2018 IL App (3d) 150359-U

Order filed June 27, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0359
v.	)	Circuit No. 10-CF-523
	)	
ANGELO T. ERVIN,	)	Honorable Kathy S. Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

¶ 1 *Held*: The State's evidence was sufficient to prove defendant guilty of the charged offenses beyond a reasonable doubt and other purported cumulative errors did not deny defendant his right to a fair trial.

¶ 2 Defendant Angelo T. Ervin was convicted of two counts of aggravated criminal sexual assault following a jury trial. The trial court sentenced defendant to concurrent sentences of nine years' imprisonment in the Illinois Department of Corrections. On appeal, defendant challenges the sufficiency of the State's evidence, alleges that the trial court erred by failing to ask the jurors

whether they understood the *Zehr* principles, and alleges that the State engaged in misconduct during opening statements, closing arguments, and rebuttal arguments.

¶ 3 FACTS

¶ 4 On October 15, 2010, the State filed a two-count indictment against Angelo T. Ervin (defendant). Count I of the indictment alleged that defendant committed aggravated criminal sexual assault in violation of section 12-13(a)(2) of the Criminal Code of 1961, "against [the victim], knowing that [the victim] was unable to understand the nature of the act, knowingly committed an act of sexual penetration with [the victim], in that the defendant, placed his penis in the vagina of [the victim], and in so doing, caused bodily harm to [the victim] by causing pregnancy." 720 ILCS 5/12-13(a)(2) (West 2010). Count II of the indictment alleged that defendant committed aggravated criminal sexual assault in violation of section 12-14(a)(2) of the Criminal Code of 1961 "against [the victim], knowing that [the victim] was unable to give knowing consent." 720 ILCS 5/12-14(a)(2) (West 2010).

¶ 5 A jury trial began on March 9, 2015. During *voir dire*, the trial court stated the following to potential jurors Richey, Burnett, Wenzelman, Love, Hoffman, Sands, Blaylock, and Lorenz:

> "I'm going to ask you each individually. Do you understand and accept the following principles of constitutional law: One, the defendant is presumed innocent to the charges against him; two, that before he can be convicted the state must prove him guilty beyond a reasonable doubt; three, the defendant is not required to offer any evidence on his own behalf; and four, if the defendant chooses not to testify, you cannot infer guilt."

The court went on to individually ask the jurors if they could "accept and follow" those principles, to which each juror answered "Yes." Burnett, Hoffman, Sands, and Lorenz were accepted as jurors.

¶ 6 During opening statements, the prosecutor stated that defendant was a close family friend of the victim's family, and had many years of contact with the victim's family during family activities and church functions. Over the defense's objection, the prosecutor told the jury that the defense was going to ask the jury to believe that the victim seduced defendant to the point that he could not resist. Defense counsel stated during his opening statement that the jury would "hear from [the victim's] pediatrician," who "will be testifying that no professional, at least a professional with these facts," would be able to conclusively opine that [the victim] was unable to understand the nature of the act or give knowing consent.

¶ 7 The State first called Dr. Degaulee Haile, an expert in obstetrics and gynecology. In July 2010, the victim first came to Dr. Haile when she was eight weeks pregnant and 18 years of age. The victim never came by herself to appointments with Dr. Haile. Dr. Haile stated that it was apparent during his first meeting with the victim that she was "in some way developmentally delayed or mentally delayed." Based on his interactions with the victim, Dr. Haile opined that the victim functioned at approximately the elementary school level and that it would be easier to explain things to his nine-year-old child. To give an example to support his opinion, Dr. Haile stated that the victim understood the concept of pregnancy the same way a young child would. Dr. Haile also stated that the victim clearly needed supervision and constant support. During labor, "it was clear that [the victim] did not understand what was going on in her body." Dr. Haile opined that even if the victim engaged in the physical act of sex, "she would not cognitively be able to understand the consequences of what it can lead to, especially pregnancy thereafter." Dr. Haile had "serious doubts" that the victim could knowingly consent to sexual relations. On cross-examination, Dr. Haile testified that he was not qualified to diagnose

someone with mental retardation. Dr. Haile stated that the victim likely functioned at the age of plus or minus a person in their early teens.

¶ 8 Candy Frye, a teacher and special education expert at Kankakee High School, testified and explained that she met the victim at the school when victim was 16 years of age. At that time, the victim had been diagnosed with a cognitive disability and a secondary speech disability. The victim is not intelligible to the average listener. The victim participated in only special education classes, and had received special education services since the age of three. Frye testified that the victim reached her maximum potential for speech services in 2010, and that the victim's speech is less than 50 percent intelligible. The victim could only speak in one to four-word phrases and utilized a pictorial communication device which audibly elicited a word when an image was pushed, which victim did not enjoy using. The victim could not read or tell time but could write her name in cursive and count to ten. The victim's IQ score in 2013 was 59. The victim had an average social adaptive behavioral score in some categories, and a below average score in other categories. The victim's academic skill level was between kindergarten and first grade. The victim did not receive sexual education classes. Frye described the victim as "most obedient and most compliant" and explained that the victim was very willing to please and comply. With regard to whether the victim understood sexual intercourse, could consent to sexual intercourse, and knew the consequences of sexual intercourse, Frye opined that the victim would not understand fully what sexual relations were and would not understand that she could consent or not consent.

¶ 9 On cross and recross-examination, Frye testified that some special education students could understand the nature of a sexual act depending on their experiences and repetition. When Frye asked the victim if she was pregnant, the victim looked at Frye like she had no idea what

Frye was talking about. Frye stated that while it was possible the victim could have understood that it was possible to get pregnant by having sex, she did not think the victim had an understanding of what sex was. Frye testified that the victim scored in the average range in social living, health and safety, leisure, self-direction, and socializing skills. At one point, the victim had come to Frye with a problem about boys giving her unwanted attention. Frye also spoke with the victim about an abnormal menstrual cycle. Frye was aware that the victim had also scored 69 and 77 on IQ tests.

¶ 10 Tammy Buhrmester, an expert in school psychology and the school psychologist for the Kankakee School District, testified that she conducted an evaluation of the victim using the "TONI-3" test in December 2006. The test placed the victim's IQ at 69 with four points of possible deviation. According to Buhrmester, the victim's score was in the very poor range, falling in the second percentile. Buhrmester also administered the Woodcock-Johnson III test of achievement. The victim's scores were in the kindergarten range. Based on the victim's level of intellectual functioning, Buhrmester did not believe the victim could consent to a sexual relationship or understand the consequences of a sexual relationship. Additionally, Buhrmester did not believe the victim had the ability to say no to an adult who asked her to do something.

¶ 11 On cross and recross-examination, Buhrmester testified that an average person's IQ score would be in the range of 85 to 115. Buhrmester opined that the victim's IQ scores placed her on the borderline between having a mild and moderate cognitive disability. Buhrmester opined that at the time of testing the victim would have been unable to have a romantic relationship.

¶ 12 Laura Bialas, another expert in school psychology and school psychologist for the Kankakee School District testified that she met the victim in 2010 and evaluated her in 2013. Bialas administered the Woodcock-Johnson III and the CTONI-2 tests to the victim. The victim

scored in the kindergarten to first grade level on the Woodcock-Johnson test. The victim scored 59 on the CTONI-2 test, which was in the first percentile. Bialas opined that the victim had a moderate cognitive disability. Based on her training and her interactions with the victim, Bialas opined that the victim could not consent or understand the consequences of a sexual relationship. Bialas also opined that the victim did not have the intellectual ability to say no to an adult who wanted to have a sexual relationship with her. Bialas never discussed sex with the victim.

¶ 13 Jennifer Schoon, an officer with the Kankakee police department, testified that she scheduled an interview for the victim at the Child Advocacy Center in August 2010. The forensic interviewer struggled to understand the victim during the interview because of the victim's speech impediment and "obvious disabilities," so the victim's mother was brought in for assistance. The victim did not seem to understand the forensic interviewer's questions. During the interview, the victim disclosed that the incident had taken place in the basement of the victim's house. Following the interview, Schoon and another detective went to the victim's home to collect evidence and photograph the scene. The victim took Schoon into the basement and showed Schoon where the incident occurred. Law enforcement collected a comforter that the victim identified. Schoon first made contact with defendant on September 30, 2010. At this time, Schoon obtained DNA from the 47-year-old defendant. The parties stipulated that experts in DNA analysis would testify within a reasonable degree of scientific certainty that defendant was the biological father of the victim's daughter.

¶ 14 Victim's mother (mother), testified that the victim was born on June 5, 1992, and was currently 22 years of age. Mother testified that the victim lived with her and that defendant was their landlord. Mother described knowing defendant for a couple of years and claimed they had a great relationship beyond just landlord and tenant. Defendant and his wife brought mother and

the victim into defendant's church. Defendant was a deacon and a choir member at the church. Mother's other sons were also very good friends with defendant's son. Defendant knew the victim and would see her at the victim's home or at the church. Mother explained that sometimes defendant would show up at mother's home unannounced. Defendant would access the home through an outside door to the basement.

¶ 15 Mother discovered the victim was pregnant in late 2010 after taking the victim to the doctor. When mother learned of the victim's pregnancy she believed a sexual assault had occurred. Mother called the police that day.

¶ 16 The victim did not tell mother who the father was until a couple of months later. During labor, mother described the victim as being scared, frightened, and terrified. The victim gave birth to a baby girl on January 28, 2011. The victim is a great mother who takes care of her daughter with the help of her mother and her mother's husband. Mother did not believe the victim and the victim's daughter could live by themselves. On cross-examination, when asked if mother believed the victim would be able to consent to sex, mother answered "Absolutely not." Mother did not think the victim was able to understand the nature of a sexual act. Mother talked about sex with the victim when the victim was 13, 14, and 15 years of age. Mother told the victim to say no to unwanted sex and the victim seemed to somewhat understand. The victim chooses the people she is willing to hug at church.

¶ 17 The victim, E.R., testified that she was 21 years of age[1] by showing the jury with her fingers.[2] The victim did not know her birthday or her address. The victim knew the alphabet and could count to ten, but could not read. The victim could write her name in cursive and could

[1]The record indicates that the victim was actually 22 years of age at the time of her testimony.

[2]The majority of the victim's responses to the questions consisted of "yes" and "no" answers. Many of the victim's answers were also unintelligible.

write mom, but could not write sentences. The victim could not tell time and was unable to identify coins correctly. The victim does not go anywhere by herself and does not think she could live alone. The victim has a four-year-old child, though she did not know the child's birthday and could not spell the child's name.

¶ 18 When asked how the baby got in her belly, the victim pointed at the genital area of a person in a picture and said "penis." The victim stated that it hurt to give birth. The victim knew defendant from church. The victim said that she had seen defendant's penis and that defendant had touched her genital area with that body part. Defendant's body part went into the victim's body part. The victim did not want defendant to touch her that way and said that it hurt. The victim did not know she could tell defendant no. Defendant taught victim how to put their body parts together. The victim used dolls to describe how the incident occurred. The victim removed the pants and underwear from the dolls and inserted the male part into the female part. The victim did not know the name of this act. Defendant did this act more than one time. One incident took place in the victim's basement and another took place in the church nursery. Defendant told the victim not to tell. The victim learned about sex from her mom.

¶ 19 On cross and re-cross-examination, the victim testified that she remembered speaking to a woman named Kristen Jackson at the police station, and that the victim told Jackson that the act only occurred in the basement. The victim's mother is always with her at church. The victim agreed that when the victim does not want to do something, she knows the difference between yes and no, and will say no if she does not want to do something. The victim agreed that when she was having sex with defendant she did not say no, she never yelled out, and never fought defendant. The victim agreed that she knew that a baby came from sex, and that sex happens

when a man puts his penis into the vagina of a woman. The victim reiterated that her mother had previously told her she could refuse sex.

¶ 20 The defense presented Dr. Rodney Alford as an expert in pediatrics. The victim was Dr. Alford's patient since the victim was very small, and he treated the victim when she was pregnant. Dr. Alford is friends with both the victim's and defendant's families from church. Dr. Alford's medical records from February 26, 2004, indicated that when the victim was 11 years of age she knew about menstruation and bodily changes. The same records indicated that the victim's school work was average. Dr. Alford's medical records from June 24, 2004, indicated that the victim's school work was above average. Dr. Alford's notes from July 14, 2010, indicated that victim had "mild to moderate [mental retardation]" based upon a "global assessment," meaning, "Basically, looking at a patient just making an assessment." Dr. Alford could not give a professional opinion about whether or not the victim was able to understand the nature of a sexual act in 2010. When defense counsel asked Dr. Alford why it would be difficult for him to make that assessment, Dr. Alford attempted to answer that he didn't think anybody could make that assessment. However, the State objected as to what anybody else could do, and the objection was sustained. Dr. Alford did eventually opine that he could not make a medical opinion about whether the victim was able to understand and consent to sex.

¶ 21 On cross-examination, Dr. Alford testified that his records on January 27, 2005, contained a notation that the victim was obviously mentally delayed. Dr. Alford did not believe that the victim functioned at a kindergarten level. Dr. Alford socializes with the victim at church and church parties. Dr. Alford teaches the victim's "young adults" Sunday school class where the victim participates by making comments, though Dr. Alford has never heard the victim speak in more than three or four-word sentences.

¶ 22 The victim's father testified that he stopped living with the victim when she was nine years old. The victim's father testified that he went to the police the same day he discovered the victim was pregnant on August 8, 2010.[3] The victim's father stated that the victim "had a slight disability but most of her disability was speech." On cross and re-cross-examination, the victim's father testified that he knew defendant. The victim's father was angry when he found out about the pregnancy because he thought someone had taken advantage of the victim, and because defendant was an older person. The victim's father was unaware of the victim's IQ or her adaptive functioning scores.

¶ 23 Throughout closing arguments, the prosecutor frequently emphasized that the State's experts gave strong and clear opinions that the victim was unable to consent or understand the nature of sexual intercourse, and that the defense's sole expert either couldn't or wouldn't give an opinion on the matter. The prosecutor stated, over defense objection, that "[the victim] needs continuous and constant repetition. And so unless over a four to seven-year period of time [mother] told [the victim] about sex weekly or daily *** [the victim] would not have the ability without that consistent repetition to understand and recall and process the information given to her by her mother." The prosecutor argued, over defense objection, that "[the victim's] testimony was also very similar to a child the age of seven or eight. As time wore on, [the victim] became tired. [The victim] started saying yes – [the victim] began to say yes to every question. [The victim] wanted to please the adults." The prosecutor argued that defendant was in a position of trust over the victim because of his status as the victim's landlord and a church deacon. During rebuttal argument, the prosecutor argued, over defense objection, that she highly doubted Dr. Alford was friendly with the victim's family at church functions. Further, the prosecutor argued

[3]Officer Schoon testified that a police report in the case was filed on August 9, 2010.

that defendant "overstepped all boundaries" by cheating on his wife and having sex with a "mentally disabled girl" from church, his tenant, and his friend's daughter. The prosecutor also stated that the victim was "emotionally affected by the incident."

¶ 24 The jury found defendant guilty on both counts I and II. The court entered convictions on both counts, but noted that the counts were to merge because of "one act, one crime."

¶ 25 Defendant filed an amended motion for a new trial on May 13, 2015. Defendant's posttrial amended motion, alleged *inter alia*, that the prosecutor made improper statements during opening statements and closing arguments. The trial court denied defendant's amended motion for a new trial. On May 15, 2015, the trial court sentenced defendant to concurrent sentences of nine years' imprisonment in the Illinois Department of Corrections. The trial court's sentencing order provided that the counts merge. A separate order dated May 22, 2015, ordered defendant to pay a $100 VCVA fine. Defendant filed a timely notice of appeal on May 27, 2015.

¶ 26 ANALYSIS

¶ 27 Defendant argues the State's evidence was insufficient to prove defendant guilty beyond a reasonable doubt of aggravated criminal sexual assault. Section 12-13(a)(2) of the Criminal Code of 1961 provides that the accused commits criminal sexual assault if he or she "commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent." 720 ILCS 5/12-13(a)(2) (West 2010). In conjunction, section 12-14(a)(2) of the Criminal Code of 1961 provides that the accused commits aggravated criminal sexual assault if the accused caused bodily harm. 720 ILCS 5/12-14(a)(2) (West 2010). Thus, in order to obtain a conviction for criminal sexual assault and aggravated criminal sexual assault, the State was required to prove the following elements: (1) that defendant committed an act of sexual penetration with the victim; (2) that defendant caused

bodily harm to the victim during the act; and (3) that defendant knew that the victim was unable to understand the nature of the act or was unable to give knowing consent.

¶ 28 Here, defendant concedes that he knowingly committed the act of sexual penetration with the victim which caused bodily harm. Further, defendant concedes that the victim was unable to give knowing consent and/or understand the nature of the sexual act. However, defendant challenges the sufficiency of the State's evidence regarding whether defendant knew that the victim was unable to understand the nature of the sexual act and knew the victim was unable to give knowing consent at the time of the sexual act. Consequently, our analysis focuses solely on the evidence presented to the jury regarding defendant's knowledge.

¶ 29 It is well established that the due process clause protects the accused against convictions except upon proof beyond a reasonable doubt of every element constituting the crime charged. U.S. Const. amends. V, XIV; Ill. Const. 1970, art. I § 2; *In re Winship*, 397 U.S. 358, 363 (1970). When considering a challenge to the sufficiency of the evidence, reviewing courts view the evidence in the light most favorable to the prosecution and are charged with determining whether any rational trier of fact could have found the essential elements of the crime to have been proven beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985); *People v. Pollock*, 202 Ill. 2d 189, 217 (2002). A conviction should be reversed if "the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Collins*, 106 Ill. 2d at 261. When evaluating the trial evidence, reviewing courts do not substitute their judgment for that of the trier of fact on issues regarding the weight of the evidence, credibility of witnesses, or resolution of conflicting evidence. *People v. Brown*, 2013 IL App (2d) 110303, ¶ 54.

¶ 30 Section 4-5(a) of the Criminal Code of 1961 provides that a person knows, or acts knowingly or with knowledge of: when "The nature or attendant circumstances of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that his or her conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists." 720 ILCS 5/4-5(a) (West 2010). Thus, to meet this burden of proving defendant's knowledge, the State was required to show that defendant knew that some fact prevented the victim from understanding or giving knowing consent to the sex act. *People v. Lloyd*, 2013 IL 113510, ¶ 40.

¶ 31 The gravamen of defendant's argument is that the State's evidence was insufficient because the State did not offer direct evidence concerning defendant's knowledge that the victim was unable to understand the nature of the sexual act and was unable to give knowing consent at the time of the sex act. For example, defendant argues the State did not present evidence showing that someone directly informed or told defendant about the victim's intellectual disability, low IQ scores, or that the victim was a special education student. Without such direct evidence, defendant claims the State did not prove defendant knew the victim was unable to understand or consent to the sex act.

¶ 32 At the onset, we emphasize that knowledge is generally established by circumstantial, rather than direct, evidence. *People v. Weiss*, 263 Ill. App. 3d 725, 731 (1994). In this case, the jury had the opportunity to observe the victim's appearance, her mannerisms, her mental abilities, and her communication skills. When testifying before the jury, the now 22-year-old victim did not know her birthday, did not know her current address, could not read, could not write a sentence, could not tell time, and could not identify coins correctly. During the victim's testimony she answered most questions with a simple "yes" or "no."

¶ 33 The State presented Dr. Degaulee Haile, an expert in obstetrics and gynecology, who told the jury that it was apparent during his first meeting with the victim that she was "in some way developmentally delayed or mentally delayed." Based on his interactions with the victim, Dr. Haile opined that the victim functioned at approximately the elementary school level and that it would be easier to explain things to his nine-year-old child. During labor, Dr. Haile stated that "it was clear that [the victim] did not understand what was going on in her body." Dr. Haile opined that even if the victim engaged in the physical act of sex, "she would not cognitively be able to understand the consequences of what it can lead to, especially pregnancy thereafter." Dr. Haile had "serious doubts" that the victim could knowingly consent to sexual relations.

¶ 34 The State presented Candy Frye, a teacher and special education expert at Kankakee High School, who explained that she met the victim at the school when the victim was 16 years of age. At that time, the victim had been diagnosed with a cognitive disability and a secondary speech disability. The victim participated in only special education classes, and received special education services beginning at the age of three. Frye testified that the victim reached her maximum potential for speech services in 2010, and that the victim's speech is less than 50 percent intelligible. The victim could only speak in one to four-word phrases and utilizes a pictorial communication device which audibly elicits a word when an image is pushed. The victim's IQ score in 2014 was 59. The victim's academic skill level was between kindergarten and first grade. Frye described the victim as "most obedient and most compliant" and explained that the victim was very willing to please and comply. With regard to whether the victim understood sexual intercourse, could consent to sexual intercourse, and knew the consequences of sexual intercourse, Frye opined that the victim would not understand fully what sexual

relations were and would not understand that she could consent or withhold consent to a sex act with another person.

¶ 35 The State presented Tammy Buhrmester, an expert in school psychology and the school psychologist for the Kankakee School District, who testified that she conducted an evaluation of the victim using the "TONI-3" test in December 2006 which placed the victim's IQ at 69. According to Buhrmester, the victim's score was in the very poor range, falling in the second percentile. Buhrmester also administered the Woodcock-Johnson III test, where the victim's scores were in the kindergarten range. Buhrmester did not believe the victim had the ability to say no to an adult who asked her to do something. Based on the victim's level of intellectual functioning, Buhrmester did not believe the victim could consent to a sexual relationship.

¶ 36 The State presented Laura Bialas, an expert in school psychology and school psychologist for the Kankakee School District. Bialas testified that she administered the Woodcock-Johnson III and the CTONI-2 tests to the victim. The victim scored in the kindergarten to first grade level on the Woodcock-Johnson III test. The victim also scored 59 on the CTONI-2 test, which was in the first percentile. Bialas opined that the victim had a moderate cognitive disability. Based on her training and her interactions with the victim, Bialas opined that the victim could not understand the consequences of a sexual relationship. Bialas also opined that the victim did not have the intellectual ability to say no to an adult who wanted to have a sexual relationship with her.

¶ 37 In addition, mother testified that defendant was the landlord of the premises where the victim resided with her mother. Mother informed the jury that over the course of a couple of years, defendant developed a personal relationship with the victim and her mother beyond the landlord/tenant relationship. For example, defendant and his wife brought mother and the victim

into defendant's church. Defendant was a deacon and a choir member at the church mother and the victim attended. Mother's other sons were also very good friends with defendant's son. Defendant knew the victim and would see her at the victim's home or at the church. Mother explained that sometimes defendant would show up at mother and the victim's home unannounced. Defendant would access the home through an outside door to the basement. The victim's mother told the jury that the victim "absolutely" could not consent to sex.

¶ 38 The jury received testimony from Officer Schoon who testified that the victim exhibited "obvious disabilities." While interviewing the victim, it became obvious to Officer Schoon that the victim did not understand the questions the interviewer was asking her.

¶ 39 Even defendant's own expert, Dr. Alford, testified that the victim exhibited "mild to moderate [mental retardation]." The doctor explained his opinion was based upon a "global assessment," meaning, "Basically, looking at a patient just making an assessment."

¶ 40 Based on the State's evidence, a jury could have reasonably inferred that defendant knew the victim personally, and had multiple and frequent opportunities to observe and interact with the victim. In this case, the combined testimony of the witnesses tends to establish that a reasonable person would know the victim exhibited a significant cognitive disability almost instantly upon meeting the victim. Further, the jury could have easily concluded that defendant knew of the victim's diminished intellect based solely on the victim's physical appearance and communication difficulties. To quote the court in *Weiss*, "The personality and limitations of [the victim] virtually leap out of the pages of this record." *Id*. at 732. For these reasons, a reasonable trier of fact could have easily found that defendant knew the victim was unable to knowingly consent to and/or understand the nature of sexual intercourse.

¶ 41 Next, we address defendant's contention that his convictions should be reversed because the trial court failed to ask four jurors whether they understood the *Zehr* principles codified in Illinois Supreme Court Rule 431(b). Ill. S. Ct. R. 431(b) (eff. May 1, 2007). Defendant concedes that this issue was not raised in the trial court and requests this court to review the trial court's omission based on plain error. The State agrees that defendant did not preserve the error for review and agrees the trial court erred by not asking the four jurors in question whether they understood the *Zehr* principles. *People v. Wilmington*, 2013 IL 112938, ¶ 32.

¶ 42 In order to demonstrate that plain error exists in this record, defendant must show: (1) the evidence is so closely balanced that the error alone threatens to tip the scales of justice against defendant, regardless of the seriousness of the error; or (2) the error is so serious that it affects the fairness of defendant's trial and challenges the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). In this case, defendant alleges the evidence pertaining to his knowledge was closely balanced, we disagree.

¶ 43 As discussed above, the evidence presented to the jury, including the victim's testimony, provided the jury with great insight into the nature, character, and intelligence of the victim. It is fair to say that the State presented a deluge of circumstantial evidence showing, beyond a reasonable doubt, that it would have been nearly impossible for any person, including defendant, to rationally conclude the victim could formulate an understanding of the nature of sexual intercourse or consent to engage in sexual intercourse with defendant. For these reasons, the evidence concerning defendant's knowledge of the victim's ability to understand or consent to the sexual act was not closely balanced. Therefore, plain error does not apply to the *Zehr* issues forfeited by defendant in the trial court.

¶ 44 Defendant also argues the prosecutors engaged in misconduct during opening statements, closing statements and rebuttal arguments, warranting reversal of his convictions. Specifically, defendant argues the prosecutors improperly made arguments that were not based on the evidence, which overstated the evidence, and which argued irrelevant matters. In opposition, the State argues that the prosecutor's statements during opening, closing, and rebuttal arguments were proper.

¶ 45 It is undisputed that defendant failed to object to several of the contested comments at trial. However, the proposition of waiver or forfeiture serves as an admonition to the parties, and does not serve to limit the jurisdiction of a reviewing court. *Jackson v. Board of Election Commissioners of Chicago*, 2012 IL 111928, ¶ 33. We choose to review defendant's claims in the interest of justice and conclude that prosecutorial misconduct does not exist in this case.

¶ 46 First, defendant argues the prosecutor's comments during opening statements that defendant was a "close family friend" of the victim, and that defendant had "many years" of "family activities" and "church functions" to learn of the victim's disabilities were improper because this testimony was never presented. Opening statements are offered to apprise the jury of the evidence the State expects to prove, and may include discussion of the expected evidence and reasonable inferences that may be drawn from such evidence. *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). Based on the evidence introduced by the State, the prosecutor did not misstate the nature of defendant's relationship with the victim's family.

¶ 47 Next the defendant takes issue with the prosecutor's statement during opening statements that the defense was going to ask the jury "to believe that it was [the victim] that seduced the defendant to the point that he could not resist." Reversible error only occurs when a prosecutor's opening statement exhibits deliberate misconduct which results in substantial prejudice to the

defendant. *Id*. at 127. Here, the prosecutor predicated her statement on her anticipation of the defense's trial theory. Thus, the statement, which we do not find particularly egregious, was based upon the prosecutor's reasonable assumptions about the case and certainly did little to prejudice defendant.

¶ 48 Similarly, defendant takes issue with the prosecutor's opening statement wherein the prosecutor commented that defendant "violated" the victim's "innocence," "[the victim's] childlike trust," and her "family trust." We do not find this statement to constitute argument which served to "inflame the passions of the jury" as defendant contends. Certainly, the statements are conclusions, but it is clear that these are some of the propositions the State intended to prove. Therefore, these statements were fair based on the nature of this case and the evidence later deduced at trial.

¶ 49 Defendant also takes issue with several statements made by the prosecutor during closing statements. We note that prosecutors are afforded wide latitude during closing argument, and even improper remarks do not merit reversal unless they result in substantial prejudice to the defendant. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 57. When appellate courts review comments made by the prosecutor during closing argument, they must decide whether the comments so prejudice defendant that it is impossible to say whether or not a verdict of guilt resulted from them. *People v. Nieves*, 193 Ill. 2d 513, 533 (2000).

¶ 50 During closing argument the prosecutor stated that "[the victim] would not have the ability *** to understand and recall and process the information [about sex] given to her by her mother" unless her mother "told [the victim] about sex weekly or daily" over "a four-to seven-year period of time." Based on the evidence presented concerning the victim's mental abilities, one could certainly infer that it would take significant time and repetition for the victim to

understand and process information about certain sex acts, including sexual intercourse. Therefore, this comment was proper.

¶ 51 Concerning the victim's testimony at trial, the prosecutor commented that "[the victim] began to say yes to every question" because she "wanted to please the adults, both the defense attorney and [the prosecutor]," and "[the victim] was tired of being questioned." Again, based on the testimony that the victim had mental abilities analogous to that of a young child, and the testimony about the victim's compliance with adult supervision, coupled with the unfamiliar court room environment, we believe the prosecutor's comment was proper. In fact, after reading the record, this court is of the same opinion as the prosecutor concerning the nature of the victim's testimony and the answers given during testimony.

¶ 52 The prosecutor also commented "As much as [Dr. Alford] would have you believe he's equally friendly with [the victim] and her family, do you really believe he's making it a point to sit down with them and talk with them at church functions? I highly doubt that." Here, even if the prosecutor inserted his opinion concerning Dr. Alford's statement, albeit incredibly minimal, the prosecutor's comment did little to prejudice defendant, and did not approach reversible error.

¶ 53 Finally, the prosecutor stated that defendant "overstepped all boundaries" by cheating on his wife, and having sex with a "mentally disabled girl" from church, his tenant, and his friend's daughter. The prosecutor also stated that the victim was "emotionally affected by the incident." Though we feel we are belaboring the point, prosecutors are afforded wide latitude during closing argument. *Id.* at 532. Prosecutors may comment on the evidence and reasonable inferences that may be drawn from the evidence. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). "A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context." *Id.* The facts adduced at trial brought to light an incredibly unsavory situation.

The prosecutor properly emphasized the significant collateral consequences brought about by defendant's actions, regardless of whether these facts were elements of the charged crime as defendant argues.

¶ 54 Next, defendant argues he received ineffective assistance of counsel. Defendant contends that counsel's deficient performance, coupled with defendant's claims of error concerning Rule 431(b), and the prosecutorial misconduct, constituted cumulative error which denied defendant his right to a fair trial. Whether defendant's due process right to a fair trial was violated is a question of law reviewed *de novo*. *People v. Radcliff*, 2011 IL App (1st) 091400, ¶ 22.

¶ 55 We may quickly dispose of defendant's cumulative error argument for two reasons. First, we previously held that defendant's Rule 431(b) challenge failed to successfully navigate plain error review, and that the prosecutor's conduct throughout the trial was not in error. Second, defendant did not receive ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and that (2) this deficient performance so prejudiced the defense as to deny defendant a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 56 With regard to defense counsel's performance, defendant argues that defense counsel stated during his opening statement that the jury would "hear from [the victim's] pediatrician," who "will be testifying that no professional, at least a professional with these facts," would be able to conclusively opine that [the victim] was unable to understand the nature of the act or give knowing consent. Defendant argues that defense counsel never offered the testimony he promised to present. However, defense counsel's failure to present testimony as promised in an opening statement does not amount to *per se* ineffectiveness. *People v. Winkfield*, 2015 IL App (1st) 130205, ¶ 20. Instead, defendant must show that this error by counsel was so grave that

without the error the result of the trial would likely have been different. *Id*. The error cited by defendant in this matter would not have changed the result of the trial.

¶ 57 Here, when asked his opinion on whether the victim was able to understand the nature of sex in 2010, Dr. Alford, the victim's pediatrician, answered that it would be difficult for him to make that assessment. When defense counsel asked Dr. Alford why it would be difficult for him to make that assessment, Dr. Alford attempted to answer that he didn't think anybody could make that assessment. However, the State objected as to what anybody else could do, and the objection was sustained. Dr. Alford did eventually opine that he could not make a medical opinion about whether the victim was able to understand and consent to sex. These facts reveal that defense counsel did attempt to elicit the promised testimony but was stymied by the State's objection. Further, counsel did solicit an opinion from Dr. Alford which contradicted the opinions of the State's experts. For these reasons, counsel was not ineffective, and cumulative error did not deny defendant his right to a fair trial.

¶ 58 Next, defendant asserts that this court should vacate one of defendant's aggravated criminal sexual assault convictions in accordance with the one act, one crime rule. Both parties request that the case be remanded to amend the sentencing order that contained an error resulting in two concurrent nine-year terms of imprisonment. In accordance with the position of the parties, we remand the case back to the trial court to vacate one of the convictions, and to amend the sentencing order to reflect only one sentence for a singular conviction for the offense of aggravated criminal sexual assault.

¶ 59 Defendant also requests that this court reduce the VCVA fine ordered by the court to $64. The State agrees that defendant is entitled to a recalculation of his VCVA fine based on *ex post facto* principles. Accordingly, we remand the matter to the trial court to recalculate the VCVA

fine owed by defendant in accordance with 725 ILCS 240/10(b) (West 2010) and to amend defendant's sentencing order to reflect the recalculation.

¶ 60 CONCLUSION

¶ 61 The judgment of the circuit court of Kankakee County is affirmed in part, vacated in part, and remanded with directions.

¶ 62 Affirmed in part, vacated in part, and remanded with directions.

¶ 63 JUSTICE SCHMIDT, specially concurring:

¶ 64 I concur in the judgment, but part company with the majority with respect to paragraphs 45 through 55. The majority concedes that defendant forfeited review of these errors. *Supra* ¶ 45. The majority relies on *Jackson v. Board of Election Commissioners* for the proposition that forfeiture serves as admonition to the parties and does not serve to limit the jurisdiction of the reviewing court. *Id.* The majority then chooses to review defendant's claims "in the interest of justice." *Id.*

¶ 65 There is nothing about this case or the alleged errors that cry out for this court to overlook defendant's forfeiture. Our supreme court, in the same paragraph relied upon by the majority for overlooking forfeiture, stated: "The rule does not, however, nullify standard waiver and forfeiture principals. *** [W]hile our case law is permeated with the proposition that waiver and forfeiture are limitations on the parties and not on the court, that principle is not and should not be a catchall that confers upon reviewing courts unfettered authority to consider forfeiture issues at will." *Jackson*, 2012 IL 111928, ¶ 33.

¶ 66 Defendant did not object at trial to the errors at issue. Likewise, he did not seek plain-error review with respect to any of those issues here on appeal. There is no reason to look past

defendant's forfeiture. Therefore, I do not join in the majority's cumulative error analysis at paragraphs 45 through 55.