2016 IL App (1st) 142071-U

FOURTH DIVISION
June 30, 2016

No. 1-14-2071

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. 12 CR 16488
	)	
MELCHOR LOPEZ,	)	Honorable
	)	John J. Hynes,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty of predatory criminal sexual assault of a child beyond a reasonable doubt; (2) the trial court did not err in admitting S.R.'s out-of-court hearsay statements under section 115-10 (725 ILCS 5/115-10 (West 2012)); and (3) the State exceeded the trial court's limited ruling to allow evidence of defendant's polygraph examination which prejudiced defendant and was reversible error.

¶ 2 Following an April 2014 jury trial, defendant Melchor Lopez was found guilty of predatory criminal sexual assault of a child and aggravated criminal abuse of S.R., aged 9. Defendant appeals, arguing that: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred in admitting out-of-court hearsay statements of S.R. under section

115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10 (West 2012)); and (3) the trial court in admitting evidence and argument relating to a polygraph examination.

¶ 3 Prior to trial, the State filed a motion for a hearing to admit testimony under section 115-10 (725 ILCS 5/115-10 (West 2012)). Section 115-10 provides for an exception to the hearsay rule and allows the admission of an out of court statement made by the child victim of certain sexual offenses complaining of the acts subject to prosecution to another person if: the trial court determines at a hearing that the time, content and circumstances of the statement provide sufficient safeguards of reliability; and the child testifies at trial or there is corroborative evidence of the act that is the subject of the statement. 725 ILCS 5/115-10 (West 2012).

¶ 4 The parties stipulated to the testimony of Maria Ramirez, a forensic interviewer at the All Our Children Advocacy Center (the Center). The stipulation stated that if called to testify Ramirez would state that she interviewed S.R. on August 7, 2012, at the Center, and the interview was recorded with working video equipment. Ramirez would identify a DVD of the interview as an accurate depiction of the interview. The trial court admitted the DVD of the interview into evidence.

¶ 5 Martha R. testified at the hearing that she is S.R.'s mother. S.R. was born on September 30, 2002. In August 2012, S.R. was 9 years old. Martha stated that when S.R. was not in school, she was watched by defendant and his wife in Burbank, Illinois. Defendant is Martha's uncle, he is her father's brother.

¶ 6 On Friday, August 3, 2012, Martha dropped S.R. off at defendant's home around 7 a.m. Martha called S.R. around 4 p.m. and there was nothing unusual about S.R. during that call. She picked S.R. up around 5:45 p.m. Martha testified that she did not notice anything unusual about S.R. at that time or during the car ride to their home in Chicago.

¶ 7 Later that evening, Martha, her husband and S.R.'s father, and S.R. were watching a movie. S.R. suddenly got up from the couch, went to Martha's bedroom, and called for Martha to come to her. Martha went to the room and closed the door. She stated that S.R. appeared scared and nervous, that S.R. was rubbing her hands in a nervous way. Martha asked S.R. what was going on. S.R. told Martha that defendant was massaging her body and his hands went inside her pants and underwear. He touched her "private part" and put his finger inside.

¶ 8 Martha stated that she did not interrupt S.R. as S.R. told her this information. Martha said S.R. was scared and crying. S.R. said after defendant put his finger inside, he went to the bathroom. He then told S.R. not to tell anyone and not to let anyone touch her. Martha said S.R. asked why did he touch her if he told her not to let anyone touch her.

¶ 9 Martha testified that when S.R. finished, she asked S.R. some questions. She asked if S.R.'s clothes were on, and S.R. said she had her clothes on. Martha asked if defendant's clothes were on, and S.R. said his clothes were on. Martha asked if this had happened before, and S.R. said no. Martha then called for her husband to come into the room. S.R. told her father what happened. Martha stated that S.R. repeated the same information as she had told Martha. S.R. was still crying at this time.

¶ 10 After S.R. finished, Martha and her husband spoke outside of S.R.'s presence and decided to call the police. The Chicago police arrived, but told them that they needed to go to Burbank police station because the events happened in Burbank. They left and went to Burbank to make a report. While at the police station, Martha and her husband each spoke to police outside of S.R.'s presence. The following day, Martha took S.R. to Christ Hospital for an examination. Martha stated that the medical personnel spoke to her only. On August 7, 2012, Martha took S.R. to the

Center for an interview. Martha testified that she did not discuss S.R.'s allegations against defendant any further and did not tell her what to say at the Center.

¶ 11 The videotaped interview of S.R. by Ramirez at the Center from August 7, 2012, was also admitted into evidence. In the video, Ramirez explains the interview process to S.R. S.R. told Ramirez that defendant had been babysitting her since she was in kindergarten because defendant's house was across from her old school. On the previous Friday, S.R. said that she asked defendant to massage her back. She said that she was lying on the floor and defendant was sitting next to her. S.R. stated that after defendant was massaging her arms and feet, his hand went inside her "panties" and touched her. Ramirez asked S.R. to show how his hand was positioned. S.R. held her hand out with palm down, saying that his hand was in that position when he put it inside her underwear. S.R. said a finger touched inside the area where she goes to the bathroom. S.R. told Ramirez that her mother called at 4 p.m., and that the touching took place after the phone call, but before her mother picked her up around 5:50 p.m.

¶ 12 S.R. told Ramirez that after the touching, defendant went to the kitchen to wash his hands. When he came back to the room, she said he told her not to tell anyone and not to let anyone touch her. S.R. said she responded, "yeah," to defendant, but she knew she would tell someone about the touching. S.R. said she told her mother that night when they were watching a movie. Ramirez asked S.R. to show the positions she and defendant were in when the touching occurred using dolls. S.R. demonstrated that she was lying on her back while defendant was sitting toward her on the floor.

¶ 13 Following the hearing, the trial court granted the State's motion to admit S.R.'s hearsay statements under section 115-10.

¶ 14 The following evidence was admitted at defendant's April 2014 jury trial.

¶ 15 Martha testified substantially similar to her testimony at the section 115-10 hearing regarding S.R.'s outcry of the allegations against defendant and the family's subsequent actions reporting defendant.

¶ 16 S.R. testified that at the time of the trial, she was 11 years old. Her birthday is September 30, 2002. She stated that she knew defendant, that he was her mother's uncle. She called him "Tio." During the summer of 2012, defendant babysat S.R. while her parents were at work.

¶ 17 On August 3, 2012, S.R. was dropped off at defendant's house that morning. Initially, defendant's wife and his adult children were there as well, but later it was just defendant, S.R., and two of defendant's young granddaughters. Around 4 p.m., S.R. spoke with her mother on the phone. She was wearing jeans and a tee shirt.

¶ 18 Later, S.R. was in the living room and asked defendant to massage her legs because she had "growing pains." She was lying down on her back and defendant was sitting down on her right side. Defendant then rubbed her calves, and his hand moved up to her knees and thighs. She testified that he then asked her in Spanish if she wanted to "massage [her] private part." S.R. said she "mumbled words" in response because she "was afraid and like uncomfortable." S.R. stated that defendant "just did." She said he touched her stomach on top of her clothes. Defendant then moved toward her pants and he put his hand under her pants and underwear. S.R. testified that "private part" refers to "the front part of [her] body where you use the bathroom." When asked what she felt when defendant's hand was on her private part, S.R. said "sort of like fingers moving." S.R. stated she did not say anything while this happened because she was "afraid." She felt "uncomfortable" when defendant's hand was on her private part.

¶ 19 When defendant stopped, she got up and adjusted her pants because they had moved down a little. She moved to the couch. Defendant went to the kitchen and bathroom area. She

could not see those areas from where she was seated. S.R. said she heard water running, and defendant was "probably washing his hands." Defendant then returned to the living room. He told her not to let anybody do that to her. S.R. said she "wonder[ed] why because he just did." Afterward, they watched television until her mother arrived.

¶ 20 S.R. testified that she left with her mother. She did not tell her mother what happened while they were in the car because she "was waiting for the right time." She explained that she "didn't really know how to take care of that situation, so [she] was waiting." Her father came home and they had dinner. S.R. stated that after dinner they started a movie, and she started to cry. She went to her parents' bedroom and called for her mother. She said she went to her mother's bedroom because she wanted to tell her mother what happened to her that day. She testified that she told her mother what happened with defendant during the massage. She said her mother got "emotional," and called her father into the room. The police came and she later went to the Burbank police station.

¶ 21 S.R. stated that she went to the hospital the next day and the doctor took samples of different parts of her body. On August 7, 2012, she spoke with Ramirez at the Center. S.R. denied that anyone told her what to say. She denied anyone telling her what to say when she came to court that day.

¶ 22 Ramirez testified that she was employed at the Center as a bilingual forensic interviewer. She explained that during interviews, she is alone with the child in an interview room, the interview is recorded, and there is an observation room where people can watch. She stated that she met with S.R. on August 7, 2012. Prior to her interview, she spoke with a detective involved in the case. The video of the interview was played for the jury.

¶ 23 On cross-examination, Ramirez stated that S.R. told her that defendant did not say anything when he touched her. S.R. also said that defendant touched her with one finger.

¶ 24 Detective Luis Santoyo testified that he was employed with the Cook County Sheriff's Department Criminal Intelligence Unit. He is bilingual and fluent in Spanish. In August 2012, he received an assignment to assist the Burbank police department. He was tasked with interpreting from Spanish to English and English to Spanish for defendant. Detective Santoyo testified that he read defendant his *Miranda* rights in Spanish at approximately 12:50 p.m. on August 10, 2012. Detective Santoyo was asked by Detective Robert Michelson to transcribe defendant's statement in Spanish. Detective Santoyo wrote the statement in Spanish and reviewed it with defendant, allowing him to make corrections. The statement was admitted at trial. A Spanish interpreter read defendant's statement into the record.

¶ 25 In his statement, defendant admitted that on August 3, 2012, he was watching S.R. and two granddaughters in his home. He said S.R. fell from the couch and asked him to give her a massage. S.R. laid on the couch on her stomach. He massaged her collar bone, waist, legs, shoulders, and neck. S.R. then moved to be on her side, and defendant massaged the front of her legs and arms. When he started to massage her stomach, he "accidentally touched her vagina." He thought S.R. was uncomfortable and he did not want to continue with the massage because "it wasn't right because the massage is not to touch her noble parts." S.R. remained on the couch and defendant moved to the other couch. Defendant stated that S.R. did not say anything and everything seemed normal. Defendant said that S.R. was wearing jeans and a blue shirt. It was during the massage that his right hand touched S.R.'s vagina under her jeans and her underwear.

¶ 26 On cross-examination, Detective Santoyo testified that he did not speak with S.R. about the incident, but had spoken with other detectives. He thought defendant was in custody before

he arrived, but did not know how long defendant had been at the police station. Detective Santoyo stated that Spanish is his first language, but he was not a certified interpreter. He also served as an interpreter when defendant gave a statement to Assistant State's Attorney (ASA) Heather Kent.

¶ 27 ASA Heather Kent testified that in August 2012, she was assigned to the felony review unit of the State's Attorney's office. She was assigned to go to the Burbank police station on August 10, 2012. She spoke with Detective Michelson, and then defendant. Detective Santoyo was present and served as an interpreter.

¶ 28 ASA Kent gave defendant his *Miranda* rights, and explained that she was an attorney, but was not his attorney. Defendant agreed to speak with her. She asked defendant questions in English, Detective Santoyo translated them to Spanish, then defendant answered in Spanish and Detective Santoyo would translate to English. ASA Kent typed a statement on a computer and reviewed the statement when they finished. Defendant was permitted to make changes and corrections. ASA Kent published the statement to the jury.

¶ 29 In the statement, defendant stated that S.R. is the daughter of his niece Martha. He has been her babysitter for the past four years. On August 3, 2012, he was babysitting S.R. at his home from about 7:15 a.m. to 5:50 p.m. He was also babysitting two granddaughters, ages 2 years and 7 months. Around 4 or 5 p.m., they were watching television when S.R. asked defendant to give her a massage because she had fallen off of the couch, which he had done in the past.

¶ 30 S.R. laid down on her stomach. Defendant massaged her back and the back of her legs. S.R. shifted onto her side, and defendant massaged the front of her legs and shins. He started to massage her stomach in a circular motion. Then the fingers of his right hand touched S.R.'s

vagina. His hand went under her jeans and underwear while rubbing her stomach in a circular motion. He stated that he touched the outer part of S.R.'s vaginal lips. He said he touched her briefly and did not put his fingers inside S.R.'s vagina. He said the touching was an accident.

¶ 31 When he took his hand away, S.R. appeared normal. He stopped because he thought S.R. might be offended. He did not talk about what happened with S.R. and continued as if nothing had happened. Defendant did not tell anyone what happened.

¶ 32 Defendant stated that he gave an earlier statement to Detective Santoyo and Detective Michelson. Everything in that statement is true and correct, no one forced him to make the statement, and he gave the statement freely and voluntarily. On cross-examination, ASA Kent admitted that when she spoke with defendant, he had been in custody for 48 hours.

¶ 33 The State entered two stipulations into evidence. First, Dr. Scott Altman would testify that he was an emergency room physician at Christ Hospital on August 4, 2012. He examined S.R. and collected a sexual assault kit, but did not observe any abnormalities on her body or external genitalia. Second, Lyle Boicken would testify that he is a forensic scientist in the DNA section of the Illinois State Police Forensic Sciences Command and an expert in forensic biology. He received a sample taken from S.R. and after performing generally accepted tests, he was able to conclude within a reasonable degree of scientific certainty that no semen was present on the clothing or vaginal swabs. Also, that no human male DNA was detected on the vaginal swabs.

¶ 34 The State then rested. Defendant moved for a directed finding, which the trial court denied.

¶ 35 Defendant testified on his own behalf through a Spanish language interpreter. Defendant stated he was 54 years old and had 5 children. He was on disability following a workplace

accident. He had regularly babysat for S.R. for more than three years. On the day of the incident, he said it was a normal day. He was watching S.R. and two granddaughters.

¶ 36 At approximately 2:40 p.m., he prepared bottles for the little girls. He said S.R. was swinging herself on the large couch. S.R. told defendant she had fallen and asked defendant for a massage. Defendant did not see her fall. Defendant said S.R. "insisted" on a massage. He checked that she did not have any fractures in her arms, shin, and head. Then he massaged her arms, legs, and her stomach with circular movements. Defendant does not have any training in massage therapy, but when his children, nieces, and nephews have fallen, he has "massaged them and they have gotten better." Defendant stated that his hands did not go anywhere else during the massage. He denied that his hand or any part of his hand went inside S.R.'s pants. After the massage, they continued to watch television.

¶ 37 Defendant testified that a social worker from the Department of Children and Family Services came to his house the next day. He was contacted by the Burbank police department on Tuesday, August 7th. He agreed to go to the Burbank police station. Defendant stated that when he arrived at the station, Detective Michelson asked him to empty his pockets and then chained defendant to a wall. He was placed in a small room with no windows. He said Detective Michelson asked him what happened, and he said that S.R. fell from the couch and asked for a massage. He needed to be certain that she was well. Defendant said there were many conversations with police. He did not speak with another detective until the next day. Defendant said he was moved to a cell and kept there until Saturday in the morning.

¶ 38 Defendant admitted he signed his Spanish language statement, but said he signed "through pressure with the detective who was here yesterday. You may remember him. I believe his name is Santoyo." He testified that Detective Santoyo "suggested" to him, "Mr.

Lopez, you are not an idiot. These detectives already have you by the b****." According to defendant, Detective Santoyo then said, "If you accept that you touched her by accident nothing is going to happen and you will be able to leave." Defendant said he responded, "If you think it's fine like that, then put on there what you want because [he] was already very tired."

¶ 39 Defendant admitted that he also met with ASA Kent, but stated that he "could no longer say anything because they had already done it their way." Defendant testified that Detective Santoyo had "already composed it, he no longer had to interpret. He would tell her what she needed to type and if not, Michelson was there somewhere in the rear because there were various cubicles." Defendant stated "it was like a game of theirs." He would be told where to sign and where to place his initials. He testified that it was "much different" from what he accepted at the beginning, which is that Detective Santoyo told him that he touched her accidentally when defendant was touching her stomach. Defendant said Detective Santoyo told him, "you just accept, A******. Don't be stupid." Defendant denying touching S.R. inappropriately.

¶ 40 After defendant's direct examination, the prosecutor moved for a sidebar, which the trial court allowed. During the sidebar, the prosecutor asked for the trial court's approval to introduce evidence that defendant had been given a polygraph examination, in order to explain the circumstances around defendant's handwritten and typed statements. Over defendant's objection, the trial court granted the State's request to admit evidence related to the polygraph examination with limitations. The court allowed the State to elicit testimony that defendant agreed to take the polygraph, the first time they could schedule a polygraph was on August 10, and after the examination, Detective Santoyo informed defendant of the results, without going into the results. Defendant then gave a statement.

¶ 41 On cross-examination, defendant stated that S.R. and Martha lied about what happened. He also said that ASA Kent lied about the statement she took from him.

¶ 42 Defendant testified that on the afternoon of August 8, 2012, he was at home when Detective Michelson came to the house with Officer Guerra as a translator. He already knew some of the allegation because DCFS had contacted him. Defendant agreed to go to the police station. Defendant said that Officer Guerra was not present for every conversation at the police station. He said he can speak two or three words in English, but it is hard to get into a conversation.

¶ 43 When asked if he signed a Spanish language document, defendant stated he did not know if he went to the police station on August 7 or 8. Defendant admitted that he did not tell Detective Michelson during an interview on August 8 that he massaged S.R. after she fell from the couch. He denied that he told Detective Michelson and Officer Guerra that he massaged S.R.'s breasts and buttocks on top of her clothing. He said he told them that he did not touch S.R.'s vagina.

¶ 44 Defendant stated that he spoke with ASA Jeanne Kolasa, with help from Officer Perez to translate, around 9 p.m. on August 8, 2012. After this conversation, defendant agreed to take a polygraph examination. He testified that Officer Perez told him that the polygraph examination "result was not going to effect the result of the case." He took the polygraph examination on the afternoon of August 10, 2012. He met with Detective Rich Williams and Detective Santoyo. Defendant admitted that he signed a document indicating consent to conduct a polygraph examination, which was written in Spanish. After the polygraph, defendant said he spoke with Detective Santoyo, but they "never discussed the results of the polygraph." Defendant testified that Detective Williams told him, "I told you not to say any lies because you are not going to

beat the machine." Defendant said he only discussed the statement from Detective Santoyo regarding touching S.R. by accident.

¶ 45 Defendant testified that S.R., Martha, and Detective Santoyo were lying. He also said that ASA Kent did "a bad job because if she has experience and if she does her job, half on the computer and the other half free-hand, what is she doing?" Defendant stated there were times they would not interpret his typed statement. Defendant agreed he signed the statement.

¶ 46 On redirect examination, defendant testified that after the polygraph, Detective Santoyo said to him, "Mr. Lopez, you're not an idiot. These asses already have you by the b*** and they're going to f*** you up. It's better for you to accept that you touched her, accidentally, and everything is going to be fine." The defense rested after defendant's testimony.

¶ 47 In rebuttal, the State called Detectives Michelson and Santoyo. Detective Michelson testified that he was assigned to investigate the case on August 8, 2012. He met with defendant at his house that day with Officer Guerra to translate.

¶ 48 Detective Michelson stated that defendant was not under arrest when he came to the Burbank police station on August 8. He denied asking defendant to empty his pockets, nor did he chain defendant to a wall. He took defendant to an interview room, he closed the door, but the door was not locked. Detective Michelson testified that defendant told him that S.R. said her shoulder hurt and asked him to massage it. Defendant also told him that he touched the skin on S.R.'s stomach, and massaged her breasts and buttocks on top of her clothes. Detective Michelson stated that defendant did not tell him that S.R. fell from the couch and he massaged her arms and legs to check for fractures. Detective Michelson testified that defendant was placed into custody after that conversation. He contacted the felony review unit and subsequently met with ASA Kolasa.

¶ 49 Detective Michelson was present during a conversation between defendant and ASA Kolasa. Officer Pierre Perez was also present to translate. After that conversation, Detective Michelson then set up a polygraph examination. Defendant signed a consent form for the polygraph on August 9.

¶ 50 On cross-examination, Detective Michelson stated that the decision to take defendant into custody was made after he admitted to touching S.R.'s chest and buttocks. He said he was able to have "very limited" conversations with defendant.

¶ 51 Detective Santoyo was recalled to testify. He came to the Burbank police station to translate from English to Spanish. He arrived around noon on August 10 for the polygraph examination. He testified that Detective Williams conducted the examination, he translated. He advised defendant of his rights and defendant signed a form acknowledging his rights in Detective Santoyo's presence.

¶ 52 Detective Santoyo testified that after the polygraph examination, he advised defendant of the results. He denied telling defendant that he should say he touched S.R. accidentally and it will be fine. He did not hear Detective Williams tell defendant not to lie and he cannot beat the machine. Detective Santoyo stated that after they discussed the results, he told defendant that "this was his opportunity to explain himself." Detective Santoyo then testified that when he said this to defendant, he noticed defendant's "shoulders dropped and he dropped his head, as well." They continued the conversation and during that conversation defendant told him what happened on August 3. After that conversation, Detective Santoyo advised Detective Michelson. Detective Michelson asked him to translate. The handwritten statement was prepared at that time. Detective Santoyo stated that he was not an investigator in the case, and he did not know

the specifics of the case or the allegations made by S.R. He denied there were times he did not interpret while the typed statement was being prepared with ASA Kent.

¶ 53 On cross-examination, Detective Santoyo stated that he did not recall a time when he was alone with defendant. Following Detective Santoyo's testimony, the State rested in rebuttal.

¶ 54 The parties presented closing arguments. Following deliberations, the jury found defendant guilty of predatory criminal sexual assault and aggravated criminal sexual abuse. Defendant filed a motion for a new trial, which the trial court denied. Subsequently, the trial court sentenced defendant to 12 years in the Illinois Department of Corrections.

¶ 55 This appeal followed.

¶ 56 Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt. Specifically, defendant contends that S.R. made several inconsistent statements which created reasonable doubt as to his guilt. The State maintains that the record established that there was ample evidence to support defendant's conviction.

¶ 57 When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, our inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001). It is the responsibility of the trier of fact to "fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.*

¶ 58 The reviewing court must carefully examine the record evidence while bearing in mind that it was the fact finder who saw and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d

274, 280 (2004). Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Id*. However, the fact a judge or jury did accept testimony does not guarantee it was reasonable to do so. Reasonable people may on occasion act unreasonably. Therefore, the fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court. *Id*. Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330.

¶ 59 A person commits predatory criminal sexual assault of a child at the time the offense occurred "if that person commits an act of sexual penetration, is 17 years of age or older," and the victim is under 13 years of age. 720 ILCS 5/11-1.40(a)(1) (West 2012). "Sexual penetration" is defined as "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including, but not limited to, cunnilingus, fellatio, or anal penetration. Evidence of emission of semen is not required to prove sexual penetration." 720 ILCS 5/11-0.1 (West 2012).

¶ 60 Here, it is uncontested that defendant was over 17 years old and S.R. was under 13 years old at the time the offense occurred. Defendant's challenge to the sufficiency of the evidence focuses on S.R.'s testimony about the sexual assault. Defendant asserts that S.R.'s testimony contained several inconsistencies that created reasonable doubt. Defendant points to three inconsistencies between her trial testimony and prior statements. First, at trial S.R. testified that defendant gestured toward her vaginal area and asked if he should massage her there, but this

detail was not previously mentioned in her outcry to her mother or in her forensic interview with Ramirez. Second, S.R. testified that after the assault, defendant got up and went toward the kitchen and bathroom area, but did not see where he went. She stated that she heard water running. Previously, she had told her mother that defendant went to the bathroom to wash his hands, but in her forensic interview she said defendant went to the kitchen to wash his hands. Third, defendant contends that S.R. testified at trial that the touching lasted two to three minutes, but had previously said that the touching happened quickly. Defendant also argues that S.R.'s demeanor before the outcry to her mother was normal and nothing unusual, similarly S.R. appeared calm during her forensic interview.

¶ 61 " '[A] complainant's testimony need not be unimpeached, uncontradicted, crystal clear, or perfect in order to sustain a conviction for sexual abuse. [Citations.] Where minor inconsistencies or discrepancies exist in a complainant's testimony but do not detract from the reasonableness of her story as a whole, the complainant's testimony may be found to be adequate to support a conviction for sexual abuse. [Citations.]' " *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 84 (quoting *People v. Soler*, 228 Ill. App. 3d 183, 200 (1992)).

¶ 62 We do not believe that defendant's claims of inconsistencies in S.R.'s testimony make her testimony unbelievable, such that, the State failed to prove him guilty beyond a reasonable doubt. These inconsistencies do not detract from S.R.'s testimony and do not alter her allegations of sexual assault by defendant. We note that the jury was presented with these inconsistencies and heard S.R.'s testimony and was able to assess her credibility accordingly. "It is for the trier of fact to resolve any inconsistencies in the testimony, and the trier of fact is free to accept or reject as much or as little as it pleases of a witness' testimony." *People v. Logan*, 352 Ill. App. 3d 73, 80-81 (2004).

¶ 63 We observe that at the time of the offense S.R. was 9 years old and at trial, almost two years later, she was 11 years old. S.R.'s testimony remained consistent in the outcry to her mother, the forensic interview, and at trial, that during a massage by defendant, he put his hand under her jeans and underwear and touched her vagina. This testimony alone satisfies the definition of sexual penetration under the Criminal Code of 2012. The jury heard all of the inconsistencies alleged by defendant on appeal and was given the opportunity to assess S.R.'s credibility. After viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of the predatory criminal sexual assault beyond a reasonable doubt. For this reason, defendant's challenge to the sufficiency of the evidence must fail.

¶ 64 Next, defendant asserts that the trial court abused its discretion in allowing S.R.'s hearsay statements to be admitted at trial pursuant to section 115-10. According to defendant, the time, content, and circumstances of S.R.'s out-of-court hearsay statements did not provide sufficient safeguards of reliability. Specifically, defendant contends that S.R.'s statements to her mother and to Ramirez were inconsistent on numerous important factual details.

¶ 65 Initially, the State responds that defendant has forfeited this argument on appeal by failing to present it in his motion for a new trial. To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule "allows a reviewing

court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). However, the plain error rule "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the supreme court has held that the plain error rule is a narrow and limited exception to the general rules of forfeiture. *Id*.

¶ 66 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). In his reply brief, defendant asserts that the evidence at trial was closely balanced. However, "[t]he first step of plain-error review is to determine whether any error occurred." *Id*. We will review defendant's claim to determine if there was any error before considering it under plain error.

¶ 67 As we previously noted, section 115-10 provides for an exception to the hearsay rule and allows the admission of an out of court statement made by the child victim of certain sexual offenses complaining of the acts subject to prosecution to another person if: the trial court determines at a hearing that the time, content and circumstances of the statement provide sufficient safeguards of reliability; and the child testifies at trial or there is corroborative evidence of the act that is the subject of the statement. 725 ILCS 5/115-10 (West 2012).

¶ 68 "The determination as to whether the hearsay statements were sufficiently reliable so as to be admitted is committed to the discretion of the trial court and the court's decision will not be reversed absent a clear abuse of that discretion." *People v. Major-Flisk*, 398 Ill. App. 3d 491, 508 (2010) (citing *People v. Stechly*, 225 Ill. 2d 246, 312-13 (2007)). It is the State's burden, as the proponent of the evidence, to establish that the declarant's hearsay statements were reliable. *Id.* "A reliability determination is based upon the totality of the circumstances, but relevant factors include the child's spontaneity and consistent repetition, use of terminology unexpected of a child of similar age, lack of motive to fabricate, and the child's mental state." *Id.* at 508-09 (citing *Stechly*, 225 Ill. 2d at 313).

¶ 69 Here, S.R. testified at trial so the only question is whether the time, content, and circumstances provided sufficient safeguards of reliability. After hearing testimony from Martha and viewing S.R.'s forensic interview, the trial court considered the requirements under section 115-10. The court made the following findings on the record.

> "In the process of evaluating the statements here, the Court must conduct a two-part analysis. First, the Court must determine whether the statements qualify as a hearsay exception under 115-10, and then under the case of *Crawford v. Washington*, the Defendant's rights under the Sixth Amendment will be abridged by admitting the statements. Under the statute, 115-10, the Court looks to whether the statements qualify as a hearsay exception. The legislature lists certain factors. First, was the victim *** under the age 13 at the time of the incident?

In this case, I don't think there's any discrepancy that the victim was nine years of age at the time of the alleged incidents here.

The second criteria is whether the statements made by the victim describe any prior sexual acts against the victim. I think that it is clear from viewing the testimony of the victim here, [S.R.'s] mother Martha, and the victim sensitive interview that they --- the statements clearly describe a prior sexual act by the Defendant. The State has indicated before that the victim will testify. That's another one of the requirements under the statute.

And, finally, that at the hearing, the State has the burden of proving that the time, content, circumstances of the statement provide sufficient safeguards of reliability, and under the case law, the Court is looking for the totality of the circumstances to determine if there are sufficient safeguards for the reliability of these statements.

The case law also cites certain factors regarding to whether or not there's sufficient safeguards of reliability. They look at the consistent repetition; use of terms inconsistent with the child's age; lack of motive to fabricate; spontaneity of the statement and mental state of the victim and absence of use of video.

That last factor, it's clear there was a video prepared as part of this victim sensitive interview, so that's not at issue here.

Applying these factors to the case at bar here, regarding the factor consistent repetition, the victim made statements to her mother. These statements were consistent with the statements made to Maria Ramirez from the Child Advocacy Center. She repeated these statements to her father the evening of the incident. She also spoke with police and nurses at Christ Hospital.

The use and terms inconsistent with the child's age. I look at the Victim Sensitive Interview. This young girl appears to be very intelligent. She used terms appropriate for her age.

The Court has to look at the lack of motivation to fabricate. From the testimony here, there's no motivation to fabricate.

The spontaneity of the statements. The victim goes home right after this incident. She is watching TV with her mother and father. The evening she calls her mother into a bedroom, asks her mother to close the door. She says she's scared and nervous. She's ringing her hands. [*sic*] She relates these statements, the incident, to her mother. She is crying. Then she talks to her dad and she relates this information to her dad. And it's clear that she is, once again, a very intelligent young lady. She repeats this to the victim sensitive interviewer. Comfortable. She has a good recall of the facts and she has a good understanding of the time and place. These all go to her mental state. And she knows and can recount the approximate time of the incident, et cetera.

> Based on all of the testimony here and the exhibits, I find that – I have looked at the statute and the factors set forth in the statute, the Court find that the statements qualify as an exception to the hearsay rule under 115-10.
>
> Furthermore, since the victim is present here, there's no conflict or will be present at the hearing or the trial. There will be no confrontation problem under *Crawford v. Washington*. Consequently, the State's motion to admit the statements under 115-10 will be granted."

¶ 70 Defendant contends that the trial court erred in admitting the statements under section 115-10 because (1) S.R. did not immediately tell her mother, but waited a few hours; (2) S.R.'s statements to her mother and Ramirez were inconsistent; and (3) the circumstances failed to provide sufficient safeguards of reliability in that S.R.'s initial outcry came after watching a movie with her parents and being told not to watch a suggestive scene. Defendant also asserts that S.R. was crying and nervous when making the outcry to her mother, but appeared calm in the interview with Ramirez.

¶ 71 We reject defendant's contentions that S.R.'s hearsay statements did not provide sufficient safeguards of reliability of time, content, and circumstances. First, we find no merit in defendant's argument that the timing of S.R.'s outcry was unreliable. Martha picked up S.R. from defendant's home around 5:45 p.m. S.R. told her mother about defendant's touching her that evening. The passage of three to four hours is negligible. Courts have found delays of longer than two weeks acceptable in determining a statement's reliability under section 115-10. *Garcia*, 2012 IL App (1st) 103590, ¶ 101 (upholding admission of statements made two weeks

after the offense occurred) (citing *People v. Jahn*, 246 Ill. App. 3d 689, 704 (1993) (statements made nearly eight months after the incident); *People v. Anderson*, 225 Ill. App. 3d 636, 649 (1992) (statements made a month after the victim left the home of his abusers and after denying any sexual abuse more than 20 times over the course of a year)).

¶ 72 As for defendant's argument regarding the content of S.R.'s statements, he focuses on Martha's testimony that S.R. said defendant put his "hands" inside her pants, but in the interview S.R. said defendant put his "hand" inside her pants. The court in *Garcia* acknowledged the statements were "substantially consistent" when considering their content. *Id.* ¶ 98 (citing *People v. Sharp*, 391 Ill. App. 3d 947, 956 (2009)). Here, one variance between using plural and singular does not negate the substantial consistency between the statements to Martha and Ramirez. Further, the trial court heard both statements before reaching a decision.

¶ 73 We also are unpersuaded that the circumstances of S.R.'s initial outcry lacked sufficient safeguards of reliability. Defendant suggests that the outcry was precipitated by watching a suggestive scene in a movie, but fails to argue that S.R. was motivated to fabricate the allegations. The trial court specifically considered and rejected that S.R. had motivation to fabricate her statements. We further find defendant's claim that S.R.'s change in emotions unavailing. Defendant cites no authority suggesting that a calm demeanor in making a statement is unreliable.

¶ 74 Our review of the section 115-10 hearing shows that the State established its burden that the time, content, and the circumstances of S.R.'s statements to her mother and Ramirez satisfied the requirements of section 115-10 and the trial court did not abuse its discretion. S.R. first reported the sexual assault to her mother the evening the offense occurred on August 3. The interview occurred on August 7, after the sexual assault at the Center. The statements to Martha

and Ramirez were substantially consistent. The trial court made a detailed finding under section 115-10 and we hold that the trial court did not abuse its discretion in granting the State's motion to admit the statements under section 115-10.

¶ 75 Finally, defendant argues that the admission of polygraph evidence amounts to reversible error. Specifically, defendant asserts that the trial court erred when it allowed the State to elicit testimony that defendant submitted to a polygraph examination and indirectly suggested that defendant failed the polygraph examination. Defendant further contends that the prosecutor's comments in rebuttal closing argument made improper direct and indirect references to the polygraph examination and the results. The State maintains that the admission of this evidence and the closing arguments were proper.

¶ 76 The general rule in Illinois is to preclude the introduction of evidence regarding polygraph examinations and their results because (1) the evidence is not sufficiently reliable, and (2) the results may be taken as determinative of guilt or innocence despite their lack of reliability. *People v. Washington*, 363 Ill. App. 3d 13, 20 (2006) (citing *People v. Jefferson*, 184 Ill. 2d 486, 492-93 (1998)). "Polygraph evidence is generally inadmissible not only to prevent unfair prejudice to a defendant, but also to protect the integrity of the judicial process." *People v. Rosemond*, 339 Ill. App. 3d 51, 59 (2003). "Our supreme court has held that the prejudicial effect of admitting such evidence substantially outweighs its probative value, and that admission of the evidence constitutes ' "an unwarranted intrusion" into the trier of fact's role in determining the credibility of the witnesses.' " *Washington*, 363 Ill. App. 3d at 20 (quoting *People v. Jackson*, 202 Ill. 2d 361, 368 (2002), quoting *People v. Baynes*, 88 Ill. 2d 225, 244 (1981)).

¶ 77 In *Baynes*, the polygraph examiner testified at trial, without objection, that in his opinion the defendant had not answered the questions about the burglary of a vehicle truthfully. The

supreme court reviewed this admission of polygraph evidence for plain error. *Baynes*, 88 Ill. 2d at 234. The court reviewed the history in the creation and use of polygraph examinations leading to modern tests. "The polygraph measures and records blood pressure changes, respiration changes, pulse changes and changes in the skin's resistance to electricity. It too operates on the principle that the autonomous nervous system will respond to stressful conditions and that sympathetic parts of that system will respond involuntarily." *Id.* at 235 (citing J. Reid & F. Inbau, Truth and Deception: The Polygraph (Lie Detection) Technique 216-50 (2d ed. 1977)). The court also acknowledged the polygraph examination's flaws and questioning of its scientific basis. *Id.* at 235-36. "The interactions between the subject and the examiner are subtle. The results are subject to conscious or unconscious manipulation. The measurement of physiological responses may be complicated by the tension of the subject or his spontaneous autonomic activity." *Id.* (citing Skolnick, Scientific Theory and Scientific Evidence, An Analysis of Lie-Detection, 70 Yale L.J. 694, 701 (1961)). The supreme court then turned to an analysis of polygraph examination admission in other jurisdictions, and ultimately agreed with courts holding that generally the prejudicial impact outweighed the probative value.

> "There is significant risk the jury will regard such evidence as conclusive. It is the jury's function, as finder of fact, to determine the credibility of witnesses. A potential trial by polygraph is an unwarranted intrusion into the jury function. It is questionable whether any jury would follow limiting instructions because the polygraph evidence ' "*** is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi. ***" ' " *Id.* at 244 (quoting *State v. Dean*, 307 N.W.2d 628, 652 (Wis. 1981),

> quoting *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975)).

¶ 78 The *Baynes* court held that the admission in that case amounted to plain error. The error impinges upon the integrity of our judicial system. *** Polygraph evidence is not reliable enough to be admitted." *Id*.

¶ 79 In *People v. Gard*, 158 Ill. 2d 191 (1994), the supreme court considered whether admission of a polygraph evidence from a witness was prejudicial to the defendant. In that case, the defendant did not take a polygraph examination, but his codefendants did and later testified against the defendant at trial. The court observed that polygraph evidence "permeate[d]" the trial transcripts. *Id.* at 203.

¶ 80 The *Gard* court expanded its previous position that polygraph evidence is generally inadmissible to include polygraph evidence of a witness.

> "For the same reasons that this court has held evidence of polygraph examination of a defendant inadmissible at trial, we hold evidence of polygraph examination of a witness inadmissible at trial. Evidence of polygraph testing is rendered no more reliable, and jurors deem it no less worthy of belief, because the person tested was a witness rather than a defendant. Whether the examination is of defendant or witness, evidence of polygraph testing is equally unreliable and likely to be accorded undue weight with the result that its prejudicial effect far exceeds its probative value. As this record amply demonstrates, the use of polygraph evidence at a defendant's trial is no less repugnant and no less an

> affront to the integrity of the judicial process when the examination has been given to a witness at the defendant's trial than it is when the examination has been given to the defendant himself." *Id.* at 204.

¶ 81 In *Jefferson*, the defendant testified that her confession was coerced because the police told her if she confessed, then she would be able to see her baby who had hours to live. The State was allowed through cross examination and rebuttal testimony, to show that the defendant had agreed to submit to a polygraph examination, but made an inculpatory statement prior to the examination being administered. No polygraph examination was then conducted. *Id*. at 496.

¶ 82 The Illinois Supreme Court in *Jefferson* allowed a limited exception for the admission of polygraph evidence.

> "Having testified that the statement was made in response to improper inducements by the police, the defendant cannot now be heard to complain about the introduction of rebuttal evidence regarding the circumstances that actually led her to make the statement. To disallow this evidence would only succeed in permitting the defendant to unjustifiably profit from our general rule that bars introduction of evidence relating to polygraphy testing." *Jefferson*, 184 Ill. 2d at 497.

¶ 83 In applying the narrow exception from *Jefferson* in the instant case, we consider whether the trial court and the State sufficiently tailored the testimony elicited to protect against prejudice to defendant.

¶ 84 Here, defendant testified during his direct testimony that he agreed to give inculpatory statements after Detective Santoyo pressured him to confess. Defendant claimed that if he [defendant] said he touched S.R. accidentally, the detective promised defendant that he would be released. In response to this testimony, the State asked the trial court to allow admission of limited testimony related to defendant's polygraph examination to rebut defendant's testimony of a coerced confession. After extensive discussion and over defendant's objection, the trial court ruled that the State could elicit the following: that defendant agreed to take the polygraph, that the first time they could schedule a polygraph was on August 10th, that Detective Santoyo informed defendant of the results, without going into the results, and that defendant then gave a statement. The trial court further clarified its holding.

> "I want to keep it crisp ***. I want to make sure the officer does *not* go into the results of the polygraph.
>
> Just that he informed him of the results and that after that, the defendant then gave him the statement that was ultimately reduced to writing." (Emphasis added.)

¶ 85 During Detective Santoyo's rebuttal testimony, the following colloquy took place.

> "PROSECUTOR: After the polygraph when you did discuss – after discussing the result with the defendant, what, if anything, did you say to him afterwards?
>
> DETECTIVE SANTOYO: After the results of the exam, I advised the defendant that – I advised him that the results were –
>
> DEFENSE COUNSEL: Objection.

PROSECUTOR: After you pulled him [*sic*] or discussed the results, what, if anything, did you say to him after you discussed the result?

DETECTIVE SANTOYO: I told him this was his opportunity to explain himself.

PROSECUTOR: Did you say – did he say anything at that time or did you notice anything about him at that time?

DETECTIVE SANTOYO: Yes, I did.

PROSECUTOR: What did you notice about him?

DETECTIVE SANTOYO: I noticed when I said that to him, his shoulders dropped and he dropped his head, as well.

PROSECUTOR: Did you then continue to have a conversation with him?

DETECTIVE SANTOYO: I did.

PROSECUTOR: During that conversation is that when the defendant described to you what had occurred on August 3, of 2012 at his home with [S.R.]?

DETECTIVE SANTOYO: Yes."

¶ 86 Defendant contends that "the State's continuous reference to the polygraph, both directly and indirectly, constituted an impermissible effort to evoke the presumably adverse results of the polygraph examination administered to Defendant, in order for the jury to convict him." After considering this testimony, we agree that the State exceeded the trial court's narrow ruling for the admission of defendant's submission to a polygraph examination in the testimony elicited. This

testimony went beyond what the trial court allowed in regard to the polygraph examination. The court specifically excluded the results of the examination. While this testimony did not directly comment on the results, Detective Santoyo's testimony that it was defendant's "opportunity to explain himself" and that he observed defendant's shoulders and head drop implicitly disclosed that defendant failed the polygraph examination. Therefore, we conclude the State erred in eliciting this prejudicial testimony.

¶ 87 Having found that the State exceeded the trial court's narrowly tailored ruling, we must still decide whether this error denied defendant his right to a fair trial. Defendant also asserts that the closing arguments, although not objected to by trial counsel, compounded the error. He relies upon the following comments. During rebuttal, the prosecutor referred to S.R.'s actions as "truth detectors."

> "That is a child. That is a truth detector for all of you. What do we know about children? If you're an adult and you tell a child don't do that. Why, Mom? You do it. That's the first thing they say. Don't do that. Well, So-and-So does it. Why not? They don't understand. You can tell from a 'Don't do something,' yet somebody is doing that. They need an explanation. And, that is how a child's mind work. [*Sic.*] And, that is how you know it is a truth detector that he did what she said he did. Because she couldn't even wrap her own mind around it.
>
> What other truth detectors do you have of this? Afterwards, when he took his hands out, 'I had to fix my pants.' You see, we are dealing with a 9-year-old at the time and an 11-

> year-old here today. And, you know we had to most diabolical 9-year-old to an 11-year-old that can come up with a story and figure out just how to make it sound ultra good. Because, think about it, again, as a child, after he was done, he didn't undo my pants. He slipped his hand in and he pushed down and got his hand into there. What do you know is going to happen to hose pants as he is doing it. Of course, you're going to see it push down. What happened after that? I fixed my pants. Well, yeah. Of course, that's what you would have to do when he did that. That's another truth detector."

¶ 88 We acknowledge that the "truth detector" comments were made in response to defendant's argument in closing that S.R. lied about the touching. While this phrase may be innocuous in a some other proceeding, we find the State's use of the term "truth detector" on multiple occasions caused prejudice to defendant.

¶ 89 Additionally, the prosecutor made multiple comments in rebuttal referencing the polygraph, its use, and the results. First, the prosecutor was arguing defendant had changed his story when ASA Kolasa came to the police station, then she proceeded to say, "So, you know what, Guys: why don't we offer him a polygraph exam. Let's find out what is going on. See if he will confess. They get the polygraph." Later, the prosecutor argued that defendant "consented to this polygraph test because he didn't think it could be used. Okay. Well, then, he did. And then afterwards he realized the gig was up" and "he knew the gig was up and he had to explain it." Although no objections were raised to these comments during closing argument, these comments specifically reference the polygraph examination and clearly suggest that

defendant gave a statement after he failed the examination. We find that the State erred by exceeding the narrow scope the trial court permitted to rebut defendant's testimony of a coerced confession.

¶ 90 Having found the prosecution exceeded the court's ruling, we consider whether the error was harmless. "[W]hen deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *People v. Becker*, 239 Ill. 2d 215, 240 (2010).

¶ 91 Focusing first on the multiple indirect references to the polygraph results, we cannot say that the clear inference that defendant failed a polygraph examination did not contribute to the jury's verdict. As previously discussed, polygraph evidence is compelling such that there is a "significant risk the jury will regard such evidence as conclusive." *Baynes*, 88 Ill. 2d at 244. Further, we find that the evidence in this case was closely balanced. There were no occurrence witnesses, nor was there any physical evidence. The case was one of credibility between S.R. and defendant. S.R.'s outcry of the touching by defendant and subsequent statements and testimony offer the only evidence of the sexual assault. Defendant denied that he touched S.R. inappropriately and testified that his statement admitting to accidentally touching S.R.'s vagina was coerced. The State's rebuttal evidence regarding the timing of defendant's statement was crucial to the case, and we cannot say that the clear inferences that defendant failed the polygraph examination would not have impacted the jury's credibility determinations.

¶ 92 The State asserts that any error was cured by the trial court's instructions to the jury that the polygraph evidence was elicited for "the limited purpose of deciding the issue of the

circumstances" of defendant's statement and they should not consider it for any other purpose. While the trial court's instructions did clarify to the jury the purpose of the polygraph evidence, the testimony and arguments went beyond the circumstances for which the polygraph evidence was allowed. We cannot find that the instructions cured the error when the State made multiple references to the polygraph implying defendant failed the test. These references to defendant failing the test were part of the circumstances that led to defendant's statement and we cannot say these references were not considered by the jury.

¶ 93 When we consider the totality of the circumstances including both testimony and argument as well as the evidence presented, we find that defendant was prejudiced by the State's questioning and argument regarding the polygraph examination. The Illinois Supreme Court has long held that evidence of polygraph examination is inadmissible against a criminal defendant. *Baynes*, 88 Ill. 2d at 244-45. The trial court's ruling based upon narrow exception set forth in *Jefferson* did not allow for the evidence of defendant's failure of the polygraph test. We cannot find this error to be harmless.

¶ 94 Accordingly, we reverse defendant's convictions and remand for a new trial. Upon remand, if defendant testifies that his statement was coerced, then the State should still be permitted to rebut defendant's testimony with limited testimony regarding the polygraph examination. Finally, we find that there is no double jeopardy impediment to a new trial. As we have already held, the evidence was sufficient to prove defendant guilty beyond a reasonable doubt. However, in our finding, we reach no conclusion as to defendant's guilt that would be binding on retrial. *People v. Naylor*, 229 Ill. 2d 584, 610-11 (2008).

¶ 95 Based on the foregoing reasons, we reverse defendant’s convictions and remand for a new trial.

¶ 96 Reversed and remanded.