No. 2—09—0366
Order filed February 18, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 05—CF—4018
JOHN BARNES,	)	Honorable Rosemary Collins,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: The trial court did not err in admitting, pursuant to section 115—7.2 of the Code of Criminal Procedure of 1963, expert testimony concerning child sexual abuse accommodation syndrome where such testimony has consistently and soundly been allowed in Illinois.

The evidence was sufficient to sustain defendant's convictions on five counts of criminal sexual assault.

In sentencing defendant on count III, the trial court erred by imposing a harsher sentence based on a finding for which there was no evidentiary basis—specifically, that sexual penetration by an object causes more harm than penetration by a body part.

Where the trial court's erroneous finding resulted in a harsher sentence than might otherwise have been imposed, this error, under plain-error review, affected the fairness of defendant's trial and challenged the integrity of the judicial process; accordingly, the sentence on count III is vacated and the cause is remanded for resentencing on that count.

I. INTRODUCTION

Following a jury trial, defendant, John Barnes, was convicted of five counts of criminal sexual assault (720 ILCS 5/12—13(a)(3) (West 2004)) and sentenced to 38 years' imprisonment (consecutive terms of seven years on four counts and a consecutive 10-year term on count III). Defendant appeals, arguing that: (1) the trial court erred in allowing testimony concerning child sexual abuse accommodation syndrome (CSAAS); (2) the State did not prove him guilty beyond a reasonable doubt; and (3) the trial court erred in sentencing defendant, where, in sentencing him on one count to 10 years' imprisonment, it relied on an improper factor. We affirm in part, vacate in part, and remand for resentencing on count III.

II. BACKGROUND

This case arose out of allegations that defendant sexually assaulted the victim, Nathan Baxter, over a four-year period (when Nathan was between ages 13 and 17) while Nathan lived with defendant. A one-day trial occurred on January 6, 2009.

A. State's Case-in-Chief

1. Officer Rosanne Baker

Officer Rosanne Baker testified that she worked as a patrol officer for the Rockford police department. On October 28, 2005, Baker responded to a call from 1920 Kings Highway. Defendant had called police, seeking help in reference to a domestic dispute. Defendant greeted Baker at the residence and directed her to the backyard. In the backyard, Baker saw two other officers and

Nathan Baxter, the victim. Baker described Nathan, age 17, as very distraught throughout their conversation; he was crying. Nathan told Baker that defendant was his guardian and had been "using him for sex and that he couldn't take it anymore and he wasn't gay." When Baker asked Nathan if there was anything in the residence that might assist in proving his allegations against defendant, Nathan retrieved anal beads from a night stand. The beads were collected as evidence.

2. Catherine McDermott

Catherine McDermott, a licensed independent social worker, was called by the State to testify about CSAAS. Describing her credentials, McDermott testified that she works at River View Center, a sexual assault counseling center in Galena. At the center, McDermott is program director and conducts adult therapy and supervises clinical staff. She has been at the center for 12 years and counsels about 20 to 25 sexual abuse victims per month. McDermott testified that she has never met or treated Nathan and that she did not review police reports in this case. She also has a part-time private practice.

Addressing CSAAS, McDermott testified that it is a syndrome and not a diagnosis, meaning that it is a collection of signs and symptoms that are typical for someone who has been sexually abused. The syndrome was identified in 1983 by Roland Summit, who conducted four years of research, looking for patterns in people who are sexually abused. According to McDermott, Summit's research contributed to the diagnosis of post-traumatic stress disorder (PTSD).

McDermott explained that the DSM-IV, the Diagnostic and Statistical Manual of Mental Disorders, is published by the American Psychiatric Association and contains syndromes and diagnoses that have been generally scientifically accepted. According to McDermott, if something is contained in the DSM-IV, it has gone through much research and discussion by psychiatrists.

CSAAS is a collection of five characteristics typically found in children who have been abused: (1) secrecy; (2) helplessness; (3) entrapment/accommodation; (4) delayed or conflicted disclosure; and (5) recantation. As to secrecy, McDermott explained that abuse typically occurs in secrecy and that abused children know that, if they reveal the secret, then everything in their life will change or the offender has threatened them or told them that no one will believe them. As for helplessness, McDermott testified that there is a misconception that abused children will tell right away if something happens to them, when, in fact, abused children are unlikely to report abuse; adults have more power. Entrapment means that abused children will not be believed if they tell or that they start to feel trapped if the abuse occurs over a long period. They have to make adjustments to survive it. He or she may go into denial or into numbing behavior such as drinking, aggression, or running away. The child might still love the abuser—this enables the child to feel more in control. The fourth characteristic, delayed or conflicted disclosure, occurs because the child fears losing his or her security, home, parent, or caretaker. "They know things will change if they tell. They know they may be blamed or looked on differently. They know that there is a stigma about sexual abuse." This can be true with either gender. Finally, recantation of the allegations is common if a abused child has revealed the secret and is not believed or is chastised about revealing and a lot of pressure is put on him or her such that the child recants.

McDermott stated that, in her research, training, and experience, not all children present with all five features of CSAAS. CSAAS is not specific to a particular socio-economic class, ethnic or religious group, or age. Contrasting child victims of sexual abuse with adult victims, McDermott testified that children feel helpless and are more trusting than adults. It is very typical for victims who are 13 and 17 years old to be frightened and confused. Even older children can display the

features. It is not unusual for a child victim of sexual abuse to not fight back during the abuse. Also, "often," they do not immediately report the abuse. Typically, when teenagers are sexually abused by their guardians, they might not report the abuse because they fear the consequences, such as whether they will be believed, blamed, or lose their home or security.

Addressing the failure to report where the abuse is between a perpetrator and a victim of the same gender, McDermott stated that males typically report less often. Also, boys worry about being perceived as homosexual if a man abused them or that they were weak or something was wrong with them. It is more typical for a child victim to first tell a peer than an adult. This is so because of the authority issue, and they might feel that they can keep their secret if they tell a peer. Mood and behavior changes are typical.

On cross-examination, McDermott testified that she is not a doctor, psychiatrist, or psychologist. None of the 70 conferences she has attended in the past 12 years addressed CSAAS. CSAAS is a set of factors that may or may not be present in a potential abuse victim. McDermott stated that CSAAS is not recognized in the DSM-IV, but it "was part of developing PTSD diagnosis." Referring to Summit's research in 1983, McDermott testified that the way abuse was reported then was different than how it is reported today. More was becoming known about sexual abuse at that time. More counseling tools are available today than were available in 1983.

On re-direct examination, McDermott clarified that the effects of abuse are no different today than they were in 1983. In her practice, McDermott has counseled children with the characteristics. She further testified that, when she first read Summit's article about CSAAS, "it very much fit with my experience that I had seen for several years."

3. Nathan Baxter

Nathan Baxter, the victim, testified that he is 20 years old. His biological parents, who are divorced, are Dawn and Dale Nelson. He has two brothers, Brian (age 21 or 22) and Dale (23). Nathan's parents divorced when he was about age six. Nathan last saw his biological father approximately two or three years ago and could not recall when he last saw him before that. Between the divorce and age 17, Nathan rarely saw his biological father; he was not someone Nathan felt he could trust or confide in. Between ages 10 and 17, Nathan's relationship with his mother was "on and off." He testified that he did not have a close relationship with her and that she was not someone he trusted or in whom he confided.

As to his mother, Dawn, Nathan testified that he does not currently see her. When his parents divorced, Nathan lived with Dawn, his grandparents, and his brothers. An aunt and her two sons also lived with them. Their address was 2204 22nd Street in Rockford. Addressing life in his grandparents' house, Nathan described it as "hard." He had asthma, and there were three or four cats living in the residence, which aggravated his condition. Nathan characterized the emotional environment as "very abusive," explaining that the children were spanked by the adults if, for example, they did not retrieve sodas for them.

When Nathan was 10 years old, he met defendant. Defendant and his boyfriend, Chris Reider, moved into the house behind Nathan's grandparents' house. The homes were separated by a fence. There was a trampoline in defendant's yard. Nathan and Dale jumped on the trampoline. They later asked Dawn's permission to do so, which she gave, and Dale asked defendant's permission, which he gave after Dawn signed a note acknowledging that defendant would not be responsible for any injuries. Nathan and his brothers frequently went to defendant's house to play on the trampoline or to "hang out" with defendant. Defendant's cousins and nephews would visit

him too. Defendant would take them out to the movies and dinner. Nathan testified that defendant became a father figure to him. He enjoyed spending time with him.

Initially, defendant did not buy gifts for Nathan. Their relationship changed when defendant started buying school clothes for Nathan. Defendant provided things for Nathan that Nathan was not getting from his mother, such as movies, dinner, and clothes. In October 1998, Nathan, age 10 at the time, moved into defendant's house. Defendant spoke to Dawn, asking if he could take in Nathan. She agreed. Nathan testified that he felt "good" about the move because it gave him the opportunity to have a father figure in his life. Nathan felt it was a "better environment." At this time, defendant told Nathan that he and Reider were roommates, and Nathan had no reason to doubt that. Nathan's brothers did not come to live with Nathan. Also at this time, Dawn and defendant agreed that defendant would become Nathan's legal guardian. Nathan changed his name from Baxter to Barnes so that his schoolmates would not ask him why his name differed from his father's name. Nathan called defendant "Dad." According to Nathan, at this time, defendant was good to him. Nathan saw Dawn periodically.

When Nathan was in fifth grade, he, defendant, and Reider moved to another house, which was at 1920 Kings Highway. Addressing his relationship with Reider, defendant testified that it was "not that great." They "got along every now and then, but he didn't like me as much. I don't know if it was interference with the relationship." Nathan became aware that defendant and Reider were more than roommates when he observed them kissing and holding hands. This bothered Nathan a little bit, but he still loved defendant and called him "Dad." At this time, Nathan was not concerned for his safety.

When Nathan was in seventh grade (about age 13), he, defendant, and Reider moved to Roscoe. According to Nathan, he rarely saw Dawn when he lived in Roscoe. Defendant had obtained a restraining order against Dawn. Also, defendant's relationship with Reider changed at this time, and they broke up and attempted to sell both the Roscoe and Kings Highway houses. The Roscoe home sold first, and Nathan and defendant moved back in to the 1920 Kings Highway house.

Nathan testified that the first sexual act by defendant toward him occurred while they lived in Roscoe. Reider still lived in the house, but he had broken up with defendant and they slept in separate bedrooms. According to Nathan, he and defendant were lying on the bed in the spare bedroom one day, discussing the move. Nathan was lying on his side. Defendant was holding Nathan, which was not unusual, and then "his hand went down" and he touched Nathan's penis for a "couple seconds" over Nathan's clothes. Reider was either in the master bedroom or not at home. Typically, defendant was physical with Nathan, such as hugging and kissing him. According to Nathan, prior to this occurrence, defendant's affection was a "little bit too much sometimes." When defendant touched Nathan's penis, Nathan was "a little scared." Neither he nor defendant said anything. Nathan believed that defendant intentionally touched him because he rubbed his hand down Nathan's side. After this occurred, they finished talking and Nathan got up. He felt awkward and "weird." Nathan could not recall any other sexual acts that occurred while they lived in Roscoe. When asked when the next sexual touching occurred, Nathan replied that he could not recall.

While living again in the Kings Highway house, Nathan started his freshman year in high school. The house had three or four bedrooms. Nathan slept in his own room. Defendant worked at either Blackhawk State Bank or Associated Bank. He continued to buy clothes for Nathan. When

Nathan turned 16, defendant assisted him in purchasing a car. Nathan testified that he did not believe that defendant was purchasing items for Dawn or Nathan's brothers.

Some time after defendant first touched Nathan in a sexual way, he began showing Nathan pornographic movies depicting sex between men. He would say to Nathan that it was okay. Defendant showed Nathan the movies "once in a while." When asked when the next sexual touching occurred, Nathan specifically recalled a Sunday when Dawn lived with them,[1] but he also testified that acts of sexual abuse occurred before Dawn moved in. According to Nathan, between age 13 and 17, defendant performed oral sex on him over 100 times. Nathan could not recall the first time this occurred. He testified that he felt awkward and that he did not know what to do. He was scared. No one else was in the house. Turning to the Sunday incident, Nathan explained that Dawn and his brother Brian were living with him and defendant. Dawn and Brian were downstairs in the living room, and Nathan and defendant were upstairs. Defendant "shoved his penis in my butt and I screamed and my mom—when we came out my mom said she thought we were just having wild sex." (At this point, Nathan began crying on the stand and the court took a short recess.) Dawn never asked Nathan about this incident, and Nathan never told her what happened because he could not trust her. He did not believe Dawn would help him. Nathan did not think that there was anyone who could help him.

Nathan described how defendant kissed him. He stated that, initially, defendant would kiss him on the lips. Then, after defendant and Reider broke up, defendant would force Nathan to "make

[1]Dawn, Brian, and Dale moved in with defendant and Nathan in 2004. Nathan was about 16 years old.

out" with him; defendant's tongue would touch Nathan's tongue. This occurred daily. Nathan testified that defendant would also kiss his neck and chest.

When asked how often defendant would perform oral sex on him, Nathan replied that it occurred "spontaneously," meaning that it might happen one week and then not occur again for two weeks. When asked if he ever tried to fight off defendant, Nathan stated that he did, but that defendant would hold him down. Also, there were times when Nathan screamed, and defendant put a pillow over Nathan's head. Nathan stated, "One incident I almost died until I got the pillow loose."

In 2004, after Nathan and defendant moved back to the Kings Highway residence, Dawn and Brian moved in with them. Nathan explained that Dawn and defendant became friends and defendant supported them. Nathan's brother Dale moved in for some time and then Dawn and Brian moved in. While Dawn and Brian lived in the house, Nathan shared a bedroom with defendant; Nathan slept with defendant every night. Referring to the incidents with the pillow, Nathan testified that they occurred when there were other people in the home. When asked if Dawn or Brian ever asked him what was going on, Nathan replied in the negative.

Nathan further testified that defendant forced him to perform oral sex on defendant. Defendant would hold down Nathan, get on top of him, and grab Nathan's head, and pull it toward his penis. Nathan would choke; it was painful. He was scared. Defendant would ejaculate on Nathan's chest or in his mouth. It made Nathan feel "gross." Defendant would not stop when Nathan asked him to stop. Nathan would cry. Nathan denied ever having an oral injury for which he had to see a doctor. According to Nathan, defendant also put his finger in Nathan's anus every time he performed oral sex on Nathan; defendant did this so that Nathan's penis could become erect.

Nathan would ejaculate when defendant abused him; he explained that defendant "wouldn't stop until I did." This made Nathan feel uncomfortable and confused.

Nathan further testified that defendant would put his penis or anal beads in Nathan's anus. According to Nathan, defendant put his penis into Nathan's anus about 10 to 15 times, including once, on October 10, 2005, while they were in a hot tub. During anal sex, defendant ejaculated into Nathan's anus. Defendant put anal beads into Nathan's anus once or twice while they were in his bedroom; Nathan was between age 13 and 17. (Nathan identified the beads he retrieved for Officer Baker as the ones defendant used on him.) Defendant also put his tongue in Nathan's anus. Nathan explained that defendant would hold up Nathan's legs, put his tongue in Nathan's anus, and then put his penis inside it.

Addressing his personal relationships, Nathan testified that he does not consider himself a homosexual. He has girlfriends. Defendant's actions confused Nathan. When he was young, Nathan thought he might be a homosexual, but, as he grew older, he did not believe that he was a homosexual.

Defendant also sexually abused Nathan while they watched gay pornography. Defendant touched Nathan while they watched the video and performed the acts the characters in the video performed. Defendant also commented on the shape of his and Nathan's penises.

Several times, defendant left Illinois with Nathan. They went to Florida, Wisconsin, Tennessee, Georgia, and South Carolina. Addressing their Georgia trip (in September or October 2005), Nathan stated that defendant's grandmother had died. Dale went with them. Defendant abused Nathan during that trip; while they were in a bedroom, defendant performed oral sex on Nathan. It was also during this trip that Nathan first told someone about the abuse.

> "I was in the bathroom brushing my teeth and Dale came in and asked me if something was going on, and I said no. Then I started crying. And I went out to the living room and just sat in the chair watching TV, and then Dale came to me and told me that it was happening to both of us."

Initially, Nathan did not tell Dale what was occurring. Later, after he did tell him, Dale offered Nathan a place to stay.

Defendant discussed his future with Nathan. He would say that, after high school, he and Nathan would go to Tennessee and Nathan would go to school there and get married. They bought rings. Defendant "wanted a ring to symbolize our promise for each other."

Nathan identified several greeting cards defendant purchased for him. One card read as follows:

> "You are in my thoughts. You are in my dreams. You are in my heart. You are in my fantasies. You are in my soul. You are in my every waking moment. You really get around. Thanks for choosing me. I love you more than my life. Love, Casey."

Another card, given on October 15, 2005, read:

> "Thanks for being everything to me. I find it hard to believe seven years are here, but I can't wait to share another seven with you. You make me so happy to be alive. I love you more than anything. Love you more, Casey."

Nathan testified that he told defendant that he loved him. He explained that he loved him as a father. Another card read:

"Congratulations to a kid who has been so cool in school. Happy graduation. I know you always strive to do your best. That's one of the reasons I love you so much. Remember to always stay focused and you will succeed. I love you more than anything, Dad."

On another card, defendant wrote: "Forever as promised. Love you, Casey."

Another card read:

"Nate, from the time I wake up to the time I go to sleep you are always in my thoughts. I said a long time ago I would always take care of you and be there. You and I made a promise and sealed it with a ring. That made it forever and I will always hold true to my commitment. I love you and hope this ring brings a smile and warm feeling to your day. Love you always, Casey."

On another card, defendant wrote: "I mean every word. Little things go a long way. I love you, Casey."

Addressing the cards, Nathan explained that he saved them because "They were nice." They made him feel cared about and special. Nathan ripped up the cards at his aunt and uncle's house after he moved out in October 2005. He ripped up the cards because he was angry about the sexual abuse. He then taped them together and took them to the police station and gave them to detectives Swanberg and Olson.

Nathan further testified that defendant once punched him in the eye. His eye turned black and blue. Nathan, who was 17 at the time, went to his girlfriend's house; he did not tell her what happened. Nathan explained that he never told his teachers or guidance counselors of the abuse because he was scared; he did not know how defendant would react. He was also concerned because defendant was of the same gender and that "it would get around the school and I would be made fun

of." Nathan testified that he did not trust anyone, including his friends and girlfriends. "I honestly didn't trust anybody. If I can't trust my mom and dad, who is to say I can trust anybody else."

On October 28, 2005, the day Officer Baker responded to the domestic disturbance, Nathan had decided to move out. He told Baker about the abuse. He "had that gut feeling that she was the right one to tell." He then went to the hospital to undergo tests, including a rape kit. On November 30, 2005, Nathan underwent a physical examination at Carrie Lynn Children's Center. At this time, Nathan lived with his aunt and uncle. He currently lives with Barb and Brian Faye, his "mom and dad."

In September and October 2005, Nathan still loved defendant and thought of him as a father figure. He wrote a college essay in September 2005 that stated positive things about defendant. Defendant bought two cars—a Mitsubishi Eclipse and a Dodge Ram (for school)—for Nathan when he was 16 or 17 years old. He was able to use them as often as he wanted. Defendant also bought for Nathan clothes, weight sets, bikes, basketballs, and hoops. The house he lived in was very nice and contained nice furniture. According to Nathan, in October 2005, after he revealed the abuse, he lost 95% of the items, including the cars and the house. Between this time and the trial (between ages 17 and 20), Nathan lived in 10 different places.

Nathan explained that he and defendant would argue about typical teenage things. Nathan had girlfriends. He had a curfew. At one time, Nathan wanted defendant to sign a contract that let Nathan go out whenever he wanted and that stated defendant could not call Nathan when he was out with his friends. The contract also stated "If you do not sign this agreement we are done *** If you break this agreement we are done *** No more second chances, this is the last one." Nathan explained that there were times when he tried to move out without telling anyone, and defendant

threatened him. Nathan denied that he fabricated the sexual abuse allegations because he did not want to follow the rules defendant put in place. He never recanted and never told anyone the abuse did not occur. Nathan testified that he never told anyone of the abuse because he was scared of what would happen to him. Between ages 10 and 17, defendant was the one constant in Nathan's life; defendant took care of him, bought him food, and paid the bills.

On cross-examination, Nathan testified that the contract he drafted was dated September 5, 2005. He drafted it because defendant would call him "nonstop" when Nathan was with his friends. While in defendant's custody, Nathan excelled at school. He received A's and B's through his senior year in high school until October 2005. Nathan participated in football and basketball in school and participated weight-lifting programs. He was in good shape. Defendant bought him clothes and ensured that Nathan attended school daily and completed his homework. He was also concerned about Nathan being out late on school nights.

Sometime after October 2005, Nathan had his attorney send defendant a list of the things he wanted back from defendant, including personal items, and the Ram and Eclipse vehicles. He also asked that defendant return about $20,000.

Addressing the biographical sketch of defendant that he wrote in September 2005, Nathan testified that defendant wrote it for him. Addressing a preparatory college essay he wrote for advanced placement English class in September 2005, Nathan testified that he wrote it on his own, that it did not mention being afraid of defendant, and that no one told him what to write in that essay.

Nathan started dating his girlfriend in June 2005. He was with her in October 2005. Defendant would call her parents; he did not want Nathan to be with her. Nathan conceded he spent

a lot of time with his girlfriend, but stated he continued to receive good grades. He also worked at this time, doing lawn care work.

Next, Nathan addressed the day Officer Baker arrived at defendant's home—October 28, 2005. Nathan denied that defendant called the police because Nathan and Dale were taking items out of the house. Nathan testified that defendant called the police because Nathan was moving out; but he conceded he was removing items. He was age 17. Defendant was still his guardian and did not consent to Nathan moving out.

Other than the October 10, 2005, hot tub incident, Nathan could not recall any specific dates on which the sexual abuse occurred. Between October 10, and October 25, 2005, he did not speak to any other Rockford police officers. However, he conceded calling in a battery complaint against defendant between those dates. Defendant was not arrested for battery based on Nathan's complaint.

Dawn, Brian, and Dale were present in the home during some of the abuse incidents. From 2001 to 2005, Nathan had an attorney–Rob Tobin–for his guardianship proceedings. He saw him only when they appeared in court for the name change and guardianship proceedings. Tobin inquired as to how things were going. Nathan did not mention the abuse.

On October 28, 2005, Nathan went to the police station and gave a statement wherein he stated that the abuse had been going on for two to four years. He did not give the police the greeting cards that day. Between October 28, 2005, and the date he eventually gave police the cards, Nathan ripped them up. Nathan denied speaking to anyone from DCFS between 2000 and 2005.

On re-direct examination, Nathan testified that defendant did not like Nathan's girlfriend; he "hated" her. When asked why, Nathan replied, "Because he didn't want to see me with anybody

else except him." Defendant was very jealous of the time that Nathan spent with his girlfriend. Defendant told Nathan's girlfriend over the phone that Nathan was promised to someone else.

Following the battery, Nathan did not tell the officer who spoke to him at school about the abuse because he did not feel comfortable with the officer; he was rude. Nathan explained that he did not tell his girlfriend about the abuse because he "thought she would think different of me and dump me." He did not tell Brian about the abuse because he did not trust him. He has problems trusting people.

Currently, Nathan does not see Dawn or Brian. He is aware that they see defendant. Nathan acknowledged a list that he had his attorney send to defendant, demanding he return certain items, including: a bookshelf, TV stand, Hot Wheels, Nathan's dog, Eclipse Spider, in-dash DVD player, sunglasses, Play Station, home theater system, jet ski, weight bench, lawn equipment, BMX bike, refrigerator, tools, weed eater, clothing, keepsakes, Play Station II, photos and school supplies, bowling ball, and $20,000. Addressing the money, Nathan explained that it consisted of Social Security benefits from his "real dad" and lawn care money. It also included money from the State for Nathan's support that were made out to defendant as his guardian; defendant put the funds into Nathan's account. Nathan conceded that defendant purchased most of the items on the list and that some were gifts. Nathan received back only the clothes.

4. Dr. Raymond Davis, Jr.

Dr. Raymond Davis, Jr., is a pediatrician and heads the child abuse program at the University of Illinois. Dr. Davis is also the medical director of the Carrie Lynn Center, a children's advocacy center. He has conducted over 1,000 child sexual abuse examinations.

On November 30, 2005, Dr. Davis examined Nathan. He diagnosed an ear infection. Otherwise, Nathan was "a healthy individual." Dr. Davis conducted a genital and rectal exam and an oral exam. During the oral exam, Dr. Davis noted a tear of the middle upper frenulum tissue (connecting the gum to the lip) that was healed with a small piece of scar tissue left. He was unable to date the tear. Addressing the cause of the injury, Dr. Davis stated that it could be caused by any "kind of injury where the lip is either pulled on or pushed up or pushed back." When asked if the injury could have been caused by forced oral sex, he replied in the affirmative. The injury could also have been caused by falls or strikes to the lip or gums; however, Nathan did not report that he had sustained any such injuries. A mouthpiece worn to play football would not have caused Nathan's oral injuries unless he sustained an injury to the mouth, and Nathan reported no such injury.

As to the genital/rectal examination, Dr. Davis observed two anal fissures; he could not date them other than to say they were at least two weeks old. They are caused by trauma or over-stretching, as by constipation or anal sex. Nathan did not report a history of constipation. Nathan reported anal bleeding, which can be caused by diarrhea or forced penile penetration that causes tearing.

Dr. Davis opined that the cause of the observations he made during the oral exam was oral sex and that the cause of the observations he made during the rectal/genital exam was anal penetration. These findings are not specific indicators of sexual abuse; specific indicators include spontaneous dilation of the anal canal and positive cultures for sexually transmitted diseases or the presence of semen. Nathan's physical exam was not normal because there were findings of some kind of trauma.

B. Defendant's Case

1. Brian Nelson

Brian Nelson, age 23, is Nathan's older brother. Defendant is Brian's "very good friend." From 2004 to about 2008, Brian lived in defendant's home with Dawn and Nathan. While he lived in defendant's home, Brian did not have sex with defendant and never observed defendant having sex with either of Brian's brothers. While living together, Nathan never expressed to Brian concern about defendant's behavior.

In October 2005, Brian learned of Nathan's accusations against defendant. After October, Brian and Dawn moved out of defendant's home and into a house Dawn owned. Since October 2005, Brian has twice seen Nathan. He saw him at Dale's house. With one exception, Nathan never came to Dawn's home.

In August 2006, Brian lived with Dawn in an apartment. Nathan came to their home that day. Brian did not invite him in, but Nathan eventually came in. According to Brian, Nathan stated that if Brian "went down and told on him that he was lying, that he would kill me." Brian replied: "I told him I was going to and that I didn't care."

On cross-examination, Brian testified that, on November 8, 2005, he met with Rockford police detectives and denied he had any sexual encounters with defendant. He told the officers that he and Dawn lived with defendant for 14 months and that defendant had hugged him goodbye. "That's all he has done." Brian denied telling the detectives that, a short time after moving in when he was 18 years old, defendant began kissing him on the mouth and fondling his penis and testicles. He denied telling them that, after the fondling, he would masturbate. Brian also denied that defendant told him that he and Nathan had sex in a hot tub and that Brian thought it was a joke.

Brian further denied telling the detectives that defendant told him that he and Nathan were using anal beads together by putting them inside Nathan's anus.

Defendant financially supported Brian; he helped him buy cars and helped his entire family.

On re-direct examination, Brian testified that he was supporting himself in 2006. He received no money from defendant that year.

2. Dawn Nelson

Dawn Nelson, Nathan's mother, testified that, when Nathan was 10 years old, she agreed to consent to defendant becoming Nathan's custodian. While living with defendant, she was never concerned about Nathan's and defendant's relationship. Nathan never expressed any fear of defendant. Defendant treated Dawn and her sons as family. Dawn moved out of defendant's house in October 2005. Thereafter, she did not have regular communication with Nathan. She has seen him only in passing in public. In August 2006, Nathan and Dale came to her apartment, where she lived with Brian. According to Dawn, Nathan threatened to kill her and Brian. She called the police.

On cross-examination, Dawn testified that she still sees defendant. He is helping remodel her house. He has financially helped her in the past, including giving her a place to live and paying bills. Dawn never paid defendant any rent.

Defendant knew Nathan for about two months before Nathan moved in with him. In August 2004, Dawn and Brian moved in with defendant and Nathan. While living with defendant, Nathan shared a bed with defendant "by Nate's choice." However, they did not sleep together the entire time they lived there. Dawn testified that defendant never told her that he and Nathan were sexually active, not even as a joke. Dawn denied telling Officer Baker that defendant told her that they were

sexually active. However, on November 8, 2005, Dawn told detectives that defendant would tell jokes by coming into a room and announcing he had the best sex with Nathan.

On re-direct examination, Dawn stated that she did not believe defendant when he announced he was having sex with Nathan.

3. Defendant

Defendant, age 39, denied that he ever had sexual contact with Nathan. He got to know Nathan and his brothers through their use of his trampoline. In 1999, he became Nathan's guardian at Nathan's and then Dawn's request. Nathan desired this because he had an unsuitable home life. After the court process, Nathan became his son. Defendant denied receiving money from the State pursuant to his guardianship. He also stated that DCFS was not involved in the process and that no home investigation was conducted.

Defendant paid for Nathan's schooling, clothes, and groceries. Nathan lived in the home with defendant and Reider. Two of Nathan's cousins also moved in when they needed help. In 2004, Dawn, Brian, and Dale moved in; Dale, however, moved in for only a brief period. Nathan was the youngest of the boys. Defendant made sure Nathan got to school every day and bought him cars. Nathan performed exceptionally well in school.

Defendant and Reider ended their relationship in 2003; Reider moved out. Defendant did not observe any changes in Nathan after Dawn, Brian, and Dale moved in. He thought it was a good idea.

In 2005, defendant's relationship with Nathan changed. In defendant's view, the cause was Nathan's girlfriend. Nathan's grades started to fall, he was irritable and broke curfew, and he would not show up for events. Defendant and Nathan had two heated conversations about Nathan's

girlfriend. Nathan drafted a contract containing various rules. There were confrontations over the rules. Nathan was staying out past curfew, and defendant was concerned about school. Defendant denied that he frequently called Nathan's cell phone and denied that Nathan was angered by defendant's calls.

On October 28, 2005, Brian called defendant, requesting that he come home. When he arrived home, defendant saw a truck in the driveway that was filled with items from the house and he saw Nathan carrying out stereo speakers. Defendant ordered Nathan, who was 17, to put the items back in the house. As Nathan had recently mentioned wanting to move in with Dale, defendant told him he could do so, but without taking the items from the house. Earlier that day, defendant and Nathan had a confrontation. According to defendant, they had just returned from a funeral (presumably in Georgia) and Nathan had not done any of his homework. Defendant told him he could not go out that Halloween weekend. Nathan became angry and tossed his books across the room. When they met later in the day at school, Nathan was no longer angry. On October 28, 2005, defendant was not anticipating Nathan moving out; he did not want Nathan to move out and Nathan was not old enough to do so.

Addressing greeting cards, defendant testified that Nathan also wrote cards for him. He never expressed any concerns about their relationship. Addressing Nathan's accusations, defendant denied that he kissed Nathan on the mouth, had oral sex with him, had anal sex with him, or used anal beads (that he conceded he owned) on him. Defendant had pornographic movies in his home, but denied ever showing them to Nathan. He and Reider never watched them; they were stored in defendant's closet. Defendant denied ever having them on when Nathan walked into the room. According to defendant, he treated Nathan as his son and loved him as a son.

On cross-examination, defendant stated that he was unaware where he kept the anal beads. He conceded giving the greeting cards to Nathan. The anniversary mentioned in one of the cards was the anniversary of his guardianship. He had known Nathan for six or seven months before Nathan moved in to his home. Nathan complained to defendant that the home he previously lived in had cats that caused him breathing problems; he was in one room with his mother and two brothers and two beds; he complained about being spanked. According to defendant, he investigated Nathan's assertions: he visited the home and spoke to Nathan's grandmother. He believed Nathan was telling the truth.

Defendant testified that he treated Nathan better than anyone in his family had ever treated him. He gave Nathan opportunities that he would not otherwise have had. Dawn paid back defendant for his assistance. Defendant also provided financial assistance to Dale and Brian from time to time. Nathan's name was on the title for the Eclipse vehicle, but defendant stated that this was an error by the dealership. Defendant denied buying a ring for Nathan other than a class ring. He conceded that he wrote in a card to Nathan: " 'You and I made a promise and sealed it with a ring that made it forever, and I will always hold true to my commitment.' "

Addressing Dawn, defendant testified he is still close to her and comes to court with her and regularly sees her on a social basis. He sees Brian a couple of times per week. Defendant denied telling Brian jokingly that he and Nathan had sex in a hot tub. He also denied joking to Dawn that he and Nathan were sexually active. Defendant conceded he made jokes of a sexual nature to Nathan and his brothers, and he acknowledged having a hot tub at his home when he was living with Nathan. Addressing Nathan's girlfriend, defendant testified that he liked her, but that he did not like what Nathan "was becoming." Defendant acknowledged that he and Nathan shared a room "[f]or a brief

period" and that Nathan slept with him "[f]rom time to time." Defendant denied having a sexual relationship with Brian. Dawn knew that defendant and Nathan shared a room, as did Brian and Dale. Defendant denied ever kissing Nathan on the mouth. He was affectionate with him "[a]s a father should be."

C. State's Rebuttal

1. Nathan Baxter

Nathan testified again in rebuttal. He denied that he had an altercation with defendant in September or October 2005 after they returned from Georgia. Nathan also denied that defendant told him that he could not go out for Halloween because he had not completed his homework; Nathan did not throw books around the room.

Nathan conceded that, in August 2006, he and Dale went to Dawn and Brian's apartment. However, they did not push their way in; they were let in. Nathan denied threatening Brian or Dawn. He stayed at their place for 15 or 20 minutes. Brian left first, and Nathan and Dale continued to talk to Dawn. On cross-examination, Nathan testified that the purpose of the trip to his mother's home was to visit her and Brian. He could not recall the last time before August 2006 that he had done that.

2. Detective Paul Swanberg

Paul Swanberg, a Rockford police detective in the youth and sex crimes unit, testified that he worked with Scott Olson, also a detective. They interviewed Brian on November 8, 2005. Initially, Brian denied having any sexual encounters with defendant; Brian stated that defendant had joked about having sex with Nathan. Brian and Dawn lived with defendant for 14 months. Initially, defendant only hugged Brian goodbye.

Later in the interview, Brian stated that, shortly after he moved into defendant's house, defendant began kissing him on the mouth and fondling his penis and testicles. Brian told the detectives that he was 18 years old when this activity started. He did not object to the activity and would masturbate afterwards.

Brian also told the detectives that defendant told him over the summer (presumably of 2005) that he and Nathan had sex in a hot tub; Brian believed it was a joke. Defendant also told Brian that he and Nathan used anal beads; they were placed inside Nathan's anus.

On cross-examination, Swanberg testified that his interview with Brian was not taped and that the detectives did not have Brian prepare or sign a written statement. On re-direct examination, Swanberg testified that the police were not investigating defendant for any sexual contact with Brian.

3. Officer Rosanne Baker

Officer Rosanne Baker testified again as a rebuttal witness. When Baker was sent to 1920 Kings Highway on October 28, 2005, she also met with Dawn. Dawn told Baker that defendant told Dawn that he and Nathan were sexually active; Dawn thought that it was a joke because defendant was always telling jokes.

D. Jury's Verdict and Subsequent Proceedings

The jury found defendant guilty on all five criminal sexual assault counts. On March 9, 2009, a hearing was held on defendant's motion for judgment notwithstanding the verdict or a new trial. The trial court denied the motion.

At sentencing, defendant's mother and his sister testified on his behalf. Also, defendant spoke in allocution and continued to deny the allegations. The court sentenced defendant to 7 years' imprisonment on counts I, II, IV, and V, to be served consecutively, and to 10 years' imprisonment

on count III (involving the use of anal beads), also to be served consecutively. Addressing the longer sentenced it imposed with respect to count III, the court noted: "there was a foreign object placed in the victim's body, and that of course is fraught with additional peril to the health and well-being of an individual, and so that's the reason the Court did give some additional time on that count." Defendant appeals.

III. ANALYSIS

A. Expert Testimony

Defendant argues first that the trial court erred in allowing McDermott's testimony concerning CSAAS pursuant to section 115—7.2 of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 5/115—7.2 (West 2004). Defendant contends that the syndrome has not been generally accepted in the scientific community because it has no scientific basis and that it has been rejected by numerous courts.

Prior to trial, the State filed a motion *in limine*, requesting that the court enter an order allowing McDermott's testimony. Defendant did not object to the State's motion, and, at trial, he did not object to McDermott's testimony, nor offer evidence disputing the testimony. On appeal, defendant concedes that he did not raise any trial objections. He did, however, argue in his posttrial motion that McDermott's testimony was irrelevant, did not aid the trier of fact, was not diagnostic, that the witness was not a doctor, and that the syndrome did not apply to the facts of the case. To preserve an issue for review, defendant must make a contemporaneous objection at trial *and* raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Accordingly, defendant has forfeited this argument.

Defendant requests that we review his claim for two reasons. First, he asks that we relax the forfeiture rule in order to maintain a sound body of precedent. See, *e.g.*, *People v. Medina*, 221 Ill. 2d 394, 402 (2006) (a reviewing court may override considerations of waiver in furtherance of its responsibility to maintain a sound and uniform body of precedent). Second, defendant asks that we consider the alleged error under the plain-error exception to the forfeiture rule. See Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999) (a court may review an otherwise forfeited issue for plain error); see also *People v. Averett*, 237 Ill. 2d 1, 18 (2010) (plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances). Under plain-error review, the defendant, not the State, bears the burden of persuasion with respect to prejudice. *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). Reviewing courts apply the plain-error doctrine 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). The first step of plain-error review is determining whether any error occurred. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009). Thus, whether we relax the forfeiture rule or commence plain-error review, we must first determine whether or not any error occurred. For the following reasons, we conclude that the trial court did not err in allowing McDermott's testimony.

Section 115—7.2 of the Code provides:

> "In a prosecution for an illegal sexual act perpetrated upon a victim, including but not limited to prosecutions for violations of Sections 12—13 through 12—16 of the Criminal

Code of 1961, or ritualized abuse of a child under Section 12—33 of the Criminal Code of 1961, testimony by an expert, qualified by the court relating to any recognized and accepted form of post-traumatic stress syndrome shall be admissible as evidence." 725 ILCS 5/115—7.2 (West 2004).

The purpose of section 115—7.2 is to provide for the admission of an expert's testimony concerning whether the victim's behavior is consistent with known syndromes. *People v. Pollard,* 225 Ill. App. 3d 970, 978 (1992). Section 115—7.2 does not require the expert to label his or her theory as posttraumatic stress syndrome, as long as the expert testifies regarding behavioral patterns typically manifested by victims of sexual abuse. *People v. Wasson,* 211 Ill. App. 3d 264, 272 (1991); *People v. Nelson,* 203 Ill. App. 3d 1038, 1041-42 (1990).

Defendant argues that, other than McDermott's testimony, the State presented no evidence at trial that CSAAS has gained general acceptance in the child abuse forensics field. He also argues that her testimony could not have aided the jury in making its factual determinations. In defendant's view, McDermott's testimony only predisposed the jury to find defendant guilty by offering an explanation for his failure to report years of sexual abuse.

Defendant cites to out-of-state cases that reject or find flawed CSAAS testimony. See, *e.g.*, *State v. Stribley*, 532 N.W.2d 170, 173-74 (Iowa Ct. App. 1995); *Bell v. Commonwealth*, 245 S.W.3d 738, 745 (Ky. 2008), *overruled on other grounds by*, *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008); *State v. Davis*, 581 N.E.2d 604, 608-12 (Ohio Ct. App. 1989); *Hadden v. State*, 690 So.2d 573, 580-81 (Fla. 1997); *State v. Foret*, 628 So.2d 1116, 1127 (La. 1993); *State v. Dickerson*, 789 S.W.2d 566, 567-68 (Tenn. Crim. App. 1990). He acknowledges that Illinois case law consistently reflects an acceptance of such testimony. See *People v. Hodor*, 341 Ill. App. 3d 853 (2003) (Second

District); *People v. Leggans*, 253 Ill. App. 3d 724 (1993) (Fifth District; expert Virginia Hoffman); *People v. Dempsey*, 242 Ill. App. 3d 568 (1993) (Fifth District; Hoffman); *People v. Pollard*, 225 Ill. App. 3d 970 (1992) (Third District); *People v. Wasson*, 211 Ill. App. 3d 264 (1991) (Fourth District); *People v. Nelson*, 203 Ill. App. 3d 1038 (1990) (Fifth District; Hoffman). However, defendant complains that many of the cases involve the same expert. We reject this argument outright, as the fact that the same expert testifies in several cases does not in and of itself warrant a rejection of the reviewing court's decision.

Further addressing Illinois case law, defendant requests that we part ways with it and conclude that CSAAS theory has not gained general acceptance in its relevant field and further hold that McDermott's testimony was improperly allowed. We reject his request. All of defendant's criticisms of CSAAS testimony have previously been addressed and rejected by the Appellate Court. For example, defendant complains that the psychology field does not recognize CSAAS, as evidenced by its absence from the DSM-IV. As the *Nelson* court noted, this is "but one factor to consider in balancing the probative value of the testimony against possible prejudice to the defendant or confusion for the jury." *Nelson*, 203 Ill. App. 3d at 1042; see also *Wasson*, 211 Ill. App. 3d at 270 (absence from manual not fatal because CSAAS "is a recognized and accepted form of" PTSD, which is listed in the manual). Further, as to defendant's reliance on case law from other jurisdictions, we note that Illinois courts have addressed the lack of uniformity among jurisdictions, noting that CSAAS is a "theory in its relative infancy." *Id.* at 1044. Indeed, in reviewing the approaches of various jurisdictions, the *Nelson* court commented that it was adopting the majority approach, which constitutes a "middle position" between "the extremes of absolute rejection" and

"absolute acceptance to the point of vouching for the" victim's credibility. *Id.*[2] "This middle position ensures that the trier of fact will be informed as to the general characteristics exhibited by victims of child abuse, which often are inexplicable or conflicting, but at the same time will not invade the province of that same trier of fact in weighing the credibility of witnesses." *Id.* In our view, the *Nelson* court's analysis, which is still the most thorough Illinois decision addressing CSAAS testimony, continues to be sound and we see no reason to depart from it. See *Medina*, 221 Ill. 2d at 402 (referring to court's responsibility to maintain a sound and uniform body of precedent). Furthermore, none of the foreign jurisdictions cited by defendant appear to have a statute similar to section 115—7.2 of the Code, which, as previously noted, has been held to permit testimony concerning whether a victim's behavior is consistent with known syndromes. *Pollard*, 225 Ill. App. 3d at 978.

Here, McDermott, a social worker, testified about her background counseling sexual abuse victims and explained the characteristics of CSAAS. She also testified that CSAAS research was used to formulate the diagnosis of PTSD, which *is* listed in the DSM-IV. McDermott addressed the syndrome in hypothetical terms and testified that it is not used to diagnose sexual abuse. She did not treat or interview Nathan and did not review the police reports in this case. McDermott's testimony was admissible pursuant to section 115—7.2 of the Code.

In summary, the trial court did not err in allowing McDermott's testimony.

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[2]Defendant cites to the jurisdictions that have adopted or come close to adopting the minority "absolute rejection" approach. See also Elizabeth Trainor, Annotation, *Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS) in Criminal Case*, 85 A.L.R. 5th 595 (2010).

B. Sufficiency of the Evidence

Next, defendant argues that he was not proved guilty beyond a reasonable doubt. When a defendant challenges the sufficiency of the evidence supporting his or her conviction, the inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). It is the function of the trier of fact to weigh and resolve conflicts in the evidence and draw reasonable inferences from the evidence. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). A jury is "not required to accept any possible explanation compatible with [the] defendant's innocence and elevate it to the status of reasonable doubt." *People v. Gilliam*, 172 Ill. 2d 484, 515-16 (1996).

We conclude that the evidence was sufficient to sustain defendant's convictions. Viewing the evidence in the light most favorable to the State, a rational jury could have found Nathan's testimony credible and found incredible defendant's denials of the allegations. Nathan's testimony concerning his failure to report four years of sexual abuse by defendant was corroborated by McDermott's testimony concerning CSAAS. Nathan's allegations were bolstered by the greeting cards defendant gave Nathan. The cards, which defendant conceded he gave to Nathan, stated that "You are in my fantasies" and stated that "You and I made a promise and sealed it with a ring. That made it forever and I will always hold true to my commitment." Defendant, who had a sexual preference for males as evidenced by his relationship with Reider, also corroborated other relevant aspects of Nathan's allegations, including that he slept with Nathan and that he owned the anal beads and pornographic movies about which Nathan testified. Defendant also corroborated Nathan's description of the living conditions at his grandmother's house, which also served to indirectly

corroborate Nathan's testimony that he did not trust his family. Nathan's family also corroborated key aspects of Nathan's allegations, including that defendant made comments/jokes about having sex with Nathan and that they slept together. Finally, the medical testimony corroborated Nathan's allegations. Although Dr. Davis testified that his conclusions were not findings on sexual abuse, he *was* able to opine that the tear he observed in Nathan's frenulum tissue was caused by oral sex and that the anal fissures were caused by anal penetration.

Defendant argues primarily that Nathan's testimony was incredible. Specifically, he contends that Nathan's testimony was often unbelievable, unclear, or irreconcilable, giving rise to reasonable doubt as to its veracity. First, defendant points to Nathan's failure to report the abuse, urging that Nathan had ample opportunity to disclose the abuse to teachers, coaches, guidance counselors, friends, and family. We disagree that Nathan's reasons for failing to disclose the abuse earlier than he did were dubious, as defendant suggests. Nathan's testimony that he did not trust anyone was not inherently suspect given the testimony concerning his upbringing. As previously noted, defendant's testimony corroborated Nathan's description of the undesirable living arrangements at his grandmother's house. Given that the Nathan and defendant were of the same gender, we believe that a reasonable jury could have credited Nathan's testimony concerning his failure to report the abuse due to the possibility of being perceived as a homosexual and the stigma that is often still attached to such sexual orientation. Further, in her testimony, McDermott explained Nathan's failure to report the abuse. She stated that this is one of the characteristics of children who have been abused, and she discussed children's familiarity with the stigma associated with sexual abuse. McDermott also testified that even older child victims of abuse display the features of CSAAS, including fear

and confusion. She also noted that boys report abuse less often in situations where the perpetrator is of the same gender; they are also fearful of being perceived as homosexual.

We disagree with defendant that Nathan provided "flatly incredible" testimony that some abuse occurred while family members were present. Nathan did not relate that these occasions (*i.e.*, while family members were present) were necessarily common occurrences, and there is nothing inherently incredible about defendant's version of these events. For the same reason, we also take issue with defendant's assertion that Nathan's allegations concerning the pillow over his face were unbelievable.

Next, defendant points to Nathan's testimony concerning the black eye he sustained after he was punched in the face by defendant and his statement that he could not recall the reason for the altercation. Defendant asserts that it was improbable that defendant randomly punched Nathan for no reason. We disagree. We cannot conclude, on the basis that Nathan could not recall the reasons for the altercation, that his testimony concerning the sexual abuse was incredible. Further, we reject defendant's assertion that the fact that he and Nathan took out-of-state trips together tends to render incredible his testimony. We disagree that the trips, some of which were to locations where defendant's family resided, necessarily provided Nathan more compelling or convenient opportunities to reveal the abuse. As discussed above, even as to this perhaps near-death pillow experience, a reasonable jury could have found that Nathan and McDermott's testimony concerning Nathan's failure to report the abuse was sufficiently credible.

Next, defendant asserts that Nathan's testimony was often self-contradictory. He notes that Nathan testified on direct examination that he told Dale about the abuse while they were in Georgia. Defendant notes that, on cross-examination, Nathan testified that he could not recall telling Dale

about the incidents. According to defendant, it defies common sense that Nathan could not recall exactly when and if he told his brother about the alleged abuse—his first revelation of abuse and to a family member. It is the jury's function to assess witness credibility, weigh the testimony, and resolve conflicts and inconsistencies in the evidence. *People v. Evans*, 209 Ill. 2d 194, 211 (2004). Nathan testified that he could not recall if he told Date the specifics of the abuse incidents. Although Nathan's failure on cross-examination to recall whether he discussed details of the abuse with his brother appears somewhat implausible and did contradict his direct testimony that he did tell Dale about the specifics, it was the jury's province to assess this inconsistency. On this basis alone, we cannot conclude that no rational jury would have found Nathan a credible witness.

Defendant also contends that various "anomalies" in the case should have raised reasonable doubt. First, defendant argues that the contract Nathan drafted (addressing his curfew, defendant's calls while he was out, and other matters) demonstrates Nathan's motive to make false sexual abuse allegations. He asserts that Nathan's testimony concerning the document was evasive and argues that the timing of the contract (it was drafted one month before Nathan moved out of defendant's home) reflect this motive. We find this argument unavailing. The jury heard Nathan testify about the contract, its timing, and his altercations with defendant over his girlfriend and other teenage matters. Its assessment in Nathan's favor was not unreasonable. See *Id.*

Second, defendant argues that Nathan's multiple laudatory essays about defendant that were written about one month before Nathan made his allegations to police undermine his credibility. We reject this argument. There is nothing inherently implausible about essays containing "laudatory" comments about defendant one month before Nathan decided to reveal the abuse. This is consistent with his testimony that he trusted no one with his secret and that he viewed defendant as a father.

Third, defendant complains that the State failed to introduce the rape kit that was administered to Nathan on October 28, 2005. Defendant argues that the test results would have been very probative of the veracity of Nathan's allegations, especially given the test's proximity in time to the alleged abuse. However, defendant never moved to admit the rape kit and, as the State notes, the test would only have detected sexual activity within the past 72 hours; the last abuse incident Nathan testified to was the hot tub incident on October 10, 2005.

Finally, defendant challenges the medical evidence. He essentially takes issue with Dr. Davis's conclusions, arguing that the alternative possible causes of Nathan's oral and genital injuries were the more plausible causes of his injuries. Because he points to nothing inherently incredible or implausible about Dr. Davis's conclusions, we reject defendant's argument.

In summary, we conclude that, viewing the evidence in the light most favorable to the State, a rational jury could have found defendant guilty beyond a reasonable doubt of the five counts of criminal sexual assault.

C. Sentence

Defendant's final argument is that the trial court erred in sentencing him to 10 years' imprisonment on count III (involving the use of anal beads), as opposed to 7 years, as it did with respect to the remaining counts. He urges that the court relied upon an "improper, redundant, and nonsensical" factor. Defendant requests a reduced sentence. For the following reasons, we agree with defendant that the court erred in sentencing him on count III and we modify his sentence.

Defendant concedes that his trial counsel failed to object to or raise the sentencing issue in a posttrial motion. Thus, the issue is procedurally defaulted. However, defendant requests that we review the issue for plain error. See *People v. Hillier*, 237 Ill. 2d 537, 545 (2010) (forfeited

arguments related to sentencing issues may properly be reviewed for plain error). We first address whether error occurred. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

As relevant here, criminal sexual assault occurs when someone:

> "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 2004).

"Sexual penetration" is defined as:

> "*any contact, however slight,* between the sex organ or anus of one person by *an object*, 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." (Emphases added.) 720 ILCS 5/12—12(f) (West 2004).

Addressing the longer sentenced it imposed with respect to count III, the court noted: "there was a foreign object placed in the victim's body, and that of course is fraught with additional peril to the health and well-being of an individual, and so that's the reason the Court did give some additional time on that count."

Defendant argues that the trial court erred in two respects. He argues first that the use of anal beads is itself an element of the offense of criminal sexual assault and that, as such, their use could not be considered as an aggravating factor. Second, defendant asserts that the court's reasoning that the use of a foreign object presented additional health risks—above and beyond those relative to penetration by an offender's body parts—was highly speculative and nonsensical.

It is well settled that a factor that is implicit in the offense for which the defendant has been convicted cannot also be used as an aggravating factor in determining his or her sentence. *People v. Phelps,* 211 Ill. 2d 1, 11 (2004). The rationale for this prohibition against "double enhancement" is based upon the assumption that the legislature considered the factors inherent in the offense in designating the range of punishment. *Id.* at 12. However, a court may consider the nature and circumstances of the offense, including the nature and extent of each element of the crime that the defendant committed. *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986). "While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted*." (Emphasis in original.) *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986). For example, in considering the statutory aggravating factor that the defendant's conduct caused serious harm to the victim, it is permissible for the trial court, in sentencing a defendant on a conviction for voluntary manslaughter, to take into account "the force employed and the physical manner in which the victim's death was brought about." *Id.* at 271. However, it is improper for the court to consider the end result of the defendant's conduct, *i.e.*, the victim's death, because that factor is implicit in the offense. *Id.* at 272. Further, a sentencing court may consider the degree of harm in an aggravated criminal sexual assault, even though serious harm is an element implicit in the offense. *People v. Spicer*, 379 Ill. App. 3d 441, 468 (2008). A court may also consider, in assessing the degree of harm, whether the victim was particularly young or particularly old, even though the victim's age is an element of the sexual assault count for which the defendant was convicted. *People v. Thurmond*, 317 Ill. App. 3d 1133, 1144 (2000) ("there is a

difference between being under age 18 and being significantly under age 18"); *Spicer*, 379 Ill. App. 3d at 368.

Defendant urges that sexual penetration by an "object" such as anal beads is an element of criminal sexual assault and it was therefore improper for the court to increase his sentence by three years on this basis. He also argues that the court's reasoning that an object presents additional health risks was highly speculative. In response, the State notes that "[t]he type of sexual penetration is not an element of [criminal sexual assault]." (Emphasis added.) *People v. Foley*, 206 Ill. App. 3d 709, 718 (1990) (further noting that inclusion in the indictment of the type of penetration is merely surplusage). It argues that the type of penetration and the harm or threat of harm are proper considerations at sentencing. The State contends that the trial court viewed the anal beads and properly determined that penetration with anal beads caused more harm or potential harm than intrusion with defendant's body parts.

Although we disagree with defendant that sexual penetration with an object is an element of criminal sexual assault (see *Id.*), we agree with defendant that there was no evidence presented that the anal beads caused additional harm to Nathan and that the court's findings on this point was error. The court's findings belie the State's contention that it viewed the anal beads and determined that they caused more harm or potential harm than intrusion with defendant's body parts: "there was a foreign object placed in the victim's body, and that *of course is fraught with additional peril to the health and well-being of an individual*, and so that's the reason the Court did give some additional time on that count." (Emphasis added.) As this language reflects, the court relied only on the fact that the beads were a foreign object; the foregoing does not reflect that there was any particular

aspect of the beads that caused more harm; indeed, no evidence was introduced supporting such finding.

Next, we consider whether the court's erroneous finding resulted in a harsher sentence than might otherwise have been imposed. See, *e.g.*, *Phelps*, 211 Ill. 2d at 11-12 (improper double enhancement occurs only if consideration of an improper factor results in a harsher sentence than might otherwise have been imposed). Here, the court, as the State concedes, clearly stated in announcing the sentence on count III that it imposed a longer sentence due to its (erroneous) finding that sexual penetration by an object necessarily causes more harm than penetration by a body part.

Having determined that there was error, we next turn to assess whether there was plain error. Defendant argues that the trial court's error meets both prongs of the plain-error test. We conclude that the second prong is met. A harsher sentence based upon finding for which there is no evidentiary support affected, in our view, the fairness of defendant's trial and challenged the integrity of the judicial process. See *People v. Lewis,* 234 Ill. 2d 32, 49 (2009) (trial court's imposition of street-value fine without evidentiary basis resulted in plain error because error challenged integrity of the judicial process and undermined fairness of the defendant's sentencing hearing); *In re Angelique E.*, 389 Ill. App. 3d 430, 432 (2009) ("The potential for a surplus sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain-error rule").

Having determined that there was plain error in sentencing defendant on count III, we note that remandment for resentencing is not always required where a reviewing court determines that a trial court relied on an improper sentencing factor. *People v. Bourke*, 96 Ill. 2d 327, 332 (1983). A reviewing court *may* reduce a sentence to correct a sentencing error only where it can determine the weight the trial court assigned to the improper factor. *Id.* However, where "the reviewing court is

unable to determine the weight given to an improperly considered factor, the cause must be remanded for resentencing." *Id.* Here, the trial court, in explaining the additional time on count III, mentioned no factor other than the potential danger of anal beads. We are reluctant, however, to infer conclusively from the court's remarks that the court regarded the acts charged in count III as equal in severity to the acts charged in the remaining counts (but for the use of the anal beads). The court's remarks were made in passing and in isolation from the remainder of the court's sentencing discussion. Accordingly, we vacate defendant's sentence on count III and remand the cause to the trial court for resentencing on that count.

IV. CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed in part, vacated in part, and remanded for resentencing on count III.

Affirmed in part and vacated in part; cause remanded with instructions.