2014 IL App (2d) 130719-U
No. 2-13-0719
Order filed June 23, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
	)	No. 08-CF-366
v.	)	
	)	Honorable
DARRELL BECK,	)	Thomas E. Mueller and
	)	T. Clinton Hull,
Defendant-Appellant.	)	Judges, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for predatory criminal sexual assault would be affirmed. First, the trial court properly admitted, under section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10 (West 2012)), the complainant, Z.B.'s, statements to others that defendant had sexually abused him. Second, any error in the introduction of expert testimony on the dynamics of child disclosures of sexual abuse was harmless. Third, the court did not unconstitutionally shift the burden of proof to the defense. Finally, there was sufficient evidence to support defendant's conviction.

¶ 2 Defendant, Darrell Beck, appeals his conviction for predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)). He contends: (1) the trial court erred by allowing certain statements into evidence under section 115-10 of the Code of Criminal

Procedure (Code) (725 ILCS 5/115-10 (West 2012)); (2) the court erred by permitting State witness Laurie Riehm to testify as an expert in the dynamics of child disclosures of sexual abuse; (3) the court, in weighing the evidence at trial, shifted the burden to the defense, in violation of defendant's due process rights; and (4) the State failed to prove defendant guilty of the offense beyond a reasonable doubt. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In February 2008, defendant was charged with two counts of predatory criminal sexual assault of a child. Count I named S.B. as victim and count II named S.B.'s sibling, Z.B., as victim. Both counts alleged the same manner of sexual penetration, namely that defendant placed his mouth on the child's penis. The counts alleged that the assaults occurred between October 24, 2006, and June 26, 2007.

¶ 5 A. Section 115-10 Statements

¶ 6 In May 2009, the State filed a motion under section 115-10 of the Code to introduce at trial certain hearsay statements of S.B. and Z.B to Dave Berg, Kathy Byrne, John Thurber, Carrie Thurber, Shirley Moore, and Teresa Beck. The State called each of these individuals to testify at the section 115-10 hearing.

¶ 7 Teresa Beck, defendant's wife, described remarks that S.B. made to her in June 2007. During that month, Teresa and defendant were in the process of moving from their home at 205 West Arrowhead in North Aurora, where they lived with four foster children: S.B., Z.B. (who were brothers), L.D., and D.D. S.B. and Z.B. had resided with the Becks since October 2006. Z.B.'s date of birth was April 24, 2000, and S.B.'s was October 10, 2001. About two months before the move, the Becks told S.B. and Z.B. that they would be unable to live with the Becks in their new home in Champaign. At first, S.B. was upset by the news, but after becoming

acquainted with the new foster parents, he was "excited" because it was a "new adventure" for him and Z.B.

¶ 8 Teresa testified that, in late June 2007, she was in the Becks' new Champaign residence with her sister, her mother, S.B., and Z.B. The five of them were "getting ready to leave to go out to eat and *** were talking" when "all of a sudden [S.B.] just piped up that [defendant] had touched his [S.B.'s] privates." When Teresa asked S.B. why he made that remark and "what happened," S.B. replied that he did not know. S.B. then "went on with something else and that was the end of it." S.B. said nothing further about the alleged touching, and Teresa made no additional inquiry. Teresa denied ever telling an investigator that S.B. had reported to her that defendant touched him while they were in the shower together.

¶ 9 Shirley Moore, Teresa's mother, denied ever hearing S.B. make a complaint to Teresa that defendant had touched him inappropriately.

¶ 10 Carrie Thurber testified to statements that Z.B. and S.B. made in November 2007. Carrie explained that she and her husband John became Z.B.'s and S.B.'s foster parents in June 2007, immediately after they left the Becks' care.

¶ 11 Carrie testified that, one Friday night in November 2007 (she could not recall the date), she was inside the Thurbers' Batavia home with Z.B. and S.B. When she went into the basement where the boys were watching television, she saw S.B. with his hands in his pants, covering his privates. Carrie asked S.B. to come upstairs. When he did, she asked him what was wrong. S.B. then "blurted out" that defendant had licked S.B.'s privates in the shower. On cross-examination, however, Carrie clarified that S.B.'s comment was not actually a "blurt-out," but was made in response to her questions, "[I]s there something wrong?" and "Do you trust me?"

¶ 12 Carrie testified that, after S.B. made the comment about defendant, she told him to go back downstairs. Carrie then called John. Afterward, Carrie brought snacks down to the boys. Z.B. then asked Carrie, "[D]id [S.B.] tell you what he did to us?" Carrie described her response: "And I just looked at him and I said you, too? And then I kind of ran back upstairs."

¶ 13 Carrie stated that S.B. and Z.B. remained in the Thurbers' care until June 2008 when they were returned to their biological mother.

¶ 14 John Thurber testified to a conversation he had with Z.B. and S.B. about defendant. The conversation occurred sometime after Carrie informed him of Z.B.'s and S.B.'s accusations about defendant but before the children were interviewed at the Kane County Child Advocacy Center (CAC). John stated that he was together with S.B. and Z.B. when S.B. started a conversation by stating that defendant "had showered with them [S.B. and Z.B.] and licked [S.B.'s] privates and wanted them to lick his privates but they refused to do that." Z.B. "added to the conversation that he had seen something inappropriate on the computer with [defendant] once but [S.B.] was not there." John asked S.B. if anything else had happened and if he had told anyone else about defendant's actions. S.B. replied that he had told Teresa, but she did not believe him and called him a "liar." After this, Z.B. declared that defendant had licked his privates, too, but that he had been too frightened to report it and had not "back[ed] up" S.B. when he spoke to Teresa about what defendant did. John had several subsequent discussions with Z.B. and S.B. about their accusations against defendant. However, John was not asked to describe any of these other conversations.

¶ 15 Dave Berg, an investigator with the CAC, testified that he interviewed Z.B. and S.B. separately at the CAC on the morning of November 16, 2007. Also present for the interviews was Kathy Byrne, an investigator for the Department of Children and Family Services. Berg and

Byrne interviewed S.B. first. When Berg asked S.B. how his time with the Becks had been, S.B. gave a negative answer. Berg asked why, and S.B. stated that defendant had pulled S.B's hair. When Berg asked if "there was anything else," S.B. stated that defendant had licked S.B.'s and Z.B.'s penises. S.B. recounted that once while they were together in the shower, defendant offered to "suck" S.B.'s penis if he would suck defendant's. Defendant then licked S.B's penis. S.B. stated that defendant did this only once. Berg asked S.B. "what happened after that." S.B. stated that once, when Teresa was with her parents, he told her what defendant did. Teresa told S.B. to "stop tattling." Berg testified that he then asked S.B. "if anything else happened." S.B. said that defendant "did the same thing to [Z.B.]." S.B. said he knew this because Z.B. told him. S.B. also said that when he told Teresa in Z.B.'s presence what defendant did, Z.B. "denied to Teresa that anything had happened to him because he was scared."

¶ 16 Berg and Byrne interviewed Z.B. next. Berg asked Z.B. how his time with the Becks had been, and Z.B. said it was "not good." Berg "asked [Z.B.] why not," and Z.B. reported that defendant had pulled his and S.B.'s hair. Defendant might have been joking, but it was still very painful to Z.B. Berg asked if anything else happened, and Z.B. stated that S.B. had told him that defendant licked S.B.'s penis. Berg "asked [Z.B.] if anything else happened," and Z.B. stated that "the same thing happened to [him]." Berg then "asked [Z.B.] to tell *** about his experience." Z.B. recalled an occasion where he was in the shower after S.B. had finished his shower and left the bathroom. According to Z.B., defendant entered the shower and licked Z.B.'s penis. Berg asked if "[defendant] said anything," and Z.B. replied that defendant said to keep it a secret. Berg "asked if anything else happened," and Z.B. said no. Berg asked "if it happened one time or more than one time," and Z.B. said it happened only once.

¶ 17 Berg testified that he then asked Z.B. "about how this was found out." Z.B. stated that S.B. told Teresa in front of her parents what defendant had done. Teresa told S.B. not to tell stories. Z.B. believed S.B.'s accusation "because it happened to [Z.B.], too." Z.B. stated that he told the Thurbers what defendant did.

¶ 18 Berg testified that, consistent with his practice for forensic interviews, he did not ask any leading questions of S.B. or Z.B. Berg also denied that Byrne asked any leading questions.

¶ 19 Subsequent to the interview with Z.B. and S.B., Berg interviewed John, who described a statement S.B. made to him and Carrie. John and Carrie had observed that S.B. was touching his penis excessively. When they asked S.B. if anyone had ever touched him inappropriately, S.B. said that defendant had licked his penis.

¶ 20 The State's final witness was Byrne, who confirmed that she participated in the November 16, 2007, interviews of Z.B. and S.B. Byrne did not provide any detail from that interview other than that Z.B. said that he did not witness "what happened *** between [S.B.] and [defendant]."

¶ 21 Byrne testified that she also interviewed John on November 16, 2007. John stated that he and Carrie had developed a concern that S.B. was "constantly touching himself." When they asked him if anyone had touched him inappropriately, S.B. replied that defendant had touched his penis.

¶ 22 Byrne also interviewed Moore by telephone on December 29, 2007. When Byrne identified herself and her affiliation, Moore volunteered that she was aware of an investigation involving defendant, her son-in-law. Moore stated that she, Teresa, and defendant were present when S.B. remarked that defendant had touched him. Moore could not recall the date of S.B.'s accusation.

¶ 23 Following the testimony and the arguments of the parties, the trial court applied the criteria of section 115-10, which requires that the proffered hearsay statement be reliable considering its timing, content, and circumstances. See 725 ILCS 5/115-10 (West 2012). First, as to Moore and Teresa, the court observed that they "would not tell the State what the State [was] looking to elicit from them." Accordingly, the court did not consider their statements further. Next, the court examined S.B.'s and Z.B.'s statements to Berg and Byrne. The court found these statements "inherently reliable" under section 115-10 based on the careful interview protocols of the CAC. The statements to the Thurbers were less reliable, but still passed muster under section 115-10, because the State established some specificity regarding where and to whom the statements were made and also narrowed the timeframe in which they were made. Therefore, the court found that the statements Z.B. and S.B. made to Carrie, John, Berg, and Byrne were admissible under section 115-10.

¶ 24 The State later moved to reconsider the trial court's ruling as to Teresa's testimony. The court agreed that Teresa did provide testimony useful for the State, namely that S.B. told her that defendant touched him inappropriately. The court further held that S.B.'s statement to Teresa met the standards of section 115-10.

¶ 25 B. The Trial

¶ 26 On January 20, 2010, the trial court granted defendant's motion to sever the counts. The case proceeded to trial on count I (S.B.) in April 2012. Defendant was acquitted. In December 2012, after waiving his right to a jury, defendant was tried on count II (Z.B.). The State moved to introduce some of S.B.'s statements, not as propensity evidence, but to provide context for Z.B.'s statements. Defendant had no objection to this use of S.B.'s statements, and the trial court ruled that it would permit it.

¶ 27 The witnesses from the section 15-110 hearing who also testified at trial recapitulated many of the same background facts, which we will not repeat here.

¶ 28 At trial, Z.B. testified for the State that he was currently 12 years old and residing with his mother and stepfather in Yorkville. Z.B. recalled that he and S.B. were once foster children residing with defendant, his wife, and two other foster children, both girls.

¶ 29 On one occasion, Z.B. was taking a shower in his house when he heard someone walk into the bathroom. Defendant then stepped into the shower naked. Z.B. was standing near the showerhead when defendant entered. Z.B. turned around to face defendant. Z.B. could not recall if he said anything to defendant. Defendant said, "Keep it a secret," and then he "sucked" Z.B.'s penis. Z.B. initially was unable to recall "how" defendant sucked his penis and whether defendant was still standing when he did it. Z.B. later testified that defendant "took a knee" to suck his penis, but Z.B. could not recall if defendant was down on one knee or both. The incident was "pretty quick" and defendant's mouth was in contact with Z.B.'s penis for a couple of seconds only. Z.B. could not recall how he reacted during the incident. After taking his mouth off Z.B.'s penis, defendant stepped out of the shower and left the bathroom without saying anything else. Z.B. could not recall how long he was in the shower before defendant entered or how long his showers normally lasted.

¶ 30 Z.B. testified that the incident occurred around dinnertime. Teresa was cooking dinner, and the foster girls were home also. The family all lived on one floor of the house. The house had a second floor, but Z.B. could not recall ever going upstairs.

¶ 31 Z.B. initially testified that he was unable to remember what he did after defendant left the shower. Later in his examination, however, Z.B. testified that he ate dinner following his

shower. Z.B. also testified that he could not recall how he reacted that evening to what defendant had done.

¶ 32 Z.B. also could not remember when the incident occurred during the eight months he resided with the Becks. Nor could he recall whether it was a weekday or weekend, or whether it was hot or cold outside. Z.B. acknowledged that he testified previously that the incident occurred in summertime.

¶ 33 Z.B. reaffirmed that defendant sucked rather than licked his penis, and that Z.B. knew the difference.

¶ 34 Z.B. was asked whether he "sa[id] anything to Teresa right after it happened." Z.B. said he did not. When asked whether he ever said anything to Teresa, Z.B. replied that S.B. "sa[id] something" once. This occurred when Z.B., S.B., Teresa, and the foster girls were in a van together. Z.B. could not remember S.B.'s exact words. Z.B. felt that Teresa did not believe what S.B. said, but Z.B. could not recall whether Teresa actually said anything in response to S.B.

¶ 35 Z.B. acknowledged that, at some point while he and S.B. were living with the Thurbers, the boys had an overnight visit with the Becks at their new home in Champaign. Z.B. was "happy" to see Teresa and defendant.

¶ 36 Teresa also testified for the State. She described the Becks' home in North Aurora, where Z.B. and S.B. lived from October 2006 to June 2007. The house had a loft with one room, but all of the bedrooms, and the only bathroom, were on the first floor. Teresa described how she and defendant readied the four children for bed. Teresa was in charge of the girls and defendant in charge of the boys. After dinner, the girls bathed, and then the boys showered. Preferably, the boys would shower by 8:00 p.m. Defendant oversaw the boys' showers by

providing them towels, shutting the bathroom door behind them, and waiting in the hallway or in his bedroom across the hall until they emerged wearing their pajamas. Defendant did not enter the bathroom once the boys were inside. Teresa knew that defendant followed this same procedure each night because she could see the bathroom from the girls' room where she was getting them ready. Teresa could recall no occasion where either of the boys showered before dinner or when she was not home. Teresa never saw defendant walk out of the bathroom during the boys' shower time or observed him with wet hair during that time. Defendant, according to Teresa, customarily showered in the morning.

¶ 37 Teresa testified that she rarely cooked dinner and did so on weekends only. On work days, she and the children picked up defendant from the train station between 5:30 and 6:30 p.m., and then the family went out to dinner.

¶ 38 Teresa described when S.B. first accused defendant of touching him inappropriately. Teresa and S.B. were at the Becks' apartment in Champaign when S.B. commented that defendant had touched S.B.'s private parts. Also present were Z.B. and Teresa's mother and sister. Teresa asked S.B. why he said that, and he replied, "I don't know." Teresa did not inquire further. She believed that S.B. was simply trying to get attention, because he did not appear upset and, after making the remark, "went on to something completely different and walked away." Z.B. heard S.B.'s remark but said nothing. Z.B. never made an accusation to Teresa about defendant.

¶ 39 Teresa testified that, at the time S.B. made the remark, the Becks were in the process of moving from North Aurora to Champaign. Teresa later informed defendant about S.B.'s remark, but could not recall his response.

¶ 40 Carrie testified that, on an evening in November (she did not specify a year, but S.B and Z.B. lived with the Thurbers only from October 2006 to June 2007), she had a conversation with Z.B. about defendant. "[S]urprised" by what Z.B. said, Carrie immediately phoned John to tell him. Carrie did not describe at trial what Z.B. said to her.

¶ 41 Carrie stated that Z.B. and S.B. visited the Becks twice after they began living with the Thurbers. Both were overnight visits. Neither child resisted the visits or displayed any hesitation. Z.B. and S.B. also had phone contact with the Becks after leaving their care.

¶ 42 According to Carrie, Z.B. was approximately four feet tall when he was living with her and John.

¶ 43 John testified that, one night in November 2007, he received a phone call from Carrie. Based on what Carrie told him, John phoned the DCFS child abuse hotline the next day. Subsequently, John was directed to take Z.B. to CAC's facility. On the way to the facility, Z.B. told John that defendant had licked Z.B.'s privates. John did not ask any follow-up questions because Z.B. was already scheduled for therapy.

¶ 44 Berg testified that he and Byrne conducted a forensic interview of Z.B. at CAC's facility on November 16, 2007. Z.B. was seven years old at the time. The interview was not digitally recorded; CAC's facility did not have that capacity until early 2008. Berg began the interview by asking Z.B. questions about his current and prior foster care arrangements. Berg asked Z.B. how his time with the Becks had been, and he replied that it " 'wasn't good.' " Berg asked Z.B. to elaborate, and Z.B. stated that defendant had pulled his hair, which hurt Z.B. even though defendant might have been "joking" in doing it. Berg asked Z.B. if defendant did anything else bad, and Z.B. stated that defendant licked S.B.'s penis. Berg asked if Z.B. had any other complaint about defendant, and Z.B. replied that defendant licked Z.B.'s penis, too. Z.B. said it

occurred in the bathroom shower and that defendant told him at the time to keep it a secret. While Z.B. was showering, Teresa was cooking dinner in the kitchen. S.B. also was in the house, but Z.B. was not sure where. Z.B. told Berg that he subsequently informed S.B. and the Thurbers what defendant did. Berg could not recall whether Z.B. said he spoke to Teresa, too. Berg noted that Z.B. was unable to say what time of the year or what day of the week the incident with defendant occurred. Z.B. could only say that he was six or seven at the time. Berg noted that children of such age "aren't bound by calendars."

¶ 45 Berg testified that, in October 2011, he took photographs of the interior of the Becks' North Aurora home. Berg photographed and measured the bathtub-shower in the bathroom. The tub measured on the inside 21 inches wide and 54 inches long. Berg spoke to the current owner of the house, who claimed to have made no alterations to the bathtub-shower. Berg's photographs of the home's interior were admitted into evidence.

¶ 46 Byrne testified to her December 5, 2007, interview with Teresa. Byrne inquired about the bedtime routines of Z.B. and S.B. and the two other foster children. Teresa explained that she supervised the girls while defendant supervised the boys. When the boys first came into the Becks' care they took baths together, but towards the end of their stay they showered separately.

¶ 47 Byrne asked Teresa if S.B. had complained to her about defendant, and Teresa replied that S.B. had told her that defendant touched him in the shower. Teresa, however, did not believe S.B. because he was a "storyteller." Teresa told Byrne that she did not recall if she told defendant about S.B.'s complaint.

¶ 48 Peter Gordon testified that he was the current owner of the Becks' former North Aurora home. Gordon purchased the home as a foreclosure in October 2000. He identified the photographs in the record as accurate depictions of the home's interior, including the bathtub-

shower. Gordon installed a new toilet in the bathroom but left the tub unaltered. Gordon and his wife have showered together in the tub without difficulty. Gordon also claimed he had no difficulty getting down on both knees while showering with his wife. Gordon stated that he was 5 feet, 9 inches tall and weighed 230 pounds, and that his wife was 5 feet, 3 inches tall and weighed over 100 pounds. (Gordon acknowledged that, at a prior proceeding on April 17, 2012, he claimed to have weighed 215 pounds. Gordon explained that he had gained weight since that prior testimony.)

¶ 49 The State called Laurie Riehm as the final witness in its case-in-chief. Riehm testified that she is a licensed clinical social worker with extensive experience in providing therapy for child victims of sexual abuse. After preliminary questioning, the State tendered Riehm to the defense for *voir dire* on whether she was qualified as an expert "in the dynamics of sexual abuse and *** [in] how children experience and disclose sexual abuse." The defense objected that Riehm's testimony would have no relevance because, based on the absence of any report from Riehm in the discovery provided by the State, she evidently had not evaluated Z.B. The State argued that Riehm's testimony was admissible for the very reason that she would not vouch for Z.B.'s credibility. After reviewing case law submitted by the State, the trial court agreed that Riehm did not need to have examined Z.B. The court permitted *voir dire* by the defense, and afterward found Riehm qualified as an expert "in the field of the dynamics of sexual abuse and the disclosure of sexual abuse."

¶ 50 Riehm testified that there are many factors affecting how and when, if ever, a child makes a disclosure of sexual abuse, including (1) the child's age, developmental abilities, and relationship to the alleged abuser; (2) the degree of trauma that the child associates with the abuse; (3) the reactions of people to whom the child attempts to provide information; and (4) any

mental health concerns with the child. A young child may delay or become confused in his outcry because he does not know how to describe the experience in terms adults understand. Some young children simply lack vocabulary to describe an experience, and with age and maturity may alter the language of the disclosure. Also, because the child may not realize the consequences of the experience, he may make an incidental disclosure in the course of speaking of something else.

¶ 51 Riehm explained that the trauma experienced may factor in a disclosure because different children experience events differently. One child may be seriously impacted, becoming disturbed and frightened, while another may employ defensive mechanisms to explain or justify the abuse so as to cope with it. The kind of touch, overt or subtle, may also impact whether and how a child discloses the abuse.

¶ 52 Next, Riehm testified to the factor of the abuser's relationship to the child. The closer the relationship, the more the child feels betrayed. Whether a child keeps the abuse secret depends on explicit and implicit factors. The explicit factors include whether the abuser directed the child not to disclose the abuse or threatened consequences.

¶ 53 Riehm also noted that it is not uncommon for a child to comply with the act of abuse. Reasons include (1) a sense of duty stemming from "an affectionate and agreeable relationship" with the abuser; (2) a confused feeling that the act is one of affection; (3) a fear of consequences (*e.g.*, corporal punishment); and (4) a sense that complying with the abuse will simply be easier than resisting. Quite commonly, the child will continue to love the abuser.

¶ 54 Riehm explained that if a child's disclosure is not understood or believed, or if the disclosure appears negatively to affect family safety or stability, then the child might become

reluctant to repeat the disclosure. Also, if there is same-sex abuse, the child may feel a particular type of shame or embarrassment and may question whether he played a role in the abuse.

¶ 55 Riehm was asked about rates of delayed disclosure. She indicated that some research shows that about 35 to 37% of children attempt to disclose within the first 48 hours. Other research shows, however, that up to 75% of children will not disclose within the first year, and 18 to 20% of children will not disclose within 5 years. In her own experience as a therapist, having treated some 600 children in her 26-year career, Riehm has seen a "huge range" in the timing of disclosures.

¶ 56 Riehm was then asked specifically about victims in "early childhood," namely three to seven years of age. Such children have a limited vocabulary, and so may describe an experience in a manner that it makes it sound implausible to adults. Also, their desire to please adults may lead them to give the answer they believe adults want. These children also have limited concepts of cause and effect and the sequencing of events. Riehm noted, however, that it is not uncommon for victims of that age range to recall the specific date when the abuse occurred.

¶ 57 On cross examination, Riehm explained that, in her initial interview with a child victim of alleged abuse, her aim is to assess the child's level of development, understand how the child interacts, and determine "how they may or may not engage in the treatment process." Riehm distinguished between forensic and therapeutic interviews. When a child is referred for treatment, Riehm does not attempt to collect forensic data. When she does conduct a forensic interview, her task is to assess the validity of the allegation of abuse by "compar[ing] the child's statements and other behaviors to children known to have been sexually abused." Factors that Riehm uses in determining the validity of an allegation include (1) the consistency of the child's statements; (2) the degree of symptoms consistent with the trauma the child describes; (3) the

child's ability to recall details such as the setting in which the abuse occurred and who was present; and (4) whether the language the child uses is age-appropriate or appears to have been rehearsed or coached in some way. Other factors include a child's background and stability. Instability can come from foster arrangements in which the child is "moved from house to house." In that situation, the child may be "looking for attention or things that will help [him] deal with their situation." All children, Riehm acknowledged, are capable of lying.

¶ 58 Riehm further noted that the details of a child's disclosure may become convoluted because of many factors including (1) the delay between the abuse and the disclosure; (2) the child's development; and (3) the child's willingness to cooperate. Riehm acknowledged that a child's description of the disclosure may change because of age and maturation, but also because the child fabricated the allegation. Riehm also acknowledged that the phrase "sucking a penis" would not be a subtle detail in an allegation of abuse. Riehm confirmed that she is unfamiliar with the particular facts of this case.

¶ 59 Riehm stated that most sexual abuse of children is perpetrated by someone known to the child. Riehm was unable to give an opinion on how many victims of sexual abuse experience it more than once.

¶ 60 On redirect examination, Riehm reiterated that children will vary in the extent of detail they provide in a disclosure of abuse. Some children will not speak about certain aspects of the experience until they better understand them and they take on a "different emotional toxicity." Riehm acknowledged that, "without a confession or *** other type[] of corroboratory data such as a videotape, it's difficult *** to determine whether in fact children have been abused."

¶ 61 Following Riehm's testimony, the State rested. The defense's first witness was Kathleen Berry, who testified that she was Z.B.'s caseworker for two periods: from February to June 2007

and from February to August 2008. Z.B. had been with the Becks several months when Berry first became his caseworker. In that capacity, Berry visited the Beck home a total of four or five times. On each occasion, Berry spoke with Z.B. and S.B outside the presence of the Becks. Sometimes Berry spoke with Z.B. and S.B. separately and sometimes they were together. The purpose was to ensure that Z.B. spoke freely, without influence from the foster parents. Neither Teresa nor Z.B. ever made an allegation to Berry of sexual abuse by defendant, nor did Berry develop any concern of sexual abuse by defendant.

¶ 62 Teresa testified for the defense that, when she and her husband decided in April or May 2007 to move from North Aurora, they informed S.B. and Z.B. that they would not be moving with them. As Z.B. was upset at the news, the Becks attempted to portray the boys' new foster arrangement with the Thurbers as a "new adventure." However, whenever the Becks went to Champaign to visit potential apartments, Z.B. and S.B. would always pick out the room they wanted to sleep in. When Teresa last saw Z.B. before the Thurbers took him into their care, he appeared upset. The Becks maintained phone contact with Z.B. and S.B., and the boys visited them in August 2007. After the August 2007 visit, the Becks had only one additional phone conversation with S.B., when they called to wish him a happy birthday. The Becks did not speak with Z.B. on this occasion or thereafter.

¶ 63 After waiving his right against self-incrimination, defendant testified in his own defense. He stated that, when Z.B. and S.B. were living with him and Teresa, they strove to get the boys to bed by 8 p.m. He and Teresa followed, without exception, the same bedtime routine each evening. Defendant would provide Z.B. a towel and send him into the home's only bathroom to shower. Defendant closed the door behind Z.B. and waited in the hallway or the bedroom across

the hall for Z.B. to finish. When Z.B. was finished, he would come out of the bathroom dressed for bed.

¶ 64 Defendant testified that he never went into the bathroom while Z.B. was showering. Also, he never sucked, licked, or touched Z.B.'s penis. Defendant could not recall Z.B. ever making in defendant's presence an accusation that defendant touched him inappropriately. Defendant also could not recall Teresa ever asking him whether he licked S.B.'s penis. Prior to June 2007, defendant heard of no allegation that he had touched Z.B. inappropriately. Defendant recalled an interview with Berg and Byrne, but did not recall telling them about a conversation in the family van where Teresa told S.B., " 'We don't talk like that.' "

¶ 65 Defendant testified that he used the shower-tub in the North Aurora to take his own showers, but the space was a "little tight given [his] size." Defendant claimed that he was currently 5 feet, 9 inches tall and weighed 323 pounds. Defendant claimed that his current size was "consistent" with his size between October 2006 and June 2007. Defendant stood up in court so that the trial judge could observe his size.

¶ 66 The State called one witness, Berg, in rebuttal. Berg testified that, in an interview in December 2007, he asked defendant if he had been made aware of any prior complaints by Z.B. or S.B. that defendant inappropriately touched them. Defendant replied that he recalled an occasion where he and Teresa were in the family van with Z.B. and S.B. S.B. made a comment that defendant did not hear. Z.B. giggled at the remark and Teresa told S.B., " 'We don't talk like that.' "

¶ 67 After taking the matter under advisement for several weeks, the trial court issued a seven-page written verdict finding defendant guilty. The trial court specifically found Z.B. credible despite his inability to recall the date of the abuse:

> "Z.B. was able to testify to where the offense took place (the bathroom), the general time of day it took place (afternoon/before dinner), how the offense took place including but not limited to where he was specifically located in the bathtub when the offense occurred, where the defendant was located in the bathtub when the offense occurred, what the defendant said immediately prior to the offense occurring, and what the defendant did to Z.B. when the offense took place. The court rejects the argument that Z.B. could have somehow provided more specific details on the manner in which the defendant perpetrated the offense. Z.B. testified how the defendant placed his mouth on his penis for a couple of seconds."

¶ 68 The court also considered Z.B.'s demeanor on the stand as indicative of his credibility. When Z.B. began his testimony, the court observed, he was "calm and did not demonstrate any emotion." When asked to describe what happened when defendant walked into the shower, Z.B.'s "demeanor changed immediately." The court observed Z.B.'s "entire body stiffen" and "his face *** begin to scrunch up." Z.B. also began to cry. Z.B.'s "demeanor then changed back to being calm when he was no longer asked questions about what the defendant did and said to him while in the bathtub with him." The court specifically found that Z.B.'s change in demeanor was caused by the nature of the traumatic event he recalled rather than by, as the defense suggested, "his realizing the seriousness *** of his false accusations against the defendant."

¶ 69 Noting the testimony as to where defendant was customarily positioned during the boys' bedtime routine, the court found that defendant had the opportunity to commit the brief act of abuse described by Z.B.:

> "The defendant was in control of when and how he committed the offense. The defendant and his wife both testified the defendant was the person in charge of [Z.B. and

S.B.'s] showers. The defendant was the person that gave Z.B. his bath towel and either stood in the hallway or near his bedroom when Z.B. showered. The entire incident took a very short period of time. It is reasonable in light of all the other evidence received and the location of the defendant's bedroom in relation to the bathroom, that the defendant had the opportunity to commit the offense as Z.B. testified."

¶ 70 The trial court specifically addressed and rejected several defense contentions, including: (1) Z.B.'s accusation was unbelievable because he waited until November 2007, forgoing numerous opportunities, including private conversations with his caseworker, to disclose the abuse; (2) Z.B. had a motive to fabricate because he was upset with the Becks for moving away and not taking Z.B. and S.B. with them; (3) Z.B. inconsistently described the abuse, telling investigators that defendant "licked" his penis, but testifying at trial that defendant "sucked" his penis; (4) defendant's size made it unlikely that he could maneuver inside the shower-tub as Z.B. claimed; and (5) it was unlikely that no one would have witnessed defendant enter the bathroom and exit it with (presumably) wet hair.

¶ 71 Defendant filed a postjudgment motion, which the trial court denied. Defendant then filed this timely appeal.

¶ 72 II. ANALYSIS

¶ 73 A. Admission of Statements Pursuant to Section 115-10

¶ 74 We address first defendant's contention that the trial court erred in admitting statements under section 115-10 of the Code. Section 115-10 provides, in pertinent part, as follows:

"(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13, * * * the following evidence shall be admitted as an exception to the hearsay rule:

* * *

(2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.

(b) Such testimony shall only be admitted if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child * * * either:

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement[.]" 725 ILCS 5/115-10 (West 2012).

¶ 75 Defendant's challenge relates solely to the reliability of the statements admitted. In evaluating whether the time, content, and circumstances of a statement provide sufficient safeguards of reliability, the court considers the totality of the circumstances. *People v. Oats*, 2013 IL App (5th) 110556, ¶ 25. "[R]elevant factors include, but are not limited to, (1) the spontaneity and consistent repetition of the statement; (2) the mental state of the child in giving the statement; (3) the use of terminology not expected in a child of comparable age; and (4) the lack of a motive to fabricate." *People v. Bowen*, 183 Ill. 2d 103, 120 (1998). "The State, as the proponent of the challenged statements, [bears] the burden of establishing that the statements [are] reliable and not the result of adult prompting or manipulation." *People v. Zwart*, 151 Ill. 2d

37, 45 (1992). The admission of evidence under section 115-10 is reviewed for abuse of discretion. *Bowen*, 183 Ill. 2d at 120.

¶ 76 Defendant challenges the statements made by Z.B. (1) to Carrie on a Friday night in November 2007, (2) to John in November 2007; and (3) to Berg and Byrne at the CAC facility on November 16, 2007. Defendant makes points particular to each of the statements, but also makes general points applicable to them all. We begin by addressing the particular points.

¶ 77 *Statement to Carrie*

¶ 78 At the section 115-10 hearing, the State proffered a statement made by Z.B. to Carrie, which the State contextualized with a prior conversation between Carrie and S.B. S.B. told Carrie that defendant had licked his privates. Later, after S.B. and Z.B. were together watching television for a few minutes, Carrie entered the room, at which point Z.B. asked, "[D]id [S.B.] tell you what he did to us?" Carrie asked, "[Y]ou too?" and ran out of the room.

¶ 79 During Carrie's trial testimony, however, the State did not elicit the substance of Carrie's November 2007 exchange with Z.B. Carrie testified only that Z.B. made a remark that surprised her and prompted her to phone John. The State also did not elicit S.B.'s earlier statement to Carrie that defendant had licked S.B.'s privates. Since none of those statements to Carrie were brought out at trial, any error in the trial court's section 115-10 holding pertaining to Carrie was of no consequence.

¶ 80 *Statement to John*

¶ 81 First, defendant claims there was a contraction between John's section 115-10 testimony and his trial testimony. Defendant notes that John's pretrial testimony was that Z.B.'s disclosure to John occurred sometime between Z.B.'s disclosure to Carrie and John's taking Z.B. to the

CAC. At trial, however, John testified that Z.B. actually made the disclosure en route to the CAC.

¶ 82 Defendant has forfeited this contention. Whether John's pretrial testimony met the standards of section 115-10 was a distinct issue from whether John's trial testimony varied from his section 115-10 testimony. See *People v. Cookson*, 215 Ill. 2d 194, 205 (2005) ("While questions about the reliability of the statements may have arisen at trial, the record available at the time of the pretrial section 115-10 hearing supports the trial court's decision to admit the complainant's hearsay statements."); *People v. Barger*, 251 Ill. App. 3d 448, 456 (1993) ("[T]he trial court must determine whether the time, content, and circumstances provided sufficient safeguards of reliability based solely on the testimony presented at that hearing."). Defendant failed to object to the variance when John testified at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (an issue is forfeited on appeal if it was not raised in the trial court through both a contemporaneous objection and a written posttrial motion). Moreover, defendant does not invoke the plain error doctrine as a means of avoiding forfeiture. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) ("A defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion.").

¶ 83 Defendant also contends that Z.B.'s disclosure to John lacked reliability because it was "not spontaneous" but instead was made "only after [S.B.] told John that Defendant had licked his privates." John's testimony indicates that Z.B. volunteered his disclosure while John was speaking with S.B. In that sense, it was indeed spontaneous. Defendant, however, insinuates that Z.B. fabricated an allegation in order to imitate S.B. Defendant infers this simply from the fact that S.B. spoke first. Just as valid is the inference that S.B.'s initiative encouraged Z.B. to disclose the truth of what happened to him. Notably, Z.B. explained to John that he had not

disclosed earlier because he was frightened. Z.B. also remarked that he had not spoken up when S.B. made his disclosure to Teresa.

¶ 84 Consequently, we find no error in the admission of Z.B.'s statement to John.

¶ 85 *Statements to Berg and Byrne*

¶ 86 Defendant first contends that, since the statements made by Z.B. at the CAC on November 16, 2007 were not video (or at least audio) recorded, a vital safeguard of reliability is absent. Berg explained that the CAC did not have recording equipment until early 2008. As defendant notes, reviewing courts have admonished police and social workers to record child interviews. See *Cookson*, 215 Ill. 2d at 211; *People v. Miles*, 351 Ill. App. 3d 857, 866 (2004). However, the lack of a recording will not, alone, render a statement unreliable under section 115-10. See *Cookson*, 215 Ill. 2d at 211 ("While we believe the lack of a contemporaneous video recording does not render the interview unreliable [citation], we once again strongly admonish law enforcement personnel and social workers to record those interviews whenever possible."). In the absence of a recording, courts scrutinize the interviewer's account for evidence of leading questions or critical gaps in the interviewer's recollection. For instance, the reviewing court in *Miles* said:

> "Without a recording of [Sheriff's Detective] Boston's interview of C.M., one cannot know whether her leading questions, either in their individual or collective potency, crossed the line into improper suggestion. Boston herself admitted she could not remember many of the questions she asked C.M. Some of the questions that she had written down were troubling in their focus on defendant: ' "I asked her if Mr. Mickey had done anything to her. I asked if Mr. Mickey had touched her." ' See [*People v. Ware*,

259 Ill. App. 3d 466, 470 (1994)] ('Roberts repeatedly asked S.M.C.[,] "[W]hat did Todd do to you the other day?" '). " 351 Ill. App. 3d at 866.

¶ 87 Defendant claims the State "failed to present detailed evidence of Berg's questions and answers to Z.B." We disagree. Berg described with specificity the questions he asked Z.B. Unlike the interviewer in *Miles*, Berg did not admit to any gaps in his memory of the interview. Defendant claims that Berg's questions were "indicative of prodding." Defendant references Berg's serial "why?" and "what happened next"? queries. Courts, however, are concerned with leading or otherwise suggestive questions, which these queries clearly were not. They were open-ended, permitting Z.B. to develop his account as he saw fit.

¶ 88 Defendant also asserts that Z.B.'s statements to Berg and Byrne were "obviously not spontaneous," but instead were made in "a forensic interview conducted in a controlled setting." Spontaneity, however, is but a factor in judging reliability. Also pertinent is consistency in making disclosures, and Z.B.'s statements to John and later to Berg and Byrne consistently described defendant as having licked Z.B.'s penis. (We note that, in Z.B.'s remark to Carrie, it was less obvious that what Z.B. claimed defendant "did to [him]" was the same thing S.B. claimed occurred, namely that defendant licked his privates. As noted, however, Z.B.'s remark to Carrie was not introduced at trial.)

¶ 89 Defendant also suggests (as he did with the statement to John) that Z.B.'s statement to Berg and Byrne was less reliable because it was "an afterthought following S.B.'s accusations." S.B. and Z.B. were interviewed separately, however, and there is no indication that Z.B. was told what S.B. had said. Thus, defendant demonstrates no possibility that Z.B. was influenced by what S.B. said to the investigators.

¶ 90 Defendant makes two points common to all of the challenged statements by Z.B. First, he comments that the statements "were wholly devoid of facts surrounding the alleged incident other than the blanket allegation that the Defendant had licked [Z.B.'s] penis." The allegations were not, in fact, "blanket." Z.B.'s statements to John and to Berg and Byrne specified that the touching occurred in the shower. The statements to Berg and Byrne had the additional details that the touching occurred after S.B. had showered and left the bathroom and that defendant told Z.B. to keep it a secret.

¶ 91 Second, defendant contends that Z.B.'s delay in making his statements also impacts their reliability. Since, however, Z.B., could not recall the date of the abuse, defendant can only speculate about the degree of delay. The maximum delay would have been between October 2006 (when Z.B. moved in with the Becks) and November 2007—13 months. "[A]s a general rule, delay in reporting abuse or initial denials of abuse will not automatically render a victim's statements inadmissible under section 115-10." *Zwart*, 151 Ill. 2d at 46. Courts have found statements reliable under section 115-10 despite years of delay, because there were adequate independent indicia of reliability. See *Bowen*, 183 Ill. 2d at 120 (delay of three years); *People v. Booker*, 224 Ill. App. 3d 542, 554 (same length). There were sufficient safeguards of reliability here. Z.B. gave repeated and consistent descriptions of how defendant abused him, and none of them was elicited by suggestive or leading questions. Also, there was no clear evidence of a motive to fabricate, for while Z.B. was initially upset at the news that he would be leaving the Becks, he subsequently became "excited" at the prospect of living with the Thurbers.

¶ 92 Finally, defendant makes two contentions that appear for the first time in his reply brief. These claims are both forfeited (see Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (points not raised in the opening brief are forfeited)), but we point out their lack of merit nonetheless.

¶ 93 First, defendant contends that "[e]ven if the court properly ruled at the [section] 115-10 hearing regarding the reliability of Z.B.'s statements to John and Berg that the Defendant *licked* his penis [citation], [the statements] should have been excluded at the trial once Z.B. testified inconsistently that the Defendant *sucked* his penis. [Citation.]" (Emphasis added.) Z.B.'s trial testimony, however, had no bearing on the admissibility of his statements under section 115-10. See *Cookson*, 215 Ill. 2d at 205; *Barger*, 251 Ill. App. 3d at 456. Defendant did, we note, cite the inconsistency in arguing that Z.B. was not a credible witness.

¶ 94 Second, defendant asserts that John's section 115-10 testimony was suspect because he and Byrne testified differently as to how S.B. first claimed to John that defendant had touched him inappropriately. Defendant points out that John testified that S.B. first made an allegation about defendant when John was alone with Z.B. and S.B. Defendant claims this was inconsistent with Byrne's testimony that John, during his November 16, 2007, interview, stated that S.B. had made an allegation to both him and Carrie after they inquired why he was constantly touching himself. There is no indication in Byrne's testimony, however, that John was speaking to her of the first time S.B. made the allegation. John may well have been speaking to Byrne about a repeated allegation.

¶ 95 For the foregoing reasons, we find no error in the admission of Z.B.'s statements pursuant to section 115-10.

¶ 96 B. Admission of Riehm's Testimony

¶ 97 Defendant contends that the trial court erred in permitting Riehm to testify on the factors that influence how and when a child discloses sexual abuse.

¶ 98 "A trial court should allow expert testimony only if (1) the proffered expert has knowledge and qualifications uncommon to laypersons that distinguish him as an expert; (2) the

expert's testimony would help the jury understand an aspect of the evidence that it otherwise might not understand, without invading the province of the jury to determine credibility and assess the facts of the case; and (3) the expert's testimony would reflect generally accepted scientific or technical principles." *People v. Simpkins*, 297 Ill. App. 3d 668, 681 (1998). See also Ill. R. Evid. 702 (eff. Jan. 1, 2011). The trial court has wide discretion in deciding whether to admit expert testimony. *People v. Cardamone*, 381 Ill. App. 3d 462, 500 (2008).

¶ 99 Defendant identifies certain portions of Riehm's testimony, contending they were inadmissible because they presupposed facts for which there was no support at trial. Defendant specifies Riehm's testimony that (1) a young child might delay or make a "confused" disclosure because he has failed to grasp the implications of what happened to him and may lack adequate vocabulary to describe the experience; (2) a young child who has suffered abuse from a member of the same sex may feel a particular type of embarrassment or shame and question whether the abuse was his fault; and (3) a young child's description of the experience may change over time.

¶ 100 Defendant contends this testimony was incompetent because there was no evidence that Z.B. delayed his accusation due to confusion or descriptive inability, or that he was particularly shamed or embarrassed by the alleged same sex abuse. Moreover, defendant asserts, "the record is devoid of any explanation" as to why Z.B. changed his description of defendant's act, telling Berg and Byrne that defendant "licked" his penis, but testifying at trial that defendant "sucked" his penis.

¶ 101 As support, defendant cites *People v. Howard*, 305 Ill. App. 3d 300 (1999), and *People v. Simpkins*, 297 Ill. App. 3d 668 (1998). In *Simpkins*, the complainant, K.S., recanted at trial her allegation that the defendant sexually abused her. The State then called a DCFS investigator, who testified that recantations occur in 50% percent of abuse cases and that one reason for

recantation might be that the child perceives the family is not supporting her or blames her. The appellate court ruled this testimony inadmissible because "no evidence was presented that K.S. recanted her allegation against defendant because of an unsupportive family or because she felt like a scapegoat." *Simpkins*, 297 Ill. App. 3d at 683. Consequently, the investigator's testimony "had nothing to do with K.S.'s credibility." *Id.*

¶ 102 *Simpkins* relied on *People v. Enis*, 139 Ill. 2d 264 (1990), where the supreme court upheld the trial court's exclusion of expert testimony offered by the defense. The expert would have testified that, contrary to popular belief, "witnesses in stressful situations have less accurate memories." *Id.* at 288. The court held that the testimony would not have aided the trier of fact because none of the eyewitnesses in the case were under stress when they observed the suspect. *Id.*

¶ 103 *Simpkins* was discussed, and distinguished, in *People v. Butler*, 377 Ill. App. 3d 1059 (2007). In *Butler*, the appellate court found no error in the admission of expert testimony that victims of sexual abuse might make piecemeal disclosures because of "repeated abuse, shame, and embarrassment." *Id.* at 1063. The court noted that, unlike in *Simpkins*, "the expert testimony found support in the testimony of laywitnesses," specifically, the victim, K.B., and her sister, N.B. *Id.* at 1064. As the court recounted, "K.B. and N.B. testified they delayed reporting, K.B.'s reporting could be seen as piecemeal, and both testified to experiencing shame." *Id.* at 1064.

¶ 104 In *Howard*, the other case upon which defendant relies, the State's expert testified that she saw no evidence that another State's witness, the defendant's live-in girlfriend Sherrie Gaines, had fabricated the account she gave investigators (and reaffirmed at trial), namely that she witnessed the defendant beat her daughter to death. The expert also opined that Gaines

suffered from battered woman syndrome from the time of the victim's death in 1990 through 1995. *Howard*, 305 Ill. App. 3d at 305-06. This court held that the expert's testimony was inadmissible for two reasons. First, it did not aid the jury in deciding the case, because the fact that Gaines suffered from battered women syndrome "was not relevant to the issue of whether the defendant murdered the victim." *Id.* at 308. Second, the expert's testimony was an improper attempt "to bolster the credibility of [a witness]." *Id.* at 309.

¶ 105 This case does not fall under the second holding in *Howard*, because Riehm never opined as to the credibility of Z.B.'s allegations. The question then becomes whether Riehm's testimony was inapposite because she testified to factual situations that had no analogue in the evidence at trial. Even if we considered Riehm's testimony to have run afoul of the holdings in the aforementioned cases, we would find no reversible error. The trial court admitted Riehm's testimony over defendant's objection, but made no mention of her testimony in its written verdict. Defendant subsequently filed a motion for a new trial, asserting, as here, that Riehm's testimony was irrelevant. The trial court disposed of the argument as follows:

> "The Court relies on its rulings that were previously entered finding [Riehm] to be an expert, finding her testimony to be relevant, and finding that her testimony was not speculative.
>
> In addition, in reviewing [t]he Court's opinion and its verdict, [t]he Court did not place a great deal of weight on her testimony, and I think that that is evidence--not that I believe that her testimony was irrelevant or in any way improper, but in considering and reaching [t]he Court's conclusion, I laid out the factors that [t]he Court considered."

¶ 106 Though the court continued to believe that Riehm's testimony was competent and relevant, the court's final word on the issue was that its written decision set forth all of the

matters that it considered. Riehm was not mentioned in that decision. Moreover, even if the court did consider Riehm's testimony, any error would have been harmless, as we explain below (*infra* ¶¶ 116-137).

¶ 107 C. The Trial Court's Comments on Defendant's Theory of the Case

¶ 108 Defendant contends that the trial court denied him due process by shifting the burden of proof to the defense. We disagree.

¶ 109 Defendant refers to the following familiar principles of due process:

> "Due process requires that the State bear the burden of proving beyond a reasonable doubt all of the elements of the charged offense. [Citation.] That burden of proof remains on the State throughout the entire trial and never shifts to the defendant. [Citation.] The defendant is presumed innocent throughout the course of the trial and does not have to prove his innocence, testify, or present any evidence. [Citations.]" *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 27.

¶ 110 The foregoing due process principles restrict how the trial court evaluates the evidence and arguments presented:

> "The trial court is presumed to know the law regarding the burden of proof and to apply it properly. [Citation.] That presumption, however, may be rebutted when the record contains strong affirmative evidence to the contrary. [Citation.] *** [T]he reviewing court must determine whether the record contains strong affirmative evidence that the trial court incorrectly allocated the burden of proof to the defendant. [Citation.] The trial court's efforts to test, support, or sustain the defense's theories cannot be viewed as improperly diluting the State's burden of proof or improperly shifting that burden to the defendant. [Citation.] The trial court is free to comment on the implausibility of the

> defense's theories, as long as it is clear from the record that the trial court applied the proper burden of proof in finding the defendant guilty. [Citation.]" *Id.* ¶ 28.

¶ 111 The remarks of which defendant complains must be understood against the backdrop of the defense's opening statement and closing argument. In its opening, the defense anticipated there would be evidence that Z.B.'s behavior toward the Becks subsequent to the time frame in which the alleged abuse occurred was not the behavior of a child who had been abused by defendant. In closing argument, the defense continued to stress that the evidence did not support Z.B.'s allegation. First, the defense reiterated that Z.B. would not have been willing to maintain contact with the Becks if defendant had abused him. Second, the defense argued that Z.B.'s account of the one incident of abuse was implausible both because the mechanics of the abuse were impossible given defendant's physical size and because Teresa would have noticed a disruption in the family's bedtime/shower routine. Besides alleging these deficiencies in the State's proof, defendant suggested the possibility that Z.B. fabricated the allegation out of resentment toward the Becks:

> "[Z.B.] is a foster kid. He is placed in the Beck home. By all accounts, it's a happy and good environment, so much so that after the Becks relocate to Champaign, Illinois, they still have a visitation with [Z.B.]; and in August, [Z.B.] goes to Champaign, spends the weekend. His own testimony is he had a good time. He was happy, and he was happy to see [defendant], and he was happy to see Teresa. This is not a kid that has been sexually abused.
>
> I will tell you what this is, though, ultimately because the term betrayal works pretty well here. Teresa Beck testifies that they went down several times to Champaign after the Becks decided to move and showing them, 'Oh, this could be my room, this

could be my room,' each time they go down there. But ultimately it didn't work out. They don't go with the Becks. They are disappointed. The record reflects that through the testimony. They are disappointed. And who knows? Who knows? All children are different. Kids lie for whatever reason, whatever their motivation. We don't know what it is or what it isn't. But ultimately in this case we have to look at this case and say okay, what really are the facts here? What are the facts?

***

Now I don't know why [Z.B.] said this, but I have a good idea why. Stability for these kids, moving from foster home to foster home, not having a home. We don't know what was going on in their prior household. We don't know what stories are made up or are not made up, but we do know this, [defendant] is about the most unlikely fellow to get in that bathtub, drop to one knee, and try to figure out how to get to this child's penis for a second, for a second."

¶ 112 The trial court, as defendant acknowledges, found Z.B. credible. Defendant also recognizes that the court "rejected one theory posed by the Defendant[,] that Z.B. might have fabricated the allegation because he was angry with the Defendant for moving away and not taking Z.B. with him." Defendant, however, believes that the trial court crossed constitutional boundaries by "inappropriately posing several questions to the defense that remained unanswered." Defendant singles out several questions, which we place in context and identify with italics:

"Z.B. testified to what occurred in the bathroom. *If, as the defense has suggested, Z.B. fabricated this testimony because he was mad at the Becks for moving or for some other unknown reason, why would he not make his story better or more believable? If, as*

argued, Z.B. fabricated this story, why would Z.B. not testify that the incident occurred at a time when only he and the defendant were in the house? Why would Z.B. not testify that the defendant sucked or licked his penis for a longer period of time? Why would Z.B. not testify that the defendant molested him on multiple occasions? The Court has found Z.B. to be a credible witness. The defendant was in control of when and how he committed the offense. The defendant and wife both testified the defendant was the person in charge of the boys[']showers. The defendant was the person that gave Z.B. his bath towel and either stood in the hallway or near his bedroom when Z.B. showered. The entire incident took a very short period of time. It is reasonable in light of all the other evidence received and the location of the defendant's bedroom in relation to the bathroom, that defendant had the opportunity to commit the defense as Z.B. described.

13. The defense has argued that a possible reason for Z.B. testifying the defendant sexually abused him was because he was angry with the defendant and his wife for moving away and not taking Z.B. or his brother with him. The timing of Z.B.'s disclosure to [Carrie Thurber] does not support this argument. The first time Z.B. told anyone outside the Becks' home about the incident was November of 2007. By this time, Z.B. had been living with John and Carrie Thurber since June of 2007, a time period of approximately six months. If Z.B. was angry with the Becks as suggested and decided to falsely accuse the defendant of sexually molesting him because he felt some sort of betrayal, it makes no sense that Z.B. would have waited for six months to make the accusation. *Or, if after Z.B. visited with the Becks in August of 2007 he suddenly became vindictive or angry at the Becks, why would Z.B. wait through September, October, and half of November before making the accusation?*"

¶ 113 Defendant suggests that "[t]he clear implication from this litany of questions is that since the Defendant did not prove why Z.B. fabricated the allegation of sexual assault, Z.B. must have been telling the truth; and therefore, the Defendant must have been guilty."

¶ 114 Defendant misconstrues the trial court's reasoning process. The court thoroughly critiqued, as was fair, defendant's theory that Z.B. fabricated the account, but the court nowhere implied that the deficiencies in defendant's theory filled a void in the State's proof. Rather, the court found the State's theory established on the strength of the evidence it produced. The court found that Z.B. presented a plausible account of how he was abused and that his demeanor while testifying lent credence to his account. The court did not shift the burden of proof away from the State.

¶ 115 Accordingly, we reject defendant's due process challenge.

¶ 116 D. The Sufficiency of the Evidence

¶ 117 Defendant's final contention is that the State did not meet its burden of proving him guilty beyond a reasonable doubt.

¶ 118 When considering a challenge to the sufficiency of the evidence in a criminal case, the reviewing court's function is not to retry the defendant. *People v. Lloyd*, 2013 IL 113510, ¶ 42. Rather, in a bench trial, it is the role of the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, weigh and draw reasonable inferences from the evidence, and resolve any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Our inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Lloyd*, 2013 IL 113510, ¶ 42. We draw all reasonable inferences from the record in favor of the

prosecution. *Id.* We will sustain a criminal conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Id.*

¶ 119 As noted, we assume, without deciding, that Riehm's testimony was improperly admitted, and consider whether the State's evidence apart from her testimony was sufficient to support a conviction. *Supra* ¶ *106*. We hold that it was.

¶ 120 At the outset, we acknowledge that Z.B. was the only first-hand witness to the abuse. "It remains the firm holding of [the supreme] court that the testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant." *Siguenza Brito*, 235 Ill. 2d at 228. The trial court expressly found Z.B. credible, basing this assessment in part on observations to which we were not privy, namely Z.B.'s demeanor while testifying. See *In re Stephen K.*, 373 Ill. App. 3d 7, 20 (2007) ("Because the trial court has the best opportunity to observe the demeanor and conduct of the parties and witnesses, it is in the best position to determine the credibility and weight to be given to the witnesses' testimony."). The trial court specifically described how Z.B.'s "demeanor changed immediately" when recounting what defendant did to him in the shower.

¶ 121 Defendant claims, however, that the trial court "failed to note the pause between Z.B.'s testimony regarding the alleged offense and his 'change in demeanor.' " Not having witnessed Z.B. testify, we cannot evaluate this claim. If defendant wanted that "pause" highlighted for the record, he could have cross-examined Z.B. on it.

¶ 122 Defendant also asserts: "Ironically, Z.B. forgot to cry during his cross-examination when he was again asked to describe the abuse." Defendant made this same claim in his posttrial motion, to which the court responded that its assessment of Z.B.'s credibility included his

demeanor both on direct and cross examination. Even if Z.B. indeed did not cry during cross-examination, we would not overturn the court's credibility determination.

¶ 123 Defendant makes several other attacks on the plausibility of the account Z.B. gave at trial. We review these alleged flaws according to these principles:

> "Illinois courts consistently h[o]ld that a complainant's testimony need not be unimpeached, uncontradicted, crystal clear, or perfect in order to sustain a conviction for sexual abuse. [Citations.] Where minor inconsistencies or discrepancies exist in a complainant's testimony but do not detract from the reasonableness of [his] story as a whole, the complainant's testimony may be found to be adequate to support a conviction for sexual abuse. [Citations.]" *People v. Soler*, 228 Ill. App. 3d 183, 200 (1992).

¶ 124 Defendant notes that Z.B. did not make his allegation until November 2007. Since Z.B. could not identify what day, week, month, or season the abuse occurred during his stay with the Becks, the delay would have ranged from a minimum of 5 months (June 2007 to November 2007) to a maximum of 13 months (October 2006 to November 2007). "[A] complaint in a sexual abuse case need not be made within a definite time limit." *People v. Petitt*, 245 Ill. App. 3d 132, 138 (1993). Courts have recognized that it is "common" for a child to delay making a disclosure of sexual abuse. *People v. C.H.*, 255 Ill. App. 3d 315, 323 (1993); *People v. Jahn*, 246 Ill. App. 3d 689, 704 (1993). Such delays are considerations for the fact finder, who is better positioned than the reviewing court to assess credibility. *C.H.*, 255 Ill. App. 3d at 323. The trial court, noting that Z.B. would have been six or seven years old when the abuse occurred, inferred that Z.B.'s delay in reporting was due to his young age and his dependency on the Becks, who "were providing [him] and his brother with a place to live and stability in their lives." This finding was reasonable, especially considering that Z.B.'s provider, defendant, told

him to keep the incident a secret. We also note that, when asked whether he "sa[id] anything to Teresa right after it happened," Z.B. replied that he did not but that S.B. "sa[id] something" to Teresa that she did not believe. The trial court could reasonably conclude that Teresa's disbelief of S.B.'s disclosure discouraged Z.B. from also disclosing the abuse to her.

¶ 125 Defendant also claims it is unlikely that Z.B., after leaving the Becks' care, would be willing to maintain phone contact with them, let alone visit them overnight, if defendant indeed had abused him. We note that Z.B. himself acknowledged that he was "happy" to see the Becks when he visited. As the trial court aptly noted, Z.B. undoubtedly could appreciate the benefits the Becks provided as foster parents. Therefore, it is certainly plausible that a child of Z.B.'s age would retain positive feelings toward the Becks.

¶ 126 Defendant makes a series of additional attacks on Z.B.'s testimony. Z.B. was not credible, defendant claims, because (1) he was entirely unable to narrow down when the abuse occurred during his stay with the Becks; (2) he vacillated in his description of how defendant abused him; (3) the description he ultimately gave of the circumstances and mechanics of the abuse was "improbable" and inconsistent with other evidence; and (4) he testified that defendant "sucked" his penis, but had told Berg and Byrne that defendant "licked" his penis. We address these in turn.

¶ 127 First, " '[t]he inability to remember exact dates and times merely affects the weight to be given the testimony and, taken alone, does not create reasonable doubt.' " *People v. Letcher*, 386 Ill. App. 3d 327, 332 (2008) (quoting *People v. Foley*, 206 Ill. App. 3d 709, 715 (1990)). In *Letcher*, this court found sufficient evidence to uphold the defendant's convictions for predatory criminal sexual assault. Though the child could not recall the dates of the abuse, she provided such details as where and how the defendant touched her, what she said during the abuse, and in

what home she was residing when the abuse occurred (she was residing in two homes during the general time period). *Id.* at 335. Similarly, Z.B. testified that the abuse occurred while he was residing with the Becks (as opposed to when he visited them while living with the Thurbers). Z.B. also recalled the following details: what general time of day the abuse occurred; who was home at the time; which room in the house the abuse occurred; how defendant approached him; what defendant said; and how defendant touched him.

¶ 128 Second, Z.B. did, we note, initially testify that he could not remember how defendant sucked his penis or whether defendant was standing when he did it. However, in giving this initial account, Z.B. was, the trial court observed, quite emotional. Later, on cross-examination, Z.B. stated that defendant kneeled in order to touch him. It is understandable that Z.B. could provide this additional detail once he had time to collect himself.

¶ 129 Third, the trial court could reasonably find that the shower-tub had adequate room for defendant to kneel down in front of Z.B. Photographs of the shower-tub, and its precise dimensions, were put into evidence, and defendant stood up in court so the judge could observe his size. Moreover, Gordon, the current owner of the house, testified that he was able to kneel down in the tub without difficulty while showering with his wife. Gordon and his wife were of such size that it was not implausible that defendant could both stand in the tub with the much smaller K.Z. and kneel down in front of him.

¶ 130 Defendant, however, claims Gordon's testimony is of limited weight because he was not asked whether he was able to get down on his hands and knees with his wife in the tub. According to defendant, because Z.B. would have been only four feet tall when the alleged abuse occurred, defendant would have had to go down on all fours in order to place his mouth at the level of Z.B.'s penis. The evidence, as we construe it, does not eliminate the possibility that,

once on his knees, defendant could have, if needed, crouch, crane, or bend in order to maneuver his mouth to Z.B.'s penis.

¶ 131 Defendant also asserts that he could not have committed the offense with the entire family home and not be noticed. He compares this case to *People v. Judge*, 221 Ill. App. 3d 753 (1991), where the reviewing court reversed the defendant's conviction for aggravated criminal sexual assault. The defendant in *Judge* was residing with the complainant's family at the time of the alleged assault. The complainant, who was seven years old at trial, testified that one morning at 5 a.m., she and her sister were sitting on the living room couch watching television when the defendant " 'dragged [the complainant] from the couch across the floor and into his bedroom,' " where he "threw her" on the bed and touched her vagina. *Id.* at 754. The complainant's mother was not home but her father was asleep in his bedroom. *Id.* The complainant's mother testified that she saw the complainant about an hour after the alleged incident and that she did not appear upset. The next day, after questioning by her mother, the complainant alleged that the defendant had assaulted her. *Id.* at 756, 761.

¶ 132 Reversing the conviction, the reviewing court found it critical that the brutal manner in which the defendant allegedly seized the complainant in the living room "did not appear to alarm or disturb her younger sister who was awake and with complainant at the time." *Id.* at 761. The court also noted that the complainant did not appear upset when her mother saw her an hour after the alleged attack. *Id.*

¶ 133 Defendant claims that it was likewise implausible that he could have assaulted Z.B. in the manner alleged while Teresa and the two foster girls were at home. Defendant asserts that someone would have noticed him enter and exit the bathroom, or at least have noticed his hair, wet from the shower. Defendant assumes, of course, that Teresa was, in keeping with the family

routine she described, preparing the girls for bed concurrently with S.B. and Z.B.'s showers and, so situated in the girls' bedroom, had a clear view of the bathroom. Z.B., however, testified that Teresa was preparing dinner while he was showering on the evening of the incident. In our view, the court reasonably could have found that the family deviated from the bedtime routine that evening and that Teresa, distracted with dinner preparation, did not observe defendant enter and exit the bathroom. Defendant also could have dried his hair before Teresa noticed.

¶ 134 Defendant also claims that the silence of the record as to what occurred after Z.B.'s shower should be resolved against the State:

> "According to Z.B.'s story, a family dinner within the home would have followed since he testified that Teresa was home cooking. Yet there was no testimony from Z.B. or anyone else in the home as to what, if anything, occurred at that dinner. ***
>
> The State failed to present any evidence as to what happened immediately after Z.B. was supposedly sexually assaulted in the shower by the Defendant. Z.B. did not testify regarding what happened after he got out of the shower and the other three occupants of the house were not called to testify. There was absolutely no evidence presented that Z.B. was ever observed acting unusual or upset after this, or any of his showers while living with the Becks."

¶ 135 First, we reject the notion that the State had any responsibility to present evidence of what occurred after the incident in the shower. The defense was free to examine Z.B., Teresa, and defendant on those subsequent events and to call other family members (S.B. and the other foster girls) to testify. In *Judge*, testimony was elicited from the complainant's mother that the complainant did not appear upset an hour after the alleged assault. Here, neither party asked Teresa whether she saw Z.B. upset—be it at shower time, dinnertime, or another time.

Moreover, it would not be unexpected that a child of Z.B.'s age would not react immediately to the abuse.

¶ 136 Finally, the discrepancy between "licked" (the description given to Berg and Byrne) and "sucked" (the description given at trial) is not consequential. Z.B. testified at trial that he knew the difference between licking and sucking. Z.B., however, was 12 years old at trial but only 7 years old when Berg and Byrne interviewed him. The acts of licking and sucking are not so physically distinct that they could not be confused by a seven-year-old child. Moreover, it is not implausible that defendant performed both acts and that Z.B. singled out one or the other in his descriptions. Finally, and most importantly, it is immaterial to defendant's criminal liability whether he licked or sucked Z.B.'s penis. Defendant was charged with "sexual penetration," which means "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." 720 ILCS 5/11-01(f) (West 2008). Licking a sex organ constitutes "contact *** between the sex organ *** [and] the *** mouth." See *People v. R.F.*, 355 Ill. App. 3d 992, 1002 (2005) (kissing and licking of child's vagina constituted "sexual penetration").

¶ 137 Consequently, we reject defendant's challenge to the sufficiency of the evidence, and also hold that that any error in the admission of Riehm's testimony was harmless.

¶ 138 III. CONCLUSION

¶ 139 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 140 Affirmed.