2013 IL App (1st) 102615-U

SECOND DIVISION
March 5, 2013

No. 1-10-2615

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 23798
ALAN WYMAN,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Dennis J. Porter
	)	Judge Presiding.
	)	

JUSTICE SIMON delivered the judgment of the court.
Harris, P.J., and Quinn, J., concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court did not abuse its discretion by granting the State's motion to bar the testimony of defendant's expert witness regarding bondage sex because the proposed testimony was not relevant to the issue of consent. Any error in admitting irrelevant evidence was harmless and did not constitute plain error because the evidence was not closely balanced where the victim's testimony was consistent with the majority of the other evidence presented at trial and defendant's testimony was not. The court did not commit plain error by sending the majority of the State's evidence to the jury room during deliberations because much of the evidence was relevant and the prejudicial effect of that evidence did not outweigh its probative value and the irrelevant evidence sent to the jury room did not threaten to tip the scales of justice against defendant where the evidence of

his guilt was not closely balanced. The prosecutor's allegedly improper comments during rebuttal argument did not substantially prejudice defendant and do not constitute plain error because the evidence was not closely balanced and the prosecutor did not suggest that the State had no burden of proof or attempt to shift the burden to defendant. The court's error in failing to ask prospective jurors whether they understood the principles of law set forth in Illinois Supreme Court Rule 431(b) does not constitute plain error because the evidence was not closely balanced and defendant did not establish that the error resulted in a biased jury.

¶ 2 Following a jury trial, defendant Alan Wyman was found guilty of aggravated criminal sexual assault and aggravated kidnaping and was sentenced to consecutive terms of 25 years imprisonment for aggravated criminal sexual assault and 20 years imprisonment for aggravated kidnaping. On appeal, defendant contends that the trial court violated his rights to due process and to present a defense by granting the State's motion to bar the testimony of his expert witness regarding sexual bondage practices and that the court violated his right to a fair and impartial trial by admitting numerous irrelevant pieces of evidence and sending nearly all of the State's evidence to the jury room during deliberations. Defendant also contends that the State violated his right to a fair trial by making improper comments during rebuttal argument and that the court failed to properly question prospective jurors pursuant to Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with multiple counts of aggravated criminal sexual assault and aggravated kidnaping for criminal acts allegedly perpetrated against M.F. between September 26 and September 30, 2006. Prior to trial, the State filed a motion to allow evidence of other crimes defendant had allegedly committed against T.T. The court granted that motion, finding that such evidence was admissible to show defendant's propensity to commit sex crimes under *People v.*

Donoho, 204 Ill. 2d 159 (2003), and that the evidence was relevant to show motive, intent, identity, absence of mistake, and absence of consent.

¶ 5 The State also filed a motion *in limine* asking the court to prohibit the alleged expert testimony of Midori Herring relating to sexual bondage practices. The State asserted that the subject of sexual bondage was not a proper matter for expert testimony because it was not beyond the common knowledge and experience of the average juror and that defendant was attempting to use such testimony to bolster his own credibility, rather than to educate the jury. At the hearing on the motion, defense counsel asserted that Herring would testify as to the reasons people engage in bondage sex, the unanticipated risks of injury associated with bondage sex, the proper way to set up certain bondage devices, the equipment found in defendant's apartment, and the widespread use of bondage sex techniques. The court granted the motion, finding that while Herring would likely be able to provide testimony beyond the understanding of the average juror regarding bondage, "the issue in this case is consent, which is not a subject that is beyond the understanding of the average juror," and Herring's testimony was not relevant to the issue of consent.

¶ 6 Defendant filed a motion *in limine* to bar evidence of handwritten notes discovered in his apartment. The State asserted that the notes were relevant to show that defendant had planned to commit a crime. Defense counsel maintained that the notes were highly prejudicial and were not probative as to criminal planning because the notes did not show that defendant was planning to commit the crimes at issue. The court denied the motion, finding that the notes were arguably relevant, that the defense was free to argue at trial that the notes did not relate to the crimes at

issue, and that any such argument by the defense would go to the weight of the evidence, rather than to its admissibility.

¶ 7 Defendant also raised oral motions *in limine* to bar evidence discovered in his apartment consisting of, in part, a stun gun, a pair of sunglasses with the lenses blacked out, and a license plate with magnets attached to its back. The court denied those motions, finding that the evidence was relevant to show defendant's criminal intent and explaining that the stun gun could be used to incapacitate someone and the magnetized license plate could be used to conceal identity.

¶ 8 At trial, M.F. testified that in August and September 2006, she was dealing with an addiction to crack cocaine which had begun in 2005. M.F. had spent much of 2006 trying to overcome that habit, but had a relapse and used cocaine one time in August 2006 and once again in September 2006. M.F. was evicted from her apartment on September 1, 2006, and was living in hotels and occasionally staying at her ex-husband's home until she could to move into her new apartment on September 29, 2006.

¶ 9 In August 2006, M.F. encountered an acquaintance named Sasha at a park. Sasha was with defendant and began to introduce defendant as "Al," when defendant interrupted her and introduced himself as "Steve." M.F. and defendant exchanged phone numbers, and M.F. agreed to go on a date with defendant in early September 2006. M.F. and defendant went on three dates and had sex on the third date. On September 26, 2006, M.F. went to defendant's apartment for dinner, but when she arrived defendant was drinking and there was no dinner. M.F. took a shower at the apartment and defendant, who was visibly drunk, attempted to have sex with her in

the shower, but she refused. M.F. eventually went to sleep on defendant's couch after defendant had gone to sleep in his bed.

¶ 10 M.F. woke up the next morning, September 27, 2006, when defendant picked her up, carried her to his bedroom, and laid her on her back on his bed. Defendant tied M.F.'s ankles together with a cable and punched her on her left side, and M.F. could feel and hear her ribs break. Defendant told M.F. that "this is not a game" and that he would kill her if she did not do as he said. Defendant strangled M.F., tied her wrists together, untied her ankles, blindfolded her with a silky scarf, put a plastic golf ball in her mouth, and tied a bandana around her mouth, then untied M.F.'s wrists, spread her arms apart, and attached her wrists to the headboard of his bed. Defendant rubbed a sharp object around M.F.'s neck and sliced the straps off her tank top, then untied M.F.'s ankles, slid off her pajama pants and tank top, spread her legs apart, restrained her in that position by attaching each of her legs to his bed with a cable or rope, and had vaginal sex with her. Defendant also attached a cold plastic restraint to M.F.'s neck at some point.

¶ 11 M.F. remained restrained to the bed all day. At some point, M.F. was able to push the golf ball out of her mouth with her tongue and tell defendant that she was diabetic and that she thought she would go into a coma. Defendant hit M.F. in the face a few times and left the room, then returned a few minutes later and fed M.F. what he said was two teaspoons of brown sugar and gave M.F. a sip of water from a plastic bottle. Defendant later removed M.F.'s restraints, turned her onto her stomach, reattached her ankles and wrists to the bed, anally penetrated her, and then removed his penis from M.F. when she begged him to stop.

¶ 12 That evening, defendant detached M.F.'s wrists and ankles from the bed, tied her wrists

and ankles together, and tied a cable around her neck that connected to her wrists and ankles. Defendant led M.F. to a closet in his hallway. Defendant opened a small wooden door in the closet and told M.F. to crawl through the door and stand up against the wall on the other side. M.F. crawled through the door and stood up against the far wall of a very small and narrow room. Defendant followed M.F. into the small room and untied her ankles, spread her legs apart, and attached her legs to the bottom of the wall with cables. Defendant also untied M.F.'s wrists and attached them to the wall above her. Defendant told M.F. not to yell because the room was soundproof and nobody would hear her and told M.F. there was a fan in the room if she got hot. Defendant punched M.F.'s legs and feet and exited the small room through the door. While M.F. was alone in the room, she turned on a light, lifted up her blindfold, and saw that moving blankets were stapled or nailed to the wall in front of her. Defendant returned to the small room hours later and detached M.F.'s arms and legs from the wall, tied her ankles and wrists together, and told her to climb out of the room through the door. Defendant then took M.F. to his bed, reattached her to the bed with her legs and arms spread apart, sprayed her vagina with a liquid she believed to be water, had vaginal sex with her, and performed oral sex on her.

¶ 13 M.F. was at defendant's apartment for four days. Defendant put M.F. in the small room seven or eight times, and M.F. spent most of her time at defendant's apartment in that small room. When M.F. was not in the small room, she was on defendant's bed. At some point while M.F. was in the small room, defendant loosened the cable restraining her left arm because she complained that her arm hurt and was numb and gave her a turned-over bucket upon which she could sit. One of the times defendant moved M.F. from the small room to the bed, M.F. saw

moving blankets, a large black bag, a very large flashlight, and license plates. M.F. believed that defendant was going to kill her and tried to escape by jumping out the window, but defendant grabbed her by her neck harness and choked her until she was unconscious. When M.F. regained consciousness, defendant was pounding her head into the floor, and defendant then dragged M.F. to his bed by her neck harness and had vaginal sex with her. At some point, defendant allowed M.F. to wear a gray sweat suit after she had complained that she was cold. On the fourth day, defendant allowed M.F. to remain out of the small room when she promised that she would not try to escape or scream, but blindfolded M.F. and kept her tied to the bed.

¶ 14 At some point during that fourth day, defendant put a plastic golf ball in M.F.'s mouth and left the apartment. While defendant was gone, M.F. heard a door open and a man call for defendant. M.F. spit the golf ball out of her mouth and called out, saying she was in the bedroom. A man M.F. had not seen before entered the bedroom and turned on the light. M.F. ripped the blindfold off her head and told the man that defendant had kidnaped her, was raping her, and was going to kill her. M.F. asked the man to help her and to call police, but the man motioned for M.F. to be quiet and walked through the apartment calling for defendant. M.F. continued to ask for help until she heard the man leave.

¶ 15 Defendant returned shortly thereafter and beat M.F. while he questioned her about who was in his apartment. M.F. responded that she did not know who the person was except that he was a tall man with dark hair and that he was wearing a blue parka. Defendant told M.F. the man was his friend and would not say anything and began to take off his clothes. M.F. decided to lie and told defendant that a second man had been in the apartment. M.F. described the second man

as having blond hair and facial hair and told defendant that this second man said he was going to leave the apartment and call the police. Defendant became panic-stricken, found a key, and unlocked M.F.'s arms. M.F. and defendant heard a police siren as defendant unlocked M.F., and M.F. told defendant that he better get her out of his apartment or he would go to jail for rape, kidnaping, and attempted murder. Defendant retrieved M.F.'s bags and removed her restraints. M.F. grabbed one of the cables that had been attached to her wrist and put it in her duffel bag as she and defendant prepared to leave the apartment. Defendant drove M.F. to her ex-husband's son's house and asked M.F. if he could call her sometime. M.F. told defendant that he could not call her because he had told her that his cat had knocked her cell phone into the toilet. Defendant apologized and took M.F. to her ex-husband's son's house located by Wells Park in Chicago, sat M.F. down on the steps of the house with her bags, and drove away.

¶ 16 It was evening at this point, and M.F. rang the doorbell, but nobody answered. M.F. approached a couple on the other side of the street, told them she had been assaulted, and asked them to call 911. The police arrived and an ambulance took M.F. to Weiss Memorial Hospital, where she was treated in the emergency room and received a vaginal exam. M.F. spoke with Detective Marszalec at the hospital and gave him the cable she had taken from defendant's apartment. During her testimony, M.F. identified photographs of herself that were taken while she was at the hospital and showed injuries caused by defendant to her eye, neck, left arm, left wrist, right arm, back, legs, and ankles.

¶ 17 On cross-examination, M.F. stated that she was evicted from her apartment because she did not have money to pay rent due to her drug addiction and that she had spent two nights in a

vacant building shortly before the incident. M.F. also stated that she was not treated for head trauma at Weiss Memorial Hospital and that defendant had not anally penetrated her.

¶ 18 Joseph Swain testified that he had been friends with defendant for about 40 years and that he had a key to defendant's apartment. About 6 p.m. on September 30, 2006, Swain went to defendant's apartment to see if defendant was home and wanted to do something for his birthday. Swain rang the doorbell and used his key to enter the front door of the building when there was no answer and then knocked on the door to defendant's apartment and used the key to enter when he again received no answer. Swain opened the door and heard a woman's voice coming from the bedroom. Swain entered the bedroom, turned on the light, and saw a woman on the bed. The woman was under a blanket and her hands and feet were tied to the bed. The woman told Swain to call the police two or three times and Swain backed out of the room and looked around the apartment for defendant. Swain did not find defendant and went home, but did not call the police. About an hour later, Swain received a phone call from defendant, and defendant asked Swain if he had been to his apartment. Swain replied that he had and asked defendant what was going on, and defendant responded that he had a hooker over and that she had since gone home.

¶ 19 Samuel Crockett testified that about 7 p.m. on September 30, 2006, he was near the 4500 block of North Oakley Avenue in Chicago with his girlfriend when they were approached by a distraught woman who said she had been held captive and repeatedly raped. The woman wanted to borrow Crockett's cell phone to call the police. Instead, Crockett called 911 and stayed with the woman until the police arrived. Chicago police officer Robert Breen testified that at about 7 p.m. on September 30, 2006, he arrived at 4540 North Oakley and encountered M.F., who was

standing in the street and seemed distraught. Officer Breen called for an ambulance.

¶ 20 Chicago police detective Joseph Marszalec testified that he spoke with M.F. at Weiss Memorial Hospital around 8:30 p.m. on September 30, 2006, at which time M.F. provided him with the metal restraint from her bag. While speaking with M.F., Detective Marszalec noticed marks around both of her wrists and bruising on her neck. Detective Marszalec drove M.F. to the police station at about 9:30 p.m. and, along the way, M.F. identified a building at 4336 North Western Avenue as the site of the incident.

¶ 21 At approximately 2 a.m. on October 1, 2006, Detective Marszalec arrested defendant and obtained a signed consent form from defendant to search his apartment. Detective Marszalec recovered a number of objects from defendant's apartment, including a long black jacket, an Illinois license plate with magnets attached to the back, a pair of black shoes, a pair of black jeans with a black belt, a New York Yankees cap, a leather tool belt with several pairs of plastic flex cuffs inside, several tools, a stun gun, blue tape, a pair of sunglasses with the lenses blacked out, seven pages of handwritten notes, a post-it note, an elastic strap, a golf ball, wire cutters, gray and blue backpacks, black and purple scarves, and a briefcase with a false bottom. The words "remember thin belt for waist" were written on the post-it note, and the court allowed Detective Marszalec to publish the other handwritten notes found in defendant's apartment to the jury as follows:

> "First page is - looks like 6:30 a.m., alley workers waiting. Two at least. 6:45 a.m., and the beautiful blond still runs on Wells with her dogs 6:55 a.m. Tuesday. Final punch list, stuff not already in kit, coat, garment, bag plus

contents. Heater, cell, knife, Mace. It says plates scratched out with a question mark in parentheses. Walking to your station wear shadeable sunglasses and hair. *** Alley, time, believe cell phone requires. I believe this is shadeable newspaper, plate protector plus remember tag for dash. Papers back. Joe, pack with a question mark. You might have to abandon the backpack in sight. Clean scratched out or clear fingerprints. Also add belt contents. Load your pockets and armed, I don't know, total package. Go for a walk. Country, neighbors, loud maybe. I don't know. The doors will drift and open. Final wipe down, bike, bike again. Papers for ride."

¶ 22 On cross-examination, Detective Marszalec stated that his notes of his interview of M.F. did not indicate that M.F. related that defendant first introduced himself to her as "Steve," cut off her tank top, sprayed her vagina with a liquid, or performed oral sex on her. The notes also did not indicate that M.F. related that she heard sirens before she left defendant's apartment.

¶ 23 Forensic investigator David Ryan testified that on the evening of October 4, 2006, he and his partner, Investigator Otten, recovered physical evidence from defendant's apartment and took photographs of the apartment. The photographs of defendant's bedroom showed a platform bed with cables attached to black boxes with metal handles that were connected to the floor below the mattress. The bedroom photographs also showed a roll of gauze and plastic flex cuffs on the floor, a golf ball in the dresser drawer, and a mouth strap on the dresser. The photographs of defendant's closet showed a small opening on the bottom of the far wall that led to a small room. The photographs of the small room showed moving blankets covering the walls and ceiling, a

bucket on the floor, a fan attached to the ceiling, two metal handles attached to the wall closest to the entry, and a cable locked to one of the handles. Investigator Ryan testified that the room was about two feet long and four and one-half feet wide.

¶ 24 T.T. testified that she first met defendant about 9:30 a.m. on August 23, 2005, near the intersection of Clark Street and Columbia Avenue in Chicago when defendant approached her and asked her if she needed a job. T.T. was 19 years old at the time, and defendant told her that he was a building inspector and was looking to hire people to do cleaning and maintenance work. T.T. responded that she was interested in a job and asked if she could fill out an application the next day. Defendant said that was fine, drove T.T. home, gave her his name and phone number, told her to call him the next day, and said his name was "Steve." T.T. called defendant the next day and said she was interested in applying for the job, but did not have a car. Defendant picked T.T. up around 11:30 a.m. and drove her to an office building where he said she could fill out an application. Defendant went inside the building, returned to the car shortly thereafter, and told T.T. there were no applications inside. Defendant then took T.T. to his apartment where he claimed to have more applications.

¶ 25 At defendant's apartment, defendant placed some papers on a desk and, as T.T. walked to the desk, defendant grabbed her by the neck and began choking her. Defendant told T.T. to be quiet and said he had a gun. Defendant punched T.T. in the stomach, laid her face-down on the floor, tied her arms behind her back by placing plastic cuffs around her wrists, tied her legs together, and blindfolded her. Defendant attempted to put some kind of ball in T.T.'s mouth, but T.T. said she could not breathe out of her nose and would suffocate. Defendant untied T.T.'s

legs, stood her up, and walked her to a bed, then untied T.T.'s wrists, undressed her, and tied her wrists together in front of her. Defendant laid T.T. on the bed on her back and restrained her legs so they were spread apart. Defendant performed oral sex on T.T., then had vaginal sex with her and ejaculated inside her.

¶ 26 T.T. pleaded with defendant to let her go and told him a number of lies, including that he would not have to hurt her because she was a prostitute, that she would not call the police, and that he could go with her to pick her children up from school if he did not believe she would not call the police. T.T. did not have children and was not a prostitute. T.T. said she needed to pick her children up from school and if she did not pick them up, the school would call DCFS or child protective services. T.T. also told defendant that if they picked up her children, she could drop them off and return to his apartment. Defendant agreed to take T.T. to pick up her children and untied her, removed her blindfold, and told her to take a shower.

¶ 27 T.T. directed defendant to drive her to a school about one and one-half miles east of defendant's apartment. On the way, defendant said that "everything is fine. You're a prostitute. I'm a rapist. That's life." When they arrived at the school, T.T. went inside and told the woman at the front desk that she had been kidnaped and raped and that the offender was outside. The woman called the police, but defendant left before the police arrived. T.T. observed marks on her wrists and ankles and above her eyebrows where she had been restrained and blindfolded. On July 5, 2007, T.T. viewed a photo lineup at a police station and identified defendant as the man who had assaulted her.

¶ 28 Dr. Seema Elahi, an attending physician at Weiss Memorial Hospital, testified that at

about 3 p.m. on August 24, 2005, T.T. arrived at the emergency room and told Dr. Elahi that she had been forced to engage in sexual intercourse with an unknown man around 12:30 p.m. that day. T.T. said the man had tried to choke her, tied her arms and legs with plastic rope, had vaginal sex with her, ejaculated inside her, and attempted to put his tongue into her vagina. Dr. Elahi conducted a physical examination of T.T. and discovered red marks on her back, neck, wrists, and ankles. Dr. Elahi also conducted a vaginal examination of T.T., which yielded results that were normal for a sexually active woman, and collected evidence for a sexual assault kit from T.T.

¶ 29 Dr. Elahi also testified that M.F. arrived at the emergency room at Weiss Memorial Hospital on the evening of September 30, 2006. M.F. said she had been raped, beaten, and choked for three consecutive days at the assailant's home. Dr. Elahi conducted a physical examination of M.F. and discovered scratch marks on her neck, wrists, ankles, and back and discovered tenderness in her breasts and waist. The injuries to M.F.'s wrists and ankles were consistent with having been restrained. Dr. Elahi conducted a vaginal examination of M.F., which yielded results that were normal for a sexually active woman, and collected evidence for a sexual assault kit. Dr. Elahi did not order a toxicology report because M.F. did not appear to be under the influence of drugs or alcohol.

¶ 30 On cross-examination, Dr. Elahi stated that M.F. was not treated for dehydration, that there were no indications M.F. was dehydrated, and that she would expect to see signs of dehydration on someone who only had sips of water over the course of four days. Dr. Elahi also stated that there was no indication M.F. had suffered head trauma and that someone who had

been punched about the head and/or had her head slammed against the floor might show signs of head trauma. Dr. Elahi's report did not indicate that M.F. had been anally penetrated. X-rays of M.F.'s left ribs and chest did not show evidence of a fracture, and Dr. Elahi determined there was no overlying discoloration on M.F.'s left side. Dr. Elahi did not note any broken blood vessels in M.F.'s eyeballs, which might occur if someone had been choked to the point of unconsciousness. Dr. Elahi further stated that M.F. had lupus and that rashes, mild lesions, and splotchy skin were symptoms of that disease.

¶ 31 Forensic scientist Andrea Paulsen testified that she identified semen on vaginal swabs taken from M.F., and the parties stipulated that, if called, Tabitha Bullock, a DNA analyst, would testify that she identified semen on a vaginal swab taken from T.T. Forensic scientist Jennifer Acosta testified that she analyzed a blood standard from M.F., a buccal swab from defendant, and vaginal swabs from M.F. and determined that the DNA profile detected on M.F.'s vaginal swabs matched the DNA profile of defendant. Acosta also analyzed the vaginal swabs collected from T.T. and determined that the DNA profile detected on T.T.'s swabs matched the DNA profile of defendant.

¶ 32 Defendant testified on his own behalf that he was a remodeling contractor and kept a workbench and tools in his living room, which he used as a gym and workshop. In August 2005, defendant, who was 51 years old at the time, was doing work as a real estate agent when he first met T.T. while showing a building to a client. Defendant indicated he might be able to provide T.T. with work in the future and exchanged phone numbers with her. Defendant called T.T. that night, T.T. agreed to go on a date with him, and they went on a couple dates. On August 24,

2005, defendant and T.T. met for lunch and then went to defendant's apartment. Defendant and T.T. previously had sex following a prior date, but this time defendant asked T.T. if he could tie her hands to the top of the bed frame and blindfold her. Defendant offered T.T. $30, and she agreed. Defendant explained that he enjoyed bondage sex since first being introduced to it by a prior girlfriend and that he had some home-made bondage equipment in his apartment.

¶ 33 Defendant blindfolded T.T. and bound her hands together with zip ties. Defendant also used a zip tie to bind T.T.'s hands to a support post on his bed frame so her hands were above her head, but did not attach any restraints to T.T.'s feet. Defendant had sex with T.T. in that position and removed the zip ties and blindfold when they were finished. As they were getting dressed, defendant could tell T.T. was angry, and he thought the $30 payment had something to do with it because T.T. said something along the lines of "so now I'm a hoe." Defendant drove T.T. to pick her children up from school. On the way, T.T. said defendant used her and took advantage of her. Defendant and T.T. argued, and T.T. told defendant that she did not want her children to see him and that she would call the police if he was still outside the school when she left with her children. Defendant drove home and did not hear from T.T. again until he received two angry voicemails from her about a week later.

¶ 34 About 7:30 a.m. on September 19, 2006, defendant was on his way to a paint store to buy supplies for work when he saw M.F. walking on Western Avenue. A lot of prostitutes worked in that area and defendant thought M.F. might be a prostitute based on the way she was walking and her presence in the area. Defendant again saw M.F. as he left the paint store and decided to ask M.F. if she knew or had seen a woman he had recently become enamored with named Sasha.

Defendant, however, did not ask M.F. about Sasha and ended up driving M.F. to his apartment because he thought she was cute. M.F. agreed to have sex with defendant for $40, but defendant decided not to have sex with her when she was reluctant to take her shirt off because her breasts were sensitive from cancer medication. Defendant let M.F. keep the $40 when she became upset and said she needed the money. Defendant drove M.F. back to the area at which he had met her, and M.F. seemed upset and called herself a "charity case" on the way. Defendant told M.F. she could earn her money by finding Sasha. M.F. said she knew Sasha and would keep an eye out for her, and defendant and M.F. exchanged phone numbers.

¶ 35 Defendant received a phone call from M.F. around 7 p.m. on September 23, 2006. M.F. said she had been out on the street for a few days and asked defendant if she could go to his apartment because she needed a place to stay and to take a shower. Defendant picked up M.F., who had three giant bags containing all her belongings, and brought her to his apartment. M.F. took a bath, then drank with defendant and had sex with him. Defendant dropped M.F. off on his way to work the next morning.

¶ 36 Defendant's birthday was September 27, and he thought about buying himself a birthday present by offering M.F. $500 to stay at his apartment for a few days and engage in light bondage sex. Over the course of the day of September 28, 2006, defendant exchanged phone calls with M.F. and offered her $500 for three days of bondage sex. Defendant and M.F. eventually agreed on a price of $600, and defendant picked up M.F. and brought her to his apartment that night.

¶ 37 At the apartment, defendant showed M.F. his homemade restraints and fit M.F. with restraints around her ankles, wrists, and neck. Defendant had designed the wrist restraints so he

could restrain a person in different positions by attaching the restraints to padlocks under his bed. Defendant also constructed a small room in his closet that divided the closet in half. Defendant used the front half of the closet as a coat rack and originally used the back half as a dark room. Defendant installed exhaust and intake fans in the small room to provide ventilation. Defendant's prior girlfriend, who had been interested in bondage sex, suggested that defendant install vertical restraints in the small room, and he installed the restraints and upholstered the walls with moving pads to accommodate naked bodies. Defendant also installed metal handles on the wall to the right of the opening so people could pull themselves up after having crawled through the opening. The room was also equipped with a fluorescent light, which someone who was restrained to the wall would not have been able to reach to turn on or off. Although the moving pads acted as a sound dampener, the room was not soundproof and shared a common wall with the adjoining apartment.

¶ 38 After defendant placed restraints around M.F.'s ankles, wrists, and neck, M.F. told him she wanted to buy drugs, and defendant drove her to the parking lot at which they had first met. When they returned to defendant's apartment, M.F. complained that her wrists hurt and defendant noticed some deep red grooves in M.F.'s wrists and apologized. Defendant then restrained M.F. to his bed, blindfolded her, put a ball gag consisting of a golf ball in her mouth, and had sex with her. After they had sex, M.F. told defendant that she did not like the ball gag and he agreed not to use it again. Defendant slept in his bed that night and M.F. slept on his couch.

¶ 39 M.F. awoke defendant the next morning and complained that the restraints were too tight, and defendant loosened the restraints and had sex with M.F. while she was blindfolded and

restrained to the bed. Around 1 or 2 p.m., defendant took M.F. into the small room in the closet, attached her to the wall, and had sex with her. Defendant noticed that it was painful for M.F. to enter the small room, and M.F. told defendant that she had sustained injuries to her ribs when a client had been rough with her. At some point, M.F. also said she had a rash on her buttocks from rug burn she had suffered at a nearby motel.

¶ 40 Defendant realized things were not going very well because M.F. was miserable and her unhappiness was ruining the experience for him. After the sexual encounter in the small room, M.F. asked defendant if she was going to have to return to the small room. Defendant replied that she would, and M.F. decided to stay in the room so she would not have to crawl in and out. Defendant provided M.F. with cigarettes and a bucket on which she could sit and returned to the small room later that day, reattached M.F. to the wall, and had sex with her. When they finished, they both crawled out of the room and M.F. said she would not go back inside the room. Later that day, defendant drove M.F. to purchase drugs.

¶ 41 Defendant decided he would have sex with M.F. one more time and then call off the arrangement. Around 7 p.m., defendant attached the neck restraint to M.F. and restrained her to his bed, but then remembered that he needed to go to a bar across the street to pay someone who had done some work for him. Defendant stayed at the bar for 15 or 20 minutes and encountered Swain on his way back to his apartment. Swain, who had stopped by defendant's apartment, was flustered and asked defendant what was going on in his apartment. Defendant said he had a hooker over and they were engaged in a long-term arrangement. Swain said the woman was acting wild and defendant told Swain that he would explain everything later. M.F. was angry

when defendant returned to his apartment because she believed defendant let someone into the apartment on purpose, and defendant removed M.F.'s neck restraint and apologized. Defendant and M.F. both slept in the bed that night, but did not have sex.

¶ 42 The next morning, September 30, 2006, defendant decided to end the arrangement and to ask M.F. to return some of his money because she had only been at his apartment for about 36 hours and they had agreed that she would stay at his apartment for three days. Defendant spoke with M.F. and offered to end their arrangement, and M.F. agreed and began to get dressed. Defendant removed the restraints from M.F.'s wrists and ankles and noticed creases from the restraints as he did so. Defendant suggested M.F. return $200 and she refused. Defendant and M.F. struggled for a bit until defendant grabbed M.F. by the neck and they fell to the floor. M.F. resumed packing her bags after they calmed down, and defendant grabbed M.F.'s cell phone while she was packing and kept it as collateral.

¶ 43 Defendant agreed to drive M.F. to her ex-husband's house. On the way, defendant told M.F. that he had taken her cell phone and left it in his apartment and that he would return her phone if she refunded him $200. M.F. told defendant that she did not have $200, but might be able to borrow the money. Defendant drove M.F. to the place at which she had most recently bought drugs, but M.F. was unable to obtain the money at that location, and M.F. said she might be able to get the money from her ex-husband. Defendant drove M.F. to her ex-husband's house, and M.F. told defendant to carry her bags to the door and then return to his car because she did not want her ex-husband to see him. Upon returning to his car, defendant saw M.F. ring the doorbell, but nobody answered, and M.F. went around the building to the backyard. Defendant

looked for M.F. behind the building when she did not return, but he did not see her again.

¶ 44 Defendant explained that the Yankees hat, black clothes, tool belt, blue tape, stun gun, magnetized license plate, and blacked-out sunglasses found in his apartment were for a movie project he was working on that included an abduction scene and that most of the notes were related to the movie project as well. The other notes were reminders about workers he was interested in hiring for a job, a woman he saw while running in Wells Park, and supplies for work. Defendant had a suitcase with a false bottom because he was sometimes paid large sums in cash at work and he wanted to be able to hide the money.

¶ 45 Shirley Hiner, a lead analyst and custodian of records at AT&T, testified for the defense that the record of telephone calls for defendant's phone reflected that between 12:10 p.m. and 7:22 p.m. on September 23, 2006, four short calls were made from defendant's phone to M.F.'s phone and three short calls were made from M.F.'s phone to defendant's phone. At 7:01 a.m. on September 26, 2006, a call was made from M.F.'s phone to defendant's phone and at 7:02 a.m., a short call was made from defendant's phone to M.F.'s phone. Between 4:27 p.m. and 8:24 p.m. on September 28, 2006, five short calls were made from M.F.'s phone to defendant's phone and three short calls were made from defendant's phone to M.F.'s phone. At 8:43 p.m. on September 30, 2006, one short call was made from defendant's phone to Swain's phone. Hiner stated on cross-examination that she could only ascertain the phone from which each call was made, and not the identity of the person who was making the call.

¶ 46 Chicago police officer Steven Miller testified for the defense that he spoke with T.T. on August 24, 2005, and that his general offense case report did not indicate that T.T. related that

she met defendant on August 23, 2005, that defendant told her to take a shower, that she told defendant she would not call police, or that defendant placed a ball in her mouth. The parties stipulated that, if called, Chicago police detective Dembowski would testify that he interviewed T.T. on August 24, 2005, and that his case supplementary report indicated that T.T. related that she first encountered defendant on August 24, 2005, and did not indicate that T.T. related that defendant asked her to take a shower. The parties also stipulated that, if called, Chicago police detective Healey would testify that she spoke with T.T. on June 25, 2007, and that her general progress report did not reflect that T.T. related that she told defendant that she would not call the police or that defendant told her to take a shower. The parties additionally stipulated that, if called, Chicago police detective Lapalermo would testify that she spoke with T.T. on June 25, 2007, and that her case supplementary report did not indicate that T.T. related that she told defendant that she would not call the police or that defendant told her to take a shower.

¶ 47 Based on this evidence, the jury found defendant guilty of aggravated criminal sexual assault and aggravated kidnaping.

¶ 48 ANALYSIS

¶ 49 I. Expert Testimony

¶ 50 Defendant contends that his rights to due process and to present a defense were violated when the trial court granted the State's motion to bar the expert testimony of Midori Herring. The State responds that defendant has forfeited this claim by failing to object at trial or raise the issue in a posttrial motion. To preserve a claim of error for appellate review, defense counsel must object to the error at trial and raise the issue in a posttrial motion. *People v. McLaurin*, 235

Ill. 2d 478, 485 (2009).

¶ 51 Defendant admits that he did not include this claim in his posttrial motion for a new trial, but asserts that this court may review his claim because the issue was raised before the trial court and concerns his due process right to present a defense. Defendant also asserts that application of the forfeiture rule in this case would not serve the rule's purpose because the trial court had the opportunity to review the issue in the hearing on the State's motion *in limine* to bar Herring's testimony. Defendant further asserts that this court may review his claim under the plain-error doctrine.

¶ 52 A reviewing court may consider unpreserved error under the plain-error doctrine when 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 the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in conducting plain-error review is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). Therefore, even if defendant has forfeited his claim by failing to include it in a posttrial motion, we must still determine whether the trial court erred by granting the State's motion to bar Herring's testimony under the first step of plain-error review. Accordingly, we now consider whether the court erred by granting the State's motion.

¶ 53 A criminal defendant's constitutional right to due process is the right to a fundamentally fair trial and includes the defendant's right to present witnesses in his own behalf. *People v. Wheeler*, 151 Ill. 2d 298, 305 (1992). The decision to admit expert testimony lies within the

sound discretion of the trial court, and a reviewing court will not disturb the trial court's decision to bar or admit expert testimony absent an abuse of that discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). In determining the admissibility of expert testimony, the court should balance the probative value of the testimony against its prejudicial effect and consider the necessity and relevance of the testimony in light of the facts in the case. *Id.* at 235. Expert testimony is only necessary when the subject of the testimony is particularly within the witness' experience and qualifications, and beyond that of the average juror, and when the testimony will aid the jury in reaching its conclusion. *Id.* Expert testimony concerning matters of common knowledge is inadmissible unless the subject is difficult to understand or explain. *Id.*

¶ 54 At the hearing on the State's motion to bar Herring's testimony, defense counsel asserted that Herring would testify regarding the reasons people engage in bondage sex, the unanticipated risks of injury associated with bondage sex, the proper way to set up certain bondage devices, the equipment found in defendant's apartment, and the widespread use of bondage sex techniques. The court granted the motion to bar Herring's testimony and explained that the determinative issue in this case was whether M.F. consented to defendant's sexual conduct, the issue of consent was not beyond the understanding of the average juror, and Herring's proposed testimony was not relevant to the issue of consent.

¶ 55 Defendant asserts that the evidence showing he possessed bondage equipment and had sex with M.F. while she was restrained created an unfair presumption that M.F. did not consent to his sexual conduct. Defendant maintains that Herring's testimony was relevant to the issue of consent because it would have counteracted that unfair presumption by showing that bondage sex

can be performed in a safe and consensual manner and that such practices are relatively common. Defendant also maintains that Herring's testimony was relevant to show that M.F.'s injuries did not necessarily indicate a lack of consent because they could have been caused by defendant's amateur bondage equipment.

¶ 56 In this case, the jury was presented with two competing versions of events regarding the issue of consent. According to the evidence presented by the State, defendant used threats and physical force to restrain M.F. and have sex with her against her will. According to the evidence presented by the defense, M.F. consented to have bondage sex with defendant in exchange for $600. The jury's determination regarding the issue of consent, therefore, turned on its resolution of those competing versions of events regarding whether M.F. consented to defendant's sexual conduct before defendant initially restrained her. The proposed testimony that bondage sex is oftentimes practiced in a safe and consensual manner and is relatively common would not have aided the jury in resolving those competing versions of events because the issue of consent did not concern the bondage sex itself, but rather, the prior agreement between M.F. and defendant or lack thereof. As such, we conclude that the trial court did not abuse its discretion by granting the State's motion to bar Herring's testimony.

¶ 57 II. Irrelevant Evidence

¶ 58 Defendant next contends that he was deprived of a fair and impartial trial because the court admitted numerous irrelevant pieces of evidence. Evidence is relevant and admissible "if it tends to prove a fact in controversy or render a matter in issue more or less probable." *People v. Nelson*, 235 Ill. 2d 386, 432 (2009). A trial court may reject evidence as irrelevant if it is remote,

uncertain, or speculative. *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993). A court may exclude evidence, even if it is relevant, if the prejudicial effect of the evidence substantially outweighs its probative value. *People v. Walker*, 211 Ill. 2d 317, 337 (2004). A trial court's decision regarding the relevance and admissibility of evidence will not be reversed absent an abuse of discretion. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001).

¶ 59 A. Handwritten notes, stun gun, sunglasses, license plate

¶ 60 Defendant asserts that the handwritten notes discovered in his apartment were irrelevant because they did not relate to any conduct, person, or item connected with this case and that the stun gun, blacked-out sunglasses, and magnetized license plate were irrelevant because the State did not present any evidence connecting those items to his alleged conduct. The State responds that the challenged evidence was relevant to show defendant's criminal intent and premeditation and that any error in admitting such evidence was harmless because the evidence of defendant's guilt was overwhelming.

¶ 61 1. Relevance

¶ 62 The notes discovered in defendant's apartment consist of a number of short messages that reference workers waiting in an alley, a blond woman who runs with her dogs, and a number of items, including a punch list, kit, coat, garment, bag, heater [presumably a stun gun], cell phone, knife, Mace [pepper spray], "shadeable newspaper," "plate protector," backpack, and "shadeable sunglasses." The notes also reference a number of actions, including abandoning a backpack, cleaning or clearing fingerprints, going for a walk, and wiping down a bicycle. In denying the motion to bar this evidence prior to trial, the court found that the notes were arguably relevant,

that the defense could argue during trial that the notes were not related to the crimes at issue, and that any argument by the defense to that effect would go to the weight of the evidence, rather than its admissibility. During rebuttal argument, the prosecutor asserted that the notes showed that defendant had planned out his crimes. The prosecutor then argued that the existence of a plan showed that defendant likely made calls from M.F.'s phone while she was restrained in his apartment to "cover his tracks." Thus, the alleged basis for the relevance of the notes is to show that defendant planned to commit criminal acts against M.F.

¶ 63 The notes, however, had little to no probative value because they do not tend to prove that defendant planned to commit criminal acts against M.F. Aside from the references to a heater, "plate protector," and "shadeable sunglasses," which may refer to the stun gun, magnetized license plate, and blacked-out sunglasses found in defendant's apartment, none of the notes are connected to other evidence presented at trial. While the notes may tend to show that defendant was planning to do something, they do not tend to show that defendant was planning to commit the criminal acts at issue because the majority of the notes are unrelated to the acts defendant is alleged to have committed. To the extent the notes reference the stun gun and blacked-out sunglasses found in defendant's apartment, there is no evidence that defendant used those items in committing the alleged criminal acts at issue.

¶ 64 Also, any slight probative value the notes may have is substantially outweighed by their prejudicial effect. The notes referring to a "beautiful blond," a knife, pepper spray, abandoning a backpack, clearing fingerprints, and wiping down a bicycle give the impression that defendant was keeping track of a woman and preparing to engage in some kind of illegal activity, perhaps

in relation to the "beautiful blond." As such, the trial court abused its discretion by admitting evidence of the handwritten notes found in defendant's apartment.

¶ 65 In denying defendant's motions to bar evidence of the stun gun, blacked-out sunglasses, and magnetized license plate, the court found that the evidence was relevant to show defendant's criminal intent and noted that the magnetized license plate could be used to conceal identity and the stun gun could be used to incapacitate someone. While the evidence presented at trial did not show that defendant used the magnetized license plate, M.F. testified that she saw license plates in defendant's apartment. Evidence of the license plate, therefore, was connected to defendant's alleged conduct and tended to prove his criminal intent where it helped show that he kept the license plate, which could have been used to conceal his identity, in close proximity while M.F. was at his apartment, and the court did not abuse its discretion by admitting it into evidence. The State did not, however, present any evidence connecting the stun gun or blacked-out sunglasses to the criminal acts at issue. While those items were found in defendant's apartment by the police, there is no evidence that defendant used them in assaulting and detaining M.F. or that he kept them close at hand at that time. As such, neither the stun gun nor the blacked-out sunglasses tended to prove a fact in controversy and the trial court abused its discretion by admitting those items into evidence.

¶ 66 2. Harmless error

¶ 67 Having determined that the trial court erred by admitting evidence of the handwritten notes, stun gun, and blacked-out sunglasses, we now consider whether such error was harmless. An erroneous evidentiary ruling will constitute harmless error if the State can establish beyond a

reasonable doubt that the error did not contribute to the jury's verdict. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005).

¶ 68 As stated earlier, the jury was presented with two competing versions of events in this case: M.F. testified that defendant restrained her and had sex with her against her will over the course of four days and defendant testified that M.F. consented to his sexual conduct as part of an agreement to engage in bondage sex in exchange for money. Swain's testimony as to events that took place on the evening of September 30, 2006, was consistent with M.F.'s testimony that she briefly encountered a man in defendant's apartment while she was restrained on defendant's bed that same evening and that the man left the apartment without contacting the police despite her pleas that he do so and contradicted defendant's testimony that he encountered Swain outside his apartment building on September 29, 2006. The testimony of Crockett and Officer Breen that they encountered a distraught woman on the evening of September 30, 2006, was consistent with M.F.'s testimony that she did not consent to defendant's sexual conduct and that defendant dropped her off on the front steps of her ex-husband's son's house that evening and was not consistent with defendant's testimony that M.F. disappeared to the back of her ex-husband's house after defendant had dropped her off earlier that day. The State also presented T.T.'s testimony to show defendant's propensity to commit sex crimes, motive, intent, identity, absence of mistake, and absence of consent.

¶ 69 While defendant presented evidence showing that a number of short phone calls were made between his phone and M.F.'s phone on September 28, 2006, that evidence did little to contradict M.F.'s testimony because M.F. testified that defendant was in possession of her phone

at that time. Also, the alleged inconsistencies between the testimony of M.F. and T.T. and their prior statements to various police officers did little to diminish their credibility because the inconsistencies, such as whether defendant told T.T. to take a shower were limited, minor, and not directly related to non-consensual sex.

¶ 70 As such, M.F.'s testimony was consistent with the majority of the other evidence presented at trial and defendant's testimony was not. Therefore, the evidence in this case was not closely balanced, and we conclude that the trial court's admission of the handwritten notes, stun gun, and blacked-out sunglasses constitutes harmless error and does not require reversal because it did not contribute to the jury's verdict.

¶ 71 B. Black clothing, briefcase, wire cutters, tools

¶ 72 Defendant next asserts that the black clothing, wire cutters, briefcase with a false bottom, and tools, including sledgehammers, an axe, and a saw found in his apartment were irrelevant because the State did not present any evidence connecting those items to his alleged criminal conduct. The wire cutters found in defendant's apartment were relevant because they tended to prove that defendant restrained M.F. where the wire cutters could have been used to release M.F. from the various restraints used by defendant. However, the State did not present any evidence connecting the black clothing, briefcase, or tools to the criminal acts at issue. Such evidence did not tend to prove a fact in controversy or render a matter in issue more or less probable and was, therefore, irrelevant.

¶ 73 Defendant admits that he did not raise his challenges to the admission of this evidence in a posttrial motion, but maintains that this court may review his claim under the plain-error

doctrine because the evidence at trial was so closely balanced that the prejudicial impact of the evidence, when considered in combination with the prejudicial impact of the handwritten notes, stun gun, and blacked-out sunglasses, threatened to tip the scales of justice against him. However, for the reasons set forth in our harmless error analysis above, the evidence in this case was not closely balanced. Therefore, the prejudicial impact of the challenged evidence did not threaten to tip the scales of justice against defendant and the admission of that evidence does not constitute plain error to excuse defendant's procedural forfeiture of this claim.

¶ 74 III. Jury Deliberations

¶ 75 Defendant next contends that the trial court violated his right to a fair trial when it sent nearly all of the State's evidence to the jury room during deliberations. Defendant admits that he did not object to the court's decision to send the evidence to the jury room, but maintains that we may nonetheless review his claim under the plain-error doctrine. The first step in conducting plain-error review is to determine whether error occurred at all. *Walker*, 232 Ill. 2d at 124.

¶ 76 While "tangible objects admitted into evidence that are probative of any material issue may be taken into the jury room during jury deliberations," such evidence should be excluded from the jury room if the probative value of the evidence is outweighed by its prejudicial effect. *People v. Blue*, 189 Ill. 2d 99, 123 (2000). The decision of whether to allow the jurors to bring physical evidence into the jury room is left to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v. McDonald*, 329 Ill. App. 3d 938, 947-48 (2002).

¶ 77 The record shows that following closing arguments, the trial court sent all of defendant's

exhibits and most of the State's exhibits to the jury room for deliberations. The State's exhibits sent to the jury room included photographs of M.F., T.T., defendant, and defendant's apartment, and physical evidence, such as the cable restraint recovered from M.F. and black clothes, flex cuffs, wire cutters, a pair of sunglasses, blue tape, backpacks, scarves, a golf ball and a tool belt recovered from defendant's apartment. The court also sent the handwritten notes, blacked-out sunglasses, and magnetized license plate found in defendant's apartment to the jury room, but did not send the stun gun. Defendant asserts that the court erred by sending the State's exhibits to the jury room because the evidence had little probative value where it was undisputed that defendant restrained M.F. with the bondage equipment and the evidence was prejudicial where it suggested a lack of consent and portrayed defendant as an immoral or criminal person.

¶ 78 In this case, defendant was charged with aggravated criminal sexual assault and aggravated kidnaping, and the State presented evidence showing that defendant committed those crimes when he restrained M.F. and had sex with her in his apartment against her will. Although defendant admitted that he used the bondage equipment to restrain M.F., the State was entitled to present evidence of every element of the crimes charged against defendant (*People v. Willis*, 299 Ill. App. 3d 1008, 1020-21 (1998)), and evidence of the bondage equipment was relevant to show that defendant restrained M.F. and was probative of that fact. To the extent the evidence was prejudicial to defendant, it was not unreasonable for the trial court to find that the prejudicial effect of the evidence did not outweigh its probative value because the prejudicial effect was relatively minor where the evidence was not disturbing or grotesque or "uniquely charged with emotion." *Cf. Blue*, 189 Ill. 2d at 125-26; *People v. Burrell*, 228 Ill. App. 3d 133, 144 (1992)

(holding the victims' blood-stained uniforms should not have been sent to the jury because they were more prejudicial than probative). As such, the trial court did not abuse its discretion by sending evidence of defendant's bondage equipment to the jury room.

¶ 79 Regarding the handwritten notes, blacked-out sunglasses, and black clothing, we have already determined that such evidence was inadmissible and now consider whether the court committed plain error by sending that evidence to the jury room. Defendant maintains that the court's decision to send the challenged evidence to the jury room was plain error because the evidence in this case was closely balanced. However, the evidence in this case was not closely balanced and the court's decision to send the handwritten notes, blacked-out sunglasses, and black clothing to the jury room did not constitute plain error to excuse defendant's procedural forfeiture of this claim.

¶ 80 IV. Prosecutorial Misconduct

¶ 81 Defendant next contends that his right to a fair trial was violated when the prosecutor made improper comments during rebuttal argument. Defendant admits that he did not object to any of the prosecutor's challenged comments at trial and only included one of his claims in a posttrial motion, but maintains that we may review his claims under the plain-error doctrine. The first step in conducting plain-error review is to determine whether error occurred at all. *Walker*, 232 Ill. 2d at 124.

¶ 82 A prosecutor is generally accorded wide latitude regarding the content of closing and rebuttal arguments and may comment on the evidence and any fair and reasonable inference the evidence may yield. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). In reviewing allegations of

prosecutorial misconduct, the comments at issue must be examined in their entirety and placed in the proper context. *People v. Cisewski*, 118 Ill. 2d 163, 176 (1987). The regulation of the substance and style of closing and rebuttal arguments is within the trial court's discretion and the trial court's determination of the propriety of a prosecutor's remarks will not be reversed absent an abuse of that discretion. *People v. Simms*, 192 Ill. 2d 348, 396-97 (2000).

¶ 83 In the event a prosecutor's comment is determined to be improper, we will not disturb the jury's verdict unless the improper comment caused substantial prejudice to the defendant. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). The question of whether a prosecutor's statement is so egregious that it warrants a new trial is a legal issue and is reviewed *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

¶ 84 A. Misstatement of facts

¶ 85 Defendant asserts that the prosecutor misstated the evidence during rebuttal argument when the prosecutor argued that the handwritten notes found in defendant's apartment showed that he had a "punch list for crime" and that the blacked-out sunglasses and magnetized license plate found in his apartment showed that he had a "rape kit." A prosecutor may not argue assumptions or facts not based upon evidence in the case. *People v. Adams*, 2012 IL 111168, ¶ 17. While a prosecutor is generally accorded wide latitude in arguing the evidence and any fair and reasonable inferences therefrom, closing and rebuttal arguments cannot be used simply to inflame the passions or develop the prejudices of the jury. *Wheeler*, 226 Ill. 2d at 128-29.

¶ 86 The prosecutor argued during rebuttal that defendant "has a punch list. He has a punch list for crime. The punch list talks about a heater, a knife, mace, wearing stashable sunglasses

and hat, plate protector, requires stashable newspaper, wipe down prints in case of flight. I mean, the guy has a punch list." The prosecutor's comments regarding defendant's "punch list" was based on the handwritten notes found in defendant's apartment which referred to a "punch list" and the objects and actions listed by the prosecutor. While we have held that the notes were irrelevant and should not have been admitted into evidence, we have also determined that the evidence in this case was not closely balanced and that the admission of the notes constituted harmless error. As such, defendant was not substantially prejudiced by the prosecutor's reference to a "punch list for crime," and any error by the prosecutor in making those comments does not rise to the level of plain error to excuse defendant's procedural forfeiture of this claim.

¶ 87 The prosecutor also argued that defendant "is a guy who has got sunglasses that are blacked out. He's got a magnetic license plate. That's what kind of guy he is. He has a rape kit. He is not making a freaking movie. He is doing it in real life. That's what kind of guy he is." We have already held that the blacked-out sunglasses were irrelevant and should not have been admitted into evidence and, therefore, the only admissible evidence used by the prosecutor to support the assertion that defendant had a "rape kit" is the magnetized license plate. That single piece of evidence does not support a reasonable inference that defendant had a "rape kit." However, we reiterate that the evidence in this case was not closely balanced and find that the prosecutor's comments did not substantially prejudice defendant and do not rise to the level plain error to excuse defendant's procedural default of this claim.

¶ 88 B. Characterization of defendant and M.F.

¶ 89 Defendant asserts that the prosecutor improperly characterized defendant as "evil" and

M.F. as a "hero." "[A] prosecutor may not characterize the defendant as an 'evil' person or cast the jury's decision as a choice between 'good and evil,' " but "may comment unfavorably on the evil effects of the crime and urge the jury to administer the law without fear" when such argument is based upon the evidence. *People v. Nicholas*, 218 Ill. 2d 104, 121-22 (2005).

¶ 90 During rebuttal, the prosecutor twice called defendant an "evil, evil man" and argued that M.F. was a "hero for what she did." Defendant did not object to the prosecutor's comments, but included this claim in his posttrial motion for a new trial. In denying that motion, the trial court agreed with defendant that the prosecutor's characterization of defendant as an "evil, evil man" was improper, but found that defendant had forfeited the issue by failing to object to the comments when they were made and that the comments did not affect the jury's verdict because the evidence of defendant's guilt was overwhelming. As the evidence in this case was not closely balanced, we agree with the trial court that the prosecutor's allegedly improper comments did not affect the jury's verdict and conclude that any error does not rise to the level plain error to excuse defendant's procedural forfeiture of this claim.

¶ 91 C. Jury's "duty"

¶ 92 Defendant asserts that the prosecutor improperly argued that it was the jury's "job" and "duty" to find defendant guilty of the crimes charged. While a prosecutor may argue that the evidence presented at trial supports a conviction, it is improper for a prosecutor to argue that a jury is obligated by its oath to return a particular verdict. *People v. Nelson*, 193 Ill. 2d 216, 227-28 (2000). In this case, the prosecutor concluded rebuttal by arguing:

"We did our job. Now I am pleading with you to do your job. He is an

evil, evil man. I am asking you to take this overwhelming evidence and find him guilty on every single count.

Counsel talked about your duty. Ladies and gentlemen, you have one. You have overwhelming evidence of what he did, and I am asking you to perform your duty and convict him on every single count.

Thank you."

¶ 93 The State asserts that the prosecutor's comments were not improper because the prosecutor asked the jurors to do their jobs by finding defendant guilty, rather than arguing that the jurors would violate their oaths if they found defendant not guilty. However, by asking the jury to do its job and perform its duty by finding defendant guilty, the prosecutor was necessarily also arguing that the jurors would not be doing their jobs or performing their duties if they found defendant not guilty. Regardless, the prosecutor's comments did not affect the jury's verdict because the evidence was not closely balanced and, therefore, defendant was not substantially prejudiced by the comments and there is no plain error to excuse defendant's procedural default of this claim.

¶ 94 D. Reasonable doubt

¶ 95 Defendant asserts that the prosecutor improperly defined reasonable doubt by suggesting that the jury could convict defendant if the jurors had a "slight doubt." During rebuttal, the prosecutor argued that "we have to prove beyond a reasonable doubt. We have proven this case beyond a reasonable doubt. I submit to you that doesn't mean without a slight doubt, without any doubt."

¶ 96 While "neither the court nor counsel should attempt to define the reasonable doubt standard for the jury," a prosecutor's attempt to define reasonable doubt will constitute reversible error only if it causes the defendant substantial prejudice. *People v. Speight*, 153 Ill. 2d 365, 374 (1992). In this case, the prosecutor's attempt to define reasonable doubt did not substantially prejudice defendant or rise to the level of plain error because the prosecutor did not suggest that the State had no burden of proof, attempt to shift the burden to defendant, reduce the State's burden of proof to a minor detail, or provide a lengthy and detailed instruction on reasonable doubt. *People v. Howell*, 358 Ill. App. 3d 512, 524 (2005).

¶ 97 V. Rule 431(b)

¶ 98 Defendant further contends that he should receive a new trial because the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) by failing to ask all prospective jurors whether they understood all of the principles set forth in the rule. Defendant admits that he failed to object to the alleged error at trial or raise it in a posttrial motion, but maintains that we may review his claim under the plain-error doctrine. The first step in conducting plain-error review is to determine whether error occurred at all. *Walker*, 232 Ill. 2d at 124.

¶ 99 Pursuant to Rule 431(b), a trial court is required to ask each potential juror, individually or in a group, whether that juror "understands and accepts" each of the following principles:

> "(1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure

> to testify cannot be held against him or her." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The language of Rule 431(b) is clear and unambiguous and mandates a specific question and response process in which the trial court must ask each potential juror, either individually or in a group, whether he or she understands and accepts each of the principles set forth in the rule and provide each prospective juror with an opportunity to respond to those questions. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). The rule, however, does not dictate a precise method for determining whether a prospective juror understands and accepts the relevant principles of law, and a court need not use the rule's precise language when addressing the jurors. *People v. Zirko*, 2012 IL App (1st) 092158, ¶ 62.

¶ 100 In this case, the trial court advised the prospective jurors of each of the four principles set forth in Rule 431(b) and after each principle, the court asked the jurors whether "anybody [had] any quarrel with that proposition of law." Defendant asserts that the court failed to satisfy the requirements of Rule 431(b) by asking prospective jurors if they had "any quarrel" with each principle of law because that question failed to ascertain whether the jurors understood each proposition. The State responds that this court has rejected this exact argument in *People v. Martin*, 2012 IL App (1st), 093506, ¶ 71, in which we held that the trial court had complied with Rule 431(b) by asking potential jurors whether they had "any quarrel" with the principles set forth in the rule. However, our supreme court has subsequently addressed this issue in *People v. Wilmington*, 2013 IL 112938, holding that the trial court did not comply with Rule 431(b) by asking prospective jurors whether any of them disagreed with the principles of law. In doing so,

the court explained that "[w]hile it may be arguable that the court's asking for disagreement, and getting none, is equivalent to juror *acceptance* of the principles, the trial court's failure to ask jurors if they *understood* the four Rule 431(b) principles is error in and of itself." (Emphases in original.) *Id.* at ¶ 32.

¶ 101 As "quarrel" is defined as "a ground of dispute or complaint" (Merriam-Webster Online Dictionary (2013), *available at* http://www.merriam-webster.com/dictionary/quarrel (last visited February 27, 2013)), and "disagreement" is defined as "the act of disagreeing," "the state of being at variance," and "quarrel" (Merriam-Webster Online Dictionary (2013), *available at* http://www.merriam-webster.com/dictionary/disagreement (last visited February 27, 2013)), we find there is no meaningful difference between asking prospective jurors if they disagree with the relevant principles of law or if they have "any quarrel" with those propositions. As such, the trial court did not comply with Rule 431(b) in this case. However, the error does not rise to the level of plain error as the evidence was not closely balanced and defendant has not established that the trial court's violation of Rule 431(b) resulted in a biased jury. *Wilmington*, 2013 IL 112938, at ¶¶ 33-34.

¶ 102 CONCLUSION

¶ 103 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 104 Affirmed.