THIRD DIVISION
June 1, 2011

No. 1-09-0404

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 3158
	)	
ROMALICE SHAVERS,	)	Honorable
	)	Thomas V. Gainer,
Defendant-Appellant.	)	Judge Presiding.

O R D E R

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Murphy and Steele concurred in the judgment.

HELD: Defendant's conviction for home invasion, aggravated criminal sexual assault, and unlawful restraint affirmed where trial court's errors in limiting defendant's cross-examination of victim and in requiring that he testify before calling the victim as an adverse witness were harmless beyond a reasonable doubt. Further, aggravated criminal sexual assault is not a lesser included offense of home invasion and the mittimus is corrected to reflect the sentence issued by the trial court.

Following a bench trial, defendant, Romalice Shavers, was convicted of home invasion (720 ILCS 5/12-11(a)(6)), aggravated criminal sexual assault (720 ILCS 5/12-14(a)(4) (West 2008)), and unlawful restraint (720 ILCS 5/10-3 (West 2008)), for entering his former girlfriend's apartment without her permission and sexually assaulting her. The trial court sentenced defendant to concurrent terms of 14 years in prison for home invasion and aggravated criminal sexual assault and three years for unlawful restraint. On appeal, defendant contends that: (1) the trial court violated his sixth amendment right to confront his accuser and present a defense, as well as its own ruling on his pre-trial motion *in limine* and the rape shield statute (725 ILCS 5/115-7 (West 2008) by preventing him from asking the victim on cross-examination whether she continued to have consensual sex with defendant up to and including the day she alleged he raped her; (2) the trial court violated his fifth amendment right to remain silent and his sixth amendment right to counsel by preventing him from calling the victim as an adverse witness unless he testified; (3) his conviction for aggravated criminal sexual assault should be vacated because it is a lesser included offense of home invasion; and (4) the mittimus incorrectly states that he was sentenced to concurrent 15 year terms for home invasion and aggravated criminal sexual assault rather than 14 years as the trial court pronounced at sentencing. For the reasons set forth below, we affirm the trial court and order the clerk of the court to correct the mittimus to reflect the sentence imposed by the trial court.

I. BACKGROUND

Defendant was arrested at his home on January 18, 2006, after his former girlfriend called the police and reported that earlier that day, defendant had entered her home without permission

and sexually assaulted her. Defendant was taken to Area One police headquarters and interviewed by Detective Anthony Flowers of the Chicago Police Department. While in custody, defendant gave a statement to Detective Flowers and Assistant State's Attorney (ASA) Meg O'Sullivan, which ASA O'Sullivan put into a writing that was signed by defendant. In that statement, defendant said that he and the victim had been in an eight to ten-year relationship that ended in May 2005, but that he continued to call her and try to see her after that date. He stated that on the morning of January 18, 2006, he was driving around in his car after spending the previous night drinking beer until 4:00 a.m. Defendant said that at approximately 10:30 a.m., he decided to go to the victim's townhouse because he wanted to have sex with her. He stated that entered the townhouse through the back door without permission and went upstairs to the victim's bedroom, where she was sleeping. Defendant said that the victim woke up when he entered the room and asked him how he had gotten in. He told her that the back door had been unlocked. Defendant said that he sat on the victim's bed, and she told him to leave. Defendant said he told the victim that he came by to talk to her and then laid across her. He then pulled a beer from his pocket and began drinking it. The victim again asked him to leave, but defendant tried to kiss, hug, and fondle her. Defendant said that the victim refused to have sex with him and begged him to leave.

Defendant stated that he told the victim that he would leave if she would let him use her telephone to call work. The victim agreed, but defendant said that after using the phone he did not leave and began to struggle with the victim as she tried to leave her bedroom. The victim hit defendant on the head and nose with a cordless phone in an attempt to defend herself. Defendant

said that the fight continued into the hallway and that he pushed the victim into her daughter's bedroom and onto an air mattress. Defendant stated that he got on top of the victim and that she could not breathe. He said that she told him she would have sex with him if he would stop fighting and leave her alone but that he knew that she wanted him to leave and was giving in because he was forcing her to have sex. Defendant said that he got off of the victim and she went toward the stairs. Defendant said they tussled as they were going down the stairs and then he forced her onto a chair in the living room. Defendant stated that the victim was wearing a robe with nothing on underneath and that he pulled his penis from his pants, forced it into the victim's vagina, ejaculated, and then got off of her. Defendant said he told the victim not to call the police but that he saw her on the phone and went into the kitchen and pretended to cut his wrists with a knife. Defendant said that he then left the townhouse through the back door and drove to work.

Defendant was charged in a five-count indictment with home invasion (720 ILCS 5/12-11(a)(6) (West 2008)), two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(A)(1) & 720 ILCS 5/12-14(A)(4)(West 2008)), criminal sexual assault (720 ILCS 5/12-13(A)(1) (West 2008)), and unlawful restraint (720 ILCS 5/10-3 (West 2008)).[1] Defendant asserted a defense of consent. On November 2, 2006, defendant filed a motion to suppress his statement to the police, which the trial court denied. On March 9, 2007, defendant filed a motion *in limine* seeking to cross-examine the victim about her prior sexual history with defendant and to permit him to introduce evidence of his prior sexual history with the victim. In particular,

[1]The State nolle prossed the aggravated criminal sexual assault counts prior to the start of trial.

defendant sought to elicit testimony and evidence showing that defendant and the victim had a 12-year relationship, dating from 1995 to the date of the incident and that they had sex at the victim's home several times a month, most recently in early January 2006, and prior to that three to four times in December 2005. The State filed a response acknowledging that the victim had two sexual encounters with defendant between May 2005 and January 2006, but asserting that those encounters were not consensual and that on those occasions, as on January 18, 2006, defendant had forced the victim onto a chair and had sex with her against her will. The State asked the court to deny the motion *in limine* or in the alternative, to permit the victim to testify about the sexual encounters in November and December 2005.

The trial court held a hearing on defendant's motion *in limine* on May 22, 2008 and issued its ruling on June 30, 2008, stating in relevant part:

> "[Y]ou will be allowed to cross examine the complainant and to offer evidence through your client that the complainant and the defendant had a relationship since 1995. And that the relationship included a sexual relationship that began in 1995 and continued until sometime in *** 2005."
>
> ***
>
> "I believe that this defendant can testify as to the sexual encounters he alleges occurred in December and early January of '06. *** [A]nd I believe that you can cross examine the complaining witness about whether or not she had sexual contact with this defendant on those dates. Now when I say cross examine what I mean is you can ask that question, but there is not going to be any detailed examination of this witness regarding

what occurred, where it occurred, how long it took, how many acts of intercourse occurred[.] *** [Y]ou can cross examine her regarding whether or not it occurred and whether she consented. And Mr. Shavers' testimony will be limited to whether it occurred and whether she consented. At the same time, I believe the complaining witness will be allowed to testify that the relationship according to her, ended in May 2005. And she will be also allowed to testify *** that the two encounters that she admits having with [defendant] *** were almost picture book encounters, to the date in question [except that] "she never went to the police ***."

***

"So while I believe that Mr. Shavers has the right to question this victim about contacts he alleges that occurred in December and early January, I believe he has a limited right to ask her whether these contacts occurred and whether they were consentual [sic], and he can offer the same testimony, that they occurred and that they were consentual [sic]."

The one-day trial was held on October 16, 2008. The victim testified that on January 18, 2006 at 11:00 a.m. she was asleep at her townhouse at 6253 South Normal in Chicago, Illinois. She said that she lived in the home with her two children, who were at school. She testified that some time between 11:00 a.m. and 12:00 p.m. she woke up and saw defendant in her bedroom standing over her. She said that she had dated defendant from 1995 until May 2005 and that she was surprised when she saw him in her house because he did not have a key or permission to enter. She asked defendant how he had gotten in and he said that he had come in through the

back door. The victim testified that she asked defendant to leave but that he tried to climb in bed with her. She tried to push him out and again asked him to leave. Defendant then asked to use her telephone, and after he finished making his call, she asked him to leave again, but he would not do so. She said that as she tried to walk defendant toward her bedroom door, he grabbed her and she them hit him in the head with the telephone. She said that she and defendant tussled in the hallway and then defendant pushed her into her daughter's bedroom and threw her down on an air mattress. Defendant got on top of her and put his arm on her chest. She said told defendant she could not breathe and he eventually let her go. She then went toward the stairs and defendant came up behind her and tried to grab her around the neck. She said he tried to pin her down and that she then told him that if he let her go she would have sex with him. She testified that he did let go of her and she ran toward the stairs, but defendant caught her and they again began to tussle. The victim said that when they finally got down the stairs, defendant threw her onto a chair in the living room. She said that her back was to the chair and defendant was holding her down with his forearm across her chest. The victim said that she was only wearing a robe and that defendant unzipped his pants and put his penis into her vagina. The victim said that defendant was not wearing a condom, that he ejaculated inside of her, and then got up and went into the bathroom.

The victim testified that defendant told her not to call the police, but that as soon as defendant went into the bathroom, she ran to the phone and called 911. Defendant then came back into the room and hung up the phone. The 911 operator called back and the victim testified that while she was on the phone defendant went into the kitchen, picked up a knife, and

threatened to kill himself. The victim hung up the phone and ran out the door. She stood in front of her house waiting for the police to arrive and then went across the street to her neighbor's house. She testified that she told her neighbor what happened and that about 10 to 15 minutes later she and her neighbor returned to the townhouse and that the defendant was gone. When the police arrived, the victim told them what happened, that defendant was the perpetrator, and where he lived. The victim then went to the hospital where a sexual assault kit was performed.

On cross-examination, the victim acknowledged that she began dating defendant in 1995 and knew that he had several children with other woman. She also acknowledged that in August 2004, defendant became engaged to someone else and eventually got married and that during that time, she continued to have a sexual relationship with defendant. Then, the following exchange occurred regarding the victim's sexual relationship with defendant:

> Defense counsel: When you found out that he was married, that didn't stop you from continuing to have this sexual relationship with him, correct?
>
> State: Objection to the phrase. Your honor, I think this goes to the motion that we had before with regards to an outstanding sexual relationship that this victim had with the defendant. I believe that we litigated this pretrial. And I understand that the defense wants to go into her knowledge of the defendant's marriage. But I think that if we are getting in a sexual relationship between the two of them, that that's [sic] hitting what we litigated in the motion, which I believe Your Honor stated would not be allowed to come out until the defendant actually testified and brought it out. So that's the basis for my objection.

Court: The objection is sustained. You can certainly inquire about her knowledge of the marriage and all of that.

Defense counsel: Thank you judge.

Later, during cross-examination, the following exchanged occurred:

Defense counsel: Now going back to 2005, you say that you broke off this relationship in May 2005; did I hear your testimony correctly?

Answer: Yes.

Defense counsel: But, yet, you continued to have a sexual relationship with Mr. Shavers after that date and time, right?

State: Objection, Your Honor, this goes specifically to the motion.

Court: Sustained.

Defense counsel then asked the victim if she had been upset that defendant got married and would not leave his wife, and she responded that she was not.

The State next called ASA O'Sullivan as a witness. O'Sullivan testified that she was assigned to the case on January 18, 2006, and that about midnight she went to Area One police headquarters. When she arrived, she spoke with Detective Flowers and reviewed the paperwork on the case and then interviewed the victim. O'Sullivan said that she then went with Detective Flowers and another detective to speak with defendant. She said that she read defendant his Miranda rights and afterwards he gave a statement and agreed that she could put his statement in writing. O'Sullivan stated that she wrote out defendant's statement and then read it back to him. Afterward, she offered defendant an opportunity to make changes and then she, defendant and

Detective Flowers signed the statement. The trial court admitted defendant's statement into evidence along with a photo taken of him at the police station.

The parties stipulated that on January 18, 2006, the victim went to the hospital, where a sexual assault kit was performed and that kit was inventoried according to proper Chicago Police Department procedures. While in police custody, on January 19, 2006, defendant gave a DNA sample via buccal swab, which was also properly inventoried. The Illinois State Police Crime Lab compared the DNA from defendant and the semen identified in the vaginal swab from the victim's sexual assault kit and found that the human DNA profile identified on the swab matches defendant's DNA. The forensic scientist who analyzed the DNA would testify that this profile would be expected to occur in 1 in 84 quadrillion black, 1 in 500 quadrillion white or 1 in 1.3 quintillion Hispanic unrelated individuals.

After the State closed its case, the defense presented a motion for a directed finding of not guilty on Counts I and III, which the trial court denied. Defendant then asked to call the victim as an adverse witness and the following exchange occurred:

> Defense counsel: Judge, I had a chance to speak with Mr. Shavers, and at this point I would be asking to call [the victim] as an adverse witness.
>
> ASA: Your Honor, that would be over our objection. [The victim] has already testified. Counsel has had an opportunity to cross her. I can only–unless counsel wants to proper [sic] what he expects to ask her, I can only imagine that he want to try to get into issues that were involved in the pretrial motion, which, of course, as the Court knows, by law they cannot ask her under [Rape] Shield the questions about her sexual past with the

defendant without the defendant testifying that it was based on consent first. So we are objecting to having her called as an adverse witness.

Court: She has already been called. She has been subject to cross-examination. There is no need for her to retestify in this case. You are welcome to make an offer of proof as to what you think the ***.

Defense counsel: Judge, the offer of proof, based on my conversations with my client, are based on the prior sexual relationship as it occurred shortly before the day in question. I discussed this with my client.

Court: All of which was the subject matter of the motion that we heard.

Defense counsel: That is correct, Judge.

Court: And I ruled on that motion. That may be relevant if he testifies and puts–and makes that of record, but at this point that's what it's going to take. Now you have the right to testify in this case, but you also have the right not to testify; do you understand?

Defendant: Yes, sir.

The court then determined that defendant knowingly and intelligently waived his right to testify and since the defense had no additional witnesses, the parties proceeded to closing arguments. Afterwards, the trial court issued its verdict, finding defendant guilty of home invasion (count I), aggravated criminal sexual assault (count III), criminal sexual assault (count IV), and unlawful restraint (count V). Defendant filed a motion for a new trial, which the trial court denied and then proceeded to sentencing. The court sentenced defendant to concurrent sentences of 14 years on counts I and III, and 3 years on count V. The court merged count IV into

count III and gave defendant credit for 1109 days spent in pre-sentence custody. Defendant filed a motion to reconsider sentence, which was denied. Defendant then filed a timely notice of appeal.

II. ANALYSIS

On appeal, defendant first argues that the trial court violated its own ruling on his pretrial motion *in limine*, the rape shield statute (725 ILCS 5/115-7(a) (West 2008)), and his sixth amendment right to confront witnesses against him and present a defense when it prevented him from cross-examining the victim about whether she continued a sexual relationship with defendant in November and December 2005 and January 2006, even though she claimed that the relationship ended in May 2005. Defendant contends that this error is grounds for reversing his conviction and remanding the case for a new trial. The State argues that the trial court properly exercised its discretion in limiting the scope of cross-examination and that any error on the part of the trial court was harmless beyond a reasonable doubt.

A criminal defendant has a constitutional right to confront the witnesses against him, which includes the right to cross-examination. See U.S. Const., amends. VI, XIV, Ill. Const. 1970, art. I, § 8, *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177, 194-95 (2004). The right to cross-examine is not absolute and is satisfied when "the defendant is permitted to expose the fact finder to facts from which it can assess [the] credibility and reliability of the witness." *People v. Bell*, 373 Ill. App. 3d 811, 818 (2007) quoting *People v. Quinn*, 332 Ill. App. 3d 40, 43 (2002). The latitude permitted on cross-examination is largely left to the discretion of the trial court and a trial court's restriction of cross-examination will not be reversed absent an abuse of discretion. *People v. Enis*, 139 Ill.2d 264, 295 (1990).

Defendant contends that the trial court abused its discretion in restricting his cross-examination of the victim because prior to trial, in ruling on his motion *in limine*, the trial court stated that he would be permitted to cross-examine the victim about whether she had consensual sex with defendant in November and December 2005 and January 2006. However, at trial when defense counsel asked the victim whether she had sex with defendant after she found out he had gotten married, the State objected on the grounds that the sexual relationship between the victim and defendant could not be introduced until defendant testified, and the trial court sustained that objection. Defendant contends that this directly contradicts the trial court's actual ruling on the motion *in limine*, which defense counsel relied on, and therefore, the trial court abused its discretion in limiting his cross-examination.

Defendant also contends that in limiting his cross-examination of the victim, the trial court violated the plain language of the rape shield statute (725 ILCS 5/115-7 (West 2008)). The rape shield statute absolutely bars defense from introducing evidence of the alleged rape victim's prior sexual activity and reputation, subject to two exceptions: (1) where evidence of past sexual activities with the accused is offered as evidence of consent, and (2) where the admission of such evidence is constitutionally required. *People v. Santos*, 211 Ill.2d 395, 401-02 (2004). Admission of such evidence is constitutionally required under the recited amendments to the constitution where the exclusion of the evidence prevents the defendant from presenting his theory of the case. See *People v. Sandoval*, 135 Ill.2d 159, 175 (1990). In other words, "[i]f the evidence is probative, the statute's protection yields to constitutional rights that assure a full and fair defense." *People v. Hill*, 289 Ill. App. 3d 859, 863 (1997).

Defendant asserts that the first exception to the rape shield statute applies to this case because his counsel sought to question the victim about her sexual encounters with defendant in November and December 2005 and January 2006 in order to show that she consented on January 18, 2006, and to undermine her credibility by casting doubt on her testimony that she had ended the relationship in May 2005. Defendant contends that because the testimony he sought to elicit from the victim fell into the first exception of the rape shield statute, the trial court abused its discretion in precluding him from asking the victim about those encounters.

Further, defendant asserts that even if this court finds that the trial court did not err in refusing to allow him to cross-examine the victim about prior sexual encounters pursuant to the plain language of the rape shield statute, this court should reverse on the grounds that the trial court violated his sixth amendment rights to confront witnesses against him and present a defense. Defendant contends that his defense to the charges against him was that the victim consented to the sexual encounter on January 18, 2006, and by precluding him from asking her whether she continued to engage in consensual sexual encounters with defendant after May 2005 and up to January 18, 2006, the trial court precluded defendant from presenting evidence to establish a consent defense. Defendant also contends that in limiting his cross-examination, the trial court infringed on his sixth amendment right to confront witnesses against him by raising doubts about the victim's assertion that ended her relationship with defendant in May 2005.

The State contends that the trial court properly allowed defense counsel to ask questions about the victim's past sexual conduct with defendant and that any limits placed on defense counsel's cross-examination was not an abuse of the court's discretion. In particular, the State

notes that defense counsel was permitted to ask the victim, "from August of 2004 going forward, you continued to have a sexual relationship with [defendant], correct?" The State contends that in permitting this questioning, the court complied with section 115-7(a) of the rape shield statute and did not err in refusing to allow additional questioning.

Based on the record, we agree with defendant that the trial court's limitation on his cross-examination contradicted the court's ruling on defendant's motion *in limine*. The court had stated in its ruling that defendant would be permitted to question the victim about whether she had consensual sex with defendant until January 2006 but sustained the State's objections to that line of questioning during cross-examination. We also find that evidence defendant sought to elicit would fall into the exception of the rape shield statute that permits an accused to offer evidence of consent. Further, we find that in limiting defendant's cross-examination of the victim, the trial court infringed on his sixth amendment right to confront witnesses against him and to present his defense of consent. However, that does not end our inquiry, as we must determine whether this constitutional error was harmless beyond a reasonable doubt.

In determining whether a constitutional error is harmless, the test to be applied is whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). The State bears the burden of proof. *Patterson*, 217 Ill. 2d at 428. In *Patterson*, our supreme court listed three different approaches for measuring error under this harmless-constitutional-error test: (1) focusing on the error to determine whether it might have contributed to the conviction, (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction, and (3) determining whether

the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *Patterson,* 217 Ill. 2d at 428 citing *People v. Wilkerson*, 87 Ill. 2d 151, 157 (1981).

Here, because the evidence of defendant's guilt was overwhelming, we find that the trial court's error in refusing to permit defendant to cross-examine the victim was harmless. On the date of the incident, defendant gave a statement to the police and an assistant state's attorney admitting that he entered the victim's home without her permission, that the victim asked him several times to leave, that he struggled with the victim, and then pushed her onto a chair, and forced her to have sex with him. This statement mirrors the victim's testimony regarding the incident and corroborates her allegation that defendant entered her home without authority and sexually assaulted her. Even if the victim had testified that she had consensual sex with defendant in November and December 2005 and in January 2006, the victim's testimony and the defendant's statement show that the encounter on January 18, 2006 was not consensual. Therefore, we find that the trial court's ruling limiting defendant's cross-examination of the victim was harmless beyond a reasonable doubt.

Next, defendant argues that the trial court violated his fifth amendment right to remain silent by permitting him to call the victim as an adverse witness only if he first testified that the encounter on January 18, 2006 was consensual. Defendant acknowledges that he did not object to the error at trial and did not specifically raise the error in his motion for a new trial, but contends that the error stems from the trial court's refusal to permit him to cross-examine the victim about recent consensual sexual encounters and because that issue was raised in his motion for a new trial this issue is also preserved on appeal. To preserve a claim of error for review, counsel must

object to the error at trial and raise the error in a motion for a new trial before the trial court. *People v. McLaurin*, 235 Ill.2d 478, 485 (2009). Defendant did not properly do either in this case, therefore, we must determine if, as defendant alternatively argues, the claim arises to plain error.

The plain error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs 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 occurs and that error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Before considering either prong of the plain-error doctrine, we must first determine whether any error occurred at all. *People v. McClaurin*, 235 Ill. 2d at 489.

At trial, after the victim testified, the defendant asked to call her as an adverse witness. After the State objected on the grounds that defense counsel had an opportunity to cross-examine her, the trial judge permitted defense counsel to make an offer of proof. In response, defense counsel stated that he expected the testimony to concern the victim's sexual relationship in the days shortly before January 18, 2006. The court stated "That may be relevant if he testifies and puts–and makes that of record, but at this point that's what it is going to take." Defendant asserts that by requiring him to testify before calling the victim as a witness, the trial court violated his fifth amendment right not to testify. Defendant relies on *Brooks v. Tennessee*, 406 U.S. 605 (1972) for support. In *Brooks*, the defendant was charged with armed robbery and unlawful possession of a pistol. *Brooks,* 406 U.S. at 606. During trial, at the close of the State's case,

defense counsel moved to delay defendant's testimony until after other defense witnesses had testified. The trial court denied this motion and based its ruling on a Tennessee statute that required a criminal defendant who wanted to testify to do so before any other testimony from the defense. *Brooks,* 406 U.S. at 606. The defendant did not testify and was convicted. The Supreme Court reversed, finding that the rule embodied in the statute was "an impermissible restriction on the defendant's right against self-incrimination, 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.' " *Brooks*, 406 U.S. at 609 quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Further, the court found that the statue violated the sixth amendment because it "deprived [the accused] of the 'guiding hand of counsel' in the timing of this critical element of his defense." *Brooks*, 406 U.S. at 612-13.

Defendant contends that here, as in *Brooks*, the trial court penalized him for invoking his right to remain silent, namely, by precluding him from calling the victim as an adverse witness. Further, defendant asserts that, as in *Brooks*, the trial court deprived him of the "guiding hand of counsel." Defendant argues that depriving him of his right to remain silent and his right to counsel was a structural error and grounds for reversing his conviction and remanding for a new trial.

The State contends that the trial court did not commit an error because defendant's offer of proof fell short of what is required under Section 115-7(b) by failing to include specific information as to the date, time, and place of the past sexual encounters between the victim and defendant that he claims occurred shortly before January 18, 2006. The State also contends that defendant's reliance on *Brooks* is misplaced because defendant was not required to take the stand

but rather to make a sufficient offer of proof before he could call the victim as an adverse witness. We disagree. The trial court did not suggest that defendant's offer of proof was unsatisfactory, but rather, stated that in order for him to call the victim as a witness, he would first need to testify as to the consensual nature of the incident in question. As in *Brooks*, the trial court here restricted the defendant's right to remain silent and penalized him for exercising that right by precluding him from calling the victim as an adverse witness. Therefore, we agree with defendant, that the trial court erred

Because as discussed above, the evidence in this case was not closely balanced, we must determine if under the second prong of the plain error test, the error here is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, requiring automatic reversal. This prong is designed to give the court the ability to act in those cases where systemic, structural errors serve to undermine the presumptions of fairness that normally attach to our criminal trials. *People v. Allen*, 222 Ill. 2d 340, 364 (2006). Our supreme court has noted that automatic reversal is required only when an error is deemed "structural." *People v. Glasper*, 234 Ill.2d 173, 197 (2009). Structural errors are systemic, serving to " 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *Glasper*, 234 Ill.2d at 197-98 [citations omitted]. An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence. *Glasper*, 234 Ill.2d at 196. The Supreme Court has recognized an error as structural only in a very limited class of cases. *Glasper*, 234 Ill. 2d at 198, quoting *Neder v. United States*, 527 U.S. 1, 8 (1999); *Johnson v. United States*, 520 U.S. 461, 468-68 (1997).

Those cases include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. *Washington v. Recuenco*, 548 U.S. 212, n. 2 (2006).

We find that under the facts of this case, the error alleged herein does not fall into this class. Defendant was permitted to cross-examine the victim regarding her past consensual sexual encounters with defendant and although the trial court should not have limited his cross-examination, the trial court's denial of the defendant's request to call the victim as an adverse witness does not fall within the very limited category of structural errors and, thus, does not require automatic reversal and is amenable to harmless error review. As addressed above, the evidence of defendant's guilt was overwhelming in light of the fact that defendant gave a statement admitting that he entered the victim's home without permission and forced her to have sex with him. This statement corroborated the victim's testimony in court. Therefore, we find that the trial court's error was harmless beyond a reasonable doubt.

We next turn to defendant's contention that his conviction and sentence for aggravated criminal sexual assault must be vacated because it is a lesser included offense of home invasion, for which he was also convicted and sentenced. We use the abstract element approach in identifying lesser-included offenses. *People v. Miller*, 238 Ill.2d 161 (2010). "Under the abstract elements approach, a comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second." *Miller*, 238 Ill.2d at 166 (citations omitted). This approach considers " 'solely

theoretical or practical impossibility.' In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense. " *Miller*, 238 Ill.2d at 166. (citations omitted).

Section 12-14(a) of the Illinois Criminal Code of 1961 set out the requirements of aggravated criminal sexual assault as follows:

> (a) The accused commits aggravated criminal sexual assault if he or she commits criminal sexual assault and any of the following aggravating circumstances existed during, or for the purposes of paragraph (7) of this subsection (a) as part of the same course of conduct as, the commission of the offense:
>
> (1) the accused displayed, threatened to use, or used a dangerous weapon, other than a firearm, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon; or
>
> (2) the accused caused bodily harm, except as provided in subsection (a)(10), to the victim; or
>
> (3) the accused acted in such a manner as to threaten or endanger the life of the victim or any other person; or
>
> (4) the criminal sexual assault was perpetrated during the course of the commission or attempted commission of any other felony by the accused; or
>
> (5) the victim was 60 years of age or over when the offense was committed; or
>
> (6) the victim was a physically handicapped person; or
>
> (7) the accused delivered (by injection, inhalation, ingestion, transfer of possession, or any

other means) to the victim without his or her consent, or by threat or deception, and for other than medical purposes, any controlled substance; or

(8) the accused was armed with a firearm; or

(9) the accused personally discharged a firearm during the commission of the offense; or

(10) the accused, during the commission of the offense, personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person. 720 ILCS 5/12-14(a) (West 2008).

Section 12-11 of the Criminal Code sets forth the elements of home invasion as follows:

a) A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present or he or she knowingly enters the dwelling place of another and remains in such dwelling place until he or she knows or has reason to know that one or more persons is present or who falsely represents himself or herself, including but not limited to, falsely representing himself or herself to be a representative of any unit of government or a construction, telecommunications, or utility company, for the purpose of gaining entry to the dwelling place of another when he or she knows or has reason to know that one or more persons are present and

(1) While armed with a dangerous weapon, other than a firearm, uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or

(2) Intentionally causes any injury, except as provided in subsection (a)(5), to any person or persons within such dwelling place, or

(3) While armed with a firearm uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or

(4) Uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs and during the commission of the offense personally discharges a firearm, or

(5) Personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person within such dwelling place, or

(6) Commits, against any person or persons within that dwelling place, a violation of Section 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961. 720 ILCS 5/12-11(a)(West 2008).

Not all of the elements of aggravated criminal sexual assault are included in the offense of home invasion and home invasion contains elements that are not included in aggravated criminal sexual assault. For instance, a person commits aggravated criminal sexual assault by committing sexual assault where one of the 10 aggravating factors is present even if the person never enters the victim's dwelling place. Similarly, a person can commit home invasion by entering the dwelling place of another with reason to know that someone is present, while armed with a dangerous weapon or firearm and threatening the use of force or intentionally causing an injury, without committing a violation of section 12-14(a) of the Criminal Code. Defendant contends

that because under section 5-12-11(a) of the Criminal Code, a person commits home invasion by entering a person's home and committing a violation of section 12-14(a), aggravated criminal sexual assault is a lesser-included offense of home invasion. However, because it is possible to commit home invasion without committing aggravated criminal sexual assault, the former is not a lesser included offense under the abstract elements test. Accordingly, both convictions may stand.

Lastly, defendant contends that the mittimus incorrectly reflects that he was sentenced to concurrent terms of 15 years for home invasion and aggravated criminal sexual assault rather than 14 years as announced at the sentencing hearing and asks this court to remand the case to correct the error. The State concedes the error but contends that the case need not be remanded because "[p]ursuant to Supreme Court Rule 615, a reviewing court may correct the mittimus without remanding the cause to the trial court." *People v. Hill*, 402 Ill. App. 3d 920, 929 (2010). The record in this case shows that at defendant's sentencing hearing, the trial court sentenced defendant to concurrent terms of 14 years' imprisonment on his home invasion and aggravated criminal sexual assault convictions and 3 years' imprisonment on his unlawful restraint conviction . Accordingly, we order the clerk of the court to correct the mittimus to reflect the correct sentence. 134 Ill.2d R. 615(b)(1).

III. CONCLUSION

For the foregoing reasons, we affirm defendant's conviction and order the clerk of the court to correct the mittimus to reflect that defendant was sentence to concurrent terms of 14 years for home invasion and aggravated criminal sexual assault

Affirmed as modified.