2014 IL App (3d) 110794-U

Order filed February 5, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-11-0794
v.	)	Circuit No. 10-CF-60
	)	
JAMES E. LERCHER,	)	Honorable Stuart P. Borden,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice Schmidt concurred in part and dissented in part.

ORDER

¶ 1 *Held*: (1) The evidence was sufficient to prove defendant guilty of aggravated criminal sexual assault beyond a reasonable doubt.
(2) The trial court committed reversible error in instructing the jury that "reasonable doubt is for you to determine."

¶ 2 Defendant James Lercher was convicted of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2010)) and unlawful use of a weapon (720 ILCS 5/24-1(a)(4) (West 2010))

arising out of allegations that he sexually abused his 16-year-old stepdaughter, A.R. The trial court sentenced him to 11 years in prison. Defendant appeals, arguing that (1) the State failed to prove him guilty of criminal sexual assault beyond a reasonable doubt, (2) he was denied a fair trial when the trial court instructed the jurors that it was for them to determine the meaning of reasonable doubt, (3) he was denied a fair trial by the prosecutor's comments during closing argument as to DNA evidence, and (4) the trial court erred in denying him the opportunity to cross-examine a witness. We reverse and remand, finding that the trial court's instruction to the jury regarding reasonable doubt violated defendant's constitutional rights.

¶ 3 At trial, A.R. testified that from June 2009 through early February 2010, she was sexually abused by defendant. She testified that the first time defendant abused her, he came into her room and touched her breasts and vaginal area over her clothing. Several times afterward, he came to her bedroom while she was sleeping and tried to reach under her clothes. A.R. said that approximately three weeks after the first incident, defendant put his finger in her vagina. She testified that on four or five occasions, she yelled for her mother, but her mother did not hear her. Defendant put his hand or a pillow over her mouth to keep her quiet. A.R. initially told police that these early incidents took place in the morning after her mother went to work. But at trial she stated that they happened late at night when defendant came to her room while she was sleeping.

¶ 4 After some time, defendant began seeking A.R. out during the day when she was awake and her mother was not home. A.R. testified that defendant would drag her unwillingly into his bedroom and force her to perform oral sex on him. Defendant would perform oral sex on A.R., insert his finger into her vagina and have sexual intercourse with her. She testified that, on occasion, defendant would use a "dildo" on her. When he first used it, she did not know what it

was and had to ask defendant. He said it was a "toy" that "feels good." She testified that defendant threatened to ground her if she resisted.

¶ 5 Prior to telling her mother, A.R. talked to her best friend, Jessica Eads, about the abuse. In November of 2009, she and Jessica took a trip to St. Louis with defendant and A.R.'s mother, Amanda. At trial, Jessica testified that she talked to A.R. about the abuse during that trip, but she did not testify as to the details of the conversation. She testified that she did not go over to A.R.'s house as much after that and that she would only go over when A.R.'s mother was home.

¶ 6 A.R. testified that she did not tell her mother about the abuse before February of 2010 because defendant threatened to hurt her if she told anyone. She stated that she took his threats seriously and was scared of him because defendant had a gun in the house and could have attacked her or her mother. Defendant told A.R. that it "would not be pretty" if she told her mother. She was worried her family would break up if she said anything. On cross-examination, A.R. admitted that she continued to spend time alone with defendant during the abuse.

¶ 7 Amanda Lercher, A.R.'s mother, testified that she and defendant had been married for 14 years and that A.R. was two years old when they married. Amanda and defendant had been having financial problems since James was laid off in 2005. The couple declared bankruptcy in 2006, and by 2009, they had incurred substantial debt again. But according to Amanda, it was not the worst it had been.

¶ 8 On February 2, 2010, Amanda was working late. She had grounded A.R. that night for "her mouth" and "her attitude." Around dinnertime, Amanda talked to defendant on the phone. He told her that A.R. was doing her homework and that everything was okay.

¶ 9 A.R. testified that at approximately 4:30 p.m. that day, defendant picked her up from the gym. At 6:30, A.R. asked defendant if she could go to a basketball game. Defendant said she

could go, even though she was grounded, as long as she did her homework. After A.R. got home from the basketball game, defendant told A.R. that she needed to "pay him off" for allowing her to go to the game. A.R. testified that defendant carried her into his bedroom, pulled down her pants and inserted his penis into her vagina. She pushed him away, at which point he said "if you are not going to have sex with me then you will suck daddy's dick." He then forced her to perform oral sex on him. A.R. testified that he ejaculated in her mouth, and she spit the ejaculation onto a white towel that was on the bed. She said she tried to go to the bathroom, but he told her that she had more to "pay off." He then proceeded to use a vibrator on her while performing oral sex. She testified that she stopped him and told him she was going to take a shower. He told her she was grounded for stopping him. She started crying and then took a shower.

¶ 10 Amanda testified that she spoke to defendant on the phone around 9 p.m. He said that A.R. was not doing her homework and was disobeying him. When Amanda arrived home around 10:30 p.m., she saw A.R. walking out of the bathroom. A.R. had just showered, and she was crying. When Amanda asked defendant why A.R. was upset, he said that A.R. was refusing to do her homework and was being disrespectful. A.R. testified that she did not tell her mom what happened that night because she was scared and she did not want to say anything in defendant's presence.

¶ 11 The next day, Amanda went to Morton to pick A.R. up from a nail salon. As they were driving home, A.R. told Amanda that defendant was sexually abusing her. Amanda described A.R. as "very shaken, crying, balling, quivering." She had never seen A.R. that upset. A.R. testified that she decided to tell her mother that day because she was "fed up" and had "reached [her] limit." Rather than driving home, Amanda drove to A.R.'s father's house. She spoke with

A.R.'s step-grandmother, who recommended they call the child abuse hotline and go to the emergency room.

¶ 12 During this time, defendant attempted to call Amanda several times. Amanda only answered the phone once. She told defendant that the pizza she ordered was wrong, and she and A.R. were waiting for a new one. Defendant tried to call Amanda and A.R. several times after that, but they ignored the calls. On the way to the hospital, Amanda and A.R. passed defendant in his truck headed in the opposite direction.

¶ 13 April Murphy, a nurse who had training in working with victims of sexual abuse, evaluated A.R. upon her arrival. Murphy testified that A.R. told her that defendant had sexually assaulted her the previous night while her mother was at work and that similar incidents had happened in the prior months. She stated that A.R. was very tearful, embarrassed and uncomfortable talking about what had happened. Murphy performed a "rape kit" on A.R. During her examination, Murphy did not find any evidence of trauma. However, she testified that the absence of trauma did not indicate that no sexual abuse occurred because "[a] lot of times you do not find injury." She stated that she did not expect to find evidence of trauma in this case because A.R. told her that she showered right after the incident and cleaned her vaginal area. A.R. did not tell Murphy that defendant used a vibrator on her during the abuse.

¶ 14 Officers May Pulliam and Nathan Ujinski were dispatched to the hospital. Pulliam spoke with A.R. and Amanda. A.R. appeared withdraw, upset and would not look at Officer Pulliam. Officer Ujinski noticed Amanda's phone and read the text messages from defendant. In them, defendant said he was sorry, asked Amanda to call him, and said that he "would really like to talk to [Amanda] before I end my life." With Amanda's permission, Ujinski called defendant on Amanda's phone. He asked defendant why he was doing this, and defendant responded "you

know why." Ujinski asked defendant what he meant by that, but defendant did not respond.

¶ 15 On cross-examination, Ujinski said he did not tell defendant that he was at the hospital or that A.R. made allegations against him. Defendant told him repeatedly that he wanted to speak with Amanda. Defense counsel then attempted to ask Ujinski whether defendant mentioned any financial problems that he and Amanda were having. The court sustained the State's hearsay objection.

¶ 16 Officer Jeffery Stolz testified that he was sent to canvass the area down by the Pekin bridge that night in search of defendant. Stolz found defendant's vehicle at the river front. When he turned his spotlight on the truck, he saw defendant sitting in the driver's seat. Defendant was on the phone with Ujinski. Defendant was upset that he had been found and threatened to kill himself if the spotlight was not turned off.

¶ 17 Deputy Sheriff Calvin Walden spoke with defendant on the phone while defendant was still in his truck. Defendant confirmed to him that he was threatening to kill himself and that he had a gun in the truck with him. Defendant told Walden that he wanted to talk to his wife and that he was afraid she was going to leave him. Defendant said "he could not live without her and his daughter." Defendant told Walden that he was not going to go to jail and that he was "accused of something that he had not done to his daughter." He told Walden that he had a friend who ended up in jail and that was not going to happen to him. He said, "I didn't do anything to her." Deputy Walden testified that he did not tell defendant about the allegations made by A.R. Defendant was eventually persuaded to surrender to police and was placed under arrest.

¶ 18 On cross-examination, Walden testified that defendant said his marital problems with Amanda stemmed from their financial issues. Defendant told him that "another cop had told him

that allegations were made by his daughter" and that "his wife believed her."

¶ 19 On February 4, 2010, officers went to defendant's house to retrieve several items. They collected A.R.'s clothes and some bedding and a white towel found in the basement. Officers Sanders and Ujinski went back to defendant's house the next day to recover a "blue dildo" A.R. mentioned in her interview. They collected the vibrator and the washcloth in which it was wrapped.

¶ 20 Amanda testified that she and defendant used the vibrator during sex and that they had last used it approximately one week before the officers collected it. She also admitted that she and defendant continued to have a sexual relationship for months after charges were filed in this case.

¶ 21 Forensic scientist Kevin Zeeb testified that traces of semen were found on the vibrator, the washcloth and the white towel. Debra Minton, a forensic scientist specializing in DNA analysis, conducted the DNA testing in this case. She testified that her tests revealed a mixture of "at least three" DNA profiles. Minton stated that A.R., Amanda and defendant could not be excluded from having contributed to the mixture of DNA profiles found on the vibrator. She added that she could not say "for certain, 100 percent" whose DNA was on the vibrator because it contained "multiple characteristics at the loci, at the locations of DNA that I looked at. I can't determine that it came from one person." She further testified that the portion of the white towel that she tested indicated the presence of one male profile and one female profile. The male was identified as defendant, but the female DNA profile did not match A.R.'s or Amanda's profile.

¶ 22 The defense presented several witnesses to impeach A.R.'s testimony. Officer Pulliam, testified that A.R. told her that defendant forced her to perform oral sex approximately 6 times, and the investigator from the Child Advocacy Center (CAC) said that A.R. told him that

defendant performed oral sex on her 18 times. At trial, A.R. testified that defendant forced her to perform oral sex 10 or 11 times. When asked about the discrepancies at trial, A.R. said that she was in shock when she spoke with Pulliam and the CAC investigator and that she was still trying to "gather all [her] feelings together."

¶ 23 MacKenzie Lercher, A.R.'s stepsister and defendant's biological daughter, testified that prior to June of 2009 she had been at defendant's and Amanda's house with A.R. when defendant and Amanda were not home. A.R. took MacKenzie to Amanda's bedroom and showed her a vibrator. Mackenzie said it was "gross" and told A.R. to put it away.

¶ 24 Defendant also testified. He stated that after the allegations, he and Amanda had sex 10 or 11 times. He testified that financial problems in the marriage began in 2005, when he lost his job at Mitsubishi. He denied that he had any sexual interactions with A.R. He further stated that a few days before the last incident of alleged abuse, he and Amanda had a fight about finances, and Amanda threatened to leave and take A.R. with her. On cross-examination, he denied responding "you know why" to the detective's question as to why he was going to kill himself.

¶ 25 In closing arguments, the prosecutor argued that "A.R.'s material generated her profile" on the DNA test from the vibrator. In rebuttal, he again argued that the DNA testing of the vibrator "found the persons whose DNA material is in the mixture: their profile is [sic] Amanda, [A.R.] and the defendant."

¶ 26 During deliberations, the jury sent a note to the trial court indicating that it was unable to reach an unanimous decision and asked "[w]ill you provide additional directions that might be of some help? A clear definition of reasonable doubt would be appreciated." The trial court did not provide a definition of reasonable doubt. Instead, the jury was brought back into the courtroom, and the trial court stated, "As far as the reasonable doubt question, you've received all the

definition, which is none, of reasonable doubt. Reasonable doubt is for you to determine."

¶ 27 The jury returned a verdict the next morning, finding defendant not guilty of aggravated criminal sexual assault and guilty of criminal sexual assault and unlawful use of a weapon.

¶ 28 I

¶ 29 Defendant first argues that the State failed to prove him guilty of criminal sexual assault beyond a reasonable doubt. Specifically, he claims that the evidence was insufficient because (1) A.R.'s testimony was not credible, (2) defendant provided a credible explanation for his behavior on the night of his arrest, and (3) Amanda's decision to continue to have a sexual relationship with him after the allegations were made suggests that she did not believe A.R.

¶ 30 When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry defendant. Rather, 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. *People v. Collins*, 106 Ill. 2d 237 (1985). Under this standard, an appellate court cannot substitute its judgment for that of the trier of fact on issues regarding the weight of evidence or the credibility of the witnesses. *People v. Kotlarz*, 193 Ill. 2d 272 (2000). A conviction will only be overturned where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Smith*, 185 Ill. 2d 532 (1999).

¶ 31 In this case, A.R. provided credible testimony regarding the assaults committed by defendant against her. She described each encounter with some detail, and she used graphic descriptions to depict the abuse that occurred on February 2, 2010. Consistent with A.R.'s testimony, the physical evidence indicated that A.R. could not be excluded from having contributed to the DNA mixture found on the vibrator, and semen found on the white towel

matched defendant's profile. In addition, the jury could have inferred that defendant's explanation for threatening to commit suicide was not credible in light of the years of financial hardship the couple had suffered and that, instead, defendant was emotionally distraught because he had sexually abused A.R. Given our standard of review, we find that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of aggravated criminal sexual assault.

¶ 32 In reaching our conclusion, we find defendant's argument that Amanda's continued sexual relations with defendant destroyed A.R.'s credibility at trial unavailing. Amanda testified that she continued to have sex with her husband because, although she knew A.R. had been abused, a part of her still loved her husband. That emotional connection is not unreasonable. However, Amanda's conduct also supported her belief that A.R. was abused. Amanda was upset when A.R. told her about the abuse, she lied to defendant and told him that she was ordering pizza when he called, and she took A.R. to the hospital. All of these acts indicate that Amanda believed her daughter. Thus, the evidence was not so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt.

¶ 33 II

¶ 34 Next, defendant argues that he was denied a fair trial when the trial court instructed the jury that "reasonable doubt is for you to determine."

¶ 35 In Illinois, a trial court's attempt to explain reasonable doubt is improper because there is no better definition of reasonable doubt than the words themselves. *People v. Speight*, 153 Ill. 2d 365 (1992). Our supreme court has consistently held that neither the court nor counsel should attempt to define the reasonable doubt standard for a jury. *Id*. at 374; *People v. Cagle*, 41 Ill. 2d 528, 536 (1969); *People v. Malmenato*, 14 Ill. 2d 52 (1958) (Illinois law is clear that reasonable

doubt should not be defined). As noted in *Malmenato,* "[r]easonable doubt is a term which needs no elaboration and we have so frequently discussed the futility of attempting to define it that we might expect the practice to be discontinued." *Malmenato*, 14 Ill. 2d at 61 (citing *People v. Schuele*, 326 Ill. 366 (1927), and *People v. Rogers*, 324 Ill. 224 (1927)). Indeed, even the committee notes to the Illinois Pattern Jury Instructions "recommend [ ] that no instruction be given defining the term 'reasonable doubt.' " Illinois Pattern Jury Instructions, Criminal, No. 2.05, Committee Note, at 78 (4th ed. 2000) (citing *Malmenato*, 14 Ill. 2d at 61).

¶ 36 Following this long standing rule, Illinois appellate courts have held that a trial court commits reversible error when it instructs jurors that reasonable doubt is for them to determine. See *People v. Turman*, 2011 IL App (1st) 091019, ¶¶ 19- 27, and *People v. Franklin*, 2012 IL App (3d) 100618, ¶¶ 23-28.

¶ 37 In *Turman,* the trial court informed deliberating jurors that it was for them "to collectively determine what reasonable doubt is." *Turman*, 2011 IL App (1st) 091019, ¶ 19. The reviewing court held that "[b]y instructing the jurors that they should collectively determine what reasonable doubt was, the court allowed the jury to use a standard that in all likelihood was below the threshold of a reasonable doubt standard. * * * The effort by the trial court in this case can be construed as an attempt to define that which the Illinois Supreme Court has said cannot be defined in this way." *Id.* ¶ 25. The court found that the erroneous instruction amounted to plain error under both prongs of the plain error rule, explaining that "[t]he jury may have used a lesser standard of doubt than reasonable doubt since they were to collectively determine what the term meant." *Id.* ¶ 27. The court concluded that the error was so serious that it affected the fairness of the defendant's trial and his right to due process, thereby challenging the integrity of the judicial process. *Id.*

¶ 38 In *Franklin*, the trial court told potential jurors during jury selection that reasonable doubt is "what each of you individually and collectively, as 12 of you, believe is beyond a reasonable doubt." *Franklin*, 2012 IL App (3d) 100618, ¶ 4. Thereafter, 12 jurors and 2 alternates were chosen, and the defendant's trial began. Following deliberations, the empaneled jurors found defendant guilty of two counts of aggravated criminal sexual assault. On review, we agreed with the analysis in *Turman* and concluded that the instruction was constitutionally deficient because there was a reasonable likelihood that the jury understood that the instruction allowed it to find the defendant guilty using a standard of proof that was less than beyond a reasonable doubt. *Franklin*, 2012 IL App (3d) 100618, ¶ 28.

¶ 39 Here, the trial court's instruction to the jury that "reasonable doubt is for you to determine" is nearly identical to the erroneous instructions in *Turman* and *Franklin*. Such an instruction is improper because it contravenes the Illinois Supreme Court's mandate that trial courts not define reasonable doubt for the jury, however slight the definition. See *Malmenato*, 14 Ill. 2d at 61. Reasonable doubt is self-defining, and courts and attorneys have been admonished to refrain from the temptation to further explain the concept. The trial court's instruction in this case was constitutionally deficient because, by telling the jurors that it was for them to determine what reasonable doubt meant, there is a reasonable likelihood that they understood the instruction to allow a conviction based on proof less than a reasonable doubt. See *Turman*, 2011 IL App (1st) 091019, ¶¶ 25-27.

¶ 40 Since the instruction was constitutionally deficient, it is a structural error that requires reversal. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). "[T]he essential connection of a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings. A reviewing court

can only engage in pure speculation– its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.' " *Id*. at 281 (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)). We reverse defendant's conviction and remand for a new trial.

¶ 41 III

¶ 42 We will briefly address the remaining issues since they may occur on retrial.

¶ 43 First, defendant argues that the prosecutor's comments during closing argument were improper when he stated that DNA evidence recovered from the vibrator matched the profiles of defendant, Amanda and A.R. Defendant admits that he forfeited this error by failing to raise it below, but claims it is reviewable under either prong of the plain error doctrine. In the alternative, defendant argues that defense counsel's failure to object to the prosecutor's comments at trial constituted ineffective assistance of counsel.

¶ 44 A defendant's guilt may be proved only by "legal and competent evidence, uninfluenced by bias or prejudice raised by irrelevant evidence." *People v. Bernette*, 30 Ill. 2d 359, 371 (1964). A prosecutor has wide latitude in making closing arguments, but this latitude has limits; arguments that misstate the evidence or are not based on the evidence are improper. *People v. Maldonado*, 398 Ill. App. 3d 401 (2010). Prosecutorial misconduct requires a new trial if it constitutes a material factor in a defendant's conviction or substantially prejudices the defense. *People v. Linscott*, 142 Ill. 2d 22 (1991). If the reviewing court cannot say that the prosecutor's improper conduct did not contribute to the conviction, the court should order a new trial. *Id*. at 28.

¶ 45 In this case, the challenged comments came after the prosecutor informed the jury that the material found on "[t]he dildo was a mixture as we've learned, and that was of at least three people that cannot be excluded, that being Mrs. Learcher, [A.R.], and the defendant. Again,

three people." Nevertheless, comments that "[A.R.'s] material generated her profile on that dildo" and "they [found] the person whose DNA material is in the mixture. Their profile is Amanda, [A.R.] and the defendant," are more conclusive statements that may have influenced the jury. Those comments infer that there was an absolute match between the DNA of the victim and the DNA of one of the donors found on the vibrator. Because DNA evidence has an aura of infallibility, it has the power to overwhelm other evidence. See *In re Detention of Erbe*, 344 Ill. App. 3d 350 (2003). Since we cannot say without any confidence that the prosecutor's misstatement of a piece of scientific evidence had no effect on the jurors, the comments constituted error. See *Linscott*, 142 Ill. 2d at 29-31 (forensic expert testified that hair samples were merely "consistent" not that they were "conclusively" identified as the defendant's as improperly argued by the prosecutor).

¶ 46 However, defendant failed to preserve the error at trial or in a posttrial motion. Therefore, it is forfeited and may only be reviewed on appeal if plain error is found. *People v. Johnson*, 218 Ill. 2d 125 (2005). Plain error may be found where the evidence is closely balanced or where the alleged error was so serious that defendant was denied a fair trial. *People v. Hayes*, 353 Ill. App. 3d 578 (2004).

¶ 47 Here, the error does not rise to the level of plain error under either prong of the plain error doctrine. First, the evidence was not closely balanced. A.R. provided credible testimony regarding the numerous assaults committed by defendant against her, including forced vaginal and oral sex. The circumstantial evidence regarding defendant's threat to commit suicide on the night the allegations were made to authorities indicated that defendant wanted to end his life because defendant knew that A.R. told Amanda that defendant had been sexually abusing her. Further, the physical evidence supported A.R.'s testimony. Forensic experts demonstrated that

A.R. could not be excluded from having contributed to the DNA profiles found on the vibrator. Forensic experts also testified that the white towel A.R. mentioned in her testimony was recovered from defendant's house, and it contained semen, which matched defendant's DNA profile.

¶ 48 Second, the prosecutor's comments do not constitute a "structural" error that "erode[s] the integrity of the judicial process and undermine[s] the fairness of the defendant's trial." *People v. Herron*, 215 Ill. 2d 167, 186 (2005). Structural errors are found only in a limited number of cases. Our supreme court has recognized an error as structural where there has been (1) a complete denial of counsel, (2) a trial before a biased judge or jury, (3) racial discrimination in the selection of a grand jury, (4) a denial of the right to self-representation at trial, (5) the denial of a public trial, or (6) a defective reasonable doubt instruction. *People v. Thompson*, 238 Ill. 2d 598 (2010). As stated in *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78, "error in closing argument does not fall into the type of error recognized as structural." Thus, the error cannot be reviewed as plain error.

¶ 49 Next, we reject defendant's claim that counsel was ineffective. To establish ineffective assistance, defendant must show that counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced by counsel's deficient performance. *People v. Coleman*, 206 Ill. 2d 261 (2002). A defendant is entitled to reasonable, not perfect, representation. Here, counsel may have decided not to object to the prosecutor's comments regarding the DNA evidence because he did not want to draw the jury's attention to the results of the DNA testing any more than was necessary. His decision was a matter of trial strategy and did not fall below an objective standard of reasonableness. See *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004) (matters of trial strategy are immune from ineffective assistance of counsel

claims).

¶ 50 Finally, the trial court did not abuse its discretion in denying defense counsel the ability to cross-examine Officer Ujinski as to defendant's reasons for threatening to commit suicide. Cross-examination is generally limited in scope to matter raised in direct examination and to matter affecting the credibility of the witness, and a court's determination that questioning falls outside the scope of direct examination will not be disturbed absent an abuse of discretion. *People v. Terrell*, 185 Ill. 2d 467 (1998). Here, Ujinski's testimony offered on direct examination was not misleading. He testified that defendant stated "you know why" when he asked defendant why he was threatening suicide and that defendant did not explain that answer any further when Ujinski asked him to do so. Further questioning on cross-examination was not needed to clarify his testimony. In addition, questions about financial issues in defendant's marriage were not related to the limited conversation Ujinski had with defendant on the phone. Thus, the trial court properly concluded that defense counsel's line of questioning about the couple's financial situation was outside the scope of direct examination.

¶ 51 CONCLUSION

¶ 52 The judgment of the circuit court of Tazewell County is reversed, and the cause is remanded for further proceedings consistent with this decision.

¶ 53 Reversed and remanded.

¶ 54 JUSTICE SCHMIDT, concurring in part and dissenting in part.

¶ 55 I dissent from the majority to the extent that the majority finds "reversible error" when the trial court responded to a question by the jury with, "Reasonable doubt is for you to determine." So, in every criminal jury trial, who decides what constitutes reasonable doubt? It is, of course, the jury. There is nothing about the trial judge's comment in this case that could

reasonably be construed as inviting the jury to convict the defendant on something less than proof beyond a reasonable doubt.

¶ 56 The trial judge told the jury the only thing that any reasonable jury could have inferred had the judge simply remained silent and not answered the question. How can any reasonable person think that a jury would come to any other conclusion after a trial judge refuses to provide a definition of "reasonable doubt?" When a judge refuses to provide a definition, what would reasonable jurors conclude, except, "Well, I guess we have to figure this out ourselves."

¶ 57 Defendant admits that he did not raise this issue at trial and, therefore, argues plain error. The majority simply concludes that the instruction was constitutionally deficient and, therefore, structural and requires reversal. *Supra* ¶ 40. The majority cites *Sullivan* as authority for this proposition. However, unlike in *Sullivan*, in the case before us, there is no misdescription of the burden of proof. The majority here, as in *Turman*, comes to the conclusion that the trial court's comments raised "a reasonable likelihood that they understood the instruction to allow a conviction based on proof less than a reasonable doubt." *Supra* ¶ 39. The majority, neither here nor in *Turman*, explained just how telling the jury that it must determine what constitutes reasonable doubt would lead a jury to conclude that it could convict based on proof less than that beyond a reasonable doubt. That is, the majority says it as though it were some universal truism that needs no explanation.

¶ 58 Without a definition of reasonable doubt, it is up to Illinois juries to determine what constitutes reasonable doubt. That is what the trial judge told the jury. That is not error. Therefore, without error there can be no plain error. Without plain error, the issue is forfeited. Likewise, even if it was error, it was not structural error. There is nothing about the trial judge's comment that deprived defendant of a fair trial, despite the majority's bald assertion to the

contrary, there is nothing about that instruction that invites the jury to convict on proof less than that beyond a reasonable doubt. Therefore, any error is not structural and the issue is forfeited.

¶ 59 I acknowledge that in *Sullivan*, 508 U.S. 275, 280-82 (1993), the United States Supreme Court held that a constitutionally deficient reasonable doubt instruction "unquestionably" qualifies as structural error. However, here there is nothing about the trial judge's comment that was constitutionally defective. In fact, as stated above, it was an absolutely correct statement of Illinois law. It did not violate the Illinois rule that the judge should not attempt to define reasonable doubt. This judge did not attempt to define reasonable doubt. In light of all the cases being reversed and remanded for new trials based upon issues as in this case, perhaps it is time for the Illinois Supreme Court to rethink its rule and give an instruction on reasonable doubt. Plenty of jurisdictions do. Even a pattern instruction based on *Malmenato*, 14 Ill. 2d 52 (1958), which says something like, "reasonable doubt is a term which needs no elaboration" would take the trial judges off the hook and obviate at least one risk of reversible error. Such an instruction would only be given if the jury asks for a definition of reasonable doubt.

¶ 60 Defendants deserve fair trials. Victims deserve justice. The courts should do what is reasonably possible to obviate all the expense, anxiety, fear and inconvenience associated with retrying cases. A simple IPI instruction on this recurring issue would solve the problem. I do not understand why it has not been done.

¶ 61 Therefore, I dissent because I find no error and, therefore, the issue is forfeited. If there was error, the error did not deny defendant due process and was not otherwise constitutionally defective. Therefore, there is no plain error and this issue is forfeited.