2014 IL App (1st) 123491-U

THIRD DIVISION
November, 26, 2014

No. 1-12-3491

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. 09 CR 17803
	)	
WILLIE WILLIAMS,	)	The Honorable
	)	Clayton J. Crane
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant failed to demonstrate that reversible error resulted from the instructions tendered to the jury or the prosecutor's comments during closing argument.

¶ 2 Following a jury trial, defendant Willie Williams was found guilty of two counts of aggravated criminal sexual assault and was sentenced to two consecutive 21-year prison terms.

On appeal, defendant asserts that the trial court's failure to tender several instructions to the jury amounted to plain error. Alternatively, he contends that trial counsel was ineffective for failing to preserve these alleged errors. Defendant further argues that prosecutorial misconduct occurred during closing arguments. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant with multiple counts arising from an incident that occurred on September 7, 2009. Pertinent to this appeal, count 1 alleged that defendant committed aggravated criminal sexual assault "in that he, knowingly committed an act of sexual penetration upon [T.K.], to wit: contact between Willie Williams's penis and [T.K.'s] mouth, by the use of force or threat of force, and he displayed a dangerous weapon, other than a firearm, to wit: a knife." Count 7 similarly alleged that he committed aggravated criminal sexual assault based on penetrating T.K.'s vagina while displaying a knife. At trial, the defense theory was that defendant and T.K. engaged in consensual sex acts.

¶ 5 T.K., then 40 years old, testified that on the afternoon of September 7, 2009, she went to a barbeque a few blocks away from her home and lost her money playing cards. Once it was dark out, T.K. left with a girlfriend and they walked toward 86th Street and Manistee to meet a male friend of the latter woman. When the women arrived at their destination, T.K. decided to walk to her cousin Demetrius's house. To get there, she walked through residential streets toward Commercial Avenue, which was a busy street where she had previously been arrested for possession of a controlled substance. T.K. further testified that she had been convicted of possession of a controlled substance in April 2007, and again in March 2008, but had since moved on from that part of her life.

¶ 6 On the day in question, T.K. was carrying two dime bags of crack, a crack pipe, a lighter, napkins and tampons, as she was menstruating at that time. In addition, she wanted to dispose of her controlled substance contraband before she reached Commercial Avenue. As she walked through a dark gangway, she smoked some of the crack but was not high. At some later point, she discarded the rest of the crack. T.K. then threw down her pipe, and walked through a gate at the back of a gangway into a well-lit alley, where she saw defendant, a black man wearing a bright-colored baseball hat and sweatshirt.

¶ 7 T.K. attempted to walk away but defendant told her to "come here." When T.K. turned to her right, defendant was already standing behind her and grabbed her while holding a knife close to her body. T.K. testified that she feared for her life. After defendant walked T.K. to a garage, he told her to get on her knees. When she responded that she could not do so due to a bad knee, he had her sit on the pavement and sat down next to her. Defendant then placed the knife on his lap and told T.K. to "suck his dick." He grabbed T.K.'s hair and pushed her toward his penis. In addition, he forced her to put her mouth on his penis, which she did because the knife was pointed near her face. Defendant then told T.K. to get on her knees and pull her pants down. As a result, T.K.'s elbows and knees became scratched by rocky pavement. Defendant tried to force his penis inside of her but it did not work because he lost his erection. Defendant said, "Look what you did, bitch. Now you're going to have to suck it again." After T.K. complied, defendant required her to get back on her knees and he forced his penis inside her. Afterward, defendant walked away.

¶ 8 T.K. removed the tampon that had remained inside her during intercourse and wiped herself off with tissues. She also spit on the ground. Upon exiting the alley, T.K. saw a police officer. She got the attention of the police but then saw defendant. After T.K. told the police

that defendant had sexually assaulted her, this information was radioed to other officers down the street, who stopped defendant. In addition, T.K. described defendant and told the police that he had a knife. From a short distance away, she watched as officers recovered the knife. She subsequently identified defendant and returned with the police to the crime scene to point out where the incident occurred, where she spat on the ground, and where she threw the tampon and tissue. After a sexual assault kit was completed at the hospital, T.K. went to the police station and told Detective Russel Sutherland what happened. She did not, however, tell Detective Sutherland that she had consumed crack cocaine because she did not believe it was important at that time.

¶ 9 On cross-examination, T.K. testified that she had purchased her drugs before attending the barbeque. T.K. also denied telling two Assistant State's Attorneys (ASA) that the friend she left the barbeque with, Kim, had given her the crack. T.K. added that she had stored the crack inside her vagina along with her tampon, but later retrieved the crack and smoked less than half of it. She wanted to throw away the remainder because it was of poor quality. In addition, T.K. testified that she did not tell the officers every detail regarding the incident and denied telling detectives, among other things, that she took her tampon out before intercourse.

¶ 10 Officer Thomas Curran testified that at about 11:50 p.m. on September 7, 2009, he and Officer James Baier were in a marked squad car. Another squad car was in the area. While driving on Commercial Avenue, Officer Curran saw a black woman, who he subsequently learned was T.K., trying to get the officers' attention. When the officers stopped, the woman appeared to be very scared, frantic and disheveled. She said that she had just been sexually assaulted at knifepoint by a black man with an orange hat. She then pointed north of the officers' location and they directed her to get in the police car.

¶ 11 Other officers pulled up in another marked squad car. After Officer Curran explained the situation to those officers, the latter individuals drove north and stopped defendant, a black man wearing an orange hat. Officer Curran then drove to that location and observed the other officers pat defendant down, recovering a knife in the process. At that point, T.K. identified defendant as the person who had sexually assaulted her. The officers then took T.K. to the crime scene for the police to locate a few items before having a sexual assault kit performed at the hospital. In addition, Officer Curran observed that T.K. had cuts and bruises on her knees. Once the victim was finished at the hospital, the officers took her to the police station to be interviewed by detectives. At the station, Officer Carlos Barrera gave Officer Curran an orange hat and a knife, which Officer Barrera had recovered from defendant's back pocket. On cross-examination, Officer Curran testified that certain details were omitted from the police reports. He also testified that T.K. never said that she smoked crack prior to the incident or that she had a tampon in during the incident.

¶ 12 Officer Barrera testified that he and Officer Brad Nielsen were in a marked squad car when they encountered Officer Curran and Officer Baier. A woman, who had seemed frazzled and upset, had approached Officer Curran and his partner. She reported that she had been sexually assaulted at knifepoint. Officer Barrera did not talk to the victim directly, however. After the four officers spoke, Officer Barrera and his partner went looking for a black man with an orange hat and located defendant, who matched that description, within a couple of blocks. During a protective pat-down, Officer Barrera recovered a knife and placed defendant into custody. On cross-examination, Officer Barrera testified that when the officers approached defendant he was cooperative and did not try to run.

¶ 13 Nurse Lauvendar Moore testified that she met T.K. in the exam room at the hospital. During that conversation, T.K. said she was coming from a friend's house and took a shortcut through an alley when she was accosted by a man with a knife, who forced her to have oral and vaginal sex. On cross-examination, Moore testified that she did not administer any painkillers to T.K. and did not observe signs of trauma to her vagina or knees.

¶ 14 Dr. Elbert Smith also testified that when he met T.K. in the examination room, she said that a man had put a knife to her neck and forced her to have oral and vaginal sex. Dr. Smith's external examination revealed bruises on her knees. In addition, the pelvic exam did not reveal any cuts or tears but she was menstruating. Dr. Smith further testified that it was common for adult women not to have trauma in their vaginal area following an assault. On cross-examination, Dr. Smith testified that while he noted the trauma to T.K.'s knees on the assault kit's diagram, he failed to include that information on the physical exam sheet. The parties stipulated that the DNA from T.K.'s vaginal swabs matched defendant's DNA profile.

¶ 15 The State next presented the testimony of J.T., which the jury was instructed to consider with respect to defendant's motive, identity, *modus operandi* and propensity. J.T., then 35 years old, testified that at about 2 a.m. on November 4, 2008, she was walking alone to a gas station when she noticed defendant, who was wearing only shorts and a t-shirt, on the opposite side of the street. Defendant subsequently appeared next to J.T. and asked where she was going. When she responded that she was going to get cigarettes, he said, "No, you're not. You're going with me." Defendant put one arm around her shoulder, held a knife up to her neck, and walked her behind a building. He then led her down some steps under a porch. After requiring her to sit down, he said, "You're going to suck my dick." Defendant placed his penis in J.T.'s mouth while holding the knife in his right hand. J.T. complied but stopped when a car pulled up. Defendant

told her that she had better not say anything. When the people in the car went inside a building, defendant said, "Now I'm going to fuck you. Turn around." J.T. moved slowly, attempting to stall, but when defendant put the knife to her neck, she pulled her pants down and bent over. He then put his penis inside of her vagina while holding the knife. After a while, he ejaculated on the steps and left.

¶ 16 J.T. pulled up her pants and followed defendant from a short distance. J.T. asked a woman standing on the corner whether she had a phone because defendant had just sexually assaulted her. The woman did not have a phone but joined J.T. in following defendant. They ultimately encountered another man who had a phone. When the police arrived, J.T. saw defendant run through a gangway. The police got defendant to the ground and handcuffed him.

¶ 17 The police then took J.T. to the hospital but she did not give the police her real name at that time because she was on drugs and thought the police would not believe her. J.T. was also instructed to go to the police station the next morning but did not do so because she thought the police would not believe her. Over a year later, on February 18, 2010, detectives contacted J.T. and she spoke to them about what had happened. She told the police her real name and identified defendant from a lineup. J.T. further testified that she had been convicted of prostitution in 2012. On cross-examination, J.T. testified that she also had a 2003 felony conviction for retail theft. She did not remember telling the police that she used a different name due to her criminal background.

¶ 18 Defendant also presented the testimony of Officer Alexander. At about 2:15 a.m. on November 4, 2008, he and his partner Officer Mendez met J.T. while responding to a sexual assault call. J.T. relayed the incident but Officer Alexander's report did not indicate that J.T. said a car pulled up during the assault, that defendant told J.T. not to say anything or that J.T.

subsequently followed defendant. In addition, J.T. said she was walking home from the gas station when the offense occurred. After reviewing the arrest report, Officer Alexander further testified that he did not recover a knife from defendant upon his arrest.

¶ 19 Detective Edwin Dantes testified that he was assigned to investigate the sexual assault of J.T. and interviewed her, but his supplemental report did not state that she said a car pulled up while she was being assaulted. In addition, Detective Dantes did not recall J.T. saying that she followed defendant. J.T. eventually said she had lied about her name because she had a criminal record and thought the police would not believe her. Furthermore, she failed to come to the police station the day after the assault and defendant was released from custody. No knife was recovered.

¶ 20 Defendant, who had a prior aggravated domestic battery conviction, testified on his own behalf. On the night of September 7, 2009, he went for a walk after having a spat with his wife. He put a knife in his pocket because the neighborhood was dangerous. When he encountered T.K., he asked what she was doing. She said she had been playing cards, and was "fucked up." Defendant, who occasionally sought out prostitutes, inquired whether she wanted to make money "sex-wise" and she said yes. After groping each other to ensure that neither was a police officer, they walked to an alley. Defendant did not show her his knife, tell her that he had one, or force her to go down the alley. They stopped in front of a garage and defendant gave her $20. She gave him oral sex and they subsequently had vaginal intercourse. When he lost his erection, she resumed oral sex. After obtaining another erection, they again had vaginal intercourse but defendant lost his erection once more. Defendant then asked for his money back because he did not have an orgasm, but she said that was not her problem. At that moment, defendant took the knife out and demanded his money back. She then returned the $20 and defendant walked away.

¶ 21 A couple blocks later, police officers asked defendant to approach their car and asked whether he and his girlfriend had been in a fight. Defendant responded that he and his wife had had an argument but he did not think she would call the police for that. The police retrieved his knife, put him in the back of the police car and subsequently had him exit the car. The police then told defendant that he had been identified and took him to the police station, where he described what had happened. Defendant told the police that he had vaginal intercourse with T.K. but his DNA would not be in her vagina because he did not ejaculate. He also told the police that he got his money back but never stated that he ordered T.K. to finish at knifepoint.

¶ 22 Defendant similarly testified that he engaged in consensual sex acts with J.T. Defendant had been walking around ingesting crack when he saw J.T. He did not have a knife at that time. When defendant approached her, she agreed to "get high" and have sex. Defendant's understanding was that they had agreed to have sex in exchange for crack. In a stairwell off of an alley, J.T. gave defendant oral and vaginal sex. Defendant did not force J.T. to have sex or display a knife but acknowledged that she had agitated him because she asked for money afterward. He responded that he had not planned on giving her money because they had agreed that he would pay her with drugs.

¶ 23 When defendant walked away, J.T. walked behind him. She also stopped to talk to a woman who was a known drug addict. Defendant himself then purchased some drugs from Slick, the neighborhood drug dealer, and went into an alley to get high. Because he was high, he panicked when the police appeared. He ran but the police arrested him. Defendant ultimately told the police that he gave J.T. drugs and denied her request for monetary compensation.

¶ 24 On cross-examination, defendant testified that his knife remained in his back pocket while having sex with T.K. He took out his knife to make sure T.K. knew he was serious about

getting his money back, but did not threaten her. In addition, defendant denied telling Detective Sutherland and ASA Holly Kremin that T.K. stopped so he pulled out a knife and ordered her to finish. Defendant told them that his DNA would not be in T.K.'s vagina but did not deny having sex with her.

¶ 25 Detective Sutherland then testified that he spoke to T.K. at the hospital and again at the police station. He subsequently prepared general progress reports and a supplementary report. T.K. did not say that after playing cards, she accompanied another woman to get crack or say that T.K. smoked crack before reaching Commercial Avenue. In addition, T.K. did not mention that defendant had a knife on his lap while they sat next to each other. She had said, however, that defendant forced her to have oral sex. T.K. had also stated that she took her tampon out before having vaginal sex. On cross-examination, Detective Sutherland testified that when he spoke to T.K. at the hospital and at the police station she was upset. He also spoke to defendant, who denied that he had vaginal sex with T.K. and said that his DNA would not be in her vagina. Instead, defendant said that he gave T.K. $20 in exchange for oral sex but she stopped abruptly so he pulled out his knife and ordered her to finish. Defendant did not say that he demanded his money back and Detective Sutherland had not found $20 in defendant's clothing. On redirect examination, Detective Sutherland acknowledged that defendant's statement had not been recorded. The parties then stipulated that T.K. told ASA Sabra Ebersole and ASA Tene McCoy-Cummings that T.K.'s friend Kim gave her crack on the night in question.

¶ 26 Detective Dantes also testified in rebuttal that defendant never said J.T. asked for money. On cross-examination, Detective Dantes testified that defendant said they had consensual sex in exchange for crack. ASA Kremin also testified in rebuttal that defendant said he and T.K. agreed to have oral sex in exchange for $20, which defendant gave her. Defendant said that

when T.K. stopped during oral sex, he pulled out a knife and ordered her to finish. ASA Kremin further testified that defendant denied having vaginal sex with T.K. and said his DNA would not be found in her vagina. He never said that he displayed his knife and demanded his money back.

¶ 27 The jury found defendant guilty of aggravated criminal sexual assault by placing his penis in T.K.'s mouth, and by placing his penis in her vagina. The trial court sentenced defendant to two consecutive 21-year prison terms.

¶ 28 II. ANALYSIS

¶ 29 A. Jury Instructions

¶ 30 On appeal, defendant asserts the trial court erred by failing to give certain jury instructions. The State correctly responds that defendant forfeited these issues by failing to tender the desired instructions, object, or raise these issues in his posttrial motion. The parties, rather than the trial court, have the burden of preparing jury instructions. *People v. Parker*, 223 Ill. 2d 494, 507 (2007). Thus, an appellant cannot challenge the court's failure to give an instruction unless he tendered it. *Id*. Similarly, a defendant forfeits review of an erroneous jury instruction if he fails to object or offer an alternative, or fails to raise the issue in his posttrial motion. *People v. Sargent*, 239 Ill. 2d 166, 188-89 (2010).

¶ 31 Notwithstanding defendant's forfeiture, he contends that plain error occurred. The plain error doctrine permits a reviewing court to address unpreserved error where (1) a clear error occurred and the evidence is so closely balanced that the error could tip the scales of justice against the defendant, regardless of how serious the error was, or (2) a clear error occurred and the error is so serious that if affected the fairness of the trial and challenged the judicial process's integrity, regardless of the closeness of the evidence. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 44. In addition, defendant has the burden of persuasion under both prongs. *People v.*

Lopez, 2012 IL App (1st) 101395, ¶ 62. There must be error, however, in order to find plain error. *Anderson*, 2012 IL App (1st) 103288, ¶ 45. Accordingly, we first consider whether the trial court erred by failing to give any of the instructions that defendant contends were required.

¶ 32 1. Aggravated Criminal Sexual Assault

¶ 33 Defendant presents two separate but related arguments in support of his contention that the aggravated criminal sexual assault instruction given to the jury was incomplete. He contends that the instruction did not accurately state the law because the instruction did not inform the jury that the State was required to prove beyond a reasonable doubt that T.K. did not consent. In addition, defendant argues that Illinois Pattern Jury Instructions, Criminal, No. 11.58 (4th ed. 2000) (hereinafter, IPI 11.58) required the court to so instruct the jury. While jury instructions are generally reviewed for an abuse of discretion, we review *de novo* whether the applicable law was accurately conveyed. *Anderson*, 2012 IL App (1st) 103288, ¶ 34. Both of defendant's arguments require us to address the offense at issue and the defense of consent.

¶ 34 The aggravated criminal sexual assault statute states, in pertinent part, as follows:

> "(a) A person commits aggravated criminal sexual assault if that person commits criminal sexual assault and any of the following aggravating circumstances exist during the commission of the offense ***:
>
> (1) the person displays, threatens to use, or uses a dangerous weapon, other than a firearm, or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon." 720 ILCS 5/11-1.30(a)(1) (West 2012) (formerly 720 ILCS 5/12-14(a)(1) (West 2010)).

It follows that one must commit criminal sexual assault in order to commit aggravated criminal sexual assault. *People v. Denbo*, 372 Ill. App. 3d 994, 1004 (2007). In addition, "[a] personal commits criminal sexual assault if that person commits an act of sexual penetration and *** uses force or threat of force." 720 ILCS 5/11-1.20(a)(1) (West 2012) (formerly 720 ILCS 5/12-13 (West 2010)). Section 11-1.70(a) (formerly 720 ILCS 5/12-17(a) (West 2010)) states, however, that "[i]t shall be a defense to [aggravated criminal sexual assault] where force or threat of force is an element of the offense that the victim consented." 720 ILCS 5/11-1.70(a) (West 2012). Section 11-1.70(a) also provides that consent involves "a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent." 720 ILCS 5/11-1.70(a) (West 2012). Thus, force and consent are two sides of the same coin. See *People v. Rollins*, 211 Ill. App. 3d 86, 91 (1991).

¶ 35 In *People v. Haywood*, 118 Ill. 2d 263, 274 (1987), our supreme court found that a victim's consent is relevant to determining whether criminal sexual assault occurred. The court stated:

> "In common understanding, if it is said that one was forced to perform an act, it follows that the person's act was nonconsensual; and if one freely consents to the performance of an act upon oneself, clearly that person has not been forced. Thus, although the prosecution is not required to prove nonconsent formally, it is obvious that if the prosecution shows that there was an act of sexual penetration by force, that evidence demonstrates that the act was nonconsensual. To prove the element of force is implicitly to show nonconsent. *Too, if force is established it would be redundant to require a separate showing of nonconsent as part of the prosecution's case in chief.* Thus, consent

> is made a defense to be raised by the accused to rebut evidence of force presented by the State. *It is clear from the legislative debates, however, that if the accused raises a question of the consent, the State has a burden of proof beyond reasonable doubt on the issue of consent as well as on the issue of force*." (Emphases added.) *Id.*

As reflected in *Haywood*, the State has the burden of proving beyond a reasonable doubt the element of force and, if the defendant raises consent as a defense, that the victim did not consent. *Denbo*, 372 Ill. App. 3d at 1005. If the State proves force, however, it necessarily proves non-consent as well. *Id*. Notwithstanding the relationship between force and non-consent, two panels of the appellate court have disputed what instruction must be given to accurately convey the law. While the two cases discussed this issue in terms of whether plain error occurred, it is questionable whether the issue would have been more appropriately framed in terms of whether error occurred at all.

¶ 36 In *People v. Coleman*, 166 Ill. App. 3d 242, 243, 248 (1987), the appellate court found that plain error occurred where the trial court did not instruct the jury that the State was required to prove the victim's lack of consent beyond a reasonable doubt in order for the jury to find the defendant guilty of aggravated criminal sexual assault. In reaching this conclusion, the reviewing court relied on the aforementioned language in *Haywood*. *Id*. at 246-47 (citing *Haywood*, 118 Ill. 2d at 274). We further note that while the reviewing court found plain error occurred, the court did not consider the two prongs of the plain error test.

¶ 37 In *People v. Roberts*, 182 Ill. App. 3d 313, 316, 318 (1989), a different panel of the appellate court reached the opposite conclusion. The appellate court stated, "Consent is the very antithesis of force. Where the State proves defendant used force, it necessarily proves the victim did not consent." *Id*. at 317. Like *Coleman*, *Roberts* found the aforementioned language in

Haywood supported its decision. *Id*. at 317-18 (citing *Haywood*, 118 Ill. 2d at 274). In addition, the *Roberts* decision essentially found the instructions adequately stated the law because the jury was allowed to weigh evidence of force against evidence of consent to determine whether the State had proved force. *Roberts*, 182 Ill. App. 3d at 318. In reaching its decision, the court expressly disagreed with *Coleman*. *Id*. at 318-19. We further note that like *Coleman*, *Roberts* did not apply the two prongs of the plain error doctrine to the error alleged.

¶ 38 Notwithstanding certain imprecise analysis in both *Coleman* and *Roberts*, we find that the reasoning of *Haywood* and *Roberts* compel the determination that jury instructions need not explicitly articulate that the State has the burden of proving the victim's lack of consent beyond a reasonable doubt. If a jury has been instructed that the State has the burden of proving the defendant's use of force beyond a reasonable doubt, the jury has also been instructed by clear and obvious implication that the State has the same burden with respect to the absence of consent. No more is necessary to accurately convey the law. To hold otherwise, as *Coleman* did, would interject redundancy into otherwise clear instructions. See also *People v. Springs*, 51 Ill. 2d 418, 424 (1972) (the defendant claimed that redundant instructions would confuse the jury). We further note that the jury was informed that consent was a defense to the charged offenses, that it was the State's burden to prove defendant's guilt beyond a reasonable doubt and that defendant's presumption of innocence remained with him at all times. Considered as a whole, the jury instructions fully, fairly and comprehensively informed the jury of the relevant law. *Parker*, 223 Ill. 2d at 501; see also *People v. Bannister*, 232 Ill. 2d 52, 81 (2008) (finding that the accuracy of jury instructions does not depend on whether counsel can imagine a problematic reading; rather, the question is whether ordinary jurors would fail to understand the instructions).

¶ 39 This does not end our inquiry, however, as defendant contends that IPI 11.58 requires a different result. "Whenever Illinois Pattern Jury Instructions, Criminal, contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI Criminal instruction shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013); see also *People v. Hopp*, 209 Ill. 2d 1, 7 (2004). As a result, if the trial court determines that the jury should be instructed on a subject it generally must use any available IPI. In addition, committee comments to IPIs do not constitute the law but the trial court is permitted to deviate from the suggested instruction only where necessary to reflect unusual facts or new law. *People v. Banks*, 287 Ill. App. 3d 273, 280 (1997). This is because IPIs have been drafted with great care. *Anderson*, 2012 IL App (1st) 103288, ¶ 40. Trial court judges should not second-guess the drafting committee where an IPI clearly applies. *People v. Durr*, 215 Ill. 2d 283, 301 (2005). Furthermore, error occurs when the trial court fails to give an IPI that a committee note makes necessary. *Hopp*, 209 Ill. 2d at 7.

¶ 40 IPI 11.58 states, in pertinent part, as follows:

> "To sustain the charge of aggravated criminal sexual assault, the State must prove the following propositions:
>
> * * *
>
> Second Proposition: That the act was committed by the use of force or threat of force."

This reflects the instruction submitted to defendant's jury. As defendant asserts, however, the committee notes to the IPI provide additional language. "When force or the threat of force is an element of the offense and the defense of consent is raised by the evidence, it is necessary under

People v. Coleman, 166 Ill. App. 3d 242, 520 N.E.2d 55, (1st Dist.1987), to give the bracketed portion of the first alternative Second Proposition." IPI 11.58. With the aforementioned bracketed language, the second proposition would provide that the State must prove "the act was committed by the use of force or threat of force, *and* that [the victim] did not consent to the act of sexual penetration." (Emphasis added.) IPI 11.58. The committee notes also acknowledge, however, that a view contrary to *Coleman* exists. Specifically, the committee notes state, "for a contrary discussion, see *People v. Roberts*, 182 Ill. App. 3d 313, 537 N.E. 2d 1080 (1st Dist.1989), where the court held that it was not plain error to omit the instruction on consent because proof of force implicitly establishes lack of consent."

¶ 41 We find the committee notes merely acknowledge a split in authority and that the particular authority to which a trial court subscribes, *Coleman* or *Roberts*, may or may not require the jury to be instructed that the State has the burden of proving the victim's lack of consent. *Cf. Rollins*, 211 Ill. App. 3d at 88-89 (finding that the committee note recommended that the jury be instructed that the State must prove lack of consent where force is an element and the defense of consent is raised, and agreeing with the State's concession that error occurred). In addition, when the Assistant State's Attorney in this case noted the split of authority, Judge Crane stated,

> "It seems to me that by the use of force in this case that implicitly indicates there's no consent. If they find it's by force - - I don't find it by consent. They have to find it by force under those circumstances. I believe the instruction that's been provided is appropriate***."

Keeping in mind our supreme court's directive that we not second-guess the drafting committee, we also note that it would be curious indeed if the committee were to determine that *Coleman*, which was issued before *Roberts*, controlled. We find no error.

¶ 42 Even assuming error occurred, we reject defendant's assertion that this would satisfy the second-prong of the plain error doctrine, that a serious error affected the fairness of the trial and challenged the judicial process's integrity. See *People v. Thompson*, 238 Ill. 2d 613-14 (2010) (equating this prong with structural error). While jury instructions may implicate substantial rights, a *de minimis* jury instruction error does not always violate those rights. See *Durr*, 215 Ill. 2d at 297, 301 (finding a jury instruction error to be *de minimis* so that it did not cause a severe threat to the trial's fairness or result in fundamental unfairness); see also *People v. Washington*, 2012 IL 110283, ¶¶ 58-59 (finding that the failure to instruct the jury on second-degree murder was not structural error). In addition, this court has held that noncompliance with an IPI does not constitute error so serious that it affects the fairness of the defendant's trial where the trial court accurately conveyed the law. *Anderson*, 2012 IL App (1st) 103288, ¶¶ 47, 52; see also *Sargent*, 239 Ill. 2d at 191 (observing that this particular standard is difficult to satisfy).

¶ 43 As stated, we have found that the jury instructions accurately conveyed the law in this instance. Accordingly, defendant cannot show that second-prong plain error occurred. See also *Rollins*, 211 Ill. App. 3d at 89 (finding that the *Roberts* approach in considering all of the instructions to determine whether plain error occurred was more appropriate than the *Coleman* approach, which adopted a *per se* rule of grave error). In reaching this determination, we are unpersuaded by defendant's contention that the Illinois Constitution requires a different result, absent citations to Illinois case law interpreting the relevant constitutional provision, as opposed

to case law from Mississippi. *People v. Kronenberger*, 2014 IL App (1st) 110231, ¶ 43 (we are not bound by other jurisdictions' decisions.).

¶ 44 2. Criminal Sexual Assault

¶ 45 Next, we agree with defendant's assertion that the trial court erred by failing to give the jury Illinois Pattern Jury Instructions, Criminal, No. 11.55 (4th ed. 2000) (hereinafter, IPI 11.55), which defines criminal sexual assault. The jury was tendered the pattern instruction that defined aggravated criminal sexual assault. Illinois Pattern Jury Instructions, Criminal, No. 11.57 (4th ed. 2000) (hereinafter, IPI 11.57). In addition, the committee note to that instruction unequivocally states, "Give Instruction 11.55." IPI 11.57. This committee note clearly made it necessary for the trial court to give IPI 11.55. Accordingly, error occurred. *Hopp*, 209 Ill. 2d at 7.

¶ 46 Once again, however, we reject defendant's suggestion that this amounted to second-prong plain error. As applied to the facts of this case, IPI 11.55 would have required the following instruction: "A person commits the offense of criminal sexual assault when he commits an act of sexual penetration upon the victim by the use of force or threat of force." While the jury was not given IPI 11.55, it was given IPI 11.58:

> "To sustain the charge of aggravated criminal sexual assault, the State must prove the following propositions:
>
> First: That the defendant committed an act of sexual penetration upon [T.K.]; and
>
> Second: That the act was committed by the use of force or threat of force; and
>
> Third: That the defendant displayed a dangerous weapon."

Thus, the definition of criminal sexual assault set forth in IPI 11.55 was encompassed within the issue instruction for aggravated criminal sexual assault and the law was accurately conveyed to

the jury. Under the circumstances of this case, where defendant was in possession of a knife at the time he was arrested and he himself admitted to police that he took the knife out during his encounter with T.K., albeit according to defendant to demand his money back, the error in the trial court's failure to instruct the jury on the lesser-included offense of criminal sexual assault was not so serious that if affected the fairness of the trial and challenged the judicial process's integrity.

¶ 47 3. Witnesses' Other Crimes

¶ 48 We further reject defendant's assertion that reversible error occurred because the trial court failed to give the jury Illinois Pattern Jury Instructions, Criminal, No. 3.12 (4th ed. 2000) (hereinafter, IPI 3.12), which governs impeachment of a witness by prior conviction. That IPI states, "[e]vidence that a witness has been convicted of an offense may be considered by you only as it may affect the believability of the witness." IPI 3.12. In addition, the committee note to IPI 3.12 states, "[t]his instruction should be given only when there has been impeachment of a witness by proof of a prior conviction." Defendant asserts that this instruction should have been tendered to the jury because T.K. testified that she had two prior possession of a controlled substance convictions, and because J.T. testified that she had felony convictions for retail theft and prostitution.

¶ 49 Initially, we find defendant's argument to be disingenuous. Defendant has nothing to gain by restricting how the jury may consider T.K. or J.T.'s prior convictions. In addition, T.K. testified regarding her prior convictions on direct examination. J.T. similarly testified on direct examination that she had a prior conviction for prostitution. Accordingly, their testimony regarding those prior convictions were not, strictly speaking, impeaching and defendant has not shown error. Conversely, J.T.'s conviction for retail theft was impeaching. Assuming that

conviction required the court to give IPI 3.12, however, any error did not rise to second-prong plain error.

¶ 50 Defense counsel argued in closing that the prior convictions of T.K. and J.T. made their testimony unreliable, thereby informing the jury how to consider those prior convictions. In addition, the jurors were instructed that they were to determine a witness's believability and the weight to be given to her testimony based on, among other things, "the reasonableness of [her] testimony considered in the light of *all the evidence in the case*." (Emphasis added.) The evidence in this case included testimony regarding the witnesses' prior convictions. As a result, the jury was effectively instructed that it could consider a witness's prior convictions as evidence of credibility, or lack thereof. Because the instructions as a whole accurately conveyed the law, we find no plain error, whether considered individually or cumulatively with any other error in the proceedings below. See *People v. Glasper*, 234 Ill. 2d 173, 215 (2009) (quoting *People v. Wood*, 341 Ill. App. 3d 599, 615 (2003)) ("The whole can be no greater than the sum of its parts." (Internal quotation marks omitted)).

¶ 51 4. Defendant's Other Crimes

¶ 52 Defendant also contends that because the court tendered to the jury Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI 3.14), which governs proof of a defendant's other offenses, the court erred by not also tendering, *sua sponte*, Illinois Pattern Jury Instructions, Criminal, No. 3.13 (4th ed. 2000) (hereinafter, IPI 3.13), which governs impeaching a defendant with prior offenses. The jury was instructed as follows:

> "Evidence has been received that the defendant has been involved in offenses other than those charged in the indictment.

This evidence has been received on the issues of the defendant's motive, identity, *modus operandi* and propensity and may be considered by you only for that limited purpose.

It is for you to determine whether the defendant was involved in those offenses and, if so, what weight should be given to this evidence on the issues of motive, identity, *modus operandi*, and propensity." IPI 3.14.

¶ 53 Defendant concedes that this IPI was properly given in so far as it applied to evidence of the alleged sexual assault of J.T. We also note that the jury received the same instruction prior to J.T.'s testimony and that the State argued in closing that this instruction applied to the assault of J.T. While evidence of other crimes is generally not admissible to demonstrate a defendant's propensity to commit crimes (*People v. Cortes*, 181 Ill. 2d 249, 282 (1998)), evidence of a defendant's commission of other sex offenses may be admissible to prove the defendant's propensity to commit sex offenses (see 725 ILCS 5/115-7.3 (West 2012); *People v. Beatty*, 377 Ill. App. 3d 861, 882 (2007)).

¶ 54 With that said, defendant argues that the jury should have also been tendered IPI 3.13, which would instruct the jury how to consider his aggravated domestic battery conviction. That instruction states, "Evidence of a defendant's previous conviction of an offense may be considered by you only as it may affect his believability as a witness and must not be considered by you as evidence of his guilt of the offense with which he is charged." The committee note to IPI 3.13 also states, however, that "[t]his instruction should be given only at the request of the defendant when there has been impeachment of the defendant by proof of a prior conviction."

¶ 55 We first note that defendant testified regarding his aggravated domestic battery conviction on direct examination. The State did not impeach him with that conviction on cross-examination. In addition, defendant did not request that the instruction be given. Based on the

committee note to IPI 3.13, defendant cannot fault the court for failing to give that instruction. While defendant contends that tendering IPI 3.14 triggered a duty to tender IPI 3.13, he offers no legal authority supporting that precise proposition, which is contrary to the committee note. We further note it is unlikely that the jury would consider defendant's aggravated domestic battery conviction as evidence of his propensity to commit a sex offense, given the differing nature of the two crimes. As a result, defendant has not demonstrated that reversible error occurred in this instance.

¶ 56 5. Closely Balanced Prong

¶ 57 Having determined that none of the alleged errors, individually or cumulatively, constituted second-prong plain error, we now reject defendant's contention that the evidence was closely balanced. The only material dispute in this case was whether penetration occurred with T.K.'s consent or, by force. T.K. testified that she was forced to engage in these acts of sexual penetration because defendant had a knife. In addition, Officer Curran, Officer Barrera and even defendant confirmed that he had a knife. While Nurse Moore did not observe signs of trauma to T.K.'s body, Dr. Smith testified that she had bruises on her knees. Officer Curran had similarly observed bruises on T.K.'s knees and added that her clothing and hair were disheveled, hardly the hallmarks of a voluntary participant. Detective Sutherland also testified that T.K. was upset. Moreover, J.T. testified to a similar experience in which defendant had forced her at knife point to engage in sex acts, notwithstanding that J.T. had initially withheld her name from the police and that no knife was recovered. Accordingly, T.K.'s testimony was corroborated by several witnesses, albeit not eyewitnesses. *Cf. People v. Naylor*, 229 Ill. 2d 584, 608 (2008) (finding the evidence to be closely balanced where two police officers and the defendant presented different accounts and no evidence corroborated either version); *People v. Ford*, 113

Ill. App. 3d 659, 661 (1983) ("When the outcome of a case depends on which of *two witnesses* the jury believes to be more credible, the evidence can be described as closely balanced." (Emphasis added.)). In contrast, no evidence corroborated defendant's testimony that the interaction between he and T.K. was purely consensual. According to both Detective Sutherland and ASA Kremin, defendant said that when T.K. failed to finish performing oral sex, defendant pulled out a knife and ordered her to continue. The evidence here was not so closely balanced that any error could have tipped the scales of justice against him.

¶ 58 B. Ineffective Assistance of Counsel

¶ 59 Defendant further contends that counsel was ineffective for failing to ask that the jury receive the aforementioned instructions. In order to demonstrate that counsel was ineffective, a defendant must prove both that (1) counsel's decisions were objectively unreasonable, and (2) a reasonable probability exists that the result of trial would have been different but for counsel's deficiency. *Anderson*, 2012 IL App (1st) 103288, ¶ 53; see also *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010) (defense counsel's choice of jury instruction is generally considered to be a tactical decision, within counsel's discretion, which will not support a claim of ineffective representation).

¶ 60 As stated, the evidence presented was not closely balanced. It follows that even if trial counsel should have pursued additional instructions, the result of proceedings would not have been different. See *People v. Land*, 2011 IL App (1st) 101048, ¶ 117. As a result, defendant cannot show that counsel was ineffective.

¶ 61 C. Closing Argument

¶ 62 Finally, defendant asserts that the State committed prosecutorial misconduct during closing argument by inflaming the jury's passions. Defendant essentially argues that the State

urged the jury to consider defendant's punishment. The State responds that defendant forfeited this error because he did not provide a sufficiently specific basis for his objection below. Regardless of whether the alleged error was preserved, defendant has not demonstrated that reversal is warranted.

¶ 63 The trial court's determination regarding whether closing arguments were proper will not be reversed absent an abuse of discretion (*People v. Blue*, 189 Ill. 2d 99, 128 (2000)), but we review *de novo* whether the prosecutor's closing argument contained statements so egregious that a new trial is warranted (*People v. Wheeler*, 226 Ill. 2d 92, 123 (2007)). See also *People v. Luna*, 2013 IL App (1st) 072253, ¶ 125 (finding it is unclear whether a *de novo* or abuse of discretion standard applies to the review of closing arguments). Prosecutors are afforded wide latitude during closing argument and a reviewing court will examine both parties' closing arguments in their entirety to place the objected-to comments in context. *People v. Nowicki*, 385 Ill. App. 3d 53, 90 (2008). Arguments may comment on the evidence and all reasonable inferences there from. *Blue*, 189 Ill. 2d at 127. In addition, arguments may comment on the witnesses' credibility if based on the evidence. *People v. Young*, 2013 IL App (2d) 120167, ¶ 37. Furthermore, where a defendant's closing argument invites a response, he cannot complain that the prosecutor responded during rebuttal. *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 26; *People v. Chaban*, 2013 IL App (1st) 112588, ¶ 58.

¶ 64 With that said, argument that only inflames the jury constitutes error. *Blue*, 189 Ill. 2d at 128. Additionally, a prosecutor's pattern of intentional misconduct may so seriously undermine the judicial proceedings' integrity as to warrant reversal under the plain error doctrine. *People v. Johnson*, 208 Ill. 2d 53, 64 (2004). Misconduct during closing argument warrants reversal for a new trial where improper comments were a material factor leading to the defendant's conviction.

(*Wheeler*, 226 Ill. 2d at 123), but a defendant faces a substantial burden in attempting to obtain reversal on this basis (*People v. Moore*, 358 Ill. App. 3d 683, 693 (2006)). Sustaining a defendant's objection, and instructing the jury that closing arguments are not evidence, will generally cure any resulting prejudice. *People v. Desantiago*, 365 Ill. App. 3d 855, 866 (2006); see also *Blue*, 189 Ill. 2d at 131 (finding that the aforementioned instruction will not always cure the defect).

¶ 65 During closing arguments, defense counsel essentially argued that T.K. and J.T. were not credible. In rebuttal, the prosecutor argued as follows:

> "Ladies and gentlemen, everything about this case is consistent, is believable, and it is reliable. Ladies and gentlemen, we are asking you [to] stand up for [T.K.], believe her. We are asking you to put him down. We are asking you to stop him in his tracks. For [T.K.], for [J.T.].
>
> Ladies and gentlemen, we are asking you that he not be allowed to walk alone in the streets carrying a knife, waiting for his next prey. We are asking you that you stop him from putting his nasty penis in another woman's mouth."

The court immediately sustained defendant's objection. The State then continued, "We are asking that you find him guilty not because I have gotten loud, we are asking you to find him guilty because the facts that you heard from that witness stand were reliable and credible."

¶ 66 We find that the prosecutor's initial comments merely asked the jury to find the testimony of T.K. and J.T. to be credible and to find defendant's testimony to be incredible. This was a proper response to defense counsel's contrary argument and was not solely directed at inflaming the passions of the jury. In addition, defendant's suggestion that those comments improperly remarked on punishment is unfounded. We agree, however, that the prosecutor's next remarks

improperly urged the jury to speculate that defendant would engage in future sex offenses and to prevent defendant from doing so with their verdict. These comments only served to inflame the jury's passions.

¶ 67 Notwithstanding this impropriety, these isolated comments did not constitute a pattern of intentional misconduct and any prejudice was cured. As stated, the trial court immediately sustained defense counsel's objection. The jury was also instructed that it was not to concern itself with defendant's potential punishment and that the jury should not be influenced by sympathy or prejudice. In addition, the jury was instructed to disregard closing arguments that were not based on the evidence. Furthermore, after the trial court sustained defense counsel's objection, the ASA, apparently realizing she had gotten carried away, urged the jury to find defendant guilty because T.K. was reliable and credible, not because the ASA had "gotten loud." Thus, the State too told the jury to focus on the evidence. *Cf. People v. Williams*, 333 Ill. App. 3d 204, 213-14 (2002) (court's instruction that arguments were not evidence did not cure the defect where the State used unsupported cross-examination to impute a motive to defendant and continued in the same line of argument despite the court sustaining the defendant's objection). As a result, any prejudice resulting from the prosecutor's improper argument was cured, particularly in light of our prior determination that the evidence was not closely balanced. Defendant has failed to show that improper comments were a material factor leading to his conviction.

¶ 68 III. CONCLUSION

¶ 69 Defendant has not demonstrated that reversible error resulted from the instructions tendered to the jury or from the prosecutor's closing arguments. Accordingly, we affirm the trial court's judgment.

¶ 70 Affirmed.