2017 IL App (1st) 153203-U

No. 1-15-3203

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FIFTH DIVISION
December 22, 2017

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. 13 CR 23523
	)	
GLYNN WILLIAMS,	)	The Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred in the judgment.

O R D E R

¶1 *HELD*: The evidence was sufficient to sustain the jury's verdict finding defendant guilty of two counts of criminal sexual assault. The State did not commit error in closing arguments. Defendant failed to demonstrate he received ineffective assistance of counsel.

¶2 Following a jury trial, defendant, Glynn Williams, was found guilty of two counts of criminal sexual assault and sentenced to a total of ten years' imprisonment. On appeal, defendant contends the State failed to prove him guilty beyond a reasonable doubt. Defendant additionally contends the State provided an incorrect definition of criminal

sexual assault during closing arguments, resulting in plain error. Defendant finally contends he received ineffective assistance of counsel. Based on the following, we affirm.

¶3 FACTS

¶4 At trial, A.F. testified that in the summer of 2009, after completing her freshman year in high school and living at home with her mother, J.F., and her brother, she met defendant. J.F. owned a boat that she kept in a harbor in Chicago, Illinois. Defendant performed maintenance on boats in that harbor. Shortly after initially meeting, A.F. began to work for defendant by cleaning the interior of boats. According to A.F., defendant engaged in sexual conversations with her and started "tickle fights" that morphed into defendant moving his hand between her legs. A.F. described feeling uncomfortable, but she did not report defendant's behavior to anyone, explaining that her mother was friends with defendant. In fact, during the same summer, J.F. and defendant started dating and defendant moved into J.F.'s home.

¶5 A.F. stated that defendant's "tickle fights" eventually transitioned into something more. A.F. described being in the car with defendant and another coworker. After dropping the coworker off, defendant drove to a park and stopped the car. Defendant offered to give A.F. a back massage. A.F. accepted; however, defendant then removed A.F.'s clothes and put his finger in her vagina. In response, A.F. ran out of the car and continued running toward a highway where she attempted to commit suicide. A.F. said defendant retrieved her from the highway and returned her to the car. Once in the car, defendant expressed his remorse while crying. He offered to provide A.F. with $40 and

instructed her not to tell anyone about the incident, promising that it would not happen again.

¶6 A.F. testified that, a few weeks after the incident in the car at the park, defendant drove A.F. to a hotel, explaining that he needed to take a quick nap. Defendant stated that A.F. could watch television while he napped; however, he insisted she remove her jeans before sitting on the bed. After A.F. removed her jeans, defendant "forced himself" on her. Defendant inserted his penis into A.F.'s vagina. A.F. described the incident as painful, explaining there was a "loud pop noise" and "some blood." After the incident, defendant drove A.F. home.

¶7 According to A.F., between the incident at the hotel and January 24, 2011, defendant penetrated her vagina with his penis more than fifty times. The incidents occurred in her bedroom, in the hallway outside her bedroom, in the car, and on boats. A.F. added that defendant inserted his penis into her mouth "mostly every time we had sex. And on the way to school." A.F. further testified that defendant inserted his penis into her anus on two occasions while on one of the boats at the harbor.

¶8 A.F. additionally testified that she requested defendant purchase a vibrator for her. According to A.F., defendant "kept expressing *** that he was doing this because he felt like [she] needed someone to do it for [her]. And that he was doing [her] a favor. So [she] thought if [she] got him to buy [her] something, he wouldn't need to continue doing [her] that favor." A.F. stored the vibrator in a hole in her mattress. On at least one occasion, defendant inserted the vibrator into A.F.'s vagina. In addition, on at least three occasions, A.F. complied with defendant's instructions to insert the vibrator in her vagina while he masturbated. According to A.F., the last sexual contact between her and defendant

occurred in mid-January of 2011 in her bedroom. A.F. recalled observing defendant masturbate on the edge of her bed and ejaculate onto her bed sheet while dressed in a bathrobe. A.F. additionally testified that the last time she and defendant had sex also was sometime in mid-January of 2011. A.F. recalled the incidents happened separately. A.F. denied reporting to the police that the last sexual contact she had with defendant was in June 2010.

¶9 A.F. explained that the sexual incidents normally took place in her house between 9 p.m. and 10 p.m. or later while J.F. and A.F.'s brother were either not home or were asleep.

¶10 A.F. additionally testified that she, defendant, and codefendant, Aaron Watkins, an employee of defendant's boat maintenance company, took a trip to Michigan to clean a client's boat. During the trip, A.F. was sick with the flu, causing vomiting, sweating, and a fever. Notwithstanding, at the hotel, defendant inserted his penis in A.F.'s mouth while Watkins inserted his penis in A.F.'s vagina. The men then switched positions. According to A.F., the men engaged in similar sexual conduct on three or four additional occasions between June 2009 and January 2011.

¶11 On January 24, 2011, defendant and J.F. had an argument and defendant moved out of the house. A.F. stated that she told J.F. about the sexual incidents with defendant on that date. A.F. explained she did not confide in J.F. earlier because defendant threatened to harm her mother and A.F.'s brother. A.F. said she and her mother went to the police station to report the incidents. A.F. spoke to the police outside of her mother's presence and did not make any statements regarding the use of the vibrator. A.F. recalled telling the police that defendant threatened her, but she could not recall whether she said

that defendant sent threatening text messages. A.F. testified that J.F. later asked her about the vibrator after receiving a text message from defendant. On January 26, 2011, A.F. recalled that an officer retrieved blue bed sheets from her bed. On February 5, 2011, a police officer spoke to A.F. at her home. During that conversation, A.F. told the officer about the vibrator and gave it to the officer.

¶12 J.F. testified that in 2009 she lived in a two-story home in Chicago with A.F. and her son. The home contained two bedrooms on the second floor, a living room, dining room, and kitchen on the main floor, and a basement. J.F. said she met defendant in the summer of 2009 because he worked on her boat. Eventually, the pair became romantically involved and defendant moved into her home at the end of August. At some point, the pair became engaged. J.F. stated that, prior to defendant moving into the house, she slept in one of the upstairs bedrooms and her children shared the remaining bedroom. When defendant initially moved into the house, he and J.F. also slept in one of the upstairs bedrooms. However, after two months, J.F. and defendant began sleeping in the basement and her children slept in separate rooms on the second floor. A.F.'s bedroom contained two twin beds. J.F.'s son's room contained a bunk bed with a twin mattress on top and a double mattress on the bottom. The basement contained a king size bed.

¶13 According to J.F., throughout 2009 and part of 2010, she worked from home. Then, sometime in 2010, she switched jobs and worked outside the house from 9 a.m. until 5 p.m. J.F. stated that her typical routine included arriving home around dinner time, staying home for the remainder of the evening, and going to bed at 10 p.m. She testified that defendant did not go to bed at the same time, instead remaining upstairs to watch television or play video games before retiring to the basement for bed.

¶14 J.F. further testified that she ended her relationship with defendant in January 2011 after the pair engaged in a verbal altercation. The altercation was related to defendant returning home on January 23, 2011, from a trip with his ex-wife and children. J.F. responded by kicking defendant out of the house. Defendant removed his things from the house early on January 24, 2011.

¶15 Later, on January 24, 2011, A.F. spoke to J.F. about the sexual incidents, which led J.F. to take her to the police station. According to J.F., she was not present during some of the officers' conversations with A.F. J.F. stated that A.F. did not mention a vibrator during her initial discussions with the police. J.F. learned about the vibrator later through a text message from defendant. J.F. added that she engaged in additional conversations with A.F. over the next two days and contacted the police again. During her conversations, J.F. learned about the incident at the park when A.F. jumped out of the car and attempted suicide. A.F. said the incident happened on June 23, 2009.

¶16 On the morning of January 26, 2011, Officer William Purvis arrived at J.F.'s home to collect A.F.'s bed sheet. J.F. had removed the sheet from A.F.'s bed prior to Officer Purvis' arrival. J.F. testified that she and defendant never engaged in sexual relations on the sheet.

¶17 J.F. acknowledged that A.F. did not share the sexual incidents with her until defendant moved out of the house. J.F. additionally acknowledged A.F. willingly traveled to Michigan with defendant and codefendant Watkins. A.F. appeared to be in good health before she left for the Michigan trip, but became sick with a cold and then the flu upon her return.

¶18 J.F. admitted to being angry about her breakup with defendant. J.F., however, stated she "wasn't nearly as angry about the breakup as [she] was to hear that [her] daughter had been raped by [her] fiancé." J.F. testified that she was unaware of the sexual incidents prior to her January 24, 2011, conversation with A.F. She reported the incidents to the Harvey police department as well as to the Michigan authorities. She further admitted that defendant filed a lawsuit against her for monetary damages and, in 2012, a final judgment was entered against her for $7,140. J.F. never paid the judgment.

¶19 Detective Jarrod Smith testified that he was assigned to investigate A.F.'s case. After receiving a call from J.F., he sent an evidence technician to her house to recover a bed sheet. On January 28, 2011, Detective Smith interviewed A.F. in the presence of an assistant state's attorney (ASA) and an employee from the Department of Children and Family Services (DCFS). A.F. reported she had received threatening text messages from defendant. Sometime later, however, Detective Smith looked through A.F.'s phone and observed all of the text messages had been deleted. A.F. did not mention a vibrator during the interview on January 28, 2011. Detective Smith instead learned about the vibrator at a later time from J.F.

¶20 On February 6, 2011, Detective Smith met with A.F. and J.F. at their house. While there, A.F. showed Detective Smith her bedroom and recovered a sock from under her mattress. The sock contained a blue vibrator, which Detective Smith inventoried. According to Detective Smith, during a phone conversation on February 12, 2011, A.F. told him that the last time she had sex with defendant or codefendant Watkins was in June 2010.

¶21 Detective Smith located and arrested defendant on February 15, 2011. During his interview at the police station, defendant denied having sexual contact with A.F. and specifically denied inserting his finger into her vagina. Defendant instead reported that A.F. made advances toward him, including when the pair were in the car together. Defendant said he rejected A.F.'s advances at which point she jumped out of the car. Defendant reported renting a hotel room for A.F. on one occasion to allow her to have sex with her boyfriend. Defendant added that he purchased a vibrator for A.F. upon her request because "all her friends had one." Defendant thought doing so would help her stay away from him and stop her repeated advances. Defendant told Detective Smith that, on one occasion, he was asleep naked on his bed when he awoke to find A.F. had his penis in her hand. A.F. was attempting to straddle him. In response, defendant pushed A.F. from him and sent her upstairs. Defendant additionally reported that, at approximately 4 a.m. on January 24, 2011, defendant again was asleep, this time on the couch downstairs, when he awoke to find "[A.F.] had taken his penis and put it inside her vagina. She was grinding on him was the term he used. *** Defendant said that he pushed her off of him. He had a talk with her and sent her back upstairs." This incident occurred just prior to him moving out of J.F.'s house, which A.F. asked him not to do. Detective Smith stated that defendant was released without being charged.

¶22 Detective Smith, however, testified that, later on February 15, 2011, he interviewed defendant again. Defendant agreed to provide a buccal swab at that time. Defendant then reported having sex with J.F. in the kitchen of her house, in a room downstairs, in A.F.'s bedroom, and in J.F.'s son's bedroom. Defendant later added that he had sex with other employees inside his vehicle and masturbated inside his vehicle.

Defendant was released again without being charged. Defendant eventually was arrested and charged on September 28, 2013.

¶23 The parties agreed to stipulate that, if called, William Purvis, an evidence technician, would testify that he recovered the blue bed sheet from J.F.'s residence on January 26, 2011. The sheet was inventoried and submitted to the Illinois State Police for DNA analysis.

¶24 The parties also stipulated that, if called, the officers that collected buccal swabs from A.F., defendant, and J.F. would testify that they properly inventoried the samples and submitted them to the crime lab for DNA analysis.

¶25 The parties further stipulated that, if called, Biao Chang, a forensic scientist, would testify that he examined the blue bed sheet for the presence of semen. Chang would testify that he could identify semen on the sheet within a reasonable degree of scientific certainty, but there was no way to determine how long the semen had been on the sheet or how the semen had been deposited on the sheet.

¶26 Ruben Ramos, a forensic scientist, testified regarding his DNA findings. Ramos received DNA swabs from A.F. and defendant, which were tested for possible matches against three samples cut from the blue bed sheet recovered from J.F.'s house. The findings were: (1) defendant's DNA profile was a match to DNA found on two of the bed sheet samples; (2) defendant's DNA profile was a match to a major male profile found in the mixture of DNA profiles found on the third bed sheet sample; (3) the male DNA deposits on the bed sheets were from defendant's semen; (4) a minor human female DNA profile from which A.F. could not be excluded was found in the DNA mixture on the third bed sheet sample; and (5) the frequency with which the minor human female profile

occurs is approximately 1 in 3 trillion black individuals, 1 in 20 trillion white individuals, and 1 in 6.5 trillion Hispanic individuals.

¶27 On cross-examination, Ramos acknowledged there was no way to determine when the two different DNA profiles were deposited onto any of the bed sheet samples. The profiles could have been deposited at different times. Ramos further acknowledged the DNA matching A.F. was generated from skin cells coming from A.F.'s skin or vaginal secretions, which could be left on a bed sheet if a person slept on the bed.

¶28 The parties additionally agreed to stipulate that, if called, Maria Salazar, a forensic scientist, tested a DNA sample from J.F. against the minor female DNA profile contained in the third bed sheet sample. Salazar would testify that J.F. could be excluded as having contributed to that minor female DNA profile.

¶29 Chicago Police Officer Edna Ziegler testified for the defense that she performed A.F.'s initial intake interview. In her report, Officer Ziegler noted that A.F. changed her statements regarding the sexual encounters with defendant multiple times. At trial, however, Officer Ziegler testified that she did not recall the contents of her report and could not recall how A.F. altered her statement.

¶30 Sue Rack testified that she owned a boat stored in Burnham Harbor in 2009. Defendant was employed to clean her boat, which she lived on during that summer. Defendant had cleaned her boat for the prior ten or eleven years. Rack stated that she observed defendant and his crew of employees almost every day at the harbor. Rack recalled being introduced to A.F., a girl that worked with defendant. She was described as a friend's daughter. According to Rack, she never observed defendant make any sexual comments to A.F. or touch her inappropriately. Rack overheard A.F. refer to defendant as

"Daddy Glynn." Rack admitted that there were occasions when she was not on the dock or could not see what happened on the dock. Rack further testified that she began a dating relationship with defendant in the fall of 2009. Their relationship lasted until 2013. Rack stated that she posted bond for defendant in the underlying case on October 29, 2015. Rack admitted she falsely told the police in 2011 that she was not dating defendant.

¶31 Scott Gordon testified that he owned a boat docked at Burnham Harbor during the summer of 2009. Gordon employed defendant to upkeep his boat that summer, as he had for the two or three years prior. According to Gordon, A.F. worked for defendant in 2009. Defendant referred to A.F. as his girlfriend's daughter. Gordon recalled being present at the harbor two or three days per week. Gordon observed defendant working on boats, but never saw defendant touch A.F. inappropriately and never heard him make sexual comments to her. Gordon approximated that there were 600 boats in the harbor. Gordon admitted he could not know everything that occurred in the harbor. Gordon only specifically observed defendant when he cleaned Gordon's boat, which was every week or every other week for approximately two to three hours.

¶32 The parties agreed to stipulate that, if called, E.M. would testify he was J.F.'s son and A.F.'s brother. E.M would testify that he lived with his mother, sister, and defendant from 2009 until 2011. E.M. never observed defendant do anything to A.F., and A.F. never reported that defendant did anything to her. E.M. would testify that A.F. watched television in E.M.'s room on occasion. Defendant, however, always watched television downstairs.

¶33 Prior to closing arguments, the trial court advised the jury that closing arguments were not evidence, but should be based on evidence and inferences drawn from the evidence. During closing arguments, the State argued:

> "You also heard from Detective Smith about the defendant's own admissions regarding sexual penetration. That he admitted that he woke up and his penis was already in [A.F.'s] vagina. ***. So legally, by definition, you have sexual penetration occurring."

In defense counsel's closing argument, he stated:

> "This thing with she jumps on him in the middle of the night and penetrates her, well, if the officer really believed that, if it really happened, why didn't they arrest him? The State wants you to believe that it is so true, he told the officer he penetrated this girl. Well, look at the jury instructions. That's a crime. You have got a girl who says it happened. You have got a defendant who says it happened. In January of 2011, hands behind the back, sir, you are going to jail. Why didn't they do that?"

¶34 The trial court instructed the jury, *inter alia*, regarding the law of criminal sexual assault as follows:

> "To sustain the charge of criminal sexual assault, the State must prove the following propositions:
>
> *First Proposition*: That the defendant committed an act of sexual penetration upon [A.F.]; and
>
> *Second Proposition*: That [A.F.] was under 18 years of age when the act was committed; and

Third Proposition: That the defendant was a family member."

Sexual penetration was defined for the jury as:

"The term 'sexual penetration' means any contact, however slight, between the sex organ or anus of one person and sex organ, mouth or anus of another person or an intrusion, however slight, of any part of the body of one person or any object into the sex organ of another person. Evidence of emission of semen is not required to prove sexual penetration."

¶35 The jury found defendant guilty of two counts of criminal sexual assault, one count of contact between defendant's penis and A.F.'s vagina and one count of inserting a vibrator into A.F.'s vagina. The trial court denied defendant's motion for a new trial. Defendant was sentenced to six years' imprisonment for the former count and four years' imprisonment for the latter count. The court also denied defendant's motion to reconsider his sentence. This appeal followed.

¶36 ANALYSIS

¶37 I. Sufficiency of the Evidence

¶38 Defendant first contends the State failed to prove him guilty beyond a reasonable doubt of criminal sexual assault as charged.

¶39 A challenge to the sufficiency of the evidence requires a reviewing court to determine "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 the original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is not the reviewing court's function to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Evans*, 209 Ill. 2d 194, 209

(2004). Rather, it is for the trier of fact, in this case the jury, to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). In order to overturn a judgment, the evidence must be "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶40 As charged here, an individual commits the offense of criminal sexual assault when he commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member. 720 ILCS 5/12-13(a)(3) (West 2008). "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 ***. Evidence of emission of semen is not required to prove sexual penetration." 720 ILCS 5/11-0.1 (West 2008). Moreover, "[f]amily member" includes "an accused who has resided in the household with the child continuously for at least 6 months." 720 ILCS 5/11-0.1 (West 2008).

¶41 Defendant argues the evidence was insufficient to sustain his convictions for vaginal penetration by his penis where A.F. reported having sex with him more than 50 times over the course of 18 months, but could not recall any specific dates. In fact, according to defendant, A.F. only described two specific instances of sexual intercourse with him; however, neither of the two instances satisfied the statute because one of the instances occurred prior to defendant living in J.F.'s house and the other instance

occurred in Michigan. Defendant maintains the other allegations of repeated vaginal intercourse were "vague, totally uncorroborated, and unrealistic." Defendant notes A.F. never reported the alleged incidents to her mother. Defendant further posits A.F.'s allegation that they had sexual intercourse on almost a daily basis in J.F.'s home or at work is incredible and improbable where A.F. attended school during the day and J.F. returned home from work every evening around dinnertime, remaining home and awake until 10 p.m. Defendant argues A.F. lacked credibility as demonstrated by contradicting testimony across witnesses regarding her statements. Defendant additionally insists the jury's acquittals of him on the charges of criminal sexual assault related to oral penetration, digital penetration, and anal penetration show the jury did not believe A.F.'s generalized accusation about the sexual incidents, most notably that defendant put his penis in A.F.'s mouth "mostly" every time they had vaginal intercourse. According to defendant, the jury instead erroneously relied upon Detective Smith's recitation of the events to support its verdict. More specifically, defendant argues the jury incorrectly relied upon his alleged statement to Detective Smith that he awoke to A.F. placing his penis in her vagina. Defendant contends Detective Smith's testimony was contradicted by that of A.F. and, nevertheless, does not establish his guilt. Defendant finally argues there was no evidence to establish the timing of the events related to his conviction for penetration with the vibrator and, therefore, his conviction was not supported.

¶42 Viewed in a light most favorable to the State, we first find the evidence was sufficient to sustain defendant's conviction for criminal sexual assault related to the vaginal penetration of A.F. A.F., who was born on January 5, 1994, was 15 years old when defendant moved into J.F.'s house in August 2009. Defendant resided with A.F.

until January 24, 2011. A.F., therefore, remained under the age of 18 the entire time defendant lived with her. A.F. testified that defendant inserted his penis into her vagina on more than 50 occasions around the time period he lived with her. A.F. described the incidents as occurring in her bedroom, in the hallway outside her bedroom, on the first floor of the house in the front room, in the car, and on a number of boats. A.F. stated the incidents that occurred in J.F.'s home took place either when J.F. and E.M. were not home or when they were asleep. A.F. testified that the last time she had sexual contact with defendant was in mid-January 2011, which was nearly 18 months after defendant first moved into J.F.'s home. Accordingly, the elements of the statute as charged were met: (1) defendant committed an act of sexual penetration against A.F.; (2) A.F. was under the age of 18 when the sexual act took place; and (3) defendant was a "family member" at the time of the act, in that he continuously lived in J.F.'s house for the six months prior to the act.

¶43 We additionally find the evidence was sufficient to sustain defendant's conviction of criminal sexual assault of A.F. by penetration with a vibrator. The first element of the statute was met because "sexual penetration" includes contact or penetration of an object with the victim's vagina. See 720 ILCS 5/11-0.1 (West 2008). As stated, the second element was established where A.F. was under 18 when the sexual act took place. Finally, A.F. described the last sexual incident as occurring in mid-January 2011 wherein defendant was dressed in a bathrobe and masturbated in her bedroom, ultimately ejaculating on her bed sheet. We recognize that A.F. did not expressly state that she used the vibrator on that occasion; however, taken in context with her testimony regarding the pattern of defendant masturbating while she used the vibrator, the jury was able to infer

that the vibrator penetrated her vagina on that occasion in mid-January 2011, which was more than six months after defendant began residing in J.F.'s house.

¶44 We further find the DNA evidence supported A.F.'s accounts of the sexual encounters where defendant's DNA appeared on the bed sheet samples along with A.F.'s DNA. A.F. testified that defendant vaginally penetrated her while in her bedroom and testified that defendant ejaculated on her bed sheet after masturbating. The masturbation occurred while A.F. inserted the vibrator into her vagina as instructed. We recognize the experts could not establish precisely when the DNA samples were deposited on the bed sheet. However, the existence of defendant's DNA on A.F.'s bed sheet lends credence to A.F.'s testimony. We additionally recognize that defendant told Detective Smith he and J.F. had sexual relations in A.F.'s bed; however, J.F.'s DNA was not found on A.F.'s bed sheet.

¶45 In terms of defendant's credibility arguments, it is not the province of this court to substitute our judgment for that of the trier of fact on issues regarding the weight of the evidence or the credibility of the witnesses. *Tenney*, 205 Ill. 2d at 428. Rather, it is the trier of fact's duty to resolve conflicts or inconsistencies in the testimony. *Id*. "[A] conviction will not be reversed 'simply because the defendant tells us that a witness was not credible.' " *People v. Brown*, 185 Ill. 2d 229, 250 (1998) (quoting *People v. Byron*, 164 Ill. 2d 279, 299 (1995)). " 'A complainant's testimony is clear and convincing if her story is consistent and *** discrepancies do not detract from its reasonableness ***.' " *People v. Escobedo*, 151 Ill. App. 3d 69, 82 (1986) (quoting *People v. Thompson*, 57 Ill. App. 3d 134, 140 (1978)).

¶46 Here, A.F. testified that defendant committed vaginal penetration upon her almost every day while living in J.F.'s home. A.F. described the various locations where the acts took place and stated the acts took place when no one was home or when her brother and mother were asleep. The fact that A.F. did not immediately report the assaults does not detract from the reasonableness of her testimony nor does the fact that she could not specify the dates of the offenses. See *id*. at 82-83. In fact, our court has found that "[i]n sexual assault cases involving family relationships, the victim's credibility is not lessened if there is no immediate outcry." *People v. Duplessis*, 248 Ill. App. 3d 195, 199-200 (1993). A.F. testified that defendant threatened to harm both J.F. and E.M. if she reported the incidents. Moreover, the weight to be given A.F.'s testimony in view of her inability to provide the dates of the offenses was a matter for the jury. See *Escobedo*, 151 Ill. App. 3d at 82. Contrary to defendant's argument, A.F. consistently testified that her last sexual encounters with defendant were in mid-January of 2011. It was Detective Smith that recalled A.F. reporting the last encounter occurring in June 2010. Again, it was the jury's duty to resolve inconsistencies in the testimony. *Tenney*, 205 Ill. 2d at 428.

¶47 Furthermore, we will not speculate as to why the jury acquitted defendant of the charges against him related to digital penetration, oral penetration, and anal penetration. The verdicts were not logically inconsistent. See *People v. Buford*, 110 Ill. App. 3d 46, 55 (1982) ("verdicts are so logically inconsistent as to contribute to a finding that the prosecution has not met its burden of proof when they cannot be construed as anything but an acceptance and rejection of the same theory of the case"). The jury was capable of accepting or rejecting parts of the witnesses' testimony and attributing different weight to specific portions. See *People v. Cobbins*, 162 Ill. App. 3d 1010, 1025 (1987).

¶48 In sum, we find the evidence was not "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to defendant's guilt and overturn the jury's verdict. See *Slim*, 127 Ill. 2d at 307.

¶49 II. Error in Closing Argument

¶50 Defendant next contends the State committed error in closing argument when it misstated the law of criminal sexual assault. Defendant acknowledges that he failed to preserve the contention for appellate review, but requests that we review the allegation under the doctrine of plain error. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (in order to preserve an error for review, the defendant must both object at trial and include the alleged error in a posttrial motion).

¶51 The plain error doctrine allows a reviewing court to reach a forfeited error affecting substantial rights under two circumstances: (1) where the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The defendant bears the burden of establishing plain error. *Id*. at 182. Before a court may conduct a plain error analysis, the record first must establish that an error occurred. *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶52 The supreme court has advised that closing arguments must be viewed in their entirety and the challenged remarks must be viewed in context. *People v. Wheeler*, 236 Ill. 2d 92, 122 (2007). It is well established that prosecutors are afforded wide latitude in closing argument. *Id*. at 123. When reviewing comments made during closing argument, we must determine "whether or not the comments engender substantial prejudice against

a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Id*. The supreme court has instructed that "[m]isconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction." *Id*.

¶53 Historically, the standard of review for closing argument challenges has been abuse of discretion. *People v. Blue*, 189 Ill. 2d 99, 132 (2007). The rationale for the abuse of discretion standard is that the trial court is in the best position to determine whether a prosecutor's closing argument has a prejudicial effect. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). As a result, it has been within the trial court's discretion to control the substance, style, and scope of closing remarks. *Blue*, 189 Ill. 2d at 132. That said, in *Wheeler*, the supreme court applied a *de novo* standard of review to the legal question of whether a prosecutor's closing argument was so egregious that the comments warranted a new trial. *Wheeler*, 226 Ill. 2d at 121. Since *Wheeler*, appellate courts have been divided regarding the appropriate standard of review. *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 26. We, however, need not resolve the issue of the appropriate standard of review at this time because our holding in this case would be the same under either standard.

¶54 Defendant takes issue with following comment made by the State during closing argument:

> "You also heard from Detective Smith about the defendant's own admissions regarding sexual penetration. That he admitted that he woke up and his penis was already in [A.F.'s] vagina. ***. So legally, by definition, you have sexual penetration occurring."

Defendant argues that the State's erroneous comment presented criminal sexual assault as an absolute liability offense. Defendant adds that the error was compounded because the jury was provided with the definition of "sexual penetration."

¶55 Based on our review of the challenged remarks in context and within the State's entire closing argument, we find there was no error. Prior to the challenged remark, the State advised the jury that the court would provide the jurors with the applicable legal instructions. The State highlighted that "the law says that a person commits the offense of criminal sexual assault when he is a family member and commits an act of sexual penetration with the victim who is under 18 years of age when the act is committed." The State then advised the jury that it would be given an "issues instruction" and stated "basically that means we have three things that we have to prove beyond a reasonable doubt." The State listed the three propositions: (1) that defendant "committed an act of sexual penetration upon [A.F.]"; (2) that "[A.F.] was under 18 years of age when the act was committed"; and (3) "defendant was a family member." The State continued:

> "If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty. If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

¶56 Turning to the first proposition, the State advised, "that the defendant committed an act of sexual penetration upon [A.F.] You will be given an instruction that tells you what sexual penetration is [in] case you have any questions." The State provided the definition of "sexual penetration," such that:

> "The term sexual penetration means any contact, however slight, between the sex organ or anus of one person and the sex organ, mouth or anus of another person or an intrusion, however slight, of any part of the body of one person or any object into the sex organ of another person. Evidence of the emission of semen is not required to prove sexual penetration."

The State continued:

> "Ladies and gentleman, you have heard significant evidence that acts of sexual penetration occurred. You heard straight from [A.F.] herself about *the things the defendant did to her and the contact she had to suffer because of him*.
>
> You also heard from Detective Smith about the defendant's own admissions regarding sexual penetration. That he admitted that he woke up and his penis was already in [A.F.]'s vagina. You did hear about the evidence of the emission of semen, although that's not required. It is actually something that's there to corroborate the issue that sexual penetration happened. So legally, by definition, you have sexual penetration occurring." (Emphasis added.)

¶57 We conclude that the State's closing argument was proper. Contrary to defendant's argument, the State did not present criminal sexual assault as an absolute liability offense. Rather, the State was clear that, to support a conviction, it was required to prove three elements beyond a reasonable doubt. Defendant takes issue with the State's remarks regarding sexual penetration, but, again, the State was clear that sexual penetration was only one element necessary to establish defendant's guilt of criminal sexual assault. The State properly defined sexual penetration as one of the elements of criminal sexual assault and applied the facts to the definition. The State made no mention

of the requisite *mens rea*, or insinuated a lack thereof. When a statute, such as criminal sexual assault, does not specifically provide a *mens rea* requirement any mental state of intent, knowledge, or recklessness is applicable. 720 ILCS 5/4-3(b) (West 2008); *People v. Finley*, 178 Ill. 2d 301, 305 (1988). Our courts have found that a mental state of intent or knowledge is implicit in offenses involving sexual penetration. See *People v. Terrell*, 132 Ill. 2d 178, 209 (1998); *People v. Burton*, 201 Ill. App. 3d 116, 121 (1990); *People v. Jimenez*, 191 Ill. App. 3d 13, 26 (1989). The State's closing argument expressly and repeatedly provided that it was required to prove beyond a reasonable doubt that defendant committed sexual penetration upon A.F. The State did not argue that the statute would be satisfied merely by Detective Smith's testimony that A.F. inserted defendant's penis into her vagina. Instead, in closing argument, the State reviewed the evidence, arguing that defendant should be found guilty based on A.F.'s credible recitation of the events, defendant's unreliable statements, and the DNA evidence.

¶58 In sum, we find the State's challenged closing remark was not error. Because we have found there was no error, we need not apply the plain error analysis.

¶59 III. Ineffective Assistance of Counsel

¶60 Defendant finally argues, in the alternative, that his counsel was ineffective for failing to object to the State's closing argument, for misstating the law in his closing argument, and for failing to tender a modified jury instruction.

¶61 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established the law required to present a claim for ineffective assistance of counsel. Under *Strickland*, a defendant must demonstrate that his counsel's performance was deficient and that he was prejudiced as a result. *Id.* at 687. To show deficient representation, a

defendant must show his counsel's performance fell below an objective standard of reasonableness. *Id*. at 688. Judicial scrutiny of a counsel's performance is highly deferential, such that a court must indulge in a strong presumption that the counsel's conduct fell within the wide range of professional assistance. *Id*. at 689. To demonstrate prejudice, the defendant must demonstrate there is a reasonable probability that, but for counsel's deficient representation, the result of the proceeding would have been different. *Id*. at 694. The Supreme Court advised that "[a] reasonable probability is a probability sufficient to undermine the confidence in the outcome" of the proceeding. *Id*. Moreover, because the defendant must satisfy both parts of the *Strickland* test, if an ineffective assistance claim can be disposed of based on lack of sufficient prejudice, a court need not consider the quality of the attorney's performance. *Id*. at 697.

¶62 Our supreme court has further advised that the right to effective assistance of counsel refers to competent, not perfect, representation. *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 101. In other words, *Strickland* only requires a fair trial for the defendant: one that is free of errors so egregious that they, in all probability, caused the conviction. *Id*.

¶63 We first find defendant cannot establish a claim for ineffective assistance based on his counsel's failure to object to the State's closing argument regarding sexual penetration. As we previously concluded, the State did not err in asserting the challenged remark. Because there was no error, defendant cannot establish he suffered substantial prejudice as a result of his counsel's failure to object to the remark. See *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 77.

¶64 Defendant next argues his counsel was ineffective for providing erroneous comments during closing argument. More specifically, defendant takes issue with the following:

> "This thing with she jumps on him in the middle of the night and penetrates her, well, if the officer really believed that, if it really happened, why didn't they arrest him? The State wants you to believe that it is so true, he told the officer he penetrated this girl. Well, look at the jury instructions. That's a crime. You have got a girl who says it happened. You have got a defendant who says it happened. In January of 2011, hands behind the back, sir, you are going to jail. Why didn't they do that?"

¶65 We conclude defendant failed to establish ineffective assistance based on his counsel's closing argument where he cannot demonstrate prejudice resulting from the challenged remark. As stated, the evidence substantially supported the jury's verdict. Defendant was a family member, as defined by the statute, when he committed repeated acts of sexual penetration, both with his penis in A.F.'s vagina and with a vibrator in A.F.'s vagina, all while A.F. was under the age of 18. Defense counsel's attempt to attack the credibility of Detective Smith and negate the purported statement that A.F. caused him to penetrate her did not undermine the confidence of the jury's outcome.

¶66 Defendant finally argues his counsel was ineffective for failing to tender a jury instruction identifying the *mens rea* for criminal sexual assault.

¶67 To establish an ineffective assistance of counsel claim for failure to submit a proposed jury instruction, the defendant bears the burden of showing the proposed

instruction would have been given and the outcome of the trial would have been different as a result. *People v. Jenkins*, 383 Ill. App. 3d 978, 991 (2008).

¶68 In *People v. Burton*, 201 Ill. App. 3d 116 (1990), this court rejected the defendant's contention that he was entitled to instructions setting forth the required mental state to sustain his conviction of aggravated criminal sexual assault. This court explained that the mental states implied by section 4-3 of the Criminal Code applied to general criminal mental states as opposed to specific mental states about which the jury must be advised in instructions defining the offense or in describing the elements the State is required to prove. *Id*. at 121. This court further stated that a statute's mental state generally accompanies the element of the prohibited act, which, in that case and in this case, was sexual penetration. *Id*. The court, however, held that, since aggravated criminal sexual assault was a general intent crime that did not require the jury to be instructed about the mental state required for each element, it was not error to provide jury instructions without the requisite mental states. *Id*. at 122; see also *People v. Simms*, 192 Ill. 2d 348, 376 (2000); *People v. Frazen*, 251 Ill. App. 3d 813, 830-31 (1993) (a jury need not be instructed on the implied mental state).

¶69 We agree with *Burton*, which was cited with approval by the supreme court in *Simms*, that jury instructions on a specific mental state were not required in this case for criminal sexual assault. We, therefore, reject defendant's argument that his counsel was ineffective for failing to offer a proposed instruction. We acknowledge the *Burton* court stated that, under some circumstances, the mental state implied by section 4-3 of the Criminal Code may possibly be so specific as to require instruction. *Burton*, 201 Ill. App. 3d at 122. However, those circumstances were not present here.

¶70 In sum, we conclude defendant failed to establish his claims of ineffective assistance of counsel.

¶71 CONCLUSION

¶72 We affirm the judgment of the trial court.

¶73 Affirmed.