2012 IL App (4th) 100516-U

Filed 2/28/12

NO. 4-10-0516

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
MICHAEL REFINE,	)	No. 08CF883
Defendant-Appellant.	)	
	)	Honorable
	)	Patrick W. Kelley,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed defendant's convictions of predatory criminal sexual assault and two counts of aggravated criminal sexual abuse.

¶ 2 In April 2010, a jury convicted defendant, Michael Refine, of predatory criminal sexual assault and two counts of aggravated criminal sexual abuse. Defendant appeals, arguing the following: (1) the State failed to prove defendant guilty beyond a reasonable doubt of predatory criminal sexual assault; (2) the trial court erred in allowing the State to introduce N.S.'s out of court statement pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/115-10 (West 2008)); (3) the trial court erred in instructing the jury as to the State's burden of proof on the aggravated-criminal-sexual-abuse charges; and (4) the trial court erred in refusing to allow a defense investigator to describe some observations he made with regard to an examination of defendant performed by an expert witness (a urologist)

testifying for the State. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 2008, a grand jury indicted defendant, who was over 17 years of age, with one count of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2006)) for placing his penis in the mouth of N.S., who was under the age of 13, and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2006)) for knowingly touching N.S.'s penis and causing N.S. to touch defendant's penis, both for the purpose of defendant's sexual arousal.

¶ 5 In May 2009, the State filed a notice of intent to use hearsay statements made by N.S. to (1) his mother on April 15, 2008, and (2) Tracy Pearson, a forensic interviewer for the Sangamon County Child Advocacy Center (Center), on April 17, 2008. The State also moved to play a recording of the interview with Pearson following N.S.'s testimony. N.S. was 5 years old when he made the statements and 7 years old at the time of trial.

¶ 6 On July 24, 2009, the trial court held a hearing on the State's notice of intent to use N.S.'s hearsay statements. The court found the statements made by N.S. to his mother and Pearson to be sufficiently reliable as to time, content, and circumstances to be admissible should N.S. testify. According to the court, the spontaneity of N.S.'s statement to his mother, even though he had twice earlier denied defendant had touched him, made that statement sufficiently reliable to admit. The court also found, on balance, Pearson's interview with N.S. did not involve the use of leading questions. The court found the statements N.S. made to his mother and to Pearson were admissible pursuant to section 115-10 of the Procedure Code (725 ILCS 5/115-10 (West 2008)) as long as N.S. testified at trial.

¶ 7 Defendant's trial was held in late March and early April 2010, approximately two years after N.S. reported the incident to his mother. N.S. testified at defendant's trial. N.S. stated his name, age, and birthday for the record and testified he was in the second grade and lived with his mom, dad, two brothers and a sister. According to his testimony, when he was five he would sometimes spend time with a man named Michael. He did not identify Michael's last name but stated he only knew one Michael. He testified Michael would come to his house, and they would read books in the living room. He testified Michael touched "his privates," which he called his "winky." He identified what he meant by "privates" on a drawing shown to him by the State. However, when asked whether his mouth ever touched part of Michael, N.S. said no. In addition, when asked whether Michael ever put anything into N.S.'s mouth or touched anything to N.S.'s mouth, N.S. said no. N.S. also testified he never touched Michael's "winky" with his hand or his mouth. According to his testimony, N.S. did not remember anything coming out of Michael's "winky."

¶ 8 N.S. stated he was real nervous about testifying. However, when asked whether he was being asked things he did not want to talk about, N.S. said no. While testifying, N.S. was concerned whether Michael was in the courtroom. According to the testimony of other witnesses, defendant's appearance had changed since N.S. last saw him.

¶ 9 Over defendant's objection, the trial court found N.S. had given testimony within the meaning of section 115-10 of the Procedure Code (725 ILCS 5/115-10 (West 2008)).

¶ 10 N.S.'s mother testified she had known defendant all her life because he had been married to her mother. She and defendant got along well prior to the allegations in this case. When N.S. was in kindergarten, she asked defendant to pick N.S. up at the bus stop and bring

him home from school on certain occasions. Defendant sometimes came inside and visited after he dropped off N.S. Defendant would sit in a recliner with N.S. and read books or go into a bedroom and sit and talk with N.S. She was usually cleaning or taking care of the other children when defendant was there. According to her testimony, sometimes she was in the same room with defendant and N.S. but other times she was not.

¶ 11 N.S.'s mother testified she had no concerns about N.S. spending time with defendant prior to the spring of 2008. N.S. seemed to like defendant. Defendant sometimes took N.S. to the breadline to get a snack. In April 2008, she became concerned because every time she looked at N.S. and defendant, who were sitting in a recliner reading a book, she saw defendant or N.S. quickly moving their hands. She thought she observed this more than once but never saw anything actually happen. She also testified around this same time N.S. occasionally came into the house with tears in his eyes after defendant dropped him off.

¶ 12 On April 14, 2008, she asked N.S. whether any grown-ups had ever touched him on his private areas. N.S. told her no. On April 15, 2008, defendant dropped N.S. off and N.S. asked if he could go with defendant to the breadline. When she said no, N.S. got upset and went into his room. Defendant called N.S. over to where defendant was sitting. He took off N.S.'s coat and held it in one hand by N.S.'s waist. N.S.'s mother testified she could not see what defendant was doing with his other hand, which concerned her. After defendant left, she asked N.S. whether defendant had touched him on his private areas. N.S. said no. About 20 minutes later, N.S. asked her if she was mad at him. She testified N.S. looked very sad. When she asked him why she would be mad at him, he crouched down in a corner and said, "Because I am lying about [defendant]." He then started crying. She told him he needed to tell her the truth.

¶ 13 N.S. told her defendant made N.S. sit right next to defendant when he picked N.S. up at the bus stop. Defendant placed N.S.'s hand inside of defendant's pants and made N.S. touch defendant's "winky." N.S. also said defendant placed his hand inside N.S.'s pants and touched N.S.'s "winky." N.S. also said this happened in the bathroom at the breadline.

¶ 14 After N.S. told her this, she testified she immediately called N.S.'s father, who then came home. N.S.'s father called the police the next day. She testified they did not call the police immediately because they wanted to make sure N.S. was not lying to them. N.S. was interviewed at the Center on April 17, 2008.

¶ 15 N.S.'s mother also testified about an incident a couple of months before N.S. told her about defendant's inappropriate contact. She testified she was in the kitchen doing dishes and N.S. and defendant were in N.S.'s bedroom. She walked by the bedroom and saw N.S. spitting on the floor. Defendant told N.S. not to spit on the floor. When she asked N.S. what he was spitting, he said some nasty food. She told N.S. to spit into the garbage. After N.S. spit into a grocery sack, defendant asked if he could have that particular bag so he could clean out his truck. N.S.'s mother testified she tried to give him an unused bag, but he insisted on having the one N.S. spit into. Defendant then offered to take her garbage out. He had never taken her garbage out before that day.

¶ 16 N.S.'s mother testified N.S. became very angry as the trial approached. He had issues at school because of his anger. She identified defendant as Michael Refine.

¶ 17 The State also introduced a recording of an interview between Tracy Pearson, a forensic interviewer for the Center, and N.S. In that interview, N.S. stated Michael touched his "pee-pee" under his clothes. N.S. said this happened in a chair at N.S.'s house. He also said

Michael touched his "pee-pee" in Michael's truck. In addition, N.S. said Michael made N.S. put his mouth on Michael's "pee-pee" by placing his hand on N.S.'s back. He said the "pee" that came out of Michael's "pee-pee" was different than what goes in the toilet. He told Pearson it was the color of a white piece of paper, came out more than one time, and tasted nasty.

¶ 18 After the video was played for the jury, defendant moved for a directed verdict, arguing the evidence was insufficient to establish a *prima facie* case because N.S. was not able to identify defendant as the person who abused him. The trial court denied this motion.

¶ 19 Robert Oney, a private investigator, testified for the defense. He testified he was present for an examination of defendant by Dr. Rebecca Findlay. He testified he took pictures of defendant's genitals. Oney testified he could not observe defendant's penis when defendant was sitting on an examination table. Oney also testified he took pictures of defendant's Chevrolet S-10 pick-up truck. Oney testified the truck had a bench seat that did not recline. Oney was not allowed to testify as to his observations of the examinations of defendant done by Dr. Kohler and Dr. Findlay.

¶ 20 Defendant testified he considered N.S.'s mother his daughter and N.S. his grandson. He married N.S.'s maternal grandmother when N.S.'s mother was a small child. His marriage began to suffer prior to N.S.'s birth because he was unable to have sex. Approximately two weeks after N.S.'s birth, his wife moved to Las Vegas. They were divorced not long after she moved to Las Vegas. He stayed in contact with N.S.'s mother and her sister.

¶ 21 When N.S. started to attend school, defendant frequently visited with N.S.'s family. He testified he picked N.S. up from the bus stop on occasion. According to his testimony, the bus stop was only half a block from N.S.'s house. He testified he sometimes

stayed at the house to visit after he brought N.S. home. Defendant stated he always took N.S. directly home from the bus stop. On occasion he would ask N.S.'s mother if he could take N.S. to the breadline but did not specifically recall N.S. going to the bathroom at the breadline. According to his testimony, he would not have gone into the restroom with N.S. because he was old enough to go to the restroom by himself. Defendant testified he was never alone with N.S. in N.S.'s bedroom and the bedroom door was always open.

¶ 22 According to defendant, he had not had an erection or ejaculated since 2004. He testified he could not access his own penis in a standing position. According to his testimony, he had to urinate sitting down. In addition, defendant testified he had problems with his legs and problems walking long distances. He also testified he did not remember ever offering to take out the trash at N.S.'s house. He denied exposing his penis to N.S., causing N.S. to touch his penis, touching N.S.'s penis, or causing N.S.'s mouth to have any contact with his penis.

¶ 23 Defendant also testified neither N.S. nor his parents had any reason to make up lies about him.

¶ 24 Defendant called Dr. Rebecca Findlay, a board-certified pediatrician, as an expert witness. The trial court found her qualified to testify as a physician but found nothing demonstrated she was an expert in the area of male reproductive matters. Defendant was a friend of Dr. Findlay's family, and she wrote a letter to defense counsel offering to perform an examination of defendant's genitalia. Dr. Findlay testified she examined defendant. When defendant was lying down, she was only able to expose his penis from the suprapubic fat pad after multiple attempts and defendant's assistance. She measured defendant's penis while he was in a lying position. His stretched flaccid penis was 2 1/2 inches. She testified the penis was not

visible when he was in a seated position. Based on the measurement of defendant's penis, she diagnosed him with micropenis. Because of his physical condition, she testified it would be difficult for defendant to ejaculate, extremely difficult for a person to extract defendant's penis from the fat pad while he was seated, and medically improbable he could ejaculate into a child's mouth. She testified she did not examine defendant in a standing position. As a result, she stated she had no testimony to offer as to what defendant could do or could not do in a standing position. She conceded a diagnosis whether defendant could get an erection or the time it would take him to get an erection was outside of the scope of her expertise. She stated she was not aware an erection was not needed to ejaculate. She also admitted if a middle-aged man came to her office with complaints of erectile dysfunction or penile length, she would not treat him but would refer him to a urologist.

¶ 25 Dr. Tobias Kohler, a urologist, testified for the State as a rebuttal witness. Dr. Kohler testified he attended medical school at the University of Minnesota, has a master's degree in epedemiology (thesis in sexual dysfunction), and served a urology residency in Minnesota for five years and then a fellowship at Northwestern in the area of sexual dysfunction, male fertility, and low testosterone. The trial court certified Dr. Kohler as an expert in sexual function and dysfunction in men without objection.

¶ 26 Dr. Kohler testified part of his exam was to look at the length of defendant's penis and determine how easily it could be delivered from defendant's suprapubic fat. He also testified he examined defendant's testicles. Dr. Kohler stated defendant's testicles were smaller than normal, which can be a sign of low testosterone. He testified defendant had a normal-sized penis. Dr. Kohler also testified oral sex could be performed on defendant.

¶ 27 According to Dr. Kohler's testimony, defendant had low testosterone levels. However, men with low testosterone levels can still have sex and the desire to have sex. Dr. Kohler also testified a man can ejaculate without having an erection. Further, he stated the ability to ejaculate does not have anything to do with low testosterone. Based on his exam of defendant and the other information he collected, Dr. Kohler testified he found no reason to think defendant would have any difficulty ejaculating. In addition, Dr. Kohler testified the term micropenis is not used with regard to adults, only children.

¶ 28 Dr. Kohler testified defendant's penis was "somewhat buried" by his suprapubic fat, which is the layer of fat that covers the pubic area. Dr. Kohler testified he was able to "deliver" defendant's penis from the suprapubic fat. Dr. Kohler stated just because a man's penis might have to be delivered from his suprapubic fat does not mean he could not have sexual intercourse. Dr. Kohler noted many obese people in the United States still have intercourse and children without problem. Dr. Kohler testified the easiest position from which to deliver defendant's penis was when he was lying down. It was slightly more difficult when defendant was standing.

¶ 29 Dr. Kohler testified he gave defendant an injection to simulate an erection to establish defendant's true penile length with a full erection, to determine where the penis would be in relation to the suprapubic fat, and to determine how difficult it would be to access. According to Dr. Kohler, defendant achieved an erection within 10 or 15 minutes of the injection.

¶ 30 In response to Dr. Findlay's statement in her medical report that it would be next to impossible for a small child to fondle defendant's penis when he was in a seated position, Dr.

Kohler testified it would not be "next to impossible." Dr. Kohler stated it would be "quite easy to fondle the patient's genitalia, the scrotum, the foreskin where the penis starts[,] in any position, because as you can see from the pictures, the scrotum is quite easy to get to." Dr. Kohler testified getting to defendant's penis when he was sitting in a completely upright position could be difficult, but if defendant was able to recline a little, spread his legs a little, and apply suprapubic pressure, defendant's penis would be accessible.

¶ 31 Dr. Kohler also testified he disagreed with Dr. Findlay's statement in her medical report it was medically improbable defendant was able to ejaculate into N.S.'s mouth in the short amount of time they were unsupervised. According to Dr. Kohler, he believed this was based on Dr. Findlay's incorrect assumption a person who cannot achieve an erection cannot ejaculate. Dr. Kohler testified the average time for men to ejaculate during intercourse was about four minutes under normal circumstances. In men who have not ejaculated in a while, it is possible ejaculation can occur much quicker.

¶ 32 Dr. Kohler stated in his opinion it was not medically improbable for defendant to put his penis in contact with and ejaculate into N.S.'s mouth.

¶ 33 Robert Oney testified again, disputing Dr. Kohler's testimony regarding the amount of time that passed between Dr. Kohler injecting defendant's penis and Dr. Kohler returning to check whether defendant had achieved an erection. According to Oney, Dr. Kohler performed the injection at 10:07 a.m. and returned to the exam room at 10:35 a.m.

¶ 34 The jury found defendant guilty on all three counts. The trial court sentenced defendant to 12 years in prison on the predatory-criminal-sexual-assault charge and 5 years on each count of aggravated criminal sexual abuse. The court ordered the sentences to run

consecutively.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 A. Sufficiency of the Evidence

¶ 38 Defendant argues the State failed to prove him guilty of predatory criminal sexual assault. According to defendant, the evidence established it was highly improbable he could have forced N.S. to perform oral sex on him because of his obesity and other medical conditions.

¶ 39 When a defendant challenges the sufficiency of the evidence used to convict him, this court must determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt when the evidence is viewed in a light most favorable to the State. *People v. Ehlert*, 211 Ill. 2d 192, 202, 811 N.E.2d 620, 625 (2004). The State alleged defendant committed predatory criminal sexual assault by placing his penis in N.S.'s mouth. Pursuant to the appropriate standard of review, the State presented sufficient evidence to convict defendant of predatory criminal sexual assault.

¶ 40 N.S.'s mother testified N.S. told her in April 2008 defendant had touched N.S.'s private parts and made N.S. touch his private parts. N.S.'s mother testified as to another event occurring a couple of months before N.S. revealed the inappropriate touching. On that occasion, N.S.'s mother was in the kitchen, and N.S. and defendant were in a bedroom. N.S. spit on the floor. She asked N.S. what he was spitting and he said "nasty food." She told N.S. to spit in a grocery sack. After N.S. spit in the sack, defendant asked if he could use that sack to clean out his truck. Defendant then offered to take the sack out to the garbage and did so. N.S.'s mother testified defendant had never taken the garbage out before.

¶ 41 The State presented as evidence N.S.'s recorded interview in which N.S. stated defendant placed his penis in N.S.'s mouth and "pee" came out. N.S. said the "pee" tasted nasty. When asked to point at something the color of the "pee," N.S. pointed at a sheet of white paper. N.S. stated this occurred both in defendant's truck after defendant picked N.S. up at the bus stop and where N.S. lived. N.S. stated he spit the pee out in the garbage. When N.S. testified at the trial, he said his mouth had never touched any part of Michael.

¶ 42 According to defendant's brief, "The allegations that N.S. was forced to perform oral sex in a vehicle or in a living room might normally be plausible[, but the] evidence in this case *** establishes the former was impossible and the latter highly improbable." Defendant argues: "Simply put, [defendant's] morbid obesity made it impossible for him to place his penis in N.S.'s mouth in the cab of his pickup, where there was insufficient room, or to do so in N.S.'s living room, where there would have been insufficient time."

¶ 43 Defendant points to Dr. Kohler's testimony that accessing defendant's penis when he was in a seated position was more difficult than when defendant was lying down or standing. Dr. Kohler testified to access defendant's penis when defendant was sitting required lifting the abdominal fat out of the way and then applying pressure to the suprapubic fat pad to cause defendant's penis to pop out. Dr. Kohler testified "the penis was very difficult to retrieve, despite suprapubic pressure maneuvers" when defendant was sitting.

¶ 44 According to defendant's brief, defendant could only sit up in the cab of his truck, which is the most difficult position for him to access his penis.

¶ 45 We find a rational trier of fact could have found it physically possible for defendant to place his penis in N.S.'s mouth in either defendant's truck or at N.S.'s home. Dr.

Kohler testified defendant's penis was "a normal length and average size." He also testified a person with low testosterone can still have sexual desire and the ability to ejaculate. In addition, Dr. Kohler testified the ability to ejaculate is "completely independent" of the ability to have an erection. Further, Dr. Kohler testified he believed defendant's genitals appeared normal when compared to persons of similar weight. According to Dr. Kohler, defendant would be able to access his own penis.

¶ 46 Dr. Kohler also stated defendant may have had difficulty getting to his penis if he was in a completely upright position, but if he reclined a "little bit," spread his legs a "little bit," and applied suprapubic pressure, he could access his penis. In addition, Dr. Kohler testified it was not medically improbable for defendant to be able to ejaculate into a child's mouth in a short amount of time.

¶ 47 The State argues in its brief "[e]ither in the truck or in the home, mouth-to-penis contact, however slight, was not so impossible to accomplish such that any reasonable doubt of guilt would remain." We agree.

¶ 48 A rational trier of fact could have found the State proved defendant guilty beyond a reasonable doubt. It is true N.S.'s trial testimony and his taped interview conflict with regard to whether defendant placed his penis in N.S.'s mouth. However, in *People v. Lara*, 2011 IL App (4th) 080983, ¶ 55, 958 N.E.2d 719, 730, this court stated:

> "As for the alleged inconsistencies and contradictions, the jury obviously found her statements regarding the alleged conduct credible. It is not the function of this court to second-guess the credibility determinations of the trier of fact unless we determine

> no reasonable jury could have come to that same conclusion. As our supreme court has stated, 'it is for the fact finder to judge how flaws in part of the testimony affect the credibility of the whole' as long as its judgment is reasonable in light of the record." *Lara*, 2011 IL App (4th) 080983, ¶ 57, 958 N.E.2d at 730 (quoting *People v. Cunningham*, 212 Ill. 2d 274, 283, 818 N.E.2d 304, 310 (2004)).

Here, as in *Lara*, the victim's taped statements were made close in time to the incident, whereas the trial testimony was given years later. A rational trier of fact could easily conclude a child's statement close in time to the incident was more accurate than one made years later.

¶ 49 B. N.S.'s Videotaped Statement

¶ 50 Defendant next argues N.S.'s testimony at trial did not establish the elements of predatory criminal sexual assault or one of the aggravated-criminal-sexual-abuse charges. At trial, N.S. testified he had never touched Michael's penis and denied Michael placed his penis in N.S.'s mouth. He also testified he did not remember anything coming out of Michael's penis. However, he testified defendant touched his privates. N.S. also answered all the questions he was asked on cross-examination.

¶ 51 Citing *People v. Kitch*, 239 Ill. 2d 452, 942 N.E.2d 1235 (2011), defendant argues N.S. was not available for cross-examination because he did not testify to every element of the charges against defendant and, therefore, his right to confront the witnesses against him was violated. In addition, citing *People v. Learn*, 396 Ill. App. 3d 891, 919 N.E.2d 1042 (2009), defendant argues "[b]ecause N.S. did not describe all of the elements of all of the offenses, his

out of court statements were also inadmissible" under section 115-10 of the Procedure Code (725 ILCS 5/115-10 (West 2010)).

¶ 52 We first address defendant's argument these statements are not admissible pursuant to section 115-10 of the Procedure Code (725 ILCS 5/115-10 (West 2010)), which allows out-of-court statements by children if, after a hearing outside the presence of the jury, the trial court finds (1) the time, content, and circumstances of the statement provide sufficient safeguards of reliability and (2) the child either testifies at the proceeding or is unavailable as a witness and corroborative evidence of the subject of the hearsay statement exists. According to defendant:

> "Pursuant to *Kitch* and *Learn*, the out of court statements of a declarant are inadmissible, barred by [s]ection 115-10 and the confrontation clause, if the declarant does not describe the elements of the offenses with which the defendant is charged during the declarant's testimony. Because N.S. denied that two of the three charged crimes occurred, all of his out of court statements concerning those crimes were improperly admitted."

In *People v. Lara*, 2011 IL App (4th) 080983, 958 N.E.2d 719, which was decided after the briefs in this case were filed, this court rejected that argument, stating: "we do not interpret our supreme court's decision in *Kitch* to require a victim to testify to every element of a charged offense before evidence of her hearsay statements can be admitted pursuant to section 115-10 of the Code." *Lara*, 2011 IL App (4th) 080983, ¶ 52, 958 N.E.2d at 729.

¶ 53 As for defendant's argument the admission of the hearsay statements violated the

confrontation clause, we disagree. In *Kitch*, our supreme court stated "the confrontation clause poses no restrictions on the admission of hearsay testimony if the declarant testifies at trial and is present 'to defend or explain' that testimony." *Kitch*, 239 Ill. 2d at 467, 942 N.E.2d at 1244. The United States Supreme Court stated in *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004) "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. *** The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." In determining whether an individual has appeared for cross-examination at trial within the meaning of *Crawford* and the confrontation clause, this court has stated the key inquiry is whether the individual was present for cross-examination and answered questions asked of him by defense counsel. *Lara*, 2011 IL App (4th) 080983, ¶ 48, 958 N.E.2d at 728. In this case, N.S. was present for cross-examination and answered all questions asked of him by defense counsel.

¶ 54 C. Jury Instruction

¶ 55 Defendant next argues he is entitled to a new trial on the aggravated-criminal-sexual-abuse charges because of the way the jury was instructed on those charges. According to defendant, the elements instructions for these charges did not comply with the Illinois Pattern instructions because they did not include the following concluding paragraphs:

> "If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a

reasonable doubt, you should find the defendant not guilty."

Illinois Pattern Jury Instructions, Criminal, No. 11.62A (4th ed. 2000).

Defendant cites our supreme court's decision in *People v. Williams*, 181 Ill. 2d 297, 318, 692 N.E.2d 1109, 1121 (1998), for the proposition it is the trial court's burden to insure the jury is given the essential instructions as to the elements of the crime charged, the presumption of innocence, and who bears the burden of proof.

¶ 56 Defendant forfeited this claim by failing to make a contemporaneous objection and by failing to include it in a posttrial motion. In fact, during the jury instruction conference, defense counsel stated he had no objection to this instruction. However, defendant claims the court's failure to give the entire jury instruction constitutes plain error.

¶ 57 The State does not attempt to argue the court did not err in the way it gave this jury instruction. However, the State argues it clearly does not amount to plain error. Our supreme court has stated an omission from a jury instruction is plain error only when the omission "creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *People v. Hopp*, 209 Ill. 2d 1, 8, 805 N.E.2d 1190, 1194 (2004).

¶ 58 The trial court's omission of the last two paragraphs of this jury instruction did not create a serious risk the jurors might have incorrectly convicted defendant based on a misunderstanding of the applicable law. The trial court instructed the jury as follows:

"To sustain the charge of aggravated criminal sexual abuse, the State must prove the following propositions:

> First, that the Defendant committed an act of sexual conduct with N.S.
>
> Second, that the Defendant was seventeen years of age of [*sic*] older, and
>
> Third, that N.S. was under thirteen years of age when the act was committed."

The written instruction submitted to the jury was substantively identical to the court's oral instruction.

¶ 59 The instruction clearly informed the jury they had to find the State proved all three of the propositions. Further, the only factor in dispute was whether defendant committed an act of sexual conduct with N.S. In addition, the trial court instructed the jury:

> "The Defendant is presumed to be innocent of the charges against him. This presumption remains with the Defendant throughout every state of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he's guilty.
>
> The State has the burden of proving the guilt of the Defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The Defendant is not required to prove his innocence."

The instruction in question was incorrect but did not rise to the level of plain error.

¶ 60 D. Testimony of Investigator Robert Oney

¶ 61 Defendant's final argument is the trial court abused its discretion in not allowing his investigator to testify regarding his observations of Dr. Kohler's examination. After the State objected to the investigator testifying as to what he observed during Dr. Kohler's examination, the court and defense counsel had the following exchange:

> "[DEFENSE COUNSEL]: He is not a doctor, and I'm not going to ask him for his medical conclusions.
>
> [TRIAL COURT]: What where [*sic*] you going to ask him?
>
> [DEFENSE COUNSEL]: I am simply going to ask him what he observed.
>
> [TRIAL COURT]: How is that going to be helpful?
>
> [DEFENSE COUNSEL]: Because it involves the efforts that it took to expose, if you will, [defendant's] penis.
>
> [TRIAL COURT]: Can't you ask the doctor about that?
>
> [DEFENSE COUNSEL]: Well, he—and the reason that this report from Mr. Oney is late is because he had an opportunity once we got Dr. Kohler's report to review that, and in some cases what Dr. Kohler will testify to is not medically, but with respect to the physical aspects of getting—
>
> [TRIAL COURT]: Do you have a case for me that it is appropriate, otherwise it is out?
>
> [DEFENSE COUNSEL]: Well, Judge, there is no case. I can't imagine that there is a case that is along these lines. I am

simply asking Mr. Oney to testify as to what he observed, and that's why he was there, otherwise there would be no purpose for him to be there.

[ASSISTANT STATE'S ATTORNEY]: And your Honor, I mean for him — if — if there was something that was said that he contradicts that it wasn't said or was said differently, but everything in terms of conversation is exactly the same as Dr. Kohler's, so the only thing he could testify to was he thought it was hard for the doctor to expose the penis.

[TRIAL COURT]: You get me some authority. You can use it only if I have that. [If not, i]t is out."

¶ 62 The next day, the investigator was allowed to testify he took pictures of defendant during the examination performed by Dr. Findlay. However, pursuant to the trial court's ruling from the day before, the investigator did not testify regarding his observations of Dr. Kohler's or Dr. Findlay's examinations. After Oney testified, the following exchange occurred outside the presence of the jury:

"[TRIAL COURT]: All right, and just so it is clear, when Agent or when Mr. Oney testified, you could have asked him about the photographs and what was in them and what they showed, I'm not going to preclude you from doing that, but I didn't want you to talk about his general observations at that point when we know the doctor's going to testify.

[DEFENSE COUNSEL]: Well, I may recall him one way or another then.

[TRIAL COURT]: I would hope the doctor would testify about what's in the photographs as well.

[DEFENSE COUNSEL]: She certainly will.

[TRIAL COURT]: In my opinion we only need to hear it twice, once from each doctor, I don't know."

¶ 63 As the trial court correctly predicted, defense counsel had every opportunity to ask Dr. Kohler about the difficulty and amount of time it took to expose defendant's penis. He also was able to ask Dr. Kohler about the characteristics of defendant's erection and whether the appearance of defendant's erection was much different than the appearance of defendant's flaccid penis during the exam. Some of defense counsel's questions elicited information pertinent to these questions. For example, Dr. Kohler testified the length of defendant's erect penis was not much longer than the length of defendant's stretched flaccid penis.

¶ 64 Further, the following exchange occurred regarding the ability to retrieve defendant's erection from his suprapubic fat.

"[DEFENSE COUNSEL]: All right, now I just have a few more questions. As I understand your testimony, the length of Mr. Refine's penis, whether it be—well, let's just limit it to the erect length is somewhere, you eyeballed it to be seven to ten centimeters?

[DR. KOHLER]: Correct, that's beyond the suprapubic fat.

[DEFENSE COUNSEL]: Right, and perhaps as much as half of that was covered with suprapubic fat?

[DR. KOHLER]: Right.

[DEFENSE COUNSEL]: And so—and the rest of it was covered with other body fat, we will just put it that way?

[DR. KOHLER]: Okay.

[DEFENSE COUNSEL]: Is that correct?

[DR. KOHLER]: Uh-huh.

[DEFENSE COUNSEL]: All right, and how much of it was covered with the other body fat depended in part on whether he was lying down, sitting or standing?

[DR. KOHLER]: The most difficult—the most difficult position to deliver the penis was sitting.

[DEFENSE COUNSEL]: Was sitting?

[DR. KOHLER]: The easiest was lying down and kind of intermediate was standing.

[DEFENSE COUNSEL]: So let's just limit it to sitting, because, as you know from reading the reports, which I didn't realize you had read, that's when he is accused of having, I won't use the word forced, I will use the word having caused a child to engage in oral sex, correct?

[DR. KOHLER]: Correct.

[DEFENSE COUNSEL]: All right, so in the sitting position, according to your report, the penis was very difficult to retrieve, despite suprapubic pressure maneuvers. After erection inducted penis buried, but was palpable one inch proximal to expected location, remained difficult to deliver despite maneuvers?

[DR. KOHLER]: Uh-huh.

[DEFENSE COUNSEL]: Correct? All right, so what's that—what that means is, put in layman's terminology, is in a sitting position, his erect penis was buried?

[DR. KOHLER]: Uh-huh.

[DEFENSE COUNSEL]: And it was difficult to deliver, in other words, you had to put a relatively large amount of pressure on the area around his erect penis in order to even get it to be visible?

[DR. KOHLER]: Correct.

[DEFENSE COUNSEL]: You did say it was palpable one inch proximal to the expected location?

[DR. KOHLER]: Uh-huh.

[DEFENSE COUNSEL]: In other words, where you would expect to see it come out, palpable means you could feel it?

[DR. KOHLER]: Yes.

[DEFENSE COUNSEL]: But you couldn't see it, and it

wasn't exposed?

[DR. KOHLER]: Correct.

[DEFENSE COUNSEL]: All right, and that was even true despite the maneuvers and the pressure placed on the pubic region?

[DR. KOHLER]: Right."

This testimony essentially covered the information about which defendant wanted his investigator to testify regarding the investigator's observations of Dr. Kohler's exam.

¶ 65 On appeal, defendant argues the trial court abused its discretion because his investigator should have been allowed to testify (1) it took Dr. Kohler "a couple of minutes" to extract defendant's penis while defendant was seated and (2) defendant's penis did not appear to be erect. We disagree. The investigator's proposed testimony regarding the time it took to extract defendant's penis did not conflict with Dr. Kohler's testimony. Further, defense counsel could have easily asked Dr. Kohler how many minutes it took to extract defendant's penis.

¶ 66 As for any statements by the investigator regarding whether defendant's penis became erect or remained flaccid after the injection, defendant argues "[a]dults, such as Mr. Oney, are in general accustomed to and capable of determining whether a penis is erect." This might be the case if the defendant was a normal-sized man. However, the parties do not dispute defendant is not a normal-sized man. In fact, defendant based most of his defense on his abnormal physical condition.

¶ 67 Dr. Kohler testified the size of defendant's erect penis was not much different than the size of defendant's penis when it was flaccid. In addition, it appears from Dr. Kohler's testimony he felt defendant's erect penis through the suprapubic fat pad. Defendant's investigator

never claimed to have felt defendant's penis.

¶ 68 After Dr. Kohler testified, the trial court allowed defendant's investigator to testify regarding the amount of time Dr. Kohler was outside of the examination room after injecting defendant's penis. The court found this was relevant because it potentially impeached Dr. Kohler's testimony.

¶ 69 Based on the record in this case, the trial court did not abuse its discretion in limiting defendant's investigator's testimony. In determining whether a trial court abused its discretion, the question for an appellate court is not whether the appellate court agrees with the trial court's decision. Instead, the appellate court looks to whether the trial court acted arbitrarily or unreasonably when the circumstances of the case are considered, resulting in substantial prejudice. *Petryshyn v. Slotky*, 387 Ill. App. 3d 1112, 1116, 902 N.E.2d 709, 712 (2008). We cannot say the trial court's ruling was arbitrary or unreasonable considering the circumstances of this case because the investigator's proposed testimony was merely cumulative to and not discordant with Dr. Kohler's testimony.

¶ 70 III. CONCLUSION

¶ 71 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 72 Affirmed.