No. 2—09—0963
Order filed May 11, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County
Plaintiff-Appellee,	)	
v.	)	No. 08—CF—2409
RAYMUNDO GONZALEZ,	)	Honorable Daniel B. Shanes
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

Held: The trial court did not err by refusing to declare a mistrial based on the State's late disclosure of investigative reports from the Department of Children and Family Services reflecting that defendant, prior to his confession to the police, denied the victim's allegations while speaking with investigators from DCFS. Defendant did not establish that the evidence was material to his guilt.

The State proved defendant guilty beyond a reasonable doubt based on the victim's prior inconsistent statements admitted under section 115—10.1 of the Code of Criminal Procedure (725 ILCS 5/115—10.1 (West 2006)) and on defendant's confession to the police.

Defendant, Raymundo Gonzalez, appeals his convictions for various sex offenses against his daughter, C.G. He argues, first, that the trial court erred when it failed to declare a mistrial when,

on the third day of trial, the State revealed that it had just discovered that defendant had, in conversations with a police detective and two investigators from the Department of Children and Family Services, (DCFS) denied C.G.'s allegations. Second, defendant contends that the evidence at trial, which consisted primarily of C.G.'s recanted out-of-court statements and defendant's confession while in police custody, was insufficient to support his convictions. For the reasons stated below, we affirm.

BACKGROUND

On July 2, 2008, the State indicted defendant on 12 counts. Ten of these counts alleged C.G. as victim; the remaining two counts, V and XII, alleged a different victim and are not at issue in this appeal.

Counts I and II both charged predatory criminal sexual assault of a child, (720 ILCS 5/12—14.1(a)(1) (West 2002)), and alleged in common that the acts occurred between December 13, 2001, and December 13, 2004, and that defendant was at least 17 years of age, and C.G. under 13 years old, when the acts occurred. Counts I and II alleged, respectively, that defendant knowingly placed his finger in C.G.'s vagina and knowingly placed his penis in C.G.'s vagina.

Counts III and IV both charged criminal sexual assault (720 ILCS 5/12—13(a)(3) (West 2002)), and alleged in common that defendant was the father of C.G., that the acts occurred between December 13, 2004, and December 13, 2005, and that C.G. was under 18 years old when the acts occurred. Counts III and IV charged, respectively, that defendant knowingly placed his finger into C.G.'s vagina and knowingly placed his penis into her vagina.

Counts VI, VII, VIII, IX, X and XI all charged aggravated criminal sexual abuse (720 ILCS 5/12—16(b), 12—16(c)(1)(I) (West 2002)). Counts VI, VII, and VIII alleged in common that the

acts occurred between December 13, 2001, and December 13, 2004, and that defendant was at least 17 years old, and C.G. under 13 years old, when the acts occurred. See 720 ILCS 5/12—16(c)(1)(I) (West 2002). Counts VI through VIII charged, respectively, that defendant knowingly touched the breasts, vagina, and buttocks of C.G.

Counts IX, X, and XI charged in common that defendant was a family member, that he committed the acts between December 13, 2004, and December 13, 2005, and that C.G. was under 18 years old when the acts occurred. See 720 ILCS 5/12—16(b) (West 2002). Counts IX through XI alleged, respectively, that defendant knowingly touched the breasts, vagina, and buttocks of C.G.

On July 9, 2008, on the motion of defendant, the trial court entered an order directing the State to disclose to the defense any written or oral statements by defendant, and any exculpatory evidence, "within [the State's] possession or control."

On September 2, 2008, defendant filed a motion to suppress statements he gave to the police while in custody. Defendant's written motion asserted that his statements were not knowing, intelligent, and voluntary because they were not preceded by *Miranda* warnings and, moreover, were the product of deception or physical or mental coercion. The motion proceeded to a hearing before the Honorable Christopher R. Stride on September 24, 2008.. The sole witnesses were defendant and Waukegan Police Detective Domenic Cappelluti.

Detective Cappelluti testified that, on June 14, 2008, Waukegan Police Detective Frank Lopez approached him and related that defendant was under investigation. Lopez said that "statements *** were made by possible victims." Lopez specifically noted that C.G., defendant's daughter, had given a statement to Lopez. Lopez asked Cappelluti to interview defendant, who was presently in an interview room at the police station. Lopez enlisted Cappelluti because he was fluent in Spanish,

which was defendant's only language. Cappelluti testified that, when he entered the interview room, defendant stood and shook hands with him because defendant recognized him from Paragon Restaurant where defendant worked. Cappelluti was in plain clothes and was not carrying a weapon. Cappelluti asked defendant if he preferred to converse in Spanish, and defendant said he did. Defendant also said he was glad he was speaking to Cappelluti because defendant recognized him. Defendant also said he was nervous, and Cappelluti told him to relax.

Cappelluti testified that he then read defendant his *Miranda* rights from a Spanish-language warning form. Defendant agreed to speak to Cappelluti and signed the form. Cappelluti identified State (Pretrial) Exhibit 1 as the waiver form bearing defendant's signature. The form was dated June 14, 2008, at 5:30 p.m. Cappelluti then informed defendant that he wanted to ask him questions about C.G., his daughter. Defendant began to cry and asked, "Where do I go from here?" Cappelluti said, "You go from here by telling me the truth." Defendant then admitted that he had sexual contact with C.G. At Cappelluti's request, defendant handwrote a statement and signed it. Cappelluti identified State (Pretrial) Exhibits 2 and 3 as the two-page handwritten statement defendant prepared and signed. The statement was dated June 14, 2008, at 6:37 p.m. As Cappelluti found the statement poorly written and missing details from defendant's oral confession, Cappelluti decided to write a statement in Spanish based on his notes of defendant's oral statement. Defendant reviewed and signed this statement as well. Cappelluti identified State (Pretrial) Exhibit 4 as the statement he wrote and defendant signed. This statement was dated June 14, 2008, at 6:47 p.m.

Cappelluti testified that defendant appeared to have no difficulty understanding him. Cappelluti never raised his voice to defendant or made threats or promises. Aside from shaking defendant's hand when the interview began, Cappelluti never made physical contact with defendant.

Defendant never said he wished to remain silent or consult an attorney. Defendant never mentioned that he was concerned for his wife because she was waiting at the station and was having a heart or anxiety problem. The only concern defendant voiced about his wife was how she would react in learning of defendant's confession. Cappelluti was not aware during the interview that defendant's wife was at the station. Cappelluti's interview with defendant lasted about one hour.

Defendant testified through an interpreter. He stated that, on June 14, 2008, the police came to his home and took him to the police station. They led him to a room and left him there alone. Cappelluti entered the room and asked defendant "what problems were in the family." Defendant responded that he "didn't have any problem." Cappelluti then informed defendant that he was at the station because the police believed that he "had been touching [his] daughter." Defendant responded that the allegations were "not true." Cappelluti told defendant that he would be free to leave the station once he filled out and signed some documents. Cappelluti told defendant that his wife was waiting for him. Cappelluti did not say anything about defendant's wife's condition, but defendant was concerned for her because he knew she has high blood pressure. Defendant denied that he cried during the interview.

Defendant initially testified that he signed State (Pretrial) Exhibit 1 but that the waiver form had no preprinted language when he signed it. Later in his testimony, defendant denied altogether that he signed State (Pretrial) Exhibit 1. Defendant consistently denied that Cappelluti informed him of his rights. Defendant recognized his handwriting in the body of State (Pretrial) Exhibits 2 and 3, but claimed that Cappelluti told him exactly what to write on those pages. Defendant also denied that he signed the pages. Defendant acknowledged signing State (Pretrial)) Exhibit 4, but claimed that the page was blank when he signed it.

Defendant testified that Cappelluti did not physically force him to complete the documents. Defendant believed that Cappelluti would not allow him to leave the station until he signed the documents. Defendant testified that the statements in State (Pretrial) Exhibits 2, 3, and 4 were untrue.

The trial court found that defendant's statements to Cappelluti were voluntary. The court noted that the issue turned on witness credibility, and the court found that Cappelluti was credible and that defendant was not:

> "In light of the inconsistencies in [defendant's] testimony, in light of the consistencies in Detective Cappelluti's testimony, and in light of the acknowledgment of the voluntariness of the statement—and when I say the voluntariness, the defendant admitted that he cooperated with the detective—and the version of events that the defendant presents is wholly incredible, especially in light of his inability to be consistent with which documents he did and did not sign in the Waukegan Police Department that evening. I do find the detective's testimony credible. I do believe that the defendant made a knowing, intelligent and voluntary waiver of his rights per *Miranda* and that he did cooperate with the detective."

Accordingly, the court denied the motion to suppress.

Also, on September 24, 2008, the day of the suppression hearing, the State filed a motion for appointment of a guardian *ad litem* for C.G. In the motion, the State asserted that "[d]uring the investigation by police and DCFS, [C.G.] was removed from her mother's home." Following the court's decision on the suppression motion, the parties argued the motion for appointment of a guardian *ad litem* and discussed the DCFS investigation that led to the criminal charges in this case.

On December 1, 2008, the case proceeded to a jury trial before the Honorable Daniel Shanes. Jury selection commenced on December 1. On December 2, jury selection concluded, and the parties presented various motions *in limine* to the court. In discussing these, the State described how DCFS became involved in this case:

> "DCFS became involved when [V.G., C.G.'s sister] made a hotline call and described how she and the other two sisters were abused.
>
> Waukegan Police Department were notified by the DCFS investigator. Waukegan police actively[,] affirmatively went out and made contact with [C.G.], the two other daughters, [and] the Defendant[,] and they all went back to the Waukegan Police Department.
>
> When the three children were spoken to there was an investigator by the name of Ed Martinez from [DCFS] who was there because Frank Lopez, the officer, did not speak Spanish. [Cappelluti][,] who did speak Spanish[,] was speaking to [defendant] at the time, so Ed Martinez served as the interpreter for Frank Lopez as he interviewed [C.G.]."

Defense counsel complained that DCFS "didn't do a proper workup on this case at all." Counsel noted that he had "received nothing" from DCFS and that the State had "not received anything" from Martinez.

The parties then presented their opening statements. In its argument, the State asserted that defendant, in an interview with Detective Cappelluti, gave detailed oral and written admissions to the sex offenses charged. The State related that defendant gave an initial confession to Cappelluti followed by further details that augmented the "first admission." The State devoted nearly all of its opening statement to recounting what defendant told Cappelluti.

C.G. was the State's first witness. C.G. was born December 13, 1991. She was asked about the period when she was between 10 and 16 years old. During this time, she lived in a two-bedroom apartment in Waukegan with defendant (her father), her mother Celia, her sister N.G., and her brothers R.G. and J.G. Defendant worked in a restaurant but was typically home when C.G. returned from school. When Celia went to the store, C.G. would always remain home with J.G. and defendant.[1] Celia would be gone about ten minutes. C.G. denied that she was ever alone with her father in a bedroom of their home. C.G. further denied that defendant did any of the following: touch C.G.'s breasts, vagina, or buttocks; ask her to touch his penis; place his finger in her vagina; force himself on top of her while she was lying on a bed; or attempt to place his penis in her vagina.

C.G. testified that, when she was between 10 and 16 years old, she became angry with defendant because he was too strict. He wanted her to remain in school and would make her stay home and study rather than go out with her friends. C.G. did not want to move out of the apartment but did want more time outside the apartment to spend with friends. Together with her sisters, C.G. planned to tell the police lies about defendant.

C.G. testified that, on June 14, 2008, police officers came to her house and she went with them to the police station. She remembered telling the police that defendant did the following when she was between 10 and 16 years old: called her into his bedroom and asked her to rub his belly;

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[1] It is unclear from the testimony in this case whether N.G. was living at the apartment during the time in question and what times she was home during the day. It is also unclear what times R.G. was home during the day. C.G.'s and some other testimony seem at least to suggest either that N.G. and R.G. were not home when Celia left for the store or that they accompanied Celia on the errand, leaving C.G. home with defendant and J.G.

asked her to touch his penis; touched her breasts, vagina, and buttocks; placed and moved his finger inside her vagina and asked her if it hurt but did not stop when she said it did hurt, but stopped only when the apartment door opened; tried to penetrate her with his penis but she would not let him; and forced himself on top of her while she was lying on the bed. C.G. also recalled telling the police that she was alone with defendant nearly every day and that his abuse of her continued "up until the very day" she spoke to the police, i.e., June 14, 2008. (C.G. turned 16 on December 13, 2007). C.G. also testified, however, that she told the police that defendant last touched her when she was 14 years old. She did not recall telling police that defendant asked her to take off her clothes or that defendant touched his penis while he touched her. Nor did she recall telling the police that defendant's penis was "hard" when he forced himself on top of her.

C.G. testified that, after telling the police what she claimed defendant did, she wrote a statement. C.G. identified State Exhibits 1 and 1A as the two-page statement she wrote and signed. According to C.G. she wrote that, "when [she] was between 10 and 14 years old [her father] tried abusing [her] of [her] private parts." C.G. specifically acknowledged writing the following sentences: (1) " 'he tried penetrating me with his penis but I wouldn't let him, I would push him away' "; (2) " 'all the time when my mother would leave to the store he would call me to rub his stomach; (3) " 'I was scared to tell my mother and that she would not believe me' "; (4) " 'my dad penetrated me with his finger' "; (5) " 'sometimes it would hurt and my dad would ask me if it hurt' "; (6) " 'I told him yes but he kept doing it' "; (7) " 'I wanted to tell my mother but I was afraid she would not believe me' "; (8) " 'my mother and my sister when they would go to the store would invite me to go but I wouldn't go with them because my father would tell me I couldn't go.' " C.G. testified that none of what she told the police was true and that her trial testimony was instead the true account.

On December 3, 2008, the third day of trial, the assistant State's Attorney (ASA) informed the court that, the night before, as he was preparing Martinez for his testimony, Martinez said that he might have DCFS reports of interviews with C.G. The next morning (December 3), Martinez brought in 61 pages of reports and told the ASA that the reports contained no statements from C.G. but did contain statements from defendant. The trial court read the pertinent parts of the reports into the record. The first was an excerpt of a report from Martinez dated June 14, 2008, at 4:35 p.m.:

> "[Defendant] [d]enied history of sexually abusing his daughters. Stated his daughter is out to get him in trouble and are [s*ic*] making stories about him. Denied sexual, drug, domestic abuse or mental health issues. Stated he will go to police station to be interviewed by Detective Frank Lopez."

The second was an excerpt of a report from DCFS investigator Tim Rossi dated June 14, 2008, at 4:40 p.m.:

> "Met with [defendant], who has a date of birth of 12-7-1957. [Defendant] only speaks Spanish and it was determined that the interviews would take place at the Waukegan Police Department."

Further inquiry by the State and defense counsel confirmed that DCFS investigators Rossi and Martinez, accompanied by Detective Frank Lopez, went to defendant's home on the afternoon of June 14, 2008, in response to a report to DCFS. While they were at defendant's home, defendant made statements to Martinez, the only one of the three investigators who spoke Spanish. Defendant was taken to the police station, where he was interviewed by Cappelluti.

Defense counsel characterized the State's failure to disclose the DCFS reports earlier as a "drastic discovery violation" that impacted the suppression issue previously litigated. Counsel remarked:

> "Cappelutti testified that when he got there, he was briefed on this matter by Lopez prior to even speaking with my client. *** But my client always at that suppression hearing persisted that he had told him that he had never done this, and I had no proof of it, because Cappelluti said there was no proof."

Counsel went on to claim that Cappelluti denied, falsely, at the suppression hearing that defendant made any statements on June 14, 2008, before speaking to Cappelluti. Counsel suggested that the newly revealed statements supported a theory that Martinez and Rossi, having failed to obtain a confession from defendant, sought out Cappelluti so that he could exploit his prior acquaintance with defendant to induce a confession. Counsel suggested that the appropriate remedy for the discovery violation would be the exclusion of all extrajudicial statements by defendant, exculpatory or inculpatory.

In response, the State took issue with defense counsel's characterization of Cappelluti's testimony at the suppression hearing. The State denied that Cappelluti expressed or implied that defendant had given no prior statements on June 14, 2008. Moreover, Cappelluti's knowledge that defendant made prior statements did not bear on the issue of whether defendant's statements to Cappelluti were voluntary. The State also stressed that the DCFS records were not in the State's possession until that morning. Defense counsel, the State noted, could have asked defendant whether he gave statements to DCFS and, if necessary, could have issued a subpoena for DCFS records. The

State suggested that the proper remedy was for the court to go into recess while defense counsel interviewed Martinez, Rossi, Lopez, and Cappelluti.

The trial court found that there was a "discovery violation," even though the State and the defense may have been jointly responsible for the DCFS records not having come to light earlier:

> "The fact that the defendant could have shared some of this information with his counsel is always the case, but that doesn't relieve the State of its obligation to tender discovery that's required by the Supreme Court rules. These were materials that were in the possession of [DCFS]. It's not necessary for me to make any finding as to whether the State had the obligation or whether they were technically in the control of the State. That the defense could have subpoenaed them is true as well, but those are all part of the totality of the circumstances.
>
> The fact is, this is a statement of the defendant which, on its face, apparently was made in the presence of a Waukegan police detective, Frank Lopez. That, in and of itself, brings it within the ambit of Supreme Court Rule 412. The fact that it contains, apparently, on its face, without getting into the veracity of it, just on its face, a denial, is in the ambit of [*Brady v. Maryland*, 373 U.S. 83 (1963)]. So it's a discovery issue."

The "real question" for the court was what remedy was appropriate. The court stated that it would give the defense a "wide berth" in examining Cappelluti at trial on whether he was "aware of any previous statements the defendant made." The court also directed the State to make Cappelluti, Martinez, Rossi, and Lopez immediately available for interviews with the defense. The court then went into recess to allow the interviews.

When court reconvened, defense counsel reported that he had spoken with Cappelluti, Martinez, Lopez, and Rossi, and learned the following. When Lopez, Rossi, and Martinez went to defendant's home on June 14, 2008, Martinez and defendant conversed in Spanish. Lopez did not speak Spanish and did not know what defendant said to Martinez. Rossi also did not speak Spanish and did not recall whether Martinez translated defendant's remarks and said that defendant denied C.G.'s accusations. Cappelluti was not with the three investigators when they went to defendant's home.

Defense counsel stated that, based on his interviews with the investigators, he was now moving for a mistrial because the revelation of defendant's prior denial of C.G.'s accusations "altered" his trial strategy and tactics. When the trial court asked counsel to elaborate on how his trial preparation was impacted, counsel said:

> "Well, it's just thrown me for a loop in prepping my client here, but I am going to have to sit down and explain to my client so he understands that now, in fact, he has been telling me—he has been telling me repeatedly he has denied these things and that these officers have lied and that they have been—and I have been trying to find it, and now it comes out at the day of trial. Now we have evidence that he did deny these statements and actually, basically, [C.G.] corroborated what [defendant] was saying."

When the court asked defense counsel how he thought defendant's denial could be admitted into evidence at trial, counsel proposed that he could elicit the statement from Martinez. The court rejected this basis and, after reviewing other potential bases, concluded that defendant's statement would be inadmissible hearsay if offered by the defense. Counsel then proposed that defendant's denial at least necessitated revisiting the suppression issue previously litigated. When the court asked

counsel how the denial was relevant to that issue, counsel replied that he would have moved to suppress any statements defendant made to the investigators while in his home. Rather than revisit the suppression issue, the court simply treated defendant's request as a motion *in limine* and barred the State from using defendant's denial. Counsel persisted that the denial was also relevant to whether defendant's later admissions to Cappelluti were admissible. The court reserved deciding whether to reopen the suppression issue and whether to declare a mistrial. The court permitted the State to proceed with its case.

Detective Lopez testified that, on June 14, 2008, at 5:14 p.m., he interviewed C.G. at the Waukegan police department. Martinez was present at Lopez's request because C.G. spoke only Spanish and Lopez did not speak it. Using anatomical charts, Lopez had C.G. identify where defendant had touched her and with what body part. After Lopez went through the charts, he asked C.G. to write down what defendant had done to her. Lopez identified State Exhibits 1 and 1A as C.G.'s two-page written statement, which he had seen her sign. Lopez testified that he did not direct C.G. what to write and did not observe Martinez direct her what to write. Lopez explained that Martinez's name was not on C.G.'s statement because Martinez was present only to translate.

Martinez testified that he was present at Lopez's interview with C.G. on June 14, 2008. Martinez acted as interpreter. Martinez recalled that C.G. told Lopez that, while she and defendant were alone, he would ask her to undress and that she would comply. She also said defendant would ask her to look at his penis, would lie down on top of her while his penis was hard, and would masturbate himself while touching her. Martinez identified State's Exhibits 1 and 1A as C.G.'s written statement, which he had seen her sign. Neither Martinez nor Lopez suggested what C.G. should write in her statement.

The State's last witness was Detective Cappelluti, whose testimony overlapped in part with his testimony at the suppression hearing. Cappelluti stated that, on June 14, 2008, he was asked by Detective Lopez to participate in an investigation of sexual abuse. Lopez asked Cappelluti to interview defendant because he spoke only Spanish and Cappelluti was the only detective then on duty who spoke Spanish. Cappelluti had had no involvement in defendant's case before this time. He was not with Lopez when he went to defendant's house and brought defendant back to the station.

Cappelluti testified that he learned from Lopez that defendant was currently in an interview room at the police station. In preparing for the interview, Cappelluti reviewed "the patrol officer's report," consisting of notes of a "hotline" call. Cappelluti made mental notes of the allegations made by C.G. Cappelluti entered the interview room at 5:30 p.m. on June 14. Defendant rose and shook Cappelluti's hand. Defendant said he recognized Cappelluti from Paragon Restaurant, where defendant was a cook and Cappelluti frequently ate with his fellow police officers. Defendant and Cappelluti conversed in Spanish. Defendant said he was "glad he was talking to [Cappelluti] and that he was kind of nervous." Cappelluti read defendant his *Miranda* rights from a Spanish-language waiver form. After defendant indicated he understood his rights, Cappelluti asked defendant if he would sign the waiver, and defendant did. Cappelluti identified State's Exhibit 2 as the waiver form, signed by defendant and dated June 14, 2008, at 5:30 p.m.

After defendant completed the form, Cappelluti, in a "conversational" tone, told defendant that he wanted to speak about C.G. At this, defendant "immediately" dropped his head. As Cappelluti told defendant the importance of telling the truth, tears formed in defendant's eyes. Defendant said something like "Where do we go from here?" Defendant also said that he did not

want his wife to know, and asked Cappelluti what C.G. had said. Cappelluti declined to tell defendant what C.G. had said. Cappelluti again told defendant to be honest. Defendant then said he had a "problem" and that he had touched C.G. "inappropriately" three or four times. As defendant spoke, tears fell from his eyes and he was shaking. When Cappelluti asked defendant what he meant by "inappropriate" contact, defendant said he had rubbed C.G.'s vagina three or four times. On just one of these occasions, defendant penetrated C.G.'s vagina with his finger. Defendant said this contact occurred when C.G. and he were alone at the family's apartment. Defendant insisted he was a "good father," and Cappelluti replied that he agreed but that the investigation showed the contact occurred more than three or four times. Cappelluti told defendant that "we need to be completely honest about everything." Cappelluti's tone of voice was still conversational, he was seated in the same chair as when he began the interview, and he had not made any threats to defendant. Defendant then said the contact happened "three or four times a week for about three or four years, *** and that it stopped about two years ago." Defendant provided "a lot more details," including

> "that it would happen mostly during the day; details about this wife being out of the apartment; details about him being off of work during the day; details about him being 52 years old and if he has a couple of drinks, that he is not thinking straight; details about how he would call [C.G.] to his bedroom; details about how he would ask [C.G.] to massage his stomach and massage his shoulders; details about sometimes he would ask and remove her clothes completely from her body; details about at times he would only pull down her pants halfway to her knees; details about him masturbating during some of the times; details about while he was masturbating, he would rub her vagina, and that he did not want his—that he

told [C.G.] not to tell nobody[,] and that he would ask her during the actual incidents if it hurt because he didn't want to physically hurt his daughter, was what he said."

Cappelluti testified that defendant stated that "three or four times a week, he would rub his hand on [C.G.'s] vagina and penetrate her with his finger." Defendant showed his middle finger to Cappelluti as the finger he had used. Defendant also said he fondled C.G.'s breasts. Moreover, after "initially saying [he] penetrated [C.G.] with [his] finger once of the three or four times, [defendant] then talked about penetrating with the finger more times." When Cappelluti asked defendant if he ever penetrated C.G. with his penis, defendant replied that he "never stuck [his] penis inside [C.G.]." When Cappelluti observed that there is a "big difference between placing your penis inside the victim or rubbing it on her vagina," defendant said he did not want to talk about it. Defendant denied that he ever forced or asked C.G. to perform oral sex. Defendant did say that he masturbated while fondling C.G. Defendant estimated that each occasion of sexual contact with C.G. lasted about five to ten minutes. Defendant said that he told C.G. not tell to anyone because it might "cause her *** shame."

Cappelluti testified that, after defendant made these oral statements, Cappelluti asked him to write a statement consistent with them. As Cappelluti asked this, defendant's head was down and he continued to cry and shake. Defendant said he would write a statement. Cappelluti left the room and returned with paper for the statement. Cappelluti instructed defendant to write down what he had said to Cappelluti. As defendant wrote the statement, Cappelluti left and sat at his desk outside the interview room, checking with defendant occasionally. About 15 to 25 minutes later, defendant finished the statement. Cappelluti read the statement and found problems with penmanship, sentence structure, and spelling Cappelluti and defendant together read through the statement to verify what

defendant wrote. After Cappelluti confirmed with defendant that what he wrote was true, both men signed the statement. Cappelluti identified State Exhibits 3 and 3A as defendant's two-page handwritten statement dated June 14, 2008, at 6:37 p.m. Cappelluti orally translated the statement for the jury:

> "Thank you to Detective Cappelluti because he knows my boss, Gus, and he knows that I am a good person and I work hard for my family. It is very difficult for me to speak about this, but I told the detective not to tell anything to my family. This paper is private for the police. When I am drunk, I don't think well because I have [*sic*] 52 years old, and when I return from work, I am very tired.
>
> ***
>
> *** And there are times that it was not right to touch my daughter, [C.G.], but I know when I touched her, I did not touch her with my penis, and I did not put it in her vagina. I know that I touched her with my hand and my finger. I want help, but I don't want my wife to know that for three or four times per year for three or four years. I would like a copy of this paper for me. Thank you to the detective. I love my family very much and I am a good person. These are all my words."

Cappelluti testified that, though he immediately signed and dated the statement after defendant reviewed it, he did not initially write a time on it because he decided to take a second statement from defendant. Cappelluti made this decision because defendant's initial statement lacked details that he had included in his oral statement to Cappelluti. For the second statement, Cappelluti asked defendant to repeat his oral statement while Cappelluti wrote it out. Cappelluti denied that he directed defendant what to say. When defendant was done, both he and Cappelluti signed the

statement Cappelluti had written. Cappelluti also wrote the time and date on the statement. Cappelluti identified State Exhibit 4 as defendant's one-page handwritten statement dated June 14, 2008, at 6:47 p.m. Cappelluti orally translated the statement for the jury:

> "[I] now wish to say that I feel very bad of what happened. I know that the detective knows my boss. I am a good person and I work very hard for my family. I know that it's not right to touch my daughter, [C.G.]. I have a problem. I never put my penis in her vagina. I touched her with my hand and my finger. I put it inside of her vagina, my finger, and I touched her with my hand on her vagina two or three times per week for three or four years. I know that it has passed a lot of time but I promise it will not happen again. Thank you."

After the second statement was signed and the date and time indicated, Cappelluti handed the statements to Lopez for copying. When Cappelluti handed defendant's first statement to Lopez, Cappelluti had not yet written the time on it. After Lopez returned both statements, Cappelluti wrote the time on the first statement. Cappelluti testified that Lopez had not altered the statements at all.

After Lopez returned, Cappelluti escorted defendant to the booking room. When they parted, defendant shook Cappelluti's hand and asked if he could call defendant's boss at Paragon because tomorrow would be busy and defendant would not be there.

On cross-examination, Cappelluti was shown a copy of defendant's handwritten statement. Unlike State Exhibits 3 and 3A, the copy did not have a time indicated on it. Cappelluti believed the document was one of the copies Lopez made of defendant's statement before Cappelluti wrote the time on it.

The State rested. The defense moved for a directed verdict, which the court denied. The defense called four witnesses: defendant, his wife Celia, and their son J.G.

Defendant testified that he has lived in the United States for 32 or 33 years but that Celia and their children came to the United States only six or seven years ago. Since that time, defendant lived with Celia, their daughter C.G., and their sons J.G. and R.G. in a two-bedroom apartment. Defendant and his wife, Celia, slept in one bedroom, J.G. and C.G. in the other bedroom, and R.G. in the living room. Defendant described the family's routine for the past six or seven years. Defendant worked at Paragon Restaurant and returned home on workdays at 2:30 p.m. Celia, who babysat another's child in the home, would be present when defendant arrived. C.G. would come home around 3 or 3:30 p.m. and J.G. at 4 p.m. Celia would leave the apartment daily to buy food for dinner. She would never, however, leave before J.G. got home. The store Celia patronized was less than a block from the apartment, and she would be gone between 10 and 15 minutes, depending on whether the store was crowded. While Celia was gone to the store, the children would watch television or do homework. During the six or seven years the family has lived in the United States, defendant was never home alone with the C.G.

Defendant testified that, in 2008, defendant and Celia set rules for C.G. and J.G. because they wanted them to graduate from high school and attend college. Defendant and Celia set a 9 p.m. curfew for C.G. "Sometimes [C.G.] was not very happy" with the household rules because she "want[ed] liberty."

Defendant testified that, on June 14, 2008, police officers came to his apartment. Celia was home and defendant was in the shower. The police took defendant to the police station, placed him in a room, and left him there alone. Eventually, Cappelluti came into the room. He told defendant to "get up" and then shook his hand. Cappelluti said, "You work at the restaurant, Paragon, right?" Cappelluti spoke Spanish to defendant, and they conversed in that language throughout the interview.

Defendant "probably" recognized Cappelluti from Paragon but was not sure because many police officers ate there. After the greeting, Cappelluti said he wanted to speak to defendant about "something that supposedly was happening at home." Cappelluti said that defendant had been "grabbing [his] daughters." Cappelluti said he had already spoken to C.G. and that he believed her. Cappelluti said that he wanted defendant to make a "declaration" that he had sexual contact with C.G. Defendant told Cappelluti that he had "never done that" and that he was "not going to write anything." At this, Cappelluti became "upset" and said, "Well you are going to do one right now." Cappelluti told defendant to "[t]hink about it" and then left. Cappelluti came back "insisting" that defendant write a declaration. Cappelluti said that Celia and J.G. were at the police station. He said that Celia was "ill," but was not more specific. Defendant knew that Celia had diabetes and high blood pressure but did not see any signs that she was ill before he left for the police station. Defendant said to Cappelluti, "I don't have to write this," but Cappelluti responded, "[Y]es, so you can leave." Defendant became "afraid" and did not believe he could leave the station without writing a statement. Defendant asked Cappelluti, "Do you think this is right?" Cappelluti replied, "Well, this won't affect you. I just want you to do this. Anyway, you are going to go home, and this is just going to be between us. It's not going to go anywhere else, not even to court or nothing." Cappelluti proceeded to dictate "word for word" what defendant wrote.

Defendant identified State Exhibits 3 and 3A as the statement he wrote while Cappelluti dictated it. Defendant claimed that Cappelluti dictated even the exculpatory portions of the statement, such as that defendant did not touch C.G. with his penis. Defendant acknowledged that he signed State Exhibits 3 and 3A. Defendant did not recognize either State Exhibit 2 or State

Exhibit 4, and denied that he signed either document. He further denied that he ever admitted having sexual contact with C.G.

Defendant testified that, after he wrote what Cappelluti dictated, Cappelluti told him to sign "so you can leave." Defendant signed the statement, and Cappelluti left the room. A short time later, another officer came and took defendant to jail.

Defendant denied that he cried during the interview with Cappelluti or asked him to tell defendant's boss at Paragon that defendant would not be there tomorrow.

On cross-examination, defendant acknowledged testifying at the suppression hearing that Cappelluti told defendant Celia was waiting for him but did not say anything about her condition.

Celia testified that she and defendant have been married 30 years and have four children: R.G., age 24, N.G., age 20, C.G., age 16, and J.G., age 10. In 2001 or 2002, when C.G. was about 10 years old, Celia and the children moved from Mexico to Waukegan, where defendant was already living. The family moved into a two-bedroom apartment. Celia stated, consistent with defendant's testimony, that she and defendant slept in one bedroom, C.G. and J.G. in the other bedroom, and R.G. in the living room. Celia described the family's routine on school and work days. Defendant arrived home between 2:30 and 3 p.m. Celia, who babysat another's two children in the home, was present when defendant arrived. C.G. came home at 3 or 3:30 p.m., and J.G. at 4 p.m. Celia made the children do their homework when they came home. Defendant and Celia did not let the children "go out much." C.G. was angry in June 2008 because she wanted to go out more and defendant would not permit it.

Celia testified that, when she went for groceries, defendant usually accompanied her, but "[s]ometimes" she went alone. Since the store was nearby, Celia would not be gone more than five

or ten minutes. Asked how she knew how long she would be gone to the store, Celia testified that she would "keep an eye on the clock" she was at the store and would check the clock again when she arrived home.

Celia testified that she has never left defendant alone in the apartment with C.G. She has never witnessed defendant take C.G. into one of the bedrooms in the apartment. Celia testified that, even when defendant visited the Celia and the children in Mexico, C.G. "would never stay alone" with him.

Celia recalled that, on June 14, 2008, the police came to the apartment and took the entire family to the station.

J.G., the defense's last witness, testified that he is eleven years old. For the last six or seven years, he lived in Waukegan in the same two-bedroom apartment with his parents, his sisters N.G. and C.G., and his brother R.G. J.G.'s parents slept in one bedroom, J.G. and his sisters in the other bedroom, and R.G. in the living room. Their parents had rules for J.G. and his sisters. They had to attend school, do their homework as soon as they returned home from school, and could not stay up late or go out at night.

J.G. testified to the family's routine on school and work days. J.G. would return home from school at 4 p.m. Defendant, Celia, C.G., and N.G. would be home when J.G. arrived. After J.G. came home, Celia would go to a grocery store around the corner from their house to buy food for dinner. J.G. would remain home with C.G. and defendant. Celia was never gone more than ten minutes. J.G. knew this because he "like[d] looking at the clock" and would see how many minutes passed while Celia was gone. J.G. admitted that, before he testified, he talked with Celia "about how long she was gone to the store." J.G. never saw defendant "touch or do anything bad to [C.G.]" or

observe him ask C.G. to come into his bedroom. J.G. also never left C.G. alone with defendant while Celia was at the store.

The defense then rested. During the jury instructions conference, the State voluntarily dismissed counts VIII and XI, both of which alleged that defendant touched C.G.'s buttocks.

The State then called Cappelluti in rebuttal. Cappelluti testified that he did not order defendant to stand up when the interview began. Cappelluti also did not tell defendant that his wife was waiting for him or that she was ill. Cappelluti did not tell defendant "word for word" what to write in his statement. He also did not tell defendant that he could not leave until he wrote a statement. Cappelluti did not videotape his interview with defendant, for two reasons. First, such recording is required by law only in homicide cases. Second, Cappelluti believed it is difficult to develop a rapport with a suspect who knows he is being videotaped. Cappelluti did not attempt to videotape defendant without his knowledge because it is against the law.

The jury convicted defendant of all eight remaining counts of the indictment: counts I through IV and VI, VII, IX, and X. Defendant retained new counsel, who filed a posttrial motion. In the motion, defendant renewed the discovery issue from earlier in the proceeding and also argued that the State failed to prove the *corpus delicti* of the crimes. At the hearing on the motion, counsel argued as follows on the discovery issue:

> "You [the court] ruled there was a discovery violation, but you said to the lawyer, the defense lawyer, oh, go out in the hall and talk to him; I'm not going to impose any other sanction. *** *** Had the defense had access to the undisclosed exculpatory statement, he might have been able to use that at the motion to suppress, and we might have had a different result, or at least had the opportunity to investigate it.

* * *

*** Judge Stride had to make certain credibility decisions when he decided to deny the motion to suppress. And here's what he had before him: He had [defendant] saying 'I don't understand this. I told them I didn't do it.' And the State knew that was true. But Judge Stride didn't know that was true. For all the defense lawyer knew, for all the trial court knew, the only evidence was that [defendant] confessed to Cappelluti. He didn't know that what [defendant] was saying was true, that he had denied these allegations. And I can't say that that wouldn't have made a difference in the evaluation of whether or not to suppress the evidence."

On the *corpus delicti* issue, defense counsel argued:

"You know that the *corpus delicti* cannot be shown by the statement of the accused alone. It has to be the statement of the accused plus something more.

I couldn't find a single case where that 'something more' was a disavowed extra-judicial statement by a police officer. It seemed to me that there's a good reason why in 200 years of Anglo/American law reported in cases in the United States there isn't a single case that parallels the case of [defendant's] case and that's because it's really fundamentally unbelievable, untrustworthy, not worthy of a verdict by a jury."

In addressing the defense's motion, the trial court noted, and reaffirmed, its prior ruling that there was a "discovery violation." The court noted the supreme court's holding in *In re C.J.*, 166 Ill. 2d 264, 270 (1995), as to when knowledge of DCFS records will be imputed to the prosecution. The court held that, because a police officer, Detective Lopez, was present when defendant made his denial to Martinez, there was "a discovery issue." The discovery violation was not, however, also

a *Brady* violation, because there was no reasonable probability that the denial would have changed the outcome of the trial. First, the denial would have been inadmissible as part of the defense's case at trial. Second, even if admissible, the denial would have been "cumulative to the defendant's own testimony." The court then addressed the potential impact of the denial on defendant's motion to suppress. The court was not certain whether the denial would have been admissible at the suppression hearing, but the court held that the denial would not likely have changed the outcome at that hearing because

> "[t]he issue at the motion to suppress [was] not the credibility of the defendant's statement, but the voluntariness of the statement. In other words, whether the defendant wanted to talk to the police officers or his will was overborne forcing him to. *** [T]he fact is that the defendant did talk to the DCFS person very briefly, he denied it, and then he did talk to Detective Cappelluti at the police station. And Judge Stride dealt with that aspect of it."

On the *corpus delicti* issue, the court found sufficient evidence to support the convictions on counts I and III (alleging that defendant placed his finger into C.G.'s vagina), VI and IX (alleging that defendant touched C.G.'s breasts), and VII and IX (alleging that defendant touched C.G.'s vagina). The court, without explanation, found insufficient evidence to support the convictions on II and IV (alleging that defendant placed his penis into C.G.'s vagina). Accordingly, the court entered judgments of acquittal on those counts.

Defendant was sentenced to 13 years of imprisonment on count I, 9 years on count III, and 7 years on each of the remaining four counts. The four 7-year sentences were made concurrent to each other. The sentences on counts I and III were consecutive to each other and to the 7-year term

on the remaining counts. Following the denial of his motion to reconsider sentence, defendant filed this timely appeal.

ANALYSIS

Defendant reasserts his discovery argument. He also argues, along the lines of his posttrial motion, that the evidence was insufficient to support the convictions.

I. Discovery

Defendant argues that the State's failure to make an earlier tender of records reflecting that defendant denied the allegations to DCFS investigator Martinez ran afoul of both Supreme Court Rule 412 (eff. March 1, 2001) and the due process requirements set forth in *Brady v. Maryland,* 373 U.S. 83 (1963). According to Martinez's report, defendant "denied history of sexually abusing his daughters" and "[s]tated his daughter is out to get him in trouble and are [s*ic*] making stories about him."

To prove a *Brady* claim, the defense must show (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either wilfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *People v. Burt,* 205 Ill. 2d 28, 47 (2010 (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Paragraph (c) of Supreme Court Rule 412 codifies *Brady* (*People v. Chears*, 389 Ill. App. 3d 1016, 1029 (2009)), and provides that the "the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged."

The State concedes the second prong of *Brady* and its parallel in Rule 412(c), thus acknowledging that the prosecution violated both its federal constitutional and state-based duties of

disclosure. The concession, we think, was not compelled. That a DCFS investigation triggers a criminal prosecution is not in itself a basis for imputing to the State knowledge of DCFS records of the investigation. See *In re C.J.*, 166 Ill. 2d 264, 270 (1995) (no basis for imputing to the State responsibility for DCFS records expunged after the agency determined that abuse and neglect complaint was groundless; though the State initiated its prosecution "[o]n the basis of a DCFS report," and thereafter DCFS and the State exercised concurrent responsibility in the case, "[t]here [was] no evidence to support that the DCFS investigator *** functioned, intentionally or otherwise, as an aid of the prosecution in this case"). "Given that child abuse has both criminal and social welfare implications, DCFS and the State's Attorney may naturally share some involvement in a particular case." *Id.* "[W]here DCFS acts at the behest of and in tandem with the State's Attorney, with the intent and purpose of assisting in the prosecutorial effort, DCFS functions as an agent of the prosecution," and the State may be deemed to know or have reason to know of DCFS reports on the joint effort. *Id.* at 270.

Defendant claims that DCFS and the State were involved in a "joint investigation" into C.G.'s allegations, but he does not establish how the admittedly concurrent efforts of the agencies were the workings of an agency relationship. Both DCFS and the police, it appears, came to defendant's residence on June 14, 2008, but the agencies had their respective concerns: the State, its concern that a crime was committed, and DCFS its concern that children were in danger. There is no indication that DCFS was then or thereafter acting as an agent of the prosecution. In finding a discovery violation, the trial court noted that defendant's statement, in Spanish, to Martinez was made in the presence of Lopez, a police detective. Subsequently, however, it was revealed that Lopez did not speak Spanish. Defendant does not question that Lopez did not know what defendant said to

Martinez. Nor does defendant question that Martinez was present for C.G.'s interview as an interpreter alone and that no DCFS agent was present for Cappelluti's interview with defendant. We will, however, not belabor the issue in light of the State's concession.

We note that the State also concedes prong (1) of *Brady* and its parallel in Rule 412(c), acknowledging that defendant's statement to Martinez denying the crime was exculpatory on its face. (The State qualifies its concession by noting that the evidence, though exculpatory, was nonetheless inadmissible. We address this below.)

The State denies, however, that the evidence was material, and our analysis is concentrated on this point. Evidence is material for purposes of *Brady* if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed in time to be used by the defense. *People v. Harris*, 206 Ill. 2d 293, 311 (2002) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). To establish materiality, an accused must show " 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *People v. Coleman*, 183 Ill. 2d 366, 393 (1998) (quoting *Kyles*, 514 U.S. at 435). As the assessment of materiality under *Brady* involves weighing the potential impact of the undisclosed evidence on the verdict (*Harris*, 206 Ill. 2d at 311), a *Brady* claim does not present a pure question of law but, rather, requires applying established law to the facts. Accordingly, we review the circuit court's decision for manifest error. See *People v. Morgan*, 212 Ill.2d 148, 155 (2004). Manifest error is error that is "clearly evident, plain, and indisputable." *Id.* The remedy for a *Brady* violation is a new trial. *People v. Maiden*, 318 Ill. App. 3d 545, 546 (2001).

Defendant first argues that his denial to Martinez was material to the suppression issue of whether his inculpatory statements to Cappelluti were voluntary. Curiously, defendant offers only

one supporting reason: that because Judge Shanes could not possibly "conjure how [Judge Stride] *** would have ruled with the new evidence," he should have "declare[d] a mistrial and allow[ed] [defendant] to return to Judge Stride to decide the ramifications of the withheld evidence." Defendant cites no authority that a successor judge in a case cannot adjudicate a *Brady* claim concerning proceedings over which he did not preside. The burden, therefore, remained with defendant to show that there was a reasonable probability that, if the evidence had been disclosed earlier, the suppression hearing would have had a different outcome. He has not attempted this. He has not, for instance, proposed a basis on which he could have offered into evidence his self-serving, out-of-court statement to Martinez. That statement was hearsay (*People v. Patterson*, 154 Ill. 2d 414, 452 (1992) ("Self-serving statements by an accused are inadmissible hearsay")), and neither at trial, in his briefs, nor at oral argument was defendant able to cite an exception to the hearsay rule through which his statement would be admissible. A defendant's *Brady* claim that the State's delayed disclosure deprived him of the ability to introduce relevant exculpatory evidence fails if the evidence would in fact have been inadmissible. See *People v. Pecorano*, 175 Ill. 2d 294, 309-310 (1997). Defendant also neglects to explain how he would have changed his approach on the suppression issue short of offering his statement into evidence. Therefore, defendant has not demonstrated that his denial to Martinez was material to the suppression issue.

Defendant similarly fails to develop his contention that his denial to Martinez was material to his guilt or innocence at trial. He contends that he had inadequate time to review the 61 pages of reports from DCFS. Defendant, however, has since had ample time to review the reports, and the only portion he has identified as potentially material is his statement to Martinez. Defendant asserts that the late disclosure of that statement

> "gave [defense counsel] no chance to reflect on the newly provided exculpatory evidence, investigate it thoroughly, and thoughtfully incorporate it into his defense. Had defense counsel had adequate and timely disclosure, he may have been able to lay an evidentiary foundation for its admission as well as created a use of its existence to impeach the statements offered by the prosecution to convict [him]."

Defendant has had months to "reflect" on how he might have revamped his defense in light of the statement to Martinez, but he does not share with us what he would have done differently. First, as with his *Brady* claim regarding the suppression issue, defendant does not propose how he would have introduced his statement as substantive evidence at trial. See *Patterson*, 154 Ill. 2d at 452. In any event, evidence of defendant's denial to Martinez would have been cumulative of his denial to Cappelluti and of his denials in court. *People v. Harris*, 206 Ill. 2d 293, 299 (2002) (no *Brady* violation where evidence in question would have been cumulative of other evidence presented at trial). Second, though defendant alludes to the possibility of using the statement to impeach the State's witnesses, he does not explain how he would have laid the groundwork for impeachment. Again, neither at trial, in his briefs, nor at oral argument was defendant able to articulate a basis for admission of the statement.

In a further attempt to prove the materiality of his denial to Martinez, defendant notes that the "State's entire opening statement at trial was that [defendant] confessed to this sexual assault to his daughter." Defendant claims that the State "knew this was not true" and "knew [defendant] denied the sexual assault." We see no implication in the State's opening statement that defendant never denied the charges. The State was simply pointing out that defendant had confessed to Cappelluti, which the evidence clearly showed. As for his serious accusation that the State knowingly

suppressed evidence of his denials, defendant provides no substantiation. Notably, though the trial court said it would give defense counsel a "wide berth" in cross-examining Cappelluti on whether defendant made previous statements to DCFS investigators, we see no suggestion in the record that defendant took advantage of the offer. Counsel's only question to Cappellutii on the subject was whether Cappelluti was at defendant's home when he was brought to the police station.

Defendant stresses that Rule 412 is designed "to afford the accused protection against surprise, unfairness, and inadequate preparation and to afford the defendant an opportunity to investigate the circumstances from which the evidence arose." *People v. Leon*, 306 Ill. App. 3d 707, 712-13 (1999). Defendant repeatedly stresses his surprise at the revelation of the DCFS reports. What blunts this claim, however, is the fact that, as early as September 24, 2008, the defense was on notice that DCFS had investigated C.G.'s accusations. Later, defense counsel revealed that defendant had insisted that he had made denials to investigators. Counsel claimed that defendant was vindicated by the disclosure of the statement to Martinez, but counsel complained that the disclosure was too late to be useful. Though defendant does not cite the criteria that Illinois courts have developed, independently of *Brady*, for determining the appropriate sanction for a discovery violation, we note that one of the factors is the wilfulness of the State in failing to disclose the evidence (see *People v. Harper*, 392 Ill. App. 3d 809, 822 (2009)). Counsel's admission that he was on notice that defendant had made admissions to investigators mitigates the State's culpability in the nondisclosure. Paragraph (g) of Rule 412 afforded defense counsel the means to specifically request the reports of DCFS and other investigative bodies. Counsel could have "request[ed] and designat[ed] *** material or information which would be discoverable if in the possession or control of the State, and which is in

the possession of control of other governmental personnel." Rule 412(g) (eff. March 1, 2001). The committee comments to Rule 412(g) state:

> "Since the State's obligations are not limited to revealing only what happens to come within its possession or control, it is expected that the State will attempt to obtain material not within its possession but of which it has knowledge. Accordingly, this paragraph is primarily concerned with material of which the State does not have knowledge but of which defense counsel is aware; and therefore the burden is upon defense counsel to make the request and to designate the material or information which he wishes to inspect. This paragraph avoids placing the burden on the prosecution, in the first instance, of canvassing all governmental agencies which might conceivably possess information relevant to the defendant." Ill. S. Ct. R. 412, Committee Comments (adopted October 1, 1971).

The trial court has considerable discretion in determining the proper sanction for a discovery violation under Rule 412. *People v. Patel*, 366 Ill. App. 3d 255, 272-73 (2006)). Defense counsel made generic requests for discovery "in the possession or control of the State," but never specifically requested the DCFS reports. That failure seriously detracts from counsel's claim that his surprise at the disclosure of the DCFS reports was so great that a new trial was warranted. See *People v. Dugan*, 237 Ill. App. 3d 688, 692-93 (1992) (defendant had no *Brady* claim for nondisclosure of a DCFS interview of the child-victim, because, though defense counsel was aware of the abuse and neglect proceeding concerning the child, he did not specifically request the DCFS report pursuant to Rule 412(g)). We conclude that the trial court, in declining to grant a new trial for the State's failure to disclose the DCFS reports earlier, did not commit manifest error under *Brady* or abuse its discretion under Rule 412.

II. Sufficiency of the Evidence

Defendant's next claim is that the evidence was insufficient to support the convictions. Our standard of review is whether, after reviewing 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*, 106 Ill. 2d 237, 261 (1985) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We will not retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). It is rather the province of the trier of fact to determine the witnesses' credibility and the weight to be given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). On these matters we do not substitute our judgment for that of the trier of fact. *Id.* We will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable double of the defendant's guilt. *Collins*, 106 Ill. 2d at 261.

The State's evidence at trial consisted of defendant's inculpatory statements to Cappelluti and C.G.'s prior inconsistent statements to Lopez. C.G.'s statements were admitted under section 115—10.1 of the Code of Criminal Procedure (725 ILCS 5/115—10.1 (West 2006)), which permits the prior inconsistent statements of a witness to be introduced as substantive evidence provided certain definite criteria are met. Defendant does not challenge the admission of C.G.'s statements but only their weight. He cites two lines of cases. The first line addresses the requirements for a section 115—10.1 statement to serve as the basis for a conviction. The position of this appellate district, set forth in *People v. Rizzo*, 301 Ill. App. 3d 481, 489 (1998), is that a section 115—10.1 statement, standing alone, may support a conviction. We said in *Rizzo*:

> "[W]here a jury or trial court has convicted a defendant on the basis of a recanted prior inconsistent statement, the question for the reviewing court is not whether any evidence existed to corroborate the statement. [Citation.] Rather, the only 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." (Emphasis in original.) *Id.*

The other line of cases addresses the markedly stricter requirements for use of a defendant's confession as the basis for his conviction. These strictures found recent application in our supreme court's decision in *People v. Sargent*, 239 Ill. 2d (2010). The court explained:

> Under the law of Illinois, proof of an offense requires proof of two distinct propositions or facts beyond a reasonable doubt: (1) that a crime occurred, i.e., the *corpus delicti*; and (2) that the crime was committed by the person charged. [Citations.] In many cases ***, a defendant's confession may be integral to proving the *corpus delicti*. It is well established, however, that proof of the *corpus delicti* may not rest exclusively on a defendant's extrajudicial confession, admission, or other statement. [Citation.] Where a defendant's confession is part of the proof of the *corpus delicti*, the prosecution must also adduce corroborating evidence independent of the defendant's own statement. [Citation.] If a confession is not corroborated in this way, a conviction based on the confession cannot be sustained. [Citation.]" *Id.* at 183.

The court stressed that, where a defendant confesses to multiple offenses, convictions are proper only for those offenses for which there is individual corroboration:

> "Our precedent demonstrates that under the corroboration rule, the independent corroborating evidence must relate to specific events on which the prosecution is predicated. Correspondingly, where a defendant confesses to multiple offenses, the corroboration rule requires that there be independent evidence tending to show that defendant committed each of the offenses for which he was convicted." *Id.* at 185.

The corroborating evidence need not, by itself, prove the existence of the crime beyond a reasonable doubt. *Id.* at 183. Rather, the defendant's confession is considered together with the corroborating evidence to determine whether the crime, and the fact that the defendant committed it, have been proven beyond a reasonable doubt. *Id.*

Defendant argues that the *corpus delicti* was not proven here because the only evidence corroborating defendant's confession to Cappelluti was C.G.'s statement, which, defendant claims, was itself uncorroborated since there was no physical evidence supporting the charges. Defendant misapprehends the law in two respects. First, a section 115—10.1 statement can by itself supply the necessary corroboration for a defendant's confession and hence establish the *corpus delicti*. The section 115---10.1 statement need not have its own corroboration (though, of course, there may be mutual corroboration between the section 115—10.1 statement and the confession). See, *e.g.*, *People v. Dean*, 192 Ill. App. 3d 144, 148-49 (1989) (conviction affirmed where the only evidence was the victim's section 115--10.1 statement and the defendant's confession). Second, while a defendant's uncorroborated extrajudicial confession cannot by itself ground a conviction, because of the historical mistrust of such confessions (*Sargent*, 239 Ill. 2d at 183), a section 115—10.1 statement may, standing alone, support a conviction (*Rizzo*, 301 Ill. App. 3d at 389). A *corpus delicti*

issue does not arise where sufficient evidence exists to convict independent of the confession. Thus, C.G.'s statements could, legally, ground defendant's conviction apart from his confession.

Defendant argues that C.G.'s statement was "not competent" evidence and thus could not corroborate defendant's confession. Defendant cites *People v. Harris*, 333 Ill. App. 3d 741 (2002), where the defendant was charged with violating the registration requirements for sex offenders by failing to notify the police department within 10 days of changing his residence. A police officer testified that the defendant admitted that he had resided at the new residence for over a month without notifying the police. The officer testified that,. in an effort to corroborate defendant's admission, she phoned his parole unit and spoke to " ' to some person,' " who said that the defendant had been living at the new address " 'for some time.' " *Id.* at 748. At the defendant's bench trial, the court specifically cited the officer's phone conversation as corroborating evidence for the defendant's confession. The appellate court held that no proper foundation had been laid for the phone conversation because the other party was not identified. Because the evidence was incompetent and inadmissible, it could not provide the requisite corroboration for the defendant's confession and, hence, the *corpus delicti* was not established. *Id.* at 747-53.

The evidence in *Harris* was not competent because it was not admissible. Though defendant asserts that C.G.'s statement was likewise "not competent," he does not elaborate. As noted, defendant does not contend that C.G.'s statement were not proper for admission under section 115—10.1.

Defendant also notes that the corroboration for a defendant's confession "cannot be based on speculation." Here, defendant cites *People v. Richmond*, 341 Ill. App. 3d 39 (2003), where the defendant was convicted of one count of penis-to- vagina contact with the victim, R.J., and one count

of penis-to-anus contact with her. R.J. testified that the defendant placed his penis in her anus. The defendant had confessed to police that, before he penetrated R.J.'s anus with his penis, he placed his penis on her vagina, attempted to penetrate it, and was unsuccessful. *Id.* at 43-4. The appellate court held that the *corpus delicti* for the penis-to-vagina contact was not shown. The court noted that R.J.'s statement addressed only penis-to-anus contact. The court rejected as "pure speculation" the State's suggestion that the "mere proximity between R.J.'s vagina and anus tended to prove his penis also came into contact with her vagina." *Id.* at 46.

Defendant does not explain in what way the corroborating evidence for his confession was speculative. He does not claim that any of the multiple instances of sexual contact for which he was convicted were, as in *Richmond*, based solely on an inference that, in touching one part of the victim, the defendant must have touched other parts as well. In fact, though defendant cites *Sargent* and other pertinent cases and recites the principles governing the *corpus delicti* requirement, he does not address any specific charge of which he was convicted and contend that corroborating evidence was lacking. Typically, where a defendant is charged with a variety of offenses, and the State's only corroboration for the defendant's confession is the victim's testimony (or section 115—10.1 statement), the defendant's *corpus delicti* argument will involve a veritable line-by-line comparison of the content of the confession with that of the victim's testimony or statement, to determine whether the specific acts to which defendant confessed, and of which he was convicted, were corroborated by the victim's statement. See, *e.g.*, *People v. Sargent*, 389 Ill. App. 3d 904, 913 (2009) (the defendant argued "that no independent evidence was presented to corroborate his statement that he used his finger to penetrate M.G.'s anus more than one time or that he ever touched M.G.'s penis"); *People v. Letcher*, 386 Ill. App. 3d 327, 330 (2008) (where defendant was charged

with multiple sex acts with the victim over multiple months, defendant argued "both that the evidence about the dates of the acts was too vague to support his convictions and that the State failed to show that the number of acts he was convicted of occurred").

The only assertion of defendant's that might be seen to resemble a *corpus delicti* challenge like that in *Sargent* and *Letcher* is his claim that C.G.'s written statement was "fanciful" because it was inconsistent with what she also acknowledged telling the police. Defendant notes that, at one point at trial, C.G. testified that she recalled telling police that defendant's abuse of her continued until June 14, 2008, the day she spoke to the police. (C.G. turned 16 on December 13, 2007.) C.G. later testified, however, that she recalled telling police that the abuse occurred when she was between 10 and 14 years old, and her written statement also alleged abuse occurring when she was between those ages. Unlike the defendant in *Letcher*, however, who argued that the *corpus delicti* was not shown because the victim's statement did not match defendant's as to the dates the alleged acts occurred, defendant does not claim that the inconsistency in what C.G. told the police placed into doubt whether any of the specific acts to which defendant confessed were corroborated. Rather, defendant's claim appears to be a general attack on C.G.'s credibility. The jury, who observed C.G.'s demeanor as she testified, was better positioned than we are to judge her credibility (*People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007)), including whether her statement to police was more believable than her testimony at trial recanting the statement (*People v. Curtis*, 296 Ill. App. 3d 991, 1000 (1998)). The inconsistency defendant points to is no warrant for our upsetting the jury's finding that C.G. was telling the truth in her statement to police about what defendant had done to her.

We also defer to the jury as to the weight to be given C.G.'s delay in reporting the abuse. C.G. wrote in her statement to police that she did not report the abuse earlier because she was afraid

that her mother, Celia, would not believe her. Also, defendant confessed to police that he told C.G. not to report the abuse because it would bring her "shame."

The jury could have reasonably determined that C.G.'s statements to the police were credible because the daily family routine she described was consistent with the accounts given by defendant, Celia, and J.G. The notable divergence between their accounts and C.G.'s was, of course, over whether defendant was left alone with C.G. during Celia's trips to the grocery store. The jury justifiably could have found preposterous defendant's and Celia's categorical denials that C.G. has ever been left alone with defendant for the six or seven years the family has been living together in the Unites States. Celia went further and flatly denied that C.G. was ever left alone with defendant when he came to visit her and the children in Mexico. The jury may also have been skeptical of Celia's and J.G.'s credibility based on their claims to know definitely how long Celia was at the store on her daily trip. Celia testified that, because she would "keep an eye on the clock" while she was gone to the store, and would check the clock again when she came home, she knew she was never gone to the store more than five or ten minutes. J.G. testified that, because he "like[d] looking at the clock" and would see how many minutes passed while Celia was gone, he knew she was never gone more than ten minutes. Notably, despite Celia and JG.'s claim to have definite contemporaneous knowledge of the duration of Celia's grocery trips, J.G. admitted that, before he testified, he talked with Celia "about how long she was gone to the store."

Defendant also argues that the evidence suggests his confession was coerced by Cappelluti, but it was well within the province of the jury to reject his claim of coercion. The jury could have rightly rejected defendant's claim that he falsely confessed to multiple heinous acts against his daughter on Cappelluti's word that Celia was ill and waiting at the station and that he could not leave

until he complied with Cappelluti's demands. Notably, defendant was impeached with his testimony at the suppression hearing that Cappellutti said Celia was waiting at the station but said nothing about her condition. The jury may well also have found it incredible that Cappelluti would fabricate various statements that were either superfluous (*e.g.*, that Cappelluti knew defendant's boss), mitigatory (*e.g.*, that defendant was a good person who worked hard for his family, and that he committed the acts when drunk), or exculpatory (*e.g.*, that defendant did not touch C.G. with his penis).

Last, we note that defendant cites three cases, *People v. Brown*, 303 Ill. App. 3d 949 (1999), *People v. Arcos*, 282 Ill. App. 3d 870 (1992), and *People v. Parker*, 234 Ill. App. 3d 273 (1992), in each of which the convictions were reversed for insufficient evidence. Defendant remarks that these cases show that, "where prior inconsistent statements are uncorroborated, the statements are insufficient to support a jury's finding of a defendant's guilt beyond a reasonable doubt." Defendant does not, however, compare the facts in those cases with the facts at hand. Because defendant has not taken the initiative in that respect, it is sufficient for us to briefly note that the cases are factually inapposite, not least because in none of them did the State rely on evidence so strong as the defendant's confession in addition to a witness's prior inconsistent statement admitted as substantive evidence. See *Brown*, 303 Ill. App. at 965 (only properly admitted evidence of guilt was a single witness's prior inconsistent statement identifying defendant as the shooter, but the statement was not made until nearly two years after the crime occurred); *Arcos*, 282 Ill. App. 3d at 875 (witness who disavowed prior statement identifying defendant as the shooter was, as the trial court found, completely lacking credibility, and there was no relevant corroborating evidence that would suggest that the witness's prior statement was more believable than his disavowal at trial); *Parker*, 234 Ill. App. 3d at 280 (evidence of guilt consistent entirely of prior inconsistent statements from three

witnesses; the first witness, who gave his prior statement in the hospital while recovering from surgery, testified that he gave the statement because he was in a great deal of pain and wanted the detective to leave his hospital room; the second and third witnesses signed their statements because a detective had threatened to arrest them if they did not). Based on C.G.'s statement and defendant's confession, and despite the lack of physical evidence, we cannot say that no rational trier of fact could determine that the State proved its case beyond a reasonable doubt.

For the reasons provided above, we affirm the judgment of the circuit court of Lake County.

Affirmed.