aggravated criminal sexual assault in violation of section 11-1.30(a)(2) of the Criminal Code (720 ILCS 5/11-1.30(a)(2) (West 2016))

> "in that said defendant committed a [c]riminal [s]exual [a]ssault *** against M.M. ***, in that by the use of force or threat of the use of force, the defendant knowingly placed his penis in the anus of M.M., and in doing so the defendant caused bodily harm to M.M. by striking M.M. repeatedly about the body."

¶ 11 Count VI alleged defendant committed the offense of aggravated criminal sexual assault in violation of section 11-1.30(a)(1) of the Criminal Code (720 ILCS 5/11-1.30(a)(1) (West 2016))

> "in that said defendant committed a [c]riminal [s]exual [a]ssault *** against M.M. ***, in that by the use of force or threat of the use of force, the defendant knowingly placed his penis in the anus of M.M., and the defendant displayed, threat[en]ed to use[,] and used a dangerous weapon, a knife, other than a firearm."

¶ 12 Count VII alleged defendant committed the offense of aggravated criminal sexual assault in violation of section 11-1.30(a)(1) of the Criminal Code (*id.*)

> "in that said defendant committed a [c]riminal [s]exual [a]ssault *** against M.M. ***, in that by the use of force or threat of the use of force, the defendant knowingly placed his penis in the anus of M.M., and the defendant displayed, threat[en]ed to use[,] and used a dangerous weapon, a wooden stick, other than a firearm."

¶ 13 Count VIII alleged defendant committed the offense of aggravated unlawful restraint in violation of sections 10-3.1(a) of the Criminal Code (720 ILCS 10-3.1(a) (West 2016))

> "in that said defendant or one for who's [*sic*] conduct he is legally accountable committed a[n] [u]nlawful [r]estraint *** against M.M. ***, in [that] he knowingly and without legal authority detained M.M. inside a bedroom at 1252 E. Lawrence Street, Decatur, Illinois and he was using a deadly weapon, a knife."

¶ 14 Count IX alleged defendant committed the offense of armed violence in violation of sections 33A-2(a) and 33A-3(a-5) of the Criminal Code (720 ILCS 5/33A-2(a) and 5/33A-3(a-5) (West 2016))

> "in that the said defendant or one for who's [*sic*] conduct he is legally accountable, while armed with a dangerous weapon, a knife with a blade at least 3 inches in length, a Category II weapon, performed acts prohibited by [section 12-3.05(a)(1) of the Criminal Code], in that he caused great bodily harm to M.M. *** by repeatedly striking M.M. about the body with his hands and feet

causing a fracture to her rib."

¶ 15 Count X alleged defendant committed the offense of armed violence in violation of sections 33A-2(a) and 33A-3(b) of the Criminal Code (720 ILCS 5/33A-2(a) and 5/33A-3(b) (West 2016))

> "in that the said defendant or one for who's [*sic*] conduct he is legally accountable, while armed with a bludgeon, a wooden stick, a Category III weapon, performed acts prohibited by [section 12-3.05(a)(1) of the Criminal Code], in that he caused great bodily harm to M.M. *** by repeatedly striking M.M. about the body with his hands and feet causing a fracture to her rib."

¶ 16 B. Jury Trial

¶ 17 In December 2017, the trial court held a four-day jury trial. The State presented testimony from several witnesses, including, *inter alia*, M.M., Charles Hill, and Detective Jeremy Appenzeller.

¶ 18 M.M. testified first for the State. M.M., who was previously in a romantic relationship with defendant, acknowledged she did not want to testify or have defendant get in trouble. She also acknowledged she still had feelings for defendant but asserted those feelings were not romantic. M.M. had prior convictions for aggravated battery and retail theft.

¶ 19 In April 2017, M.M. was introduced to defendant by a friend. The introduction occurred at a hotel in Decatur, where defendant was living. At the time, M.M. was not taking the medication prescribed to her for bipolar disorder. M.M. testified she and defendant became romantically involved upon their introduction and she began staying at the hotel with defendant. Defendant provided M.M. with crack cocaine and, in return, M.M. provided defendant with sex.

While together, M.M. and defendant used illegal drugs. M.M. used crack cocaine, heroin, ecstasy, and marijuana.

¶ 20 During the early morning of April 22, 2017, M.M. stated to a hotel employee she was in fear of defendant. M.M. acknowledged she was in a manic state at the time and having delusions and thoughts of grandeur. Police responded to investigate, and M.M. retracted her statement. Defendant and M.M. were asked to vacate the premises. M.M. testified she stole defendant's Rolex watch, a watch previously belonging to defendant's deceased brother, while they were packing up to leave the hotel. M.M. testified when she took the watch from defendant she felt as if she "was in a reality show" where she had to "prove whether or not [she] would be loyal."

¶ 21 Defendant's uncle, Charles Hill, and defendant's aunt picked defendant and M.M. up from the hotel and then allowed them to stay at their residence. Upon arriving at the Hill residence, M.M. hid defendant's watch in a bedroom. Hill, defendant, and M.M. then spent time in the living room. Defendant's aunt left the residence shortly thereafter as she had to work. M.M. testified Hill consumed various illegal drugs and became aggressive. At some point, defendant asked M.M. for his watch. M.M. went into the bedroom to get the watch but could not find it.

¶ 22 M.M. testified she was on her knees looking for the watch in the bedroom when defendant placed "his body weight" on her. M.M. explained defendant "kind of pushed me down, not too aggressive, but enough to get me there." Defendant then kneeled on her body and held her head down with his hands. M.M. testified she could breathe while her head was being held down and defendant would lift his hands when she wanted to say something. M.M. acknowledged telling Detective Appenzeller during a June 20, 2017, interview at McFarland Mental Health Center (McFarland) defendant "was on top of me, breaking my ribs, pushing my face sideways, down to

the ground, and I couldn't breathe or talk." M.M. testified she felt "cloudy" during that interview because she thought she "was being watched through the window by, like, aliens."

¶ 23 Defendant repeatedly asked M.M. for the location of the watch and noted the watch was "irreplaceable." M.M. testified Hill, who had come into the bedroom "in an outrage," screamed they were going to kill her. M.M. continued to yell out possible locations where the watch might be found, and defendant had Hill search those locations. Hill tied M.M.'s legs with what she believed was a thin rope. When asked if anything was placed in her mouth, M.M. testified, "There was like a loose duct-tape situation with—I think there was a sock."

¶ 24 M.M. testified she and defendant had consensual anal sex on the floor after her legs were untied. M.M. testified she enjoyed when defendant gave her commands so they "were kind of role playing" and the sex was "anything but rough." After about five or ten minutes, Hill, who had been "[r]unning around looking for things [and] smoking crack," returned to the bedroom. M.M. testified defendant, while they were still having sex, said to Hill, " 'She's a beast, ain't she?' " M.M. acknowledged telling Detective Appenzeller during the June 20, 2017, interview " 'Demariel forced me to have anal sex' " and it occurred " '[k]ind of in the middle.' " M.M. acknowledged June 20, 2017, was the first time she "told anyone about the sexual assault." M.M. testified she was "thinking more clearly" than when she spoke with Detective Appenzeller. M.M. acknowledged she had not previously reported the sex was consensual but noted she was never specifically asked if the sex was consensual.

¶ 25 M.M. testified the sequence of events became "very hazy" after she and defendant had sex. At some point, she and Hill were fighting, which involved punching and kicking. At another point, Hill twisted her thumb with a wrench until it was numb, numbness which lasted approximately three months. At another point, Hill struck her with a baseball bat, which caused

her to lose consciousness. M.M. testified defendant was in and out of the bedroom during the attack by Hill. M.M. acknowledged defendant was in the room when Hill was hitting her with the baseball bat. M.M. initially testified defendant never stopped the attack by Hill. M.M. later testified defendant tried to stop the attack at a point when Hill was punching her and she was struggling with defending herself. M.M. acknowledged she had not previously reported defendant tried to stop the attack.

¶ 26 M.M. testified defendant began to "slash" her after the attack by Hill. M.M. explained Hill held her arms from behind while defendant stepped forward and "slashed" her multiple times. In the areas where she was "slashed," M.M. had corresponding burns and scars.

¶ 27 During cross-examination, M.M. was asked if she told somebody defendant "had reached up inside of [her] looking for the watch," to which M.M. testified, "I think that was, you know, part of the—well actually, honestly, I had told him to." M.M. further testified she believed it may have been as a "stimulating kind of thing." On redirect examination, M.M. acknowledged telling Detective Appenzeller there was a point "during the beating" when defendant "put his fists inside" of her to look for the watch but testified she left out the fact she told defendant to do so. During cross-examination, M.M. also testified she was not struck with a broomstick, but Hill had "threatened to insert it."

¶ 28 M.M. initially testified the incident lasted approximately four hours. M.M. later testified the incident lasted approximately two-and-a-half hours. M.M. believed she could not leave the bedroom during "the beating." In total, she believed she lost consciousness approximately three times.

¶ 29 Following the incident, M.M. stayed at the Hill residence with defendant and Hill for a few days. M.M. testified she stayed with defendant because she thought she "had fell in love"

and because defendant "was really all [she] had."

¶ 30 On April 24, 2017, M.M. told defendant she needed to leave the residence to get medication. Defendant told M.M. his aunt would take her to get the medication. Defendant's aunt drove M.M. to get her medication.

¶ 31 M.M. did not return to the Hill residence after getting her medication but instead went to a hospital to tend to her injuries. M.M. identified photographs of her injuries, which were admitted into evidence and published to the jury. M.M. had a fractured rib, bruising to her right eye, bottom lip, and back, and second-degree burns along her outer thighs and her upper left arm. The jury also had the opportunity to see the scarring to her arm at the time of trial.

¶ 32 Police officers responded to the hospital and asked M.M. to identify the individuals who caused her injuries from a photographic line-up. M.M. selected a photograph depicting Hill but did not select a photograph depicting defendant. When asked why she did not select the photograph depicting defendant, M.M. testified, "Because it was a domestic," meaning she "stole his watch" and "tried to set him up for abuse in the hotel room."

¶ 33 Hill testified next for the State. Hill acknowledged he was in police custody on charges of aggravated kidnapping and aggravated battery based on the April 22, 2017, incident. Hill also acknowledged he entered into an agreement with the State in which he would testify truthfully against defendant and plead guilty to the aggravated battery charge in exchange for a three-and-a-half year prison sentence and a recommendation of where to be housed within the prison system. Hill had prior convictions for "felon in possession of a controlled substance with intent," theft, residential burglary, forgery, and retail theft and had served several terms of imprisonment.

¶ 34 During the early morning of April 22, 2017, Hill and his wife picked defendant and

M.M. up from the hotel and then allowed them to stay at their residence, which was located at 1252 E. Lawrence Street, Decatur, Illinois. Hill met M.M. for the first time that morning. Shortly after returning to their home, Hill's wife left because she had to work. Hill, defendant, and M.M. spent time in the living room. At some point, defendant and M.M. began arguing about a Rolex watch.

¶ 35 Hill testified defendant "slapped her or something and pulled her—dragged her by her hair to the bedroom and started whooping on her." Hill followed defendant and M.M. into the bedroom. Defendant told Hill to tie up M.M. Hill tied her legs with a cord from a vacuum cleaner, while defendant repeatedly kicked and hit her. At some point, M.M. was released from the restraints and was able to stand. At that point, Hill began striking M.M. with his fists and a broomstick. Hill testified he struck M.M. with the broomstick approximately six times. The men repeatedly requested the location of the watch, to which M.M. repeatedly stated she did not know. Defendant went into the kitchen and heated a knife on the stove, while Hill stayed in the bedroom restraining M.M. Defendant returned to the bedroom, kneeled next to Hill and M.M., and burned M.M. with a knife and a screwdriver. Defendant then went back and forth to the kitchen to heat the knife. The burning lasted approximately ten minutes, and, at some point, M.M. lost consciousness. After the burning, Hill went into the kitchen to get water for defendant and M.M. Upon returning to the bedroom, Hill observed defendant having sex with M.M. M.M. was "crying and hollering." Hill heard M.M. ask defendant, "was he finished, was he ready to come, and he said[,] 'No, no. I get ready to. I come when I get ready to.' " Defendant then offered M.M. to Hill, which Hill declined. When asked how long the incident "[w]ith both of you hitting her" lasted, Hill testified approximately 30 to 45 minutes.

¶ 36 Hill, on direct examination, acknowledged being interviewed by Detective

Appenzeller on June 8, 2017. Hill admitted to not being truthful during the first hour of the interview because he was scared. Hill also acknowledged he was interviewed by Detective Appenzeller on August 18, 2017. During that interview, Hill first disclosed defendant's use of a heated knife against M.M. Hill testified he did not report the use of knife earlier because he was scared and wanted to protect himself. Following the interview, Hill asked his wife to give Detective Appenzeller the knife used against M.M., which Hill's wife later did. Hill identified the knife in a photograph, which was admitted into evidence and published to the jury. The knife had an eight-inch blade, which showed some discoloration.

¶ 37 On cross-examination, the defense questioned Hill about the police reports he reviewed prior to his June 8, 2017, interview. Hill acknowledged his attorney was given police reports following his April 2017 arrest. The defense asked if Hill had gone over the police reports with his attorney prior to his June 8, 2017, interview, to which Hill initially indicated he had not but then later indicated he had. The defense then asked if Hill had the opportunity to review what M.M. reported prior to his June 8, 2017, interview, to which Hill testified he had not. The defense asked whether Hill had just acknowledged reviewing the police reports with his attorney, to which Hill testified his attorney told him about the police report but he did not read them.

¶ 38 The defense also questioned Hill about the deal he was receiving in exchange for his testimony against defendant. Hill acknowledged he would receive a three-and-a-half-year prison sentence despite the fact he had been charged with the Class X offense of aggravated kidnapping, which carried a possible penalty of between 6 and 30 years' imprisonment. The defense asked Hill if he had been given his deal prior to his June 8, 2017, interview, to which Hill testified he had not. Hill acknowledged he was told prior to that interview anything he said would not be used against him. Hill testified he was not initially truthful during that interview because he

was scared the information he provided would be used against him despite any averments to the contrary. Hill testified he was not truthful during the first hour of the interview in that he denied having done anything to harm M.M. but, after speaking with his attorney again, he disclosed his participation.

¶ 39 The defense questioned Hill about the incident itself. Hill testified he never used a baseball bat against M.M. but rather only his fists and a broomstick. Hill acknowledged previously reporting defendant used the broomstick against M.M. "in a sexual manner" in that he "stuck [it] up in her." Hill testified he did not know the location of the screwdriver used to burn M.M. Hill initially testified he did not know the location of the broomstick but then later acknowledged telling Detective Appenzeller during the August 18, 2017, interview he discarded the broomstick in a grassy area next to a pawn shop. Hill also acknowledged previously reporting he "gagged [M.M.] with a *** piece of duct tape."

¶ 40 After eliciting testimony from M.M. and Hill, the State presented testimony from Detective Appenzeller. Detective Appenzeller testified, on June 2, 2017, he met with M.M. at McFarland. M.M. was unwilling to cooperate at that time. On June 8, 2017, he met with Hill. After asking various questions concerning the circumstances surrounding the interview—such as its location, the individuals present, and whether it was recorded—the State asked, "On that date, June 8th, 2017—well, is that the first time that you learned of or heard of a sexual assault allegation in this case," to which Detective Appenzeller testified, "Yes." On June 20, 2017, Detective Appenzeller met with M.M. at McFarland. Unlike the first meeting, M.M. was cooperative. A recording of the meeting was admitted into evidence and portions of it were published to the jury. In the recording, M.M. reported, in part,

> "the very first thing that happened was Demariel had me down on

> the ground and he was smashing my face to the ground and I couldn't breathe, and I kept screaming out different places the watch could be because I didn't know what to do at that point because all I knew was where I had left it and it was gone so I was panicking but he had—he was on top of me breaking my ribs, pushing my face sideways down to the ground, and I couldn't breathe or talk. That was Demariel."

M.M. also reported, after being asked if anything else happened to her, "Demariel forced me to have anal sex" and it occurred "[k]ind of in the middle." On July 21, 2017, Detective Appenzeller met with M.M. at McFarland. Detective Appenzeller testified M.M. told him during that meeting defendant "reached his fists into her vagina looking for the watch." Detective Appenzeller testified M.M. did not tell him she asked defendant to do that or indicate defendant did so as a type of foreplay. Detective Appenzeller acknowledged he never asked M.M. if the sex was consensual or if she had been sexually assaulted. Detective Appenzeller testified he did not ask M.M. these questions given her statement indicating she was forced to have anal sex. Detective Appenzeller also acknowledged officers were unable to find the broomstick used against M.M.

¶ 41 In its case against defendant, the State also presented testimony from several police officers who executed a search warrant at the Hill residence after a statement was taken from M.M. at the hospital. The officers testified defendant and another woman exited the residence upon executing the warrant.

¶ 42 In closing, the State argued the evidence showed defendant was guilty beyond a reasonable doubt of the charged offenses. The State asserted M.M. was subject to an attack by defendant and Hill after she could not find defendant's irreplaceable watch. The State asserted the

"course of conduct" was as follows. First, defendant forced M.M. to the ground and then held her face to the ground where she could not breathe or talk. Second, defendant and Hill beat M.M. with their hands and feet, as well as a broomstick. Third, defendant sexually assaulted M.M. after she was mentally and physically exhausted. And fourth, defendant burned M.M. while she was being restrained by Hill.

¶ 43 The State reviewed several of the instructions it expected the trial court would give to the jury. The State began by addressing the situation where defendant would be legally responsible for the conduct of another person. The State argued defendant was responsible for the actions of Hill where the evidence made clear the "course of conduct" started with defendant forcing M.M. to the ground and ended with defendant burning her. The State addressed the instructions related to the aggravated battery charge. The State argued, in part, the evidence showed M.M. sustained great bodily harm by being "burned by the knife." The State turned to the instructions relating to the armed violence charges. First, the State argued the evidence showed defendant committed an aggravated battery, "which we've already gone through," and "at the time that the aggravated battery was committed, this defendant was armed with the knife." Second, the State argued the evidence showed defendant was responsible for the aggravated battery that occurred while Hill was armed with a broomstick. In so arguing, the State noted, "I would submit to you, ladies and gentlemen, that this—the entire course of conduct—this is one continuous long act that happens over a span of time. And this defendant started it, and this defendant ended it. And everything that happened in between, they're both equally responsible for."

¶ 44 The defense, in response, urged the jury to consider the "interest, motives, bias or prejudice someone might have in testifying." In arguing Hill was not a credible witness, the defense commented on Hill's June 8, 2017, interview with Detective Appenzeller:

"After an hour, he finally tells them, as he testified when I asked him, what they want to hear. They say, Okay. Now we'll give you a deal. Now, we'll let you out of this. Same kind of charges we're charging Demariel with, well, we'll just give you three[-]and[-]a[-]half years instead of this time you're facing for this. Is there an incentive for him at that point to invent a story? And he tells you, well, I didn't see the police reports. I don't know anything about—well, I did talk about them with my attorney before—you're thinking two months after he's been charged with a crime, he's not wondering what's in his police reports before he ends up talking to the police? Does that make sense? Does that seem credible to you?"

¶ 45 The State, in its rebuttal argument, stated:

"[The defense] says that before June 8th—and those were the questions asked. Before June 8th when Charles Hill meets with Detective Appenzeller, had he had time to meet with his attorney and go over the police reports. And Charles says yes. Initially, he says no, but he says, yes, I had an attorney. But here's the deal. Here's the thing. Charles tells Detective Appenzeller for the first time—it's June 8th, 2017. That's the first time Jeremy Appenzeller ever hears about a sexual assault because it was never reported before. So it's not in the police reports. And it was pretty clear on the stand [M.M.] and Charles are not friends. They weren't chatting.

> It isn't until June 20th, 2017, that [M.M] first reports a sexual assault, so how did Charles, who's just trying to please the police, who is just trying to get a deal, just trying to please me, how would he have that information if it didn't happen and if it wasn't true?"

At another point during its rebuttal argument, the State suggested the evidence showed defendant had "already called a new girl" when M.M. was at the hospital tending to her injuries. The defense objected to the State's suggestion on the ground it was "beyond the scope of closing argument." The trial court overruled the objection.

¶ 46 During deliberations, the jury sent the trial court the verdict forms relating to whether it found defendant guilty of "Aggravated Criminal Sexual Assault caused bodily harm" (count V) and asked, " 'Does this mean that the bodily harm was caused during the sexual assault or by the sexual assault?' " The State believed the jury was asking a legal question and suggested the court instruct it pursuant to *People v. Colley*, 188 Ill. App. 3d 817, 820, 544 N.E.2d 812, 814 (1989) and *People v. White*, 195 Ill. App. 3d 463, 467, 552 N.E.2d 410, 412 (1990), that the bodily harm had to occur "sufficiently close in time to the sexual acts." The defense questioned whether the State's suggested instruction was responsive. By agreement of the State and the defense, the court asked the jury to clarify its question.

¶ 47 The jury responded: "[A]ggravated criminal sexual assault caused bodily harm. To be considered bodily harm, does the bodily harm or injury need to occur as a result of the penetration?" The defense acknowledged, as a matter of law, "it's up to the jury, the trier of fact, to determine if the injury caused—was caused in a sufficiently close nexus to the sexual assault to be part of it." However, the defense believed the jury presented a "question of fact of when the injury occurred and what the injury was," which the trial court need not answer. The State

maintained the jury was asking a legal question and should be instructed as indicated. The court found the jury was asking a question of law that should be answered. The defense, referring to *Colley*, requested the court instruct the jury "it is for the trier of fact to determine if bodily harm occurred during the commission of the offense and if the cause of the bodily harm was sufficiently close in time to the sexual assault so that they can be said to have been committed during the course of the sexual assault." The State requested the court instruct the jury, "[I]f the bodily harm occurs sufficiently close in time to the sexual act, then it is occurring during the course of the sexual act." The court instructed the jury, "If the bodily harm occurs sufficiently close in time to the sexual act, then it's found to be committed during the course of the sexual assault."

¶ 48 The jury returned a verdict finding defendant guilty of counts III, V, VII, VIII, IX, and X but not guilty of count VI.

¶ 49 C. Motion for a New Trial

¶ 50 In January 2018, defendant filed a motion for a new trial, arguing, in part, (1) he was not proven guilty beyond a reasonable doubt and (2) the trial court erred in overruling his objection to the State's suggestion during closing argument he moved on to another woman. Following a February 2018 hearing, the court denied defendant's motion.

¶ 51 D. Sentencing Hearing

¶ 52 In April 2018, the trial court held a sentencing hearing. With respect to counts V and VII, the State argued the court should sentence defendant on both offenses but have the sentences be served concurrently. The defense argued counts V and VII "should be sentenced as one act, one crime." Based on the evidence and recommendations presented, the court sentenced defendant to 10 years' imprisonment on count III, 25 years' imprisonment on count V, 25 years' imprisonment on count VII, 10 years' imprisonment on count VIII, 25 years' imprisonment on

count IX, and 10 years' imprisonment on count X. When addressing the sentence on count VII, the court noted, "I do think the one act, one crime does merge." The court found the sentence on count IX was to be served consecutive to the other sentences, which were to be served concurrently. We note the court's written sentencing judgment does not reflect any merger.

¶ 53 This appeal followed.

¶ 54 II. ANALYSIS

¶ 55 On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt of armed violence as charged in count IX of the information, (2) the State misstated both the law and the facts during its closing argument, (3) the State elicited inadmissible hearsay from Detective Appenzeller concerning Hill's statement reporting the alleged sexual assault and then used that hearsay during its closing argument to bolster M.M.'s statement indicating she was sexually assaulted, and (4) the trial court misstated the law in answering the question from the jury during deliberations. The State disagrees with each of defendant's arguments.

¶ 56 A. Sufficiency of the Evidence

¶ 57 Defendant asserts the State failed to prove him guilty beyond a reasonable doubt of armed violence as charged in count IX of the information. Specifically, defendant contends the State failed to prove he committed the predicate felony while armed.

¶ 58 When presented with a challenge to the sufficiency of the evidence, "the question 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 crime beyond a reasonable doubt." (Emphasis and internal quotation marks omitted.) *People v. McLaurin*, 2020 IL 124563, ¶ 22. "The trier of fact remains responsible for resolving conflicts in the testimony, weighing the

evidence, and drawing reasonable inferences from the facts." *People v. Harris*, 2018 IL 121932, ¶ 26, 120 N.E.3d 900. "A criminal conviction will not be reversed for insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *People v. Gray*, 2017 IL 120958, ¶ 35, 91 N.E.3d 876.

¶ 59 Count IX alleged defendant committed the offense of armed violence in violation of sections 33A-2(a) and 33A-3(a-5) of the Criminal Code (720 ILCS 5/33A-2(a) and 5/33A-3(a-5) (West 2016)). A person commits the offense of armed violence in violation of sections 33A-2(a) and 33A-3(a-5) when that person "commits any felony defined by Illinois law," with certain unrelated exceptions, "while armed with a [Category II] dangerous weapon." *Id.*

¶ 60 Count IX specifically alleged defendant committed the offense of armed violence in violation of sections 33A-2(a) and 33A-3(a-5) in that he, or one for who's conduct he was legally responsible, performed acts prohibited by section 12-3.05(a)(1) of the Criminal Code (720 ILCS 5/12-3.05(a)(1) (West 2016)) while armed with a knife with a blade at least three inches in length. The predicate felony alleged in count IX was the commission of an aggravated battery causing great bodily harm. *Id.* ("A person commits aggravated battery when, in committing a battery, *** he or she knowingly *** [c]auses great bodily harm ***."); see also 720 ILCS 5/12-3.05(h) (West 2016) ("Unless otherwise provided, aggravated battery is a Class 3 felony."). The Category II dangerous weapon alleged in count IX was a knife with a blade of at least three inches in length. 720 ILCS 5/33A-1(c)(2) (West 2016).

¶ 61 Thus, to prove defendant guilty of armed violence as charged in count IX, the State had to show defendant, or one for whose conduct he was legally responsible, while committing a battery, knowingly caused great bodily harm while armed with a knife with a blade at least three inches in length.

¶ 62 At trial, Hill testified defendant repeatedly burned M.M. over the course of approximately 10 minutes. According to Hill, defendant did so, at least in part, by heating a knife on the stove and then placing it against M.M.'s body. Hill identified the knife defendant used against Hill. The knife had an eight-inch blade and some discoloration. M.M. testified defendant "slashed" her multiple times and, in the areas where she believed she was "slashed," she had corresponding burns and scars. Photographs of M.M.'s second degree burns were admitted into evidence and published to the jury. The jury also had the opportunity to view the scar from the burn on her arm at the time of trial. As argued by the State, we find this evidence was more than sufficient to conclude defendant, while committing a battery, knowingly caused great bodily harm while armed with a knife with a blade at least three inches in length.

¶ 63 Notwithstanding the evidence showing he knowingly caused great bodily harm to M.M. by repeatedly burning her with an eight-inch knife, defendant asserts the State failed to prove he committed the offense of armed violence "as charged" in that it failed to prove, as alleged in the information, he repeatedly struck M.M. about her body with his hands and feet causing a fracture to her rib while armed with the knife. Defendant suggests the factual allegations in the information concerning the manner in which the aggravated battery was committed and the type of great bodily harm inflicted limit the predicate felony for which the jury could find him responsible. As discussed above, the essential elements the State was required to prove was defendant, or one for whose conduct he was legally responsible, committed an aggravated battery causing great bodily harm while armed with a knife with a blade at least three inches in length. The difference between the proof at trial and the factual allegations in the information concerning the manner in which the aggravated battery was committed and the type of great bodily harm

inflicted amounts to a variance, an issue which defendant neither raised before the trial court nor pursues on appeal.

¶ 64 Defendant also suggests it would be inappropriate to sustain his conviction based on the fact he knowingly caused great bodily harm to M.M. by repeatedly burning her while armed with an eight-inch knife as the State did not advance such an argument at trial. In closing, the State, in addressing the aggravated battery charge, argued the evidence showed M.M. sustained great bodily harm by being "burned by the knife." The State then turned to the instructions relating to the armed violence charges and argued the evidence showed defendant committed an aggravated battery, as it had previously addressed, and, "at the time that the aggravated battery was committed, this defendant was armed with the knife." Contrary to defendant's argument, we find the State did advance an argument suggesting defendant caused great bodily harm to M.M. by repeatedly burning her while armed with an eight-inch knife.

¶ 65 Defendant relies principally on *People v. Bueno*, 35 Ill. 2d 545, 548, 221 N.E.2d 270, 271 (1966), which found the State failed to prove a charge set forth in an indictment. We find that case is distinguishable from the present case. Here, as discussed above, the State proved the essential elements of the offense as charged. We also note the analysis in *Bueno* has not been followed by other Illinois courts. See *People v. Ramos*, 316 Ill. App. 3d 18, 25, 735 N.E.2d 1094, 1100 (2000) (citing *People v. Rothermel*, 88 Ill. 2d 541, 547, 431 N.E.2d 378, 381 (1982); *People v. Williams*, 299 Ill. App. 3d 143, 151, 700 N.E.2d 753, 759 (1998)).

¶ 66 B. Closing Argument

¶ 67 Defendant asserts the State misstated the law and the facts during its closing argument.

¶ 68 First, defendant contends the State misstated the law when it argued he was guilty of armed violence because "this is one continuous long act that happens over a span of time." Defendant concedes he forfeited his contention of error by failing to raise it before the trial court but asserts his forfeiture may be excused under the plain error doctrine.

¶ 69 The plain error doctrine provides a "narrow and limited exception" to the general rule of forfeiture. *People v. Reese*, 2017 IL 120011, ¶ 72, 102 N.E.3d 126. Under the plain error doctrine, a reviewing court may disregard a defendant's forfeiture and consider an unpreserved claim of error in two circumstances:

> "(1) where 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 and (2) where 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." (Internal quotation marks omitted.) *People v. Harvey*, 2018 IL 122325, ¶ 15, 115 N.E.3d 172.

The defendant bears the burden of persuasion in establishing plain error. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015.

¶ 70 We turn first to whether defendant has shown a clear or obvious error occurred. *People v. Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. In closing argument, a prosecutor must not misstate the law. *People v. Ramsey*, 239 Ill. 2d 342, 441, 942 N.E.2d 1168, 1223 (2010). When reviewing a closing argument for error, we must consider the argument "in its entirety, and

the challenged remarks must be viewed in their context." *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 420 (2009).

¶ 71 Defendant contends the State's comment indicating he was guilty of armed violence because "this is one continuous long act that happens over a span of time" was a misstatement of law because it contradicts this court's finding in *People v. Neylon*, 327 Ill. App. 3d 300, 307, 762 N.E.2d 1127, 1134 (2002) that there is a "time nexus" between the elements of armed violence. Defendant, however, takes the State's comment out of context.

¶ 72 The State addressed several of the instructions it expected the trial court would give to the jury. The State first addressed the situation where defendant would be legally responsible for the conduct of another person. The State argued defendant was responsible for the actions of Hill where the evidence made clear the "course of conduct" started with defendant forcing M.M. to the ground and ended with defendant burning her. The State later addressed instructions related to the armed violence charges. First, the State argued, the evidence showed defendant committed an aggravated battery, and "at the time that the aggravated battery was committed, this defendant was armed with the knife." Second, the State argued the evidence showed defendant was responsible for the aggravated battery that occurred while Hill was armed with a broomstick. In so arguing, the State noted, "I would submit to you, ladies and gentlemen, that this—the entire course of conduct—this is one continuous long act that happens over a span of time. And this defendant started it, and this defendant ended it. And everything that happened in between, they're both equally responsible for."

¶ 73 In context, the State recognized the evidence largely showed Hill committed the acts constituting aggravated battery while armed with the broomstick and, therefore, it needed to show defendant was accountable for Hill's actions. The State's comment indicating "this is one

continuous long act that happens over a span of time" related to defendant's accountability for Hill's actions and was not a misstatement of law suggesting the predicate aggravated battery did not have to occur while armed. Defendant has failed to establish clear or obvious error. We therefore hold him to his forfeiture.

¶ 74 Second, defendant contends the State misstated the facts when it argued he had "already called a new girl" when M.M. was in the hospital. Defendant fully preserved his claim for review by objecting to the State's comment at trial and then raising it in his posttrial motion. See *People v. Wheeler*, 226 Ill. 2d 92, 122, 871 N.E.2d 728, 744 (2007) ("To preserve claimed improper statements during closing argument for review, a defendant must object to the offending statements both at trial and in a written posttrial motion.").

¶ 75 "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *Glasper*, 234 Ill. 2d at 204. A prosecutor must not "argue assumptions or facts not contained in the record." *Id.*

¶ 76 At trial, the State presented testimony from several police officers who executed a search warrant at the Hill residence after a statement was taken from M.M. at the hospital. The officers testified defendant and another woman exited the residence upon executing the warrant.

¶ 77 Even if we were to find the State's inference that defendant called the new woman was an unreasonable one, it is clear from the record defendant was not prejudiced by the passing comment. Assuming the comment was intended to suggest defendant had minimal regard for M.M., that suggestion was already before the jury through the evidence showing defendant repeatedly beat M.M. and was present in the bedroom when Hill did the same. We find any misstatement of fact was immaterial and harmless.

¶ 78 C. Hearsay

¶ 79 Defendant asserts the State elicited inadmissible hearsay from Detective Appenzeller concerning Hill's statement reporting the alleged sexual assault and then used that hearsay during its closing argument to bolster M.M.'s statement indicating she was sexually assaulted. Defendant concedes he forfeited his contention of error by failing to raise it before the trial court but asserts his forfeiture may be excused under the plain error doctrine. Alternatively, defendant contends his counsel provided ineffective assistance by failing to object.

¶ 80 Hearsay is generally prohibited and must be excluded. Ill. R. Evid. 802 (eff. Jan. 1, 2011); *People v. Williams*, 238 Ill. 2d 125, 143, 939 N.E.2d 268, 278 (2010). "Hearsay is an out-of-court statement offered to establish the truth of the matter asserted and testimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement is not hearsay." (Internal citations omitted.) *People v. Banks*, 237 Ill. 2d 154, 180, 934 N.E.2d 435, 449 (2010). " 'The fundamental reason for excluding hearsay is the lack of an opportunity to cross-examine the declarant.' " *People v. Matthews*, 2017 IL App (4th) 150911, ¶ 18, 93 N.E.3d 597 (quoting *People v. Jura*, 352 Ill. App. 3d 1080, 1085, 817 N.E.2d 968, 973-74 (2004)).

¶ 81 "In general, proof of a prior consistent statement made by a witness is inadmissible hearsay ***." (Internal quotation marks omitted.) *People v. Stull*, 2014 IL App (4th) 120704, ¶ 99, 5 N.E.3d 328. An exception to the general rule allows admission of prior consistent statements "to rebut a charge or an inference that the witness is motivated to testify falsely or that his testimony is of recent fabrication, and such evidence is admissible to show that he told the same story before the motive came into existence or before the time of the alleged fabrication." (Internal quotations marks omitted.) *Id.*; see also Ill. R. Evid. 613(c) (eff. Jan. 1, 2011).

¶ 82 At trial, Hill, during his direct examination, provided testimony suggesting M.M. was sexually assaulted by defendant. Hill acknowledged he was receiving a favorable plea deal in exchange for his testimony. Hill also acknowledged being interviewed by Detective Appenzeller on June 8, 2017. With respect to the substance of that interview, Hill simply admitted to not being truthful during the first hour of the interview. On cross-examination, the defense, presumably believing the jury might infer Hill had testified consistent with at least some of his June 8, 2017, statement, attempted to attack the veracity of that statement. Through its questions, the defense suggested Hill's statement, and therefore his testimony, were fabricated to receive leniency from the State in his pending criminal case. Specifically, the defense suggested Hill might have fabricated his account from the information he received in reviewing police reports. After the defense suggested Hill's June 8, 2017, statement and testimony had been fabricated, the State elicited testimony from Detective Appenzeller indicating he first heard of an alleged sexual assault allegation on June 8, 2017, the same day he spoke with Hill. This testimony, as defendant argues, strongly infers Hill made the sexual assault allegation on June 8, 2017, which, in effect, introduced a prior consistent statement of Hill.

¶ 83 The prior consistent statement was not, however, offered to bolster M.M.'s statement indicating she was sexually assaulted. Instead, it was properly offered to rebut the defense's suggestion Hill's June 8, 2017, statement and testimony had been fabricated to receive leniency from the State in Hill's pending criminal case. The State's purpose for eliciting the prior statement was made clear in its response to the defense's closing argument. In closing, the defense, again presumably believing the jury might infer Hill was testifying consistent with at least some of his June 8, 2017, statement, attacked the veracity of that statement by arguing, consistent with its prior suggestion, it was of recent fabrication to receive leniency from the State in his criminal

case. The defense again specifically suggested Hill might have fabricated his account from the information he received in reviewing police reports. In response, the State argued the jury should reject the defense's unsupported claim suggesting Hill's June 8, 2017, statement was of recent fabrication. The State asserted the basis of defendant's claim—that Hill might have fabricated his account from the information he received in reviewing police reports—was unconvincing given the evidence indicating Hill made a sexual assault allegation before M.M. made one. Hill could not have learned about a sexual assault from police reports before the June 8 interview.

¶ 84 While we find no error in the introduction and use of Hill's prior consistent statement to rebut the charge of recent fabrication to receive leniency in his criminal case, we find error in the failure to instruct the jury as to the limited use of the statement. Rehabilitative prior consistent statements "are not admissible as substantive evidence." *Stull*, 2014 IL App (4th) 120704, ¶ 99; see also Ill. R. Evid. 613(c) (eff. Jan. 1, 2011). In this case, the jury was not instructed Hill's prior consistent statement could be used only for a limited rehabilitative purpose. The failure to properly instruct the jury was error.

¶ 85 Despite the failure to instruct the jury as to the limited purpose of Hill's prior consistent statement, we are not convinced that error was prejudicial in this case. See *Stull*, 2014 IL App (4th) 120704, ¶ 105 ("Under the standard of review applicable to purely evidentiary errors, the erroneous admission of prior consistent statements would seldom warrant reversal."). Hill testified to observing defendant having sex with M.M. after they beat and burned her. Hill testified M.M. was "crying and hollering," and she asked defendant, "was he finished, was he ready to come, and he said[,] 'No, no. I get ready to. I come when I get ready to.' " Hill also testified defendant offered M.M. to him, which he declined. A recorded statement from M.M. was admitted as substantive evidence and played for the jury. In the recording, M.M. states, after being generally

asked if anything else happened to her, "Demariel forced me to have anal sex." Based on Hill's testimony, M.M.'s recorded statement, and the circumstances surrounding the act of sexual intercourse, we find the jury would have reached the same result—rejecting M.M.'s testimony suggesting she and defendant had consensual sex between the beating and the burning which she sustained.

¶ 86 Defendant has failed to establish clear or obvious error and, therefore, we hold him to his forfeiture. Also, given the lack of prejudice, we reject defendant's claim of ineffective assistance.

¶ 87 D. Jury Question

¶ 88 Defendant argues the trial court misstated the law in answering the question from the jury during deliberations. Specifically, defendant asserts the court incorrectly instructed the jury the bodily harm need only occur " 'sufficiently close in time to the sexual act.' " Defendant concedes he forfeited his contention of error by failing to raise it before the trial court but asserts his forfeiture may be excused under the plain error doctrine.

¶ 89 As an initial matter, the State asserts defendant is barred from complaining about the trial court's instruction where he invited any error. Defendant disagrees.

¶ 90 "[A] party cannot complain of error which that party induced the court to make or to which that party consented." *In re Detention of Swope*, 213 Ill. 2d 210, 217, 821 N.E.2d 283, 287 (2004). This is because "it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings." *Id.*

¶ 91 At trial, the defense acknowledged, as a matter of law, "it's up to the jury, the trier of fact, to determine if the injury caused—was caused in a sufficiently close nexus to the sexual assault to be part of it." The defense believed, however, the jury had presented a question of fact,

which the trial court need not answer. After the court ruled the jury had presented a question of law that should be answered, the defense requested the court instruct the jury "it is for the trier of fact to determine if bodily harm occurred during the commission of the offense and if the cause of the bodily harm was sufficiently close in time to the sexual assault so that they can be said to have been committed during the course of the sexual assault." After hearing the State's recommendation, the court instructed the jury, "If the bodily harm occurs sufficiently close in time to the sexual act, then it's found to be committed during the course of the sexual assault."

¶ 92 At a minimum, the defense consented to the use of the language defendant now challenges on appeal. Accordingly, we find defendant is estopped from arguing the trial court incorrectly instructed the jury based on that same language.

¶ 93 III. CONCLUSION

¶ 94 We affirm the trial court's judgment.

¶ 95 Affirmed.