2018 IL App (2d) 150937-U
No. 2-15-0937
Order filed May 4, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANDREW HARRIS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 14-CF-148 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of predatory criminal sexual assault of a child: despite some weaknesses in the alleged victim's testimony, it was not so weak that the jury was required to reject it; (2) defendant showed first-prong plain error in the State's rebuttal argument: the State committed clear and reversible error by repeatedly impugning defense counsel's character, and the evidence was so closely balanced that the comments could have affected the verdict.

¶ 2 Defendant, Andrew Harris, appeals from his conviction of a single count of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)). He contends that the evidence was insufficient to support his conviction and, alternatively, that the prosecutor's

rebuttal argument, which tended to impugn defense counsel's character, amounted to first-prong plain error. We hold that the evidence was sufficient to sustain the conviction. However, we agree with defendant that some of the prosecutor's remarks in rebuttal were clearly improper. We further agree that the evidence was closely balanced and that the improper argument might have swayed the verdict. We thus find that first-prong plain error occurred; we therefore vacate the conviction and remand the cause.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with a single count of predatory criminal sexual assault of a child ("sexual penetration *** finger in *** sex organ of HD.") The offense allegedly occurred between August 1, 2013, and October 31, 2013.

¶ 5 Defendant had a jury trial. The State had four witnesses: (1) H.D.; (2) H.D.'s mother, Tanya D.; (3) Traci Mueller, the forensic interviewer at Shining Star Children's Advocacy Center in Dixon, Illinois, who interviewed H.D.; and (4) Mark Nachman, the De Kalb police detective who interviewed defendant. Defendant had two witnesses: (1) Debbie Harris, defendant's mother and, between August 1, 2013, and October 31, 2013, a housemate of H.D. and Tanya; and (2) Jesse Harris, defendant's brother, Tanya's former boyfriend, and the sometime housemate of H.D., Tanya, defendant, and Debbie.

¶ 6 H.D. was the State's first witness. She said that she was about7 ½ years old, would be starting second grade in the fall, and lived in Sterling with her mother and her "mimi"—her grandmother. She knew defendant because she and her mother used to live with him and "Deb"—Debbie Harris—in a house in De Kalb. Jesse moved into the house after they did. While they lived there, her mother worked at the De Kalb Walmart, and defendant sometimes

babysat for her while her mother was at work. He let her watch cartoons in his room on his computer; she was adamant that she always watched Scooby Doo.

¶ 7 The State asked H.D. if "there [was] ever a time when [defendant] touched [her] in a way that [she] didn't like." She agreed that there was; it had happened while her mother was at work. She had been in the bathroom: "I was going to the bathroom and I was about to get into the bathtub [to take a bath] when I was about to go to my mimi's house, and then he touched me in one of my private parts." He touched her "[r]ight between [her] legs"; she called this her "coochie." He used his hand to touch her.

> "[The State] Q. Did he touch you on the inside or the outside of your coochie?
>
> [H.D.] A. Outside.
>
> Q. Did it hurt?
>
> * * *
>
> A. Yes.
>
> Q. When you say it hurt, was his finger inside of you to make it hurt?
>
> A. No.
>
> Q. How long did this take? How long did he touch you?
>
> A: Just for a little bit."

¶ 8 After defendant touched her, she got in the bathtub. As defendant left, he turned on the light and locked the door behind himself. When she was done with her bath, she dressed and defendant drove her to her grandmother's house. She did not say anything about the assault to him, Tanya, or her grandmother. She did not tell Tanya because she was afraid that Tanya would be angry.

¶ 9 The State questioned her further about where her mother was:

"[The State] Q. So when did you see your mom again after this happened?

[H.D.] A. Well, she was at home with me.

Q. Why did you go to your grandma's if your mom was at home?

A. Well, we both moved back.

Q. Back where?

A. Back to my mimi's house.

Q. You didn't tell your mom about this for quite a while?

A. No."

H.D. was not upset with defendant but did think that he should have said that he was sorry.

¶ 10 On cross-examination, H.D. described the circumstances surrounding the assault as follows:

"[Defense counsel] Q. You said when you were in the bathroom the light was off?

[H.D.] A. Yes. I forgot to turn it on.

Q. Who had filled up the bathtub for you?

A. I did.

Q. You filled it up yourself?

A. Yeah.

Q. In the dark?

A. I forgot to turn the light on.

Q. And you said that your mom was home at the time?

A. No. She was at work. She worked a day shift.

Q. And who was home at the time?

A. [Defendant].

Q. Anybody else?

A. No.

Q. Do you remember if it was in the morning or it was in the afternoon or it was at night?

A. It was in the morning."

¶ 11 H.D. could not say how long this was before she moved out of the De Kalb house. She could not remember whether she had her own room at the time, where she slept, where Tanya slept, or where Debbie slept. She denied that she had ever had a room next to Debbie's or that her room was next to the bathroom. She said that she did not know whether she ever even had a room. Neither she nor Tanya was angry with defendant. They had moved out of the house because Tanya "didn't really get along" with Debbie and in fact "didn't get along with anyone."

¶ 12 Tanya testified next. She and H.D. stayed at the house in De Kalb until the end of October 2013—in her cross-examination testimony, she said they had moved there in June 2012. She started working at the De Kalb Walmart on August 23, 2013. She always worked night shifts, which ran from 10 p.m. to 7 a.m. The only time she had worked days was her first week, which was training. On her regular schedule, she slept after taking H.D. to school. Defendant looked after H.D. at night while she was at work, "because [H.D.'s] bedroom was upstairs along with his." H.D.'s bedroom was between Debbie's bedroom and the bathroom. Tanya had her bed in the basement. Jesse moved in after Tanya did and, after they became romantically involved, they both slept in the basement. She and H.D. moved out of the De Kalb house in October 2013 and moved in with friends of hers in Cortland. They stayed there until February 2014.

¶ 13 Tanya testified that defendant knew that the only people who were supposed to give H.D. baths were Tanya and Debbie; he knew this because Tanya had told him. Tanya explained that H.D. did not take baths late at night; further, she did not take baths before 7 a.m. except on mornings before Tanya took her to see her grandmother, which occurred on alternate weekends.

¶ 14 Tanya admitted that she and Debbie had a poor relationship. They repeatedly argued, usually about money, but sometimes about Tanya's relationship with Jesse. As she explained, "I argue with a lot of people" because, as she characterized herself, she was "stubborn and bull[-] headed." By contrast, her relationship with defendant was fine.

¶ 15 She and H.D. moved out of the De Kalb house after a particularly acrimonious argument with Debbie—Tanya later testified that Debbie threw a mug toward her and that it shattered on the floor. Tanya called her friends in Cortland, and she and H.D. moved to the friends' trailer that day. Tanya's relationship with Jesse ended a week after she moved out.

¶ 16 Soon after the move to Cortland, Tanya started noticing that H.D. was "misbehaving on a completely different level than a typical [child of her age]"—"[l]ashing out," striking Tanya, and "refus[ing] to do anything." On February 16, 2014, Tanya initiated a conversation with H.D.:

> "I asked her—I said, 'What is with you? What's wrong? Has somebody hurt you that you're acting like this?', and she came right out and said that *** [defendant] had touched her, and I asked her where and she told me in her coochie which is what she called[ ] it and at that point I just—I lost it. I called my mom and my mom told me to take her to the hospital, so I did. Two days later we moved back to Sterling."

Tanya said that the conversation took place in "the hallway across from the bathroom where we were staying at."

¶ 17 Tanya's testimony on cross-examination was largely consistent with her direct-examination testimony. However, she volunteered what seemed to be a different location for the discussion she had with H.D.:

"[Defense counsel] Q. *** [N]obody else was present when [H.D.] made this initial statement to you?

[Tanya] A. Her and I. I was standing at the back door smoking a cigarette."

Tanya indicated that defendant had been H.D.'s babysitter before she moved into the De Kalb house: "[B]efore I moved in with the Harrises I was working at a cash[-]for[-]gold store and that was during the day and [defendant] would watch her for me." However, from what H.D. had said, she understood that the incident had taken place "in the time frame from where [she] started working till the time [they] moved out." When Tanya took H.D. to the emergency room, they received a referral to a specialist who could do a more detailed physical examination. Her belief was that the examination did not reveal any abnormalities. H.D. had also received a referral for counseling every other week.

¶ 18 Tanya, who had declined to view the recording of the interview, said that she was surprised to learn that H.D. had told Mueller, " '[Defendant] hated my mommy.' " But she was not surprised to learn that H.D. had said," 'Deb hated my mommy.' " The arguments between Tanya and Debbie involved screaming, and on occasion Debbie had come close to striking her.

¶ 19 Nachman, the De Kalb police officer, testified that he went to the De Kalb house to find and interview defendant. Defendant agreed to accompany him to the police department. After defendant was Mirandized, he told Nachman that he was born on April 2, 1979, making him 34 years old at the time of the interview. Nachman encouraged defendant to admit that he had made a mistake, but defendant said little. "Eventually," Nachman told defendant that he "knew that

[defendant] had done something inappropriate to [H.D.]." Defendant responded that he had never touched her. "[T]hat was about the end of the interview."

¶ 20 On cross-examination, Nachman conceded that the only time he or other officers had been in the De Kalb house was when he and another officer went to get defendant. He did not interview the other members of the household or anyone else. However, he had observed Mueller's interview of H.D. at Shining Star.

¶ 21 Mueller testified to lay a foundation for the video recording of the Shining Star interview.

¶ 22 In the recording, H.D. volunteered that she was then six years old and in kindergarten. She said that her mother had lived with defendant, Jesse, and Debbie in De Kalb, but had moved from De Kalb to Cortland because defendant, Debbie, and Jesse were being "mean." Debbie and defendant "hated" H.D.'s mother. They were mean to her mother by yelling at her "like a kid." H.D. did not like Debbie, but she did like defendant.

¶ 23 When Mueller first asked H.D. about "touches" she did not like, her first answer related to nonsexual touches and her second answer was nonresponsive. Mueller next asked what places it is wrong to touch a girl, and H.D. pointed to the "butt" and "coochie" on a drawing. Mueller asked her if anyone had touched her in those places, and she said that only her "mommy" and her "mimi" could. Asked if anyone other than her mother and grandmother had touched her on her coochie, her first answer was a flat denial. However, when Mueller asked her if she had ever talked to "mom or mimi or anybody" about someone touching her on her coochie, she said "Andy [that is, defendant] did," and, asked if this was Andy in De Kalb or some other Andy, she said "Andy in De Kalb."

¶ 24 Mueller asked her to describe what had happened. H.D. responded:

> "When he didn't know that I was in the bathroom, when I was about to get [inaudible], when my mommy was about to get home, when Jesse was going to pick her up from Walmart, well somehow, he didn't know that I was in the bathroom, and he did not have permission to give me the bath when I was going to go to my mimi's, and when I was about to get in the bath, he touched me right there, right here."

(H.D. strongly emphasized "did not" in the phrase, "he did not have permission.") She had taken her clothes off—perhaps to take her bath—when defendant did this. Defendant did not say anything. "[She told him] to stop it, [but] he just kept doing it and doing it and doing it." Mueller asked her what he was touching her coochie, and she said "hands" and made a grasping gesture in which she touched the fingers of each of her hands together. Asked if his hands were touching her outside or inside her coochie with, she delayed briefly while looking closely at the body diagram and said "inside." Asked how this felt, she said, "Like, bad," and then less loudly, "bad, real bad."

¶ 25 In response to questions from Mueller, H.D. said that she was taking a bath because her mother wanted her to take one. She later explained that her mother would expect her to have a bath "when she was going to get home." However, "[defendant] did not have permission to give me a bath yet," but was supposed "to wait until my mommy got home." Defendant had filled the tub for her to bathe. When he did this, "Deb was asleep and Jesse was asleep, and they were all asleep and [defendant] had to wait until my mommy got back home so he could get his permission to do it." "He had permission to give me baths other times, but not the times I get to go to my mimi's." Asked if defendant had touched her coochie other times, she said "just one day," and he had not touched her anywhere else. Asked what happened after defendant touched her on the coochie, she said, "My coochie started hurting." "It turned red! Like bright red!"

Mueller asked if H.D. said anything to defendant; H.D. said that she had said, "Stop it!"—"but he didn't stop it."

¶ 26 H.D. further told Mueller that defendant had come in just after she had used the toilet; she had just pulled her underwear up. The assault happened when defendant "was on the bath setting the water for me." "My mommy opened the door even before he touched me. He touched me when my mommy was home." Mueller then asked, "Was mommy at home or was she not at home?" and H.D. responded, "Home, she was about to give me my bath, but [defendant] started the bath for me." Mueller followed up by asking whether Tanya had seen defendant touching her, and H.D. said "No." H.D. had not told Tanya what had happened; she was "too scared."

¶ 27 H.D. believed that the assault had occurred "in the spring."

¶ 28 The State rested after the jury saw the recording, and defendant moved for a directed verdict, which the court denied.

¶ 29 Jesse was defendant's first witness. He said that Tanya and H.D. had moved into the De Kalb house about a year before he did and that they had initially slept on couches in the living room. He moved in after Tanya had started working nights at Walmart, and he and Tanya both slept in the basement. H.D. had started sleeping in a bedroom that Debbie had formerly used as an office. The bedrooms and the house's one bathroom were all within a few feet of one another.

¶ 30 H.D. was in kindergarten in the fall of 2013. On a school morning, Jesse and Debbie would be up at 5:30 a.m. Tanya would get home "[p]robably between 6:30, 7 o'clock." H.D. never had baths in the morning—she took them after dinner and before she went to bed and only Tanya and Debbie ever gave her baths. When Tanya got home in the morning, she would wake H.D., get her dressed, and take her to school.

¶ 31 Debbie was the final witness. She confirmed what others had said about when and by whom H.D. was bathed. She also partially confirmed the household schedule others described; she said Jesse was usually up at 6:30 or 6:45 a.m. Defendant was a "night owl" and usually went out at around 8 p.m., came back at "one or two," and slept "most of the day." However, he sometimes did odd jobs during the day—snow removal, lawn mowing, and "scrapping." The house was quite small, so anyone in the house would hear bath water running. She could hear anything H.D. did in her bedroom because their rooms had a common wall. Also, although the floors were carpeted, they creaked, so Debbie, who slept with her door open, would have heard H.D. leaving her room.

¶ 32 In his closing argument, the prosecutor talked about how direct and comfortable H.D. had been when Mueller interviewed her. He further argued that nothing suggested that H.D. had any ill will toward defendant or the household, and she was, if anything, upset that defendant did not apologize to her. He also made what could be read as a request for sympathy for H.D.:

> "You had the opportunity to see [H.D.] here in court. A little bitty kid. She's everybody's next-door neighbor. She's the kind of kid that you watch grow up, you see her as she progresses through being a child, going to kindergarten, and that's exactly what [H.D.] was."

¶ 33 Defense counsel's closing argument emphasized the inconsistencies in H.D.'s various statements:

> "Essentially [H.D.] has given four different statements as to what happened to her, and the obvious rejoinder to that is little children are remembering things that happened and they're going to remember them a little bit differently the same way all of us remember things differently."

Counsel stressed what he portrayed as weaknesses in the investigation:

> "And if I might pause there just for a minute, ladies and gentlemen, when I say investigation, it's almost sarcastic because there truly was no investigation in this case, so apparently the way you prosecute these cases these days, the way you investigate these cases these days is you get the statement of the child and it's got some salacious, terrible, awful touching in it and she's cute as a button and you say to yourself why would any kid lie about this, why would any mother lie about this and then you don't do anything else. You put her on a camera. You get her to talk for a while and that's it.
>
> ***
>
> Not even the most basic—I mean, ladies and gentlemen, this isn't even CSI. I mean, this is like, you know, Investigation 101. Go stand in the bathroom, survey the premises and make some determination in your head, try to paint that picture for yourself as a detective. That's a crime scene. If what [HD] is saying is true, that's a crime scene.
>
> ***
>
> The photographs that you'll get to see of that hallway and those bedrooms and that bathroom, those photographs were admitted into evidence by [the prosecutor]. Ideally in the investigation the police—I've seen the crime shows, they put all this stuff on. You know why they put it on? Because they have the burden of proof. They need to say, 'We only have the statement of a little girl. Let's make sure we uncover everything we can uncover here. Let's look into everything because all we have is a statement[.'] "

¶ 34 Defense counsel closed his argument by describing the evidence as a metaphoric shell game, and reiterating that H.D. had given four different descriptions of the assault, several of which had to be "a lie":

"Ladies and gentlemen, this is a case of you put the cups on the table and you put the ball under one of the cups and you move them all around and you open one up and you're trying to figure out which one the ball is in and if you get the one with the ball you must have done it. Because remember, you've got four different stories. For you to conclude that one of them is true you have to conclude that the other three aren't because they're different.

If you conclude that what she said happened to her happened, then you have to conclude that her saying 'Nobody touched me' is a denial. It's a lie. If you conclude that it was just [defendant] in there and Jesse Harris and Debbie Harris were asleep, if you believe that, then you have to think that her saying her mom [was] home is a lie. If you believe that her mom was home and she walked in, then you have to believe that the other parts are lies. And you certainly wouldn't believe Tanya because Tanya said, 'She never said anything to me. I didn't know anything about this until she told me in the trailer in Cortland.' "

¶ 35 In this appeal, defendant asserts that the State's rebuttal arguments were improper both in that they personally impugned the motives of defense counsel and in that they overstated the consistency of H.D.'s statements. That rebuttal opened as follows.

"Make no mistake everything that [defense counsel] just told you is not evidence. Likewise, make no mistake [defense counsel] had one job to do when he came into this courtroom, and that's to zealously represent the interests of [defendant]. Make no mistake that despite whatever he told you, whatever illusion he created about having any empathy for [H.D.,] that is overridden by his job, his need and his desire to defend his

client zealously, so while he comes in and says some nice things about [H.D.], at the same time he's tearing down the word of a child.

Were there things that [H.D.] said during her statements that weren't consistent from start to finish? *** You are the ones that are going to go back into that room and decide what was said or what wasn't said, what was consistent from statement to statement, but the one thing that was consistent from start to finish is that this man put his finger in that little girl's vagina. She initially said 'Nobody touched me' but when [Mueller] followed up immediately, 'So, well, you said something to your mom', [H.D.] related at that point what the defendant had done to her."

¶ 36 Later, in discussing defense counsel's attacks on the sufficiency of the investigation, the prosecutor suggested that defense counsel was distracting the jury. Defense counsel had, among other things, suggested that the police were remiss in failing to photograph the interior of the De Kalb house. The prosecutor argued:

"[Defense counsel] talks about the bathroom. *** [The police] should have gone in and they should have swept for fibers and they should have taken fingerprints and they should have taken all those rolls of toilet paper·because they might be evidence.

*** There is nothing in that photograph that [defense counsel] brought you or that could have been taken by the DeKalb Police Department that's going to show one thing one way or the other, but again, this is a conscious effort by [defense counsel] to shift the focus of the case, to shift the focus of the ultimate question you're being asked to answer from his client to what everybody else did wrong."

¶ 37 The prosecutor concluded with remarks similar to those with which he opened:

> "Again, don't be misled by [defense counsel's] statements concerning [H.D.]. [Defense counsel] is here to do a job, I'm here to do a job, but whatever [defense counsel] may or may not think about [H.D.] is not because of any genuine compassion for her. It's because he's got a job to do and at the expense of the victim in this case he's trying to do that job."

¶ 38 The jury found defendant guilty of the charged offense after deliberations in which it requested to see the video recording of Mueller's interview of H.D. for a second time. It did not receive instructions concerning any lesser included offense. Defendant moved for a "new trial" on the basis that the evidence had been insufficient. The motion also asserted that the handling of the jury's request to view the recording had been irregular and that the entry of Tanya and H.D. into the courtroom during the defense's closing argument had tended to bias the jury. However, the motion did not assert that the rebuttal argument had been improper. The court denied the motion and then sentenced defendant to 10 years' imprisonment. Defendant timely appealed.

¶ 39 II. ANALYSIS

¶ 40 On appeal, defendant raises three claims of error. One, he argues that, because the case against him rested entirely on H.D.'s testimony and out-of-court statements, and because those contained multiple inconsistencies, the evidence was insufficient to sustain a conviction of *any* sex offense. Two, he argues that, because H.D.'s testimony contained a flat denial that his finger was "inside," his conviction of predatory criminal sexual assault of a child must be reduced to the lesser included offense of aggravated criminal sexual abuse (720 ILCS 5/11-1.60 (West 2012)). Three, he argues that the prosecutor's attack on defense counsel and his statement that

"the one thing that was consistent from start to finish is that this man put his finger in that little girl's vagina" amounted to first-prong plain error.

¶ 41 At the outset, we decline to adopt defendant's framing of his sufficiency-of-the-evidence claims. Defendant asks us to start with the abstract question of whether the evidence was sufficient to sustain a conviction of *any* sex offense. But defendant was charged with and convicted of a specific offense, predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) based on sexual penetration of H.D.'s sex organ by defendant's finger. We thus start by considering whether the evidence was sufficient to support his conviction of that offense. We conclude that it was. We then address defendant's claim that the prosecutor engaged in improper rebuttal argument that rose to the level of plain error. We conclude that the attacks on defense counsel were clear error that could have changed the outcome of the trial.

¶ 42 Defendant argues that, "[w]here [defendant] denied the charge against him, and the State failed to present corroborating evidence of the complainant's unreliable statements, no rational trier of fact could have found him guilty of any sexual offense beyond a reasonable doubt." In particular, "[v]ariances in H.D.'s statements, about both significant and minor details, demonstrate that she may have been confused, making her memory inaccurate and unreliable." He further argues that the testimony of Tanya and other household members makes it likely that what H.D. said about, for instance, who was allowed to bathe her was incorrect. The State responds that the inconsistencies in H.D.'s statements were explained by, for instance, her apparent distraction during portions of the Mueller interview. It notes that, under *People v. Hillier*, 392 Ill. App. 3d 66, 69 (2009), a "jury may reasonably infer that an act of penetration occurred based on testimony that the defendant 'rubbed' 'felt' or 'handled' the victim's vagina" and that such an inference is "unreasonable only if the victim denies that penetration occurred."

It argues that the jury could reasonably give the greatest weight to the parts of the interview in which H.D. is most "somber" and could partially discount her courtroom testimony on the basis that she was likely reacting to defendant's presence. It also argues that her statements were as consistent as could be expected for a child of her age.

¶ 43 We review the sufficiency of the evidence under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), as adopted by *People v. Collins*, 106 Ill. 2d 237, 261 (1985): when a reviewing court decides a challenge to the sufficiency of the evidence, " 'the relevant question 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 crime beyond a reasonable doubt.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson*, 443 U.S. at 319). "[W]here the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt," but, "[i]n conducting this inquiry, the reviewing court must not retry the defendant." *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). "Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280. Although we must accord great deference to the fact finder's decision to accept testimony, and must view the evidence in the light most favorable to the prosecution, the fact finder's decision is not conclusive. *Cunningham*, 212 Ill. 2d at 280.

¶ 44 As the State recognizes, to find defendant guilty, the jury must have concluded that H.D. was credible on the core points even while her statements were inconsistent or unlikely on others. We hold that it could reasonably do so. Moreover, we conclude that, although H.D. made facially inconsistent statements about whether defendant's finger penetrated her vagina,

her description of what she experienced was always consistent with penetration. We thus hold that the evidence was sufficient on that element.

¶ 45 H.D.'s out-of-court statements and testimony were (with the major exception of whether defendant penetrated her vagina with his finger) consistent on the elements of the offense. In particular, even as H.D. was uncertain about exactly what happened before and after the assault, she consistently described defendant touching her genital area with his finger. Further, H.D. was not easily led. She was invited several times to say that there had been more than one assault and that defendant had let her watch movies other than Scooby Doo, but she insisted otherwise to both invitations.

¶ 46 Defendant argues that H.D.'s testimony denying that his finger was "inside" precludes proof beyond a reasonable doubt of the sexual-penetration element of predatory criminal sexual assault of a child. We do not agree. "Sexual penetration," as it was charged here, is "any intrusion, however slight, of any part of the body of one person *** into the sex organ or anus of another person." 720 ILCS 5/11-0.1 (West 2012). H.D., although presumably unfamiliar with the sensation of intrusion into her vagina, consistently described the touching as causing pain. That she was uncertain whether defendant's finger was "inside" seems of little consequence when her description of the sensation was consistent. We recognize that, under *Hillier*, 392 Ill. App. 3d at 69, "if the victim denies that penetration occurred," an inference of penetration is unreasonable. However, what may be a generally useful rule may prove to be unreasonable as applied to unanticipated circumstances. Where a young child literally denies penetration, but consistently describes sensations strongly implying penetration, it is reasonable to accept the clear import of the description over the child's specific wording.

¶ 47 It is instructive to compare this case to *People v. Schott*, 145 Ill. 2d 188 (1991), in which our supreme court, despite abolishing a less deferential standard of review in sex-offense cases, nevertheless deemed that the State's evidence, which was founded on the complainant's testimony, to be insufficient due to the complainant's lack of credibility. *Schott*, 145 Ill. 2d at 206. In *Schott*, the complainant, who was sufficiently old to be a second-grader, had in common with H.D. that she was unable to give a fully consistent account of the assault. However, unlike H.D., she had a history of recanting both claims of sexual abuse by adults and claims of sexualized behavior involving other children. She also admitted that she lied " 'a lot.' " *Schott*, 145 Ill. 2d at 193. An expert witness said that the complainant "exhibited 'psychotic features due to past traumatization.' " *Schott*, 145 Ill. 2d at 195. Here, in contrast to the *Schott* complainant, nothing suggests that H.D. was ever deliberately misleading. Thus, although H.D.'s descriptions of the circumstances of the assault were variable and not fully consistent with the descriptions of the routine at the De Kalb house given by both State and defense witnesses, she was *not* "so lacking in credibility that a reasonable doubt of defendant's guilt remains." *Schott*, 145 Ill. 2d at 207.

¶ 48 The State understands defendant to suggest that Tanya, intentionally or not, encouraged H.D. to fabricate the accusation. Nothing in the evidence suggests that Tanya held any of her disputes with Debbie against defendant. Moreover, given that H.D. clearly lacked animus toward defendant, any manipulation of her by Tanya would have needed to be implausibly subtle.

¶ 49 On appeal, defendant admits that his posttrial motion did not include his current claims that the prosecutor's rebuttal remarks were improper and prejudicial; he thus concedes that he forfeited that claim (see *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007)). However, he asks that

we review the claim as first-prong plain error—that is, he contends that clear reversible error occurred and that the evidence was closely balanced.

¶ 50 The plain-error doctrine serves as " 'a narrow and limited exception' " to the general forfeiture rule. *People v. Szabo*, 113 Ill. 2d 83, 94 (1986) (quoting *People v. Pastorino*, 91 Ill. 2d 178, 188 (1982)). Illinois's plain-error doctrine is set out in *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005), and clarified in *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The *Piatkowski* court explained:

> "We now reiterate that the plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a *clear or obvious error* occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error [(first-prong plain error)], or (2) a *clear or obvious error* occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence [(second-prong plain error)]." (Emphases added.) *Piatkowski*, 225 Ill. 2d at 565.

¶ 51 To find plain error, we first must find reversible error. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008) ("Absent reversible error, there can be no plain error."). Moreover, that reversible error must be clear or obvious. See *People v. Burton*, 2012 IL App (2d) 110769, ¶ 15 (we must determine whether the error is such that it would require reversal of the defendant's convictions before we reach the issue of whether the evidence was closely balanced). Only upon finding clear or obvious reversible error do we apply the two-prong plain-error analysis as such. See *Burton*, 2012 IL App (2d) 110769, ¶ 15. We thus first explain why the argument was improper and then why it was clearly reversible error.

¶ 52 Substantively, whether argument is improper "depends, in each case, on the nature and extent of the statements and whether they are probative of [the] defendant's guilt." *People v. Blue*, 189 Ill. 2d 99, 132 (2000).

> "Courts allow prosecutors great latitude in making closing arguments. [Citation.] In closing, the State may comment on the evidence and all inferences reasonably yielded by the evidence. [Citation.] However, argument that serves no purpose but to inflame the jury constitutes error. [Citations.] Closing arguments must be viewed in their entirety and the allegedly erroneous argument must be viewed contextually." *Blue*, 189 Ill. 2d at 127-28.

Nevertheless, multiple errors in prosecutorial argument can act together to create an unfair trial even where no one error rises to the level of plain error. *People v. Johnson*, 208 Ill. 2d 53, 64-65 (2003).

¶ 53 In *Wheeler*, the supreme court described three conditions under which improper argument becomes reversible error: (1) "if the improper remarks constituted a material factor in a defendant's conviction"; (2) "[i]f the jury could have reached a contrary verdict had the improper remarks not been made"; and (3) if "the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction." *Wheeler*, 226 Ill. 2d at 123. We have noted that Illinois authority is unclear about the underlying standard of review—abuse of discretion or *de novo*—for the propriety of a prosecutor's closing remarks. See, *e.g.*, *People v. Burman*, 2013 IL App (2d) 110807, ¶ 26 (discussing the uncertainty). We will not resolve the issue here; we conclude that the remarks were improper under either standard.

¶ 54 " '[P]ersonal attacks upon defense counsel' are 'unprofessional and highly improper.' " *People v. Staake*, 2016 IL App (4th) 140638, ¶ 102 (quoting *People v. Burnett*, 27 Ill. 2d 510,

518 (1963). A prosecutor may not argue that defense counsel is feigning emotion to make the defense more persuasive. *People v. Luna*, 2013 IL App (1st) 072253, ¶ 135. "Such comments 'improperly shift the focus of attention from the evidence in the case to the objectives of trial counsel.' " *Luna*, 2013 IL App (1st) 072253, ¶ 135 (quoting *People v. Emerson*, 97 Ill. 2d 487, 498 (1983)).

¶ 55 Defendant contends that the prosecutor's comments concerning defense counsel's motivations—implying that any empathy he showed for H.D. was faked—were improper attacks on defense counsel's character. He also asserts that the prosecutor confused the jury by misstating "a key piece of evidence"—specifically, that the prosecutor led the jury to believe that H.D. had consistently stated that defendant had placed his fingers in her vagina.

¶ 56 The attacks on defense counsel were error under any standard. Just after the start of the rebuttal, the prosecutor made comments concerning defense counsel's personal feelings about the case:

> "Make no mistake that despite whatever [defense counsel] told you, whatever illusion he created about having any empathy for [H.D.,] that is overridden by his job, his need and his desire to defend his client zealously, so while he comes in and says some nice things about [H.D.], at the same time he's tearing down the word of a child."

Moreover, the prosecutor concluded with remarks in the same vein:

> "Again, don't be misled by [defense counsel's] statements concerning [H.D.]. [Defense counsel] is here to do a job, I'm here to do a job, but whatever [defense counsel] may or may not think about [H.D.] is not because of any genuine compassion for her. It's because he's got a job to do and at the expense of the victim in this case he's trying to do that job."

These passages contain several attacks on defense counsel's character. A prosecutor has a broad right to attack defense counsel's arguments, but attacks on counsel's character are unacceptable.

¶ 57 The State responds with a defense of individual phrases in the challenged remarks, arguing that some were clearly true and that, in any event, they were invited by defense counsel's own arguments. The State's arguments are misdirected: they fail to address the prosecutor's explicit claims that feigning sympathy was a job requirement for a defendant's attorney and that defense counsel was behaving accordingly. This was inflammatory and irrelevant. H.D. was naturally sympathetic, so telling the jury that defense counsel was devoid of these natural sympathies and only pretended to have them out of "his need and his desire" to strengthen the defense was to tell the jury that defense counsel was heartless. That implication was amplified by the prosecutor's statement that defense counsel did his job "at the expense of the victim." Moreover, the effect was certainly to " 'improperly shift the focus of attention from the evidence in the case to the objectives of trial counsel.' " *Luna*, 2013 IL App (1st) 072253, ¶ 135 (quoting *People v. Emerson*, 97 Ill. 2d 487, 498 (1983)).

¶ 58 The State argues that the rule in *People v. Glasper*, 234 Ill. 2d 68 (2009) requires us to deem that the prosecutor's argument was proper. We disagree; the comments at issue in *Glasper* were mild by comparison with those at issue here. At issue in *Glasper* were the prosecutor's comments about defense counsel's directing " 'laughter and *** insults' " toward a police officer who testified for the State; defense counsel had expressed disbelief concerning the officer's claim to have moved evidence—including a firearm—out of concern for his own safety. *Glasper*, 234 Ill. 2d at 206. The *Glasper* court held that, although the prosecutor should have avoided describing defense counsel as " 'mocking' " the officer, context made clear that the prosecutor was criticizing counsel's argument, not attacking counsel personally. *Glasper*, 234

Ill. 2d at 207. Furthermore, the *Glasper* court concluded that the prosecutor's argument had a basis in evidence and was intended to bolster the officer's credibility against defense counsel's attack. *Glasper*, 234 Ill. 2d at 207. Here, if all that were at issue had been the comment that defense counsel was "tearing down the word of a child," we would have a case like *Glasper*: one with language that the prosecutor should have avoided but no clear reversible error. But that is not what happened. The prosecutor incorporated the "word of a child" comment into what was already a personal attack.

¶ 59 We deem that the comments attacking defense counsel are sufficient for us to reverse based on first-prong plain error. Under *Wheeler*, both condition (2)—that "the jury could have reached a contrary verdict had the improper remarks not been made—and condition (3)—that "the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction"—are met here (*Wheeler*, 226 Ill. 2d at 123). The prosecutor's argument encouraged anger toward defense counsel and was the last thing the jury heard before the court read the unavoidably dry instructions. The jury did not hear any correction to the prosecutor's appeal to emotion. Moreover, the case was an emotionally charged one by its nature. Further, the evidence was by no means overwhelming; we need address only the penetration element to see why this was so. We have explained why the conviction *could* survive H.D.'s denial that penetration occurred. However, given that denial, we must recognize that the evidence was exceptionally closely balanced. Thus, we conclude that the improper appeal to emotion could have tipped the balance.

¶ 60 Defendant argues that the prosecutor improperly misled the jury about how consistent H.D. was in stating that defendant had put his finger inside her vagina: "[T]he one thing that was consistent from start to finish is that this man put his finger in that little girl's vagina." Because

our holding as to the attacks on counsel's character are dispositive here, we need not address this point individually. Nevertheless, we note that the remarks tended to draw the jury's attention away from H.D.'s testimony denying penetration. This remark could only have contributed to the unfairness of the trial.

¶ 61 As the fairness of defendant's trial was compromised, we therefore must vacate his conviction and remand for a new trial.

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we vacate defendant's conviction. However, as the evidence was sufficient to support a conviction, we decline to reverse the conviction outright. We remand for a new trial.

¶ 64 Vacated and remanded.