2019 IL App (1st) 162782-U

SECOND DIVISION
May 14, 2019

No. 1-16-2782

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STEVEN YOUNG, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois. Nos. 14 CR 3538 and 14 CR 9659 Honorable Evelyn B. Clay, Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: (i) Trial court did not commit plain error in admitting out-of-court statement of seven-year-old victim of sexual assault. (ii) Evidence was sufficient to convict defendant of predatory criminal sexual assault of seven-year-old victim. (iii) Evidence was sufficient to convict defendant of criminal sexual assault of 13-year-old victim. (iv) Trial court properly took into account defendant's lack of remorse at sentencing.

¶ 2 Defendant Steven Young was charged with sex offenses against two minors, 13-year-old D.J. and 7-year-old B.A. Following a bench trial, Young was convicted of two counts of criminal sexual assault (as to D.J.) and one count of predatory criminal sexual assault (as to

B.A.) and sentenced to 16 years' imprisonment. Young appeals, arguing that (i) the trial court erred in admitting B.A.'s video-recorded statement, which he argues was the product of the interviewer's prompting and manipulation; (ii) the evidence was insufficient to convict him of criminal sexual assault against either minor, because B.A.'s accounts were inconsistent and D.J.'s account was incredible; and (iii) the trial court erred by taking into account his refusal to admit guilt at sentencing as an aggravating factor. Finding no error, we affirm.

¶ 3 BACKGROUND

¶ 4 In early 2014, 29-year-old Young was the landlord for D.J. and B.A.'s families, who lived in different buildings. On January 25, 2014, D.J. stayed over at Young's apartment, and Young allegedly assaulted him while he was showering. D.J. returned home and reported the assault to his mother. His mother called her best friend, B.A.'s mother. B.A.'s mother then spoke to B.A., who said that she was also assaulted by Young. Young was charged with sex offenses under two different case numbers that were consolidated for trial.

¶ 5 Evidence as to D.J.

¶ 6 Around 2009 or 2010, Young became the landlord of D.J., his siblings, and his mother Lasandra R. According to Lasandra, Young was "like a mentor" to D.J. Young took D.J. and his siblings on various outings and also paid D.J. to do various jobs for him, such as mowing lawns, painting houses, and buying groceries. On numerous occasions, D.J. spent the night at Young's apartment, and nothing unusual happened.

¶ 7 On Friday, January 24, 2014, D.J. did some work for Young and spent the night at his apartment. On Saturday, they did more work and Young invited him to spend the night again. D.J. did not have his cell phone with him.

¶ 8 D.J. testified that on Saturday evening, he went to take a shower in Young's bathroom while speaking on the portable "house phone" with a girl. Young entered the bathroom and started taking pictures of D.J. naked in the shower. D.J. asked what he was doing; Young just smiled. Young then pulled down his own pants "and his private part was on hard already."

¶ 9 Young got in the shower with D.J. and started playing with D.J.'s penis with his hand. D.J. moved Young's hand away. Young then grabbed D.J.'s hip and the back of his neck, bent him over, and stuck his penis inside D.J.'s "booty." D.J., who was still on the phone, hung up because he did not want the girl to hear what was going on. (The girl was not identified at trial, nor was there any cross-examination regarding the girl or the phone call.)

¶ 10 Young got out of the shower, retrieved something from the cabinet, and rubbed it on his penis. He then got back in the shower and tried to stick his penis in D.J.'s "booty" again. D.J. pushed him away. Young got on his knees and put his mouth on D.J.'s penis. When D.J. tried to push him away, Young got up, grabbed D.J., and pulled him toward himself. D.J. then got out of the shower, went to the guest room, and put on his clothes.

¶ 11 After getting dressed, D.J. went downstairs to the computer room and got on Facebook. A couple of minutes later, he used the house phone to call his mom, asking her to come pick him up. He did not mention the assault. His mom was unable to come, so Young drove D.J. home.

¶ 12 When D.J. arrived home, he was limping because his "booty" hurt. His mom asked why he was limping. According to D.J., he told her that his leg was hurting and went to his room. Later that night, he told his sister about the assault and then told his mom. His mom called the police and brought D.J. to Rush University Medical Center.

¶ 13 According to Lasandra, D.J. told her that while he was taking a shower, Young entered the bathroom with a "hard-on." Young got something out of the medicine cabinet, put it on his

penis, got in the shower with D.J., and tried to force his penis into D.J.'s anus. Young also put his mouth on D.J.'s penis and tried to shove his fingers into D.J.'s anus. D.J. "fought him off," ran to the guest room, got dressed, and called his mother. On cross-examination, Lasandra admitted that in January 2014, she was five months behind on rent, but she denied that she was facing eviction.

¶ 14 Dr. Rahul Patwari, an emergency room physician at Rush, examined D.J. shortly after midnight on January 26. D.J. told Dr. Patwari that at around 8:30 p.m., he was in the shower when his landlord entered the bathroom and started feeling D.J.'s penis. The landlord then put something on his own penis and inserted his penis into D.J.'s rectum. After that, the landlord placed his own penis in D.J.'s mouth.

¶ 15 An external physical exam revealed no signs of trauma. Specifically, there were no scratches, tears, bruising, or bleeding on D.J.'s penis, thighs, or anus. There was also no bruising on D.J.'s neck or hips. Dr. Patwari testified that this could be consistent with D.J.'s account of events because an assault could cause no trauma or only internal trauma. Additionally, lubricant would reduce signs of trauma.

¶ 16 The parties stipulated that the Forensic Science Center examined D.J.'s sweatpants and underwear. There was semen on D.J.'s underwear, but the DNA profile was not consistent with Young and was consistent with D.J. Oral and anal swabs collected from D.J. did not contain any semen, and penile swabs from D.J. did not contain any saliva. DNA collected from the penile swabs was, again, not consistent with Young and consistent with D.J. Finally, no lubricant was identified on the anal swabs.

¶ 17 Evidence as to B.A.

¶ 18 Before trial, the trial court granted the State's motion pursuant to section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10 (West 2014)) to admit out-of-court statements that B.A. made (i) to her sister D.E., (ii) to her mother, T.S., and (iii) to Lauren Glazer, a forensic interviewer at the Children's Advocacy Center.

¶ 19 In 2010, T.S. and her three children (B.A., B.A.'s twin brother, and their 15-year-old sister D.E.) became tenants at Young's residence. It was a two-flat unit; T.S. and her family lived on the ground floor, and Young lived alone on the second floor. According to T.S., they had an "open-door policy." Young came downstairs whenever he wanted, and the kids went upstairs whenever they wanted to play video games, use Young's computer, or watch TV. On a "weekly, monthly" basis, Young took the kids on various outings: to McDonalds, to get ice cream, or to go bowling. T.S. said that none of the children exhibited unusual behavior around Young, and she never saw anything that led her to believe she didn't want her children around him.

¶ 20 In 2013, during Thanksgiving break, D.E. spoke with B.A. in the kitchen of their apartment. D.J. and D.J.'s sister Shay were also present. According to D.E., B.A. said, "Steve like me, he put his fingers in my private part." D.E. asked, "Are you serious?" B.A. replied, "Yes." D.E. repeated her question four or five times, and B.A. kept responding yes, until on the last time, she answered no. D.E. then told B.A. not to go upstairs alone with Young. D.E. did not tell any adults about this conversation. She was afraid because she knew that Young had a gun—he showed it to the siblings on one occasion—although he never threatened any of them with it.

¶ 21 For Christmas 2013, Young got presents for all three children. B.A.'s present was an iPod Touch worth about $200. T.S. thought this was a strange gift because it was so expensive. The other children received "a paper airplane" and "a speaker."

¶ 22 At around 10 p.m. on January 25, 2014, T.S. received a phone call from Lasandra, her best friend. After speaking with Lasandra[1], T.S. went to Lasandra's house with her three children. In the kitchen of Lasandra's house, T.S. asked B.A. if anyone had touched her. Nobody else was present for the conversation. B.A. initially did not respond, then said it was "our secret." Asked whom she had the secret with, B.A. said, "[H]is name starts with S and he lives with us." Nobody living with them except for Young had a first name starting with S.

¶ 23 T.S. then asked B.A. where Steve touched her. B.A. pointed at "her private part *** [i]n the front." T.S. asked how many times he touched her, to which B.A. replied, "Mommy, I don't count." She looked afraid and sad. She did not say when the touching occurred.

¶ 24 Later that night, T.S. took B.A. to Rush University Medical Center, where she was examined by Dr. Rene Carizey, an emergency room physician. B.A. told Dr. Carizey that Young "expos[ed] himself and touch[ed] her private parts under her clothes." She could not specify when the touching happened, and she denied that he penetrated her. A full body examination did not reveal any signs of trauma, but Dr. Carizey stated that this could be consistent with B.A.'s story, depending on when the abuse occurred and the degree of force used.

¶ 25 At trial, B.A. testified that the first time Young did anything to her, they were in the computer room in his apartment. Young touched her "front private part" (her vaginal area) with his hands over her clothes, and he told her not to tell anybody about it.

[1] The content of this conversation was not discussed at trial, but presumably, Lasandra told T.S. that Young sexually assaulted D.J. We may also assume that Lasandra relayed that B.A. told D.J. she was assaulted as well.

¶ 26 B.A. said that Young touched her on multiple other occasions. Once, he brought B.A. to his bedroom, where he pulled down her pants and her underwear. He then touched her vaginal area with his hands, both on the outside and on the inside. His "front private part" touched her vaginal area. His "front private part" also touched her "back private part," or "booty." Counsel asked, "[D]id it touch your booty or did it go into your booty?" She replied, "In." Additionally, Young touched B.A.'s vaginal area with his mouth. When he did so, B.A. saw white stuff coming out of his penis, which he put in a tissue. She testified that she saw the white stuff "[m]ore than once." She denied that Young ever put his penis in her mouth.

¶ 27 On the last occasion that Young touched her, he said, "Okay, let me stop before I get in trouble." B.A. could not recall exactly when these incidents occurred, though she knew some were during her school break. She did not initially tell an adult because Young instructed her not to tell anyone and she was afraid of him. She knew he had a gun, since he showed it to her once when it was not loaded. He never threatened to shoot her.

¶ 28 On January 27, 2014, B.A. gave a videotaped interview to Glazer at the Children's Advocacy Center. B.A. told Glazer that Young touched her "[l]ots of times." All of the incidents occurred while she was on the couch, not anywhere else in the apartment. The first time, Young told her to massage his back, and she did it because she was afraid of him. "And…that's it," she said. On another occasion, B.A. was watching television on the couch downstairs. Her mother was not home; D.E., D.J., and Shay were all in the computer room. Young came downstairs and touched B.A.'s vaginal area inside "the line." On a third occasion, Young slid his hand down B.A.'s underwear and touched her vagina both inside and outside "the hole." He then pulled down his pants and displayed his penis, which was "laying down." He shook his penis with his hand and white stuff came out, which he put in a tissue.

¶ 29 B.A. told Glazer that she only saw Young's penis once and only saw the white stuff once. She denied that Young ever touched her with his penis. She also denied that Young ever touched any of her body parts besides her vaginal area, or that he used anything besides his hand on her vaginal area.

¶ 30 B.A. said that she told D.E., D.J., and Shay that Young touched her vaginal area. Glazer then said:

> "I had heard that you told them that something else had happened to you, that Steve did something else to you.
>
> B.A.: I told them that I said that I was just playing, but I wasn't. But I didn't tell them nothing else."

¶ 31 Glazer took a break to go "check [her] questions." When she returned, the following exchange occurred:

> "Glazer: So, [B.A.], I was talking to [D.J.] and to Shay earlier, and they told me that some other stuff happened, that you told them that some other stuff happened with Steve. You know, it's really important today that we talk about what really happened. And you're not in any kind of trouble with me, but it's really, really important that we talk only about the truth and you tell me that—everything that happened and not leave anything out. Okay?
>
> B.A.: (nods)
>
> Glazer: So, I talked to [D.J.], and he said that you told him that other stuff happened. So, tell me about that.
>
> B.A.: What other stuff?
>
> Glazer: That Steve had done some other stuff to you. ***

B.A.: I don't remember.

* * *

Glazer: [I]t's really important that if something more happened to you, that you tell me so the people I work with can help you. But if you don't tell me the truth and what really happened, the people I work with can't help you.

B.A.: Can you tell me what Shay and [D.J.] said?

Glazer: Well, I want to know what happened to you. So, just tell me the truth.

B.A.: I don't remember."

B.A. then clarified that she both could not remember anything else and was afraid of Young. Glazer told her, "Okay, well, the people I work with are here to protect kids from people like Steve. But if you don't tell the truth and what really happened, they can't protect you as well. So we have to know everything that Steve did." B.A. replied, "I don't remember. *** I'm telling the truth, I don't remember."

¶ 32 Glazer then asked:

"Glazer: I heard that Steve may have touched you on your private part with something besides his hand. Was there any other thing that Steve used to do something to your private part?

B.A.: (shakes head)

Glazer: No? Did he put his pri— his thingy anywhere on your body?

B.A.: (nods)"

B.A. then told Glazer that, during the previously-mentioned incident where she was watching television on the couch, Young "rolled [her] over" and put his penis in her "booty." Glazer thanked B.A. for telling her, and B.A. said, "I told you everything that happened." Glazer then

asked, "So the time that he put his thingy in your booty, did that happen on one day or more than one day?" B.A. said that it happened on more than one day, and some of the incidents occurred in Young's room, although she did not remember what happened in those incidents. She denied that Young put his penis on any other part of her body.

¶ 33 B.A. told Glazer that Young had not done anything else to her. Glazer asked, "Is that the truth or is that a story?" B.A. replied, "The truth." Glazer said: "Okay, well I hear—when I talked to [D.J.] earlier, he had said that you told him something more that happened besides his thingy in your booty. What else did you tell [D.J.] that Steve had done?" B.A. said she did not know. She denied that Young ever used something besides his hand to touch her vaginal area. She also denied that Young ever put something in her mouth, despite repeated questioning by Glazer on this point.

¶ 34 Verdict

¶ 35 As to D.J., the court found Young guilty of two counts of criminal sexual assault, based on contact between (i) Young's mouth and D.J.'s penis and (ii) Young's penis and D.J.'s anus. The court stated that D.J. was "extremely credible" and was "corroborated almost word for word." The court also stated that the lack of physical evidence was unsurprising since the assault took place in a shower. As to B.A., the court found Young guilty of predatory criminal sexual assault based on Young inserting his finger into B.A.'s vagina, stating that "the corroboration from the Children's Advocacy Center and other persons *** holds up despite the lack of physical evidence." But the court found Young not guilty of predatory criminal sexual assault based on contact between his penis and B.A.'s buttock. Additionally, the court stated it did not believe the defense theory that D.J. and B.A. fabricated their allegations because D.J.'s family was behind on rent. Young was sentenced to five years on each of the criminal sexual assault charges

involving D.J. and six years on the predatory criminal sexual assault charge involving B.A., to be served consecutively.

¶ 36 ANALYSIS

¶ 37 Young argues that his conviction must be reversed because (i) the trial court erred in admitting B.A.'s videotaped interview with Glazer and (ii) the evidence was insufficient to convict him of criminal sexual assault against either minor, since B.A.'s accounts were inconsistent and D.J.'s account was incredible. Young also argues that the trial court erred at sentencing by taking into account his refusal to admit guilt as an aggravating factor. We consider these contentions in turn.

¶ 38 Admissibility of B.A.'s Videotaped Interview

¶ 39 Young argues that B.A.'s videotaped interview with Glazer should not have been admitted because the video shows that Glazer manipulated and coerced B.A. into fabricating allegations against him.

¶ 40 Young admits he has forfeited this issue because he did not object to admission of the video at trial, nor did he include the issue in a posttrial motion. *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010). Young argues that we may still consider the issue under the plain error doctrine, which allows us to review "clear and obvious" unpreserved errors when either (i) the evidence is so closely balanced that the error threatened to tip the scales against the defendant, or (ii) the error "is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Here, Young argues that the first prong of plain error applies.

¶ 41 Section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10 (West 2014)) creates an exception to the rule against hearsay in prosecutions of sexual offenses committed

against children under the age of 13. Specifically, a victim's out-of-court statement describing an element of the offense may be admitted if the court finds in a hearing "that the time, content, and circumstances of the statement provide sufficient safeguards of reliability." 725 ILCS 5/115-10(a), (b)(1) (West 2014). In determining reliability, the court considers the totality of the circumstances, including (i) whether the victim made the statement spontaneously and consistently; (ii) whether the victim had a motive to lie; (iii) the victim's mental age; and (iv) any terminology not expected from a child of comparable age. *People v. Johnson*, 363 Ill. App. 3d 1060, 1076 (2005). The State, as the proponent of the statement, bears the burden of establishing that the statements were reliable and not the result of adult prompting or manipulation. *Id.* Absent an abuse of discretion, we will not disturb the trial court's finding that a statement is sufficiently reliable to be admitted. *People v. Major-Flisk*, 398 Ill. App. 3d 491, 508 (2010).

¶ 42 B.A.'s interview with Glazer can be divided into two parts. In the first part, Glazer asked, "So how come you came here today to talk to me?" B.A. answered that Young touched her "in a negative way." Asked what happened, B.A. readily explained that Young touched her "private part *** [l]ots of times," including multiple occasions on which he penetrated her with his fingers. This is consistent with B.A.'s statement to D.E. that Young "put his fingers in [her] private part," and also consistent with her statements to her mother and Dr. Carizey that Young touched her vaginal area. B.A. expressly denied to Glazer that Young touched any of her other body parts.

¶ 43 In the second part of the interview, Glazer claimed that D.J. and Shay said "other stuff" happened with Young. B.A. stated no fewer than six times that she did not remember anything else, but Glazer continued pressuring her to reveal "everything." Glazer also effectively threatened B.A. by telling her, "[I]f you don't tell me the truth and what really happened, the

people I work with can't help you," and, later, "The people I work with are here to protect kids from people like Steve. But if you don't tell the truth and what really happened, they can't protect you as well." Faced with threats and repetitious badgering, B.A. made a new allegation not contained in any of her prior statements, namely, that Young touched her "booty" with his "thingy."

¶ 44 We agree with Young that Glazer's conduct in the second part of the interview was strongly manipulative to an extent that may have affected its reliability. Even though Glazer asked generally non-leading questions, she refused to accept B.A.'s repeated assertions that she did not recall anything more and instead continued to insist that "something else happened" until B.A. made a new allegation. Nevertheless, we do not find that admitting B.A.'s resulting statement constitutes plain error, because Young was found not guilty of touching his penis to B.A.'s buttock—the only allegation B.A. made in the second part of the interview. Thus, admitting B.A.'s statement to that effect did not prejudice Young. See *People v. White*, 2011 IL 109689, ¶ 134 (rejecting first-prong plain error claim where defendant could not show prejudice).

¶ 45 Moreover, we find that the first half of the interview had sufficient indicia of reliability that admitting it was proper. As noted, B.A.'s statement that Young touched her vagina with his hand was largely consistent with her prior statements. She volunteered the information in response to open-ended, non-leading questions. She used terminology appropriate for a child, saying that Young touched her "in the private part" and showed her his "thingy." Finally, she had no apparent motive to lie. For all these reasons, the trial court's decision to admit the first half of B.A.'s interview was not error, much less plain error. See *People v. Brant*, 394 Ill. App. 3d 663, 677 (2009) (in the absence of error, there can be no plain error).

¶ 46 Sufficiency of the Evidence as to B.A.

¶ 47 Young next argues that the evidence was insufficient to convict him of sexually assaulting B.A. because her statements regarding the assaults were inconsistent.

¶ 48 In reviewing a challenge to the sufficiency of the evidence, we must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *People v. Peterson*, 2015 IL App (1st) 130157, ¶ 188 (citing *People v. Jackson*, 232 Ill. 2d 246, 280 (2009)). Moreover, it is not our function to retry the defendant. Rather, the fact finder is tasked with determining the credibility of witnesses and resolving conflicts in the evidence, and we will not substitute our judgment on these matters. *People v. Teague*, 2013 IL App (1st) 110349, ¶ 26.

¶ 49 As noted, as to B.A., Young was convicted solely of digitally penetrating her. On this point, B.A. was consistent: she told D.E. that Young "put his fingers in [her] private part," and she repeated to her mother, Dr. Carizey, and Glazer that Young touched her vaginal area. She also repeated this allegation at trial.

¶ 50 Young nevertheless argues that B.A. lacked credibility because she was inconsistent as to the location and circumstances of the assaults. To Glazer, B.A. stated that the incidents occurred in the TV room downstairs, whereas at trial two years later, B.A. testified that Young assaulted her in the computer room and in his bedroom, and she did not recall anything in the TV room. She also described different circumstances surrounding the assaults; she told Glazer that, on one occasion, Young touched her while she was watching TV on the couch, while at trial, she described an incident in which Young touched her when she went upstairs to use his computer. But it was also B.A.'s consistent stance that Young assaulted her multiple times. She told her mother "I don't count" and was unable to tell Glazer whether the number of assaults was more or

less than five. Under such circumstances, it is not unreasonable to credit B.A.'s testimony of assaults occurring in different rooms of the apartment. Nor would it be unreasonable to infer that a seven-year-old might forget some collateral details in the two years before trial, while still accurately recalling that the assaults happened.

¶ 51 In this regard, *People v. Cowan*, 209 Ill. App. 3d 994 (1991), is distinguishable. The adult victim in *Cowan* told police that defendant and his accomplice assaulted her while she was standing in the kitchen. She then testified at trial that the assault occurred in the bedroom while they held her down on the bed. She also made inconsistent statements as to whether one or both assailants penetrated her. Based on these and other inconsistencies, we found the evidence left reasonable doubt as to defendant's guilt. *Id.* at 997. But the present case does not involve an adult testifying to a single discrete instance of assault, but a young child testifying to multiple incidents that might reasonably have occurred in different rooms and under different circumstances. *Cowan* is therefore inapposite.

¶ 52 Young additionally argues that B.A. was not consistent as to anything else he might have done besides touching her vagina with his hand. Specifically, to Glazer, after much badgering, B.A. claimed that Young touched her buttock with his penis; at trial, she added for the first time that he touched her vaginal area with his penis and with his mouth. But, as noted, the trial court acquitted Young of the former charge, and the State did not seek to convict Young of the latter.[2] Thus, B.A.'s inconsistencies in this regard do not render the evidence insufficient as to Young's conviction for predatory criminal sexual assault.

¶ 53 Young next contends that B.A.'s testimony is implausible because she could not explain why she continued to go to Young's apartment after he assaulted her. This contention lacks

[2] Although Young was originally charged with predatory criminal sexual assault based on touching B.A.'s vagina with his penis, the State *nolle prossed* that charge prior to trial.

merit. In fact, B.A. did explain; she said, "Oh, because nobody knew, and I live there." It is not implausible in the slightest that a seven-year-old, sexually assaulted in the building where she lived but afraid to tell others about the incident, would continue to return to the apartment, particularly since the evidence showed her siblings went there too.

¶ 54 Finally, Young argues that the trial court misapprehended the evidence when it stated that the Glazer interview corroborated B.A.'s trial testimony. See *People v. Mitchell,* 152 Ill. 2d 274, 321 (1992) (due process violation where trial court did not recall substance of defendant's testimony in ruling on motion to suppress). But, as discussed, the interview does corroborate B.A.'s testimony on a crucial point—that Young touched her vagina on multiple occasions—and the inconsistencies pointed out by Young do not render the evidence insufficient to convict but merely impact B.A.'s credibility.

¶ 55 Thus, drawing all reasonable inferences in favor of the prosecution, and keeping in mind that the fact finder is tasked with determining the credibility of witnesses, we find that a reasonable fact finder could conclude that Young touched B.A.'s vagina with his hand based on B.A.'s statements to her sister, her mother, Dr. Carizey, Glazer, and finally her testimony at trial.

¶ 56 Sufficiency of the Evidence as to D.J.

¶ 57 Young next argues that the evidence was insufficient to convict him of sexually assaulting D.J., because D.J.'s account of events was not corroborated by physical evidence, D.J. himself was not credible, and his statements regarding the alleged assault were inconsistent. Viewing the evidence in the light most favorable to the prosecution, and keeping in mind that our role is not to retry the defendant, we do not find D.J.'s testimony to be so flawed that a reasonable fact finder could not find Young guilty beyond a reasonable doubt.

¶ 58 Young first argues that D.J.'s testimony is not corroborated by the physical evidence, since an external body exam did not reveal any trauma. But it is well established that lack of injury does not disprove sexual assault. See, *e.g.*, *People v. Davis*, 260 Ill. App. 3d 176, 189 (1994); *People v. Fryer*, 247 Ill. App. 3d 1051, 1058 (1993). Moreover, Dr. Patwari testified that it was reasonable for a sexual assault as described by D.J. to cause no injury or only internal injury that would not have been discovered in an external exam.

¶ 59 In a similar vein, Young argues that D.J.'s testimony was not substantiated by forensic testing. Specifically, Young's DNA and semen were not found on D.J.'s underwear or penile swabs, saliva was not found on D.J.'s penile swabs, and lubricant was not found on his anal swabs. But, as the trial court noted, the assault occurred in a shower, which could reasonably have washed away such evidence. Additionally, there was no testimony that Young ejaculated during the assault, and it is unclear whether Young penetrated D.J. after putting on lubricant (D.J. testified only that Young's penis "touched" his "booty" before D.J. pushed him away). Accordingly, the lack of forensic corroboration is not fatal to Young's conviction.

¶ 60 Young also points out that D.J.'s description of the assault is different from Dr. Patwari's: D.J. testified that Young put his own mouth on D.J.'s penis, while Dr. Patwari testified that D.J. said Young put his own penis in D.J.'s mouth. But it is the trial court's province to resolve conflicts in the evidence. The trial court apparently found D.J. to be more credible than Dr. Patwari on this issue, and it is not our place to second-guess this determination. Moreover, a finder of fact could reasonably have concluded that Dr. Patwari misremembered what D.J. told him about the assault. See *People v. Cunningham*, 212 Ill. 2d 274, 282 (2004) (where officer testified that arrest occurred on December 15, but his report was dated December 14, "one could reasonably infer he confused the dates when he wrote the report").

¶ 61 Finally, Young argues that D.J.'s description of the assault is "fantastical" because D.J. was on the phone when the assault happened but made no contemporaneous outcry. We note in passing that the defense theory—either that Robinson coached D.J. to lie about being on the phone, or that D.J. on his own decided to add such an improbable detail to his story—is equally fantastical. More importantly, the defense argued to the trial court that D.J.'s testimony was unconvincing for this reason, and the trial court rejected the argument, finding D.J. to be "very, very credible." As our supreme court has stated, even where there are "unresolved questions" about certain parts of a witness's testimony, "it is for the fact finder to judge how flaws in part of the testimony affect the credibility of the whole." *Cunningham*, 212 Ill. 2d at 283 (acknowledging flaws in officer's testimony but finding that the evidence was sufficient to convict because "there is nothing in the record showing that the only reasonable inference is that the questionable parts of [Officer] Pfest's testimony make the whole unworthy of belief"). The trial court found D.J. credible as to the ultimate issue of sexual assault, and it is not our place as a court of review to second-guess the trial court's credibility determination. *Teague*, 2013 IL App (1st) 110349, ¶ 26.

¶ 62 Accordingly, we find the evidence sufficient to convict Young of criminal sexual assault as to D.J.

¶ 63 Sentencing

¶ 64 Finally, Young argues that the trial court erred at sentencing by taking into account his refusal to admit guilt as an aggravating factor. Because Young did not object at sentencing or include this issue in a postsentencing motion, we review his claim for plain error. *People v. Rathbone*, 345 Ill. App. 3d 305 (2003). Young argues that the first prong of plain error applies in that the evidence at his sentencing hearing was closely balanced.

¶ 65 A trial court may not "automatically and arbitrarily" consider a defendant's refusal to admit guilt as an aggravating factor. *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011) (citing *People v. Ward*, 113 Ill. 2d 516, 529 (1986)). But it is well established that the court may consider a defendant's lack of remorse as it affects his potential for rehabilitation. *People v. Mulero*, 176 Ill. 2d 444, 462 (1997). As our supreme court has explained:

> "In some instances and under certain factual circumstances, a continued protestation of innocence and a lack of remorse may convey a strong message to the trial judge that the defendant is an unmitigated liar and at continued war with society. Such impressions garnered by the trial judge from the entire proceeding are proper factors to consider in imposing sentence." *Ward*, 113 Ill. 2d at 528.

Thus, "numerous sentences have been affirmed on appeal despite a reference by the sentencing court to a defendant's persistent claim of innocence." *People v. Speed*, 129 Ill. App. 3d 348, 349-50 (1984); see also *Perkins*, 408 Ill. App. 3d at 763-64 (trial court did not err in determining that defendant harbored "continuing dishonesty and opposition to society" based on his insistence on innocence and his suggestion that others were responsible for harming the victim).

¶ 66 At sentencing, Young made a statement in allocution in which he discussed at length "the many wrongs of the criminal justice system here in Illinois" and argued that it was unjust to convict anyone solely on witness testimony without physical evidence. He asserted that the State's case against him was "exceptionally weak and almost non-existent." He also stated that "[i]t was very clear that the answers [of] the victims were a product of coercion" and claimed that neither victim suffered any emotional injuries.

¶ 67 Prior to imposing sentence, the court stated: "The court did not find [the victims] to be coerced or liars. The court *** found after trial that the evidence presented was very, very

credible beyond a reasonable doubt." The court also found credible the victim impact statements indicating that Young caused the victims ongoing emotional harm.

¶ 68 In aggravation, the court found that Young sexually assaulted two minors. But the court also stated: "The mitigation is also great. You're an outstanding citizen. This is your first offense. The potential for rehabilitation is also great." The court then sentenced Young to 26 years' imprisonment (10 years for each of the counts as to D.J., plus 6 years for the count as to B.A., to be served consecutively).

¶ 69 Defense counsel orally moved to reconsider sentence. In ruling on that motion, the court stated:

> "I don't think it's excessive in the sense that Mr. Young has shown zero remorse, absolutely zero remorse. *** 'These two children are liars.' In a court of law, credible testimony is evidence, Mr. Young. I found D.J. to be very credible. Very credible.
>
> * * *
>
> I am also not unmindful of the ongoing future effects of your conduct with this family that trusted you. And you betrayed that trust. *** You're going to have to own that and admit to that. And it didn't happen today. Today it was everybody else's fault, including the Court. And you don't know how, you are accusing the Court of not having assessed the evidence properly. The State of Illinois is at fault, the Court, the judge, those victims and their families.
>
> Mr. Young, you're going to have to own what you did one day. But it wasn't today, unfortunately. Had you stood there and owned it, your sentence would have been somewhat less. Had you told that family, those mothers, the mothers that you were sorry—that would have been showing remorse."

The court then granted the motion for reconsideration, reducing the sentence for each count as to D.J. from 10 to 5 years. Young's total sentence was 16 years, 2 more than the 14-year minimum. 720 ILCS 5/11-1.20 (West 2016); 730 ILCS 5/5-4.5-30 (West 2016) (criminal sexual assault is a Class 1 felony with a range of 4 to 15 years); 720 ILCS 5/11-1.40 (West 2016) (predatory criminal sexual assault is a Class X felony with a range of 6 to 30 years).

¶ 70 Viewing the trial court's comments as a whole (*People v. Csaszar*, 375 Ill. App. 3d 929, 952 (2007)), we find that the trial court properly considered Young's lack of remorse. The court observed that Young, who elected to make a statement in allocution, showed "absolutely zero remorse" for his actions, despite the emotional harm he caused to both children. The court also observed that instead of admitting responsibility for his actions and apologizing to the families, Young chose to blame everyone else for his present situation. Based on these observations, the trial court could reasonably have concluded that Young's "continuing dishonesty and opposition to society" (*Perkins*, 408 Ill. App. 3d at 763-64) warranted a harsher sentence.

¶ 71 *Speed*, 129 Ill. App. 3d 348, is readily distinguishable. Speed was convicted of rape. At sentencing, he expressed remorse for the suffering he caused and admitted that he was guilty of "some crime," such as indecent liberties or attempted rape, though he claimed he did not actually rape the victim. *Id.* at 350. The trial court stated: "After a portion of the testimony I thought perhaps a ten year sentence might be appropriate. When Mr. Speed said he didn't commit the crime which he stands charged and convicted again tilted the scale the other way." *Id.* at 351. The trial court then sentenced Speed to 11 years' imprisonment. We reduced Speed's sentence to 10 years, since the trial court did not find that Speed lacked remorse; rather, it enhanced his sentence solely based on his failure to admit guilt. By contrast, Young expressed no remorse to the victims or their families, and the trial court explicitly premised its sentence upon that lack of

remorse, an entirely proper consideration. *Perkins*, 408 Ill. App. 3d at 763 (citing *Ward*, 113 Ill. 2d at 529).

¶ 72 At oral argument, Young's counsel expressed concern that a criminal defendant who maintains his innocence faces a "catch-22" at sentencing, because if he elects to make a statement in allocution, the trial court may hold his lack of remorse against him, but if he elects not to make any statement, the trial court may likewise construe his silence as evidencing a lack of remorse. We do not agree that a defendant's silence at sentencing can be used against him in this manner. It is well established in criminal cases that "no negative inference from the defendant's failure to testify is permitted." *Mitchell v. U.S.*, 526 U.S. 314, 327-28 (1999). The Supreme Court has extended this rule to the sentencing hearing, stating: "The concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing." *Id.* at 329 (sentencing court could not draw adverse inference from defendant's silence in determining facts relating to circumstances and details of crime); see also *People v. Swank*, 344 Ill. App. 3d 738 (2003) (in burglary prosecution, sentencing court violated defendant's right against self-incrimination when it demanded that defendant tell the name of his drug dealer or face a heavier prison sentence). Thus, if a defendant chooses not to make a statement in allocution, no negative inference may be drawn from his silence. But if he chooses to speak, the trial court may consider his words as they bear upon his remorse or lack thereof. *Ward*, 113 Ill. 2d at 528.

¶ 73 CONCLUSION

¶ 74 Because the evidence was sufficient to convict Young of sexually assaulting B.A. and D.J., and because the trial court properly took into account Young's statement in allocution as it reflected his lack of remorse, we affirm.

¶ 75 Affirmed.