

NOTICE

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2015 IL App (4th) 140307-U
NOS. 4-14-0307, 4-14-0308 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 12, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
MICHAEL J. CONNOR,	)	Nos. 11CF262
Defendant-Appellant.	)	11CF263
	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Pope and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* Based on the facts of this case, the trial court's evidentiary rulings were not erroneous, the State's evidence was sufficient for the trial court to find defendant guilty beyond a reasonable doubt, and the trial court's oral findings did not show it shifted the burden of proof or created a fatal variance between the information and the trial evidence.

¶ 2 After a lengthy joint trial in summer 2013, the Livingston County circuit court found defendant, Michael J. Connor, guilty of predatory criminal sexual assault of both Z.T. (case No. 11-CF-262 (hereinafter, Z.T.'s case)), and La. C. (case No. 11-CF-263 (hereinafter, La. C.'s case)). Defendant filed several posttrial motions. At an April 2014 hearing, the court denied defendant's pending posttrial motions and sentenced him to consecutive prison terms of 30 years in Z.T.'s case and natural life in La. C.'s case. Defendant appeals, arguing (1) the trial court erred by (a) admitting the victims' hearsay statements under section 115-10 of the Code of Criminal

Procedure of 1963 (Procedure Code) (725 ILCS 5/115-10 (West 2008 and 2010)) and (b) considering such statements as substantive evidence of abuse; (2) the court erred by admitting entire medical publications into evidence and considering them as substantive evidence; (3) the court abused its discretion by barring defendant from cross-examining Amanda Garcia, the victims' mother, about the money she owed defendant's mother, Sandra Connor; (4) the State's evidence was insufficient to prove him guilty beyond a reasonable doubt of all five of the charges; (5) the court improperly shifted the burden of proof to defendant; and (6) a fatal variance existed between the information in La. C.'s case and the evidence at trial, which exposed defendant to double jeopardy. We affirm.

¶ 3

I. BACKGROUND

¶ 4

Amanda and defendant were in a relationship from 2004 until 2010. At the time they started dating, Amanda's oldest daughter, Z.T. (born in 2003), was an infant; and defendant had two daughters, S.C. (born in 2000) and J.C. (born in 2001), from a prior marriage.

Defendant helped Amanda raise Z.T., and they had two daughters of their own, La. C. (born in 2004) and Le. C. (born in 2006). After Amanda and defendant's relationship ended, Amanda married Louis Garcia, and they had a son. Defendant dated Melissa Johnson and later Mirla

Revis. Amanda and defendant established their own visitation schedule, with defendant having

Z.T., La. C., and Le. C. every weekend. At some point, defendant stopped taking Z.T. for

visitation. Then, in August 2011, Amanda took La. C. to a counselor, who asked Amanda if she

thought La. C. had been sexually abused. Amanda told the counselor she did not think so, but,

later that day, she asked Z.T. about a statement she had made about defendant when Z.T. was

younger. Z.T. recounted the same allegation with more detail, and Amanda called the police on

the evening of August 16, 2011, to report Z.T.'s statements about defendant's actions. On August

25, 2011, Ellen Joann Sipes of the Children's Advocacy Center interviewed Z.T., La. C., and Le. C.

¶ 5 Four days after Sipes's interviews, the State filed charges against defendant. In Z.T.'s case, the State charged defendant with three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006 and 2008)), asserting defendant knowingly placed his penis in Z.T.'s vagina (count I), anus (count II), and mouth (count III) during the period of March 21, 2008, through March 20, 2009. In La. C.'s case, the State charged defendant with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010) (both versions of the statute are applicable)), which alleged defendant knowingly placed his penis in La. C.'s vagina (count I) and mouth (count II) during the period of August 26, 2010, through August 25, 2011.

¶ 6 In December 2011, the State filed a motion *in limine* to admit hearsay evidence under section 115-10 of the Procedure Code (725 ILCS 5/115-10 (West 2008 and 2010)). The evidence sought to be admitted was Z.T.'s statement to Amanda and Z.T.'s and La. C.'s statements to Sipes. In January 2012, the trial court commenced a hearing on the State's motion *in limine*. The State presented the testimony of Amanda and Sipes as well as the digital video discs (DVDs) of Sipes's interview of Z.T. (38 minutes) and La. C. (45 minutes). Defendant did not present any evidence.

¶ 7 Amanda testified that, when Z.T. was five years old, she came into the kitchen and stated, "Daddy put his peepee in her peepee." Amanda explained she had just gotten off of work and had walked in the door when Z.T. made the statement. At the time, Z.T. called defendant "daddy." In Z.T.'s presence, Amanda confronted defendant. Defendant responded he did not know what Z.T. was talking about and denied doing it. Z.T. calmly persisted in her

claim. Amanda did not believe Z.T. because she thought defendant was a good father. Amanda also stated Z.T. told little lies, like blaming things on her sisters, but denied Z.T. told big lies. After the talk with defendant, Z.T. never brought up her assertion again.

¶ 8 After La. C.'s August 2011 counseling session, and once the other children were not around, Amanda asked Z.T., who was then eight years old, if she remembered what she had told Amanda that defendant had done a long time ago. According to Amanda, Z.T. replied, "Michael put his peepee in her peepee." Z.T. also mentioned to Amanda it hurt really badly, she had asked defendant to stop, and defendant also put his peepee in her mouth. Z.T. also "motioned the jerking off motion" and noted "white stuff" came out. Amanda denied asking Z.T. any leading questions.

¶ 9 Sipes, a forensic interviewer, explained a protocol existed for interviewing children, on which she had a great deal of training. She explained how the interviews were recorded and testified the DVDs were a fair and accurate description of her interviews of Z.T. and La. C. Sipes denied using leading questions with the victims. Sipes also stated she did not think Z.T. and La. C. were hiding anything from her. Additionally, Sipes testified she did not find anything wrong with the Z.T.'s or La. C.'s demeanor.

¶ 10 The DVDs of the interviews are lengthy, and the parties are familiar with the statements made on them. For the understandability of our order, we note that, before both of the victims disclosed the sexual abuse, Sipes had them name the body parts on a body diagram and then asked them about places where it was not okay to touch. Z.T. described one incident, during which defendant put his peepee in her peepee, mouth, and anus. Z.T. stated defendant was wearing Coca-Cola pajamas at the time. La. C. stated defendant had put his peepee in her peepee and mouth more than one time. La. C. also noted defendant had rubbed her peepee with

his hand.

¶ 11 On March 28, 2012, the trial court resumed the section 115-10 hearing.

Defendant's only argument was a general one that the statements did not meet the requirements of the section. After hearing the parties' arguments, the court ruled Z.T.'s statement to Amanda and the victims' statements to Sipes were admissible under section 115-10 of the Procedure Code.

¶ 12 On June 11, 2013, the trial court commenced defendant's bench trial. The State presented the testimony of Amanda; Z.T.; La. C.; Sipes; and Maureen Hofmann, an advanced practice nurse with the Pediatric Resource Center. The State also played the DVDs of Sipes's interviews of Z.T. and La. C. and presented defendant's birth certificate. Defendant testified on his own behalf and presented the testimony of Dr. Theodore Hariton, a forensic gynecologist; Leland Brooke, a Livingston County sheriff's deputy; Amanda; Johnson; and Sandra. Defendant also presented two photographs of him with all five of the girls and one photograph of him and Amanda's three daughters. During the State's cross-examination of Dr. Hariton, the State presented Dr. Hariton's report, as well as two full articles from medical journals and two pages from a medical textbook, all of which were authored by some of the experts that Dr. Hariton referred to in his report. The trial court admitted the complete report and articles for impeachment purposes only. Last, in rebuttal, the State presented for impeachment purposes defendant's 2010 conviction for deceptive practices. We will only set forth the basic facts necessary to understand this order.

¶ 13 Amanda again testified about Z.T.'s statements when she was 5 or 6 (2008 or 2009) and the later ones in August 2011, after La. C.'s counseling appointment. As to Z.T.'s initial statement, Amanda testified she never found any evidence of blood from Z.T. after Z.T.'s

statement. With regard to the second statement, Amanda explained the reason she took La. C. to the counselor in the summer of 2011 was La. C. had expressed wanting to kill Louis and fearing everyone was going to die. On cross-examination, Amanda admitted things were not good between her and defendant in August 2011. At that time, defendant had indicated he was going to hire a lawyer. Moreover, Amanda had texted defendant several times on August 12, urging defendant to give up his parental rights. Around the same time, she told him the kids would be better off without him. Amanda also admitted she had asked defendant several times if she could move the kids to Texas, so her husband could work for the border patrol, and defendant had refused. Additionally, Amanda did talk with defendant's mother, Sandra, after her conversation with Z.T., but she did not recall if that was before or after she called the police. Last, Amanda admitted that, sometime after she talked with Z.T. on the evening she called the police, she discussed with Sandra "the police" and that the matter just involved Z.T.

¶ 14 During her testimony, Z.T. testified she stopped seeing defendant "[b]ecause he raped me." She explained that meant he put his peepee in her peepee and anus. She also mentioned he put his peepee in her mouth and white stuff came out. Z.T. did not notice any blood after the incident. For the first time, Z.T. mentioned a second incident that happened on a chair and involved defendant putting his peepee in her peepee. Z.T. also stated she was crying when she initially told her mother about the incident.

¶ 15 La. C. testified she stopped seeing defendant because he did "bad stuff" to her, specifically "ucky stuff." She explained that meant "he put his pee pee in [her] pee pee and his pee pee in [her] butt." La. C. also testified defendant put his peepee in her mouth, "white stuff" came out, and she tried to spit it out. She said it happened a lot. It started happening when she was no longer living with defendant, and she was "[s]ix, five, seven." La. C. did not notice any

blood after the incidents.

¶ 16 The State moved to have Hofmann, who performed physical exams on the victims, certified to testify as an expert in the field of child sexual abuse. Defense counsel did not object, and the trial court certified her. On November 9, 2011, Hofmann examined both Z.T. and La. C., and they both had normal physical exams. Hofmann testified having a normal physical exam did not exclude the possibility of abuse. For girls with a history of sexual abuse, 95% of the time the exam is normal. Hofmann noted "many larger studies" have found a minimal chance of detecting any type of injury 72 hours after the incident. The more time that passed between the sexual abuse and the examination, the less likely one would be to see any kind of injury. She also noted, "[t]here are numerous studies that are out there that support that the history that's provided by the child in relationship to child sexual abuse is of utmost importance when trying to, you know, review the allegations that have been made."

¶ 17 In addition to Hofmann's physical exam, which included a colposcopy, laboratory tests were done. With the tests done at the initial visit, La. C. had a positive urine test for chlamydia, but her cultures were negative. Hofmann explained cultures are less sensitive, which meant it was less likely to detect the organism. La. C. was tested again on November 17, 2011, and both her urine and vaginal culture were positive for chlamydia. La. C.'s rectal culture was negative. Hofmann also testified no documented cases exist of a child getting chlamydia from the birth process and still having it at age six. In her experience and training, the only other way one can contract chlamydia is through sexual contact. Hofmann also explained chlamydia is treated by azithromycin, the most commonly prescribed antibiotic. It is used to treat ear and sinus infections. About 30% of time in adults, the human immune system can clear the infection without the person even knowing they had it. In her medical opinion, La. C. was the victim of

sexual abuse because she tested positive for chlamydia.

¶ 18 Hofmann further explained that one would not necessarily expect bleeding with penile-vaginal penetration of a prepubescent girl because a lot of factors contribute to pain or bleeding. Moreover, the penis may have only penetrated the labia area or the anus, both of which can feel like vaginal penetration in young girls. With penetration past the hymen, bleeding would be more likely. She also testified a partial tear to the hymen can heal in a way that it looks like a normal variant in weeks or months after the tear. Complete tears of the hymen, which are a less common finding, do not necessarily heal.

¶ 19 Dr. Hariton testified he had reviewed the photographs from the victims' colposcopic exams and found no evidence of penile-vaginal penetration in either girl. He testified it would be unusual for a six-year-old girl to have no findings of sexual abuse after experiencing nonconsensual penile-vaginal penetration. With a partial tear of the hymen, one would see a notch or a cleft, and with a complete tear, one would still see the tear. Moreover, with penile-vaginal penetration, he would expect a history of bleeding, pain, and residual findings. Dr. Hariton also testified chlamydia was highly infectious but easily cured. He also testified it was "[h]ighly unlikely" for a six-year-old child to have chlamydia from birth.

¶ 20 The parties stipulated defendant tested negative for chlamydia on October 16, 2010.

¶ 21 Deputy Brooke spoke with Amanda on August 16, 2011, and Amanda reported Z.T. cried when reporting the abuse to her for the first time. Amanda also told him she had taken La. C. to a counselor because she was masturbating daily. Moreover, Amanda stated Z.T. reported the abuse happened twice, and the second time involved defendant putting his finger in her anus and vagina.

¶ 22 Amanda was also called to testify by defendant. She testified she talked with La. C. before calling the police, and La. C. denied being touched in a private area. Additionally, Amanda denied telling anyone she would do whatever it took to make sure defendant did not see the kids.

¶ 23 Johnson testified she lived with defendant from May to October 2010 and was at his house most of the time during that period due to two ruptured disks in her back. She also testified that, in spring 2011, she had a conversation with Amanda on Facebook, during which Amanda stated she would do whatever was necessary to make sure defendant did not see his kids.

¶ 24 Sandra testified the kids were always happy to see defendant and never displayed any fear of him. In June 2011, she and Amanda's mother got defendant and Amanda together at a park to work out their differences, as they were not getting along. Moreover, according to Sandra, defendant stopped having visitation with Z.T. in July 2011. Sandra also testified about a time when Z.T. was little and she had to instruct defendant on how to give her a suppository.

¶ 25 Defendant testified his and Amanda's relationship ended in May 2010. He testified about Amanda's demands to take the children to Texas and for him to give up his parental rights. Amanda also told him the children were better off not seeing him. Moreover, Amanda denied him visitation the weekend of August 12 through 14, 2011. According to defendant, he filed legal papers seeking visitation with the children a few days before his arrest.

¶ 26 Defendant denied having a conversation with Amanda and Z.T, wherein Z.T. accused him of putting his penis in her vagina. He also denied ever owning Coca-Cola pajamas. Furthermore, defendant denied ever sexually abusing Z.T. and La. C. He believed Amanda got the children to make the accusations.

¶ 27 On September 11, 2013, the parties gave their closing arguments, and two days later, the trial court made its decision, finding defendant guilty of all five charges. In rendering its judgment, the court made numerous findings in 18 pages of verbatim transcript.

¶ 28 In October 2013, the trial court gave defendant an extension to file his posttrial motions. The next month, in both cases, defendant filed a motion for a new trial, a motion for recusal of judge, and a motion for substitution of judge for cause. The latter two motions related to the fact the trial judge represented defendant's ex-wife, Shalan Connor, in the dissolution proceedings between Shalan and defendant (In re Marriage of Connor, No. 04-D-44 (Cir. Ct. Livingston Co.)). A different trial judge denied the latter two motions in January 2014. In the motion for a new trial in Z.T.'s case, defendant argued the evidence was insufficient to prove him guilty beyond a reasonable doubt and the trial court erred by (1) not disqualifying itself based on its representation of Shalan, (2) failing to admonish him that he was facing an imprisonment term of natural life, (3) admitting Z.T.'s out-of-court statements to Amanda and Sipes, (4) refusing to allow cross-examination of Amanda about owing Sandra money, (5) allowing Hofmann to testify as an expert, (6) allowing Hofmann to give an opinion without foundation and disclosure and to testify about large studies and not her personal experience, (7) allowing several improper comments by the prosecutor during closing arguments, and (8) referencing facts not in evidence during its oral findings. In La. C.'s case, the motion for a new trial added the following allegations of trial court error: (1) allowing La. C.'s statements to Sipes; (2) not striking the testimony of La. C. for lack of foundation; and (3) allowing Hofmann to testify about chlamydia in general, La. C.'s test results, and how La. C. contracted the disease. In both cases, defendant filed an April 2014 supplemental motion for a new trial, attaching a copy of Amanda's alleged Facebook page, which contained a post from the night of June 11, 2013, the first day of trial,

which stated, "i taught them well they knew the story!!!" Underneath that post, it stated, "Edited."

¶ 29 At a joint April 2, 2014, hearing, the trial court denied defendant's motions for a new trial and the supplemental motions and sentenced defendant to consecutive prison terms of 30 years in Z.T.'s case and natural life in La. C.'s case (see 720 ILCS 5/12-14.1(b)(1.2) (West 2010) (eff. until July 1, 2011); 720 ILCS 5/11-1.40(b)(1.2) (West 2010) (eff. July 1, 2011)). Under the one-act, one-crime rule, the court only sentenced defendant on the first count in each case. On April 10, 2014, in both cases, defendant filed a motion to reconsider his sentence, asserting the sentence was excessive and not consistent with the ends of justice. As to his sentence in La. C.'s case, defendant also argued the information did not state he was subject to natural life imprisonment, and the court never admonished him about natural life imprisonment. At an April 17, 2014, hearing, the court denied defendant's motions to reconsider his sentence.

¶ 30 On April 18, 2014, in both cases, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Feb. 6, 2013). In August 2014, defendant filed a motion to consolidate the appeals from the two cases, and this court allowed the motion. This court has jurisdiction of this consolidated appeal under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 31 II. ANALYSIS

¶ 32 A. Admissibility of the Victims' Hearsay Statements

¶ 33 Defendant argues the victims' hearsay statements should not have been admitted into evidence because they were (1) not reliable as required for admission under section 115-10 of the Procedure Code and (2) simply prior consistent statements. The State contends the statements were properly admitted.

¶ 34 Section 115-10 of the Procedure Code (735 ILCS 5/115-10 (West 2008 and 2010)) allows for the admission of a hearsay statement by a child victim who is under 13 under two scenarios: "(1) the court deems the statement reliable and the child testifies at trial (subsections (b)(1) and (b)(2)(A)); or (2) the child does not testify, the statement is deemed reliable, and the allegations of sexual abuse are independently corroborated (subsections (b)(1) and (b)(2)(B))." *People v. Kitch*, 239 Ill. 2d 452, 467, 942 N.E.2d 1235, 1244 (2011). This case involves the first scenario as both children testified at trial. "Reliability is judged based on the totality of the circumstances [citation], but relevant factors include consistent repetition, use of terminology unexpected of a child of similar age, and lack of motive to fabricate." *People v. Stechly*, 225 Ill. 2d 246, 313, 870 N.E.2d 333, 372 (2007). In addition, this court has recognized important factors include the child's spontaneity and mental state. *People v. Stull*, 2014 IL App (4th) 120704, ¶ 85, 5 N.E.3d 328.

¶ 35 Furthermore, this court has stated the following:

"As the proponent of the out-of-court statements sought to be admitted under section 115-10, the State bears the burden of establishing that the statements are reliable and not the result of adult prompting or manipulation. [Citation.] However, when the trial court finds that the State has met its burden, a reviewing court will not reverse that finding unless the record demonstrates that the court abused its discretion. [Citation.] An abuse of discretion occurs when the [court's] ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." (Internal quotation marks omitted.) *In re Brandon P.*, 2013

IL App (4th) 111022, ¶ 39, 992 N.E.2d 651 (quoting *People v.*

Sharp, 391 Ill. App. 3d 947, 955, 909 N.E.2d 971, 978 (2009)).

Moreover, in reviewing the trial court's ruling, "we do not focus on the evidence presented at trial, but instead, *only on the evidence presented at the pretrial hearing* concerning the reliability of the victim's hearsay statements." (Emphasis added.) *Stull*, 2014 IL App (4th) 120704, ¶ 85, 5 N.E.3d 328.

¶ 36

1. Reliability

¶ 37

As to Z.T.'s statements to Amanda, her initial statement about defendant putting his peepee in her peepee was spontaneous, stated in age-appropriate terms, and was not something a child that age would generally state. Amanda testified Z.T. did not make a similar statement about anyone else. Moreover, at that time, Z.T. had no motive to lie as she was around five years old and considered defendant her father. Amanda explained why she did not believe Z.T. at that time. Due to Amanda and defendant dismissing her statement, it is reasonable Z.T. would not bring up the incident again until it was raised by Amanda in response to a counselor's concerns about La. C. being sexually abused. In questioning Z.T. in 2011 about her prior statement, Amanda denied telling Z.T. what she had previously said about defendant, and Z.T. again stated defendant put his peepee in her peepee. Such language was consistent and age appropriate. When allowed to speak about the incident, Z.T. provided more information to Amanda, which included an age-appropriate description of oral sex and defendant ejaculating, as well as Z.T.'s physical pain during the incident.

¶ 38

Defendant asserts the timing of Z.T.'s second statement to Amanda is questionable and shows unreliability. However, according to the evidence at the section 115-10 hearing, the second statement did not take place right after Amanda and defendant's break up or

right after defendant stopped taking Z.T. for visits. Instead, the evidence showed that, in August 2011, defendant and Amanda had not been a couple for almost a year and a half, and Z.T. had not been visiting defendant for four or five months. Moreover, Amanda's testimony that her questioning Z.T. was raised in response to a counselor expressing concerns about sexual abuse of La. C. was not refuted. No evidence was presented at the section 115-10 hearing that defendant and Amanda were in a heated dispute in August 2011, when Amanda raised Z.T.'s prior allegation about defendant. Also, no evidence was presented establishing the children had been manipulated and prompted to accuse defendant.

¶ 39 As to Sipes's interview of Z.T., Z.T. again first mentioned defendant putting his peepee in her peepee, which is consistent with her two previous statements. Her recounting of defendant's oral assault was also the same as the one she gave to Amanda. Z.T. did add that defendant also touched his penis to her anus during the interview, but that does not outweigh the consistency of the other two assaults. Further, since Z.T. did not know why she was talking to Sipes, it is not unreasonable or surprising she would not mention anything about the incident until Sipes discussed bad touches and presented the body diagram. Defendant also notes inconsistencies in Z.T.'s statements to Amanda and Sipes as well as internal inconsistencies in her statements to Sipes. However, Z.T. was only eight at the time of the interview, and the incident had happened anywhere from two to four years in the past. Z.T.'s age was shown by the fact she could not recall the name of the town she then lived in and spontaneously talked about other things. Additionally, as with La. C.'s interview, Sipes asked if anyone had touched them in one of the places people are not to touch, and Z.T. stated defendant had. Defendant's name was not suggested to Z.T.

¶ 40 Regarding La. C., when Sipes asked her about anyone touching her on one of

those spots, she at first said no and then quickly named defendant. After that, she stated she did not want to talk about it, and her body language was consistent with what she was saying. With her training, Sipes was able to get La. C. to talk without being suggestive or coercive. It was never suggested to La. C. during the interview that defendant had touched her inappropriately. La. C. acted and talked like a normal six-year-old during the interview. We note no evidence was presented that La. C.'s initial counselor, who recommended she see a sexual abuse counselor, specifically questioned La. C. about sexual abuse. The evidence was the counselor questioned Amanda, not La. C. Thus, given La. C.'s hesitancy to talk about defendant's actions with Sipes, it is not surprising she had not told anyone before Sipes's interview.

¶ 41 Based on the totality of the circumstances as established by the evidence presented at the section 115-10 hearing, we find the trial court did not abuse its discretion in finding the minor victims' statements had sufficient safeguards of reliability.

¶ 42 *2. Prior Consistent Statements*

¶ 43 Defendant also argues he was denied a fair trial because the victims' hearsay statements were not corroborated by independent evidence and thus they were merely consistent prior statements, which are generally inadmissible as substantive evidence. The State asserts defendant has forfeited this issue because he failed to raise this specific objection during his trial. In response, defendant argues that, if he did forfeit the issue, we should review the matter under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). Regardless, our first step is to determine whether any error occurred at all. See *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010) (discussing plain-error review).

¶ 44 As stated, section 115-10 of the Procedure Code (735 ILCS 5/115-10 (West 2008 and 2010)) allows for the admission of a child victim's hearsay statement under two scenarios:

"(1) the court deems the statement reliable and the child testifies at trial (subsections (b)(1) and (b)(2)(A)); or (2) the child does not testify, the statement is deemed reliable, and the allegations of sexual abuse are independently corroborated (subsections (b)(1) and (b)(2)(B))." *Kitch*, 239 Ill. 2d at 467, 942 N.E.2d at 1244. In support of his argument, defendant cites the Second District's *People v. Learn*, 396 Ill. App. 3d 891, 919 N.E.2d 1042 (2009). There, the reviewing court found the child did not testify and thus applied the second scenario, which does require independent corroboration for the statement's admission. *Learn*, 396 Ill. App. 3d at 899, 903-04, 919 N.E.2d at 1049, 1053. However, this case falls under the first scenario, and thus, unlike in *Learn*, the State did not have to prove the allegations were independently corroborated for their admission under section 115-10. Additionally, we note much of the Illinois judiciary has distanced itself from the *Learn* decision. See *In re Brandon P.*, 2013 IL App (4th) 111022, ¶ 44, 992 N.E.2d 651.

¶ 45 As to the children's hearsay statements being prior consistent statements, this court has recognized the mere fact a statement, which is offered at trial as substantive evidence under section 115-10 of the Procedure Code, is consistent with the declarant's trial testimony does not render that prior statement no longer admissible. *Stull*, 2014 IL App (4th) 120704, ¶¶ 100-01, 5 N.E.3d 328. We further explained a trier of fact could consider the statements admitted under section 115-10 along with all of the other evidence in the case when reaching its verdict, regardless of whether the child declarant testified at trial consistently or inconsistently with his or her prior statements. *Stull*, 2014 IL App (4th) 120704, ¶ 101, 5 N.E.3d 328. Thus, the fact the hearsay statements were consistent with Z.T.'s and La. C.'s trial testimony did not render those statements inadmissible at trial. Accordingly, no error occurred.

¶ 46 B. Admissibility of Medical Publications

¶ 47 Defendant also challenges the trial court's admission of medical publications into evidence. While defendant's argument is unclear, he seems to argue (1) the trial court could only consider for impeachment purposes the portions of the documents discussed during Dr. Hariton's testimony, and (2) the court considered the documents substantively. The State asserts defendant has forfeited these issues by failing to include them in his posttrial motions. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). If forfeiture does apply, defendant requests we review the matter under the plain-error doctrine. Thus, we first consider whether any error occurred.

¶ 48 We note that, when the State moved for the admission of the *full* documents, defense counsel expressly stated he was not objecting to their admission as long as they were being admitted for impeachment purposes. After that, the prosecutor noted that, for impeachment purposes, the trial court could read what the medical documents stated to impeach defendant's expert but could not consider them as substantive evidence against the defendant. Defense counsel did not express any disagreement with the prosecutor's description of what the court could read, which is consistent with the admission of the full documents. Thus, defendant's position on appeal as to the admission of the full documents is different from his position in the trial court.

" 'It is fundamental to our adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding.' "

McMath v. Katholi, 191 Ill. 2d 251, 255[, 730 N.E.2d 1, 3] (2000), quoting *Auton v. Logan Landfill, Inc.*, 105 Ill. 2d 537, 543[, 475 N.E.2d 817, 818] (1984). A party is estopped from taking a

position on appeal that is inconsistent with a position the party took in the trial court. *In re Stephen K.*, 373 Ill. App. 3d 7, 25[, 867 N.E.2d 81, 98] (2007); *In re Detention of Swope*, 213 Ill. 2d 210, 217[, 821 N.E.2d 283, 287] (2004) (the rule of invited error provides: 'a party cannot complain of error which [the] party induced the court to make or to which [the] party consented')." *People v. Major-Flisk*, 398 Ill. App. 3d 491, 500, 923 N.E.2d 324, 331 (2010).

Accordingly, we find defendant is estopped from challenging on appeal the trial court's consideration of the full medical publications submitted by the State.

¶ 49 As to whether the trial court improperly considered the medical publications as substantive evidence, we note the trial court, in the pronouncement of the judgment, stated it had only considered the medical publications for impeachment purposes. Moreover, when reviewing a judgment after a bench trial, we presume the trial court considered the evidence for the limited purpose for which it was admitted. See *People v. Jackson*, 202 Ill. 2d 361, 369, 781 N.E.2d 278, 282 (2002). Defendant cites the following remark by the trial court as evidence the court considered the publications substantive: "the research suggests that history from the child is still the most important factor to consider." That statement is part of the paragraph in which the court was discussing the testimony of Hofmann, the State's expert. Defendant asserts she never made the statement. The State notes Hofmann testified: "There are numerous studies that are out there that support that the history that's provided by the child in relationship to child sexual abuse is of utmost importance when trying to, you know, review the allegations that have been made." While phrased differently, the court's statement and Hofmann's testimony are substantively the

same, and thus the record does not support defendant's assertion. Accordingly, we find the trial court did not improperly consider the medical publications as substantive evidence. Since no error occurred, we need not consider the applicability of the plain-error doctrine.

¶ 50 C. Amanda's Debt to Defendant's Mother

¶ 51 Defendant raises another admissibility-of-evidence argument, asserting the trial court erred by barring defendant from cross-examining Amanda about money she owed defendant's mother, Sandra. Specifically, defendant contends he had a right to present his theory that Amanda had a motive to fabricate the story based on the fact she owed Sandra money. Defendant notes Amanda called Sandra before she called the police about Z.T.'s statements. The State disagrees. We find defendant has forfeited this issue.

¶ 52 In this case, the trial court found defendant's questioning of Amanda about her debt to Sandra was irrelevant. At trial, defendant did not make an offer of proof establishing facts that would show the debt's relevancy, such as the amount of the debt or how the debt would go away if defendant was not accused of sexually abusing the children. "When a defendant claims that he has not been given the opportunity to prove his case because the trial court improperly barred evidence, he 'must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been.' " *People v. Pelo*, 404 Ill. App. 3d 839, 875, 942 N.E.2d 463, 493-94 (2010) (quoting *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 773, 771 N.E.2d 966, 970 (2002)). "The purpose of an offer of proof is to disclose to the trial judge and opposing counsel the nature of the offered evidence and to enable a reviewing court to determine whether exclusion of the evidence was proper." *People v. Andrews*, 146 Ill. 2d 413, 421, 588 N.E.2d 1126, 1131 (1992). A defendant's failure to make an adequate offer of proof results in forfeiture of the issue on appeal. *Andrews*, 146 Ill. 2d at 421, 588 N.E.2d at 1131.

Since defendant failed to make any offer of proof on Amanda's alleged debt to defendant's mother, defendant has forfeited his challenge to the trial court's prohibition of his cross-examination on that matter.

¶ 53

D. Sufficiency of the Evidence

¶ 54

Defendant next asserts the State failed to prove him guilty beyond a reasonable doubt of predatory criminal sexual assault of both Z.T. and La. C. The State disagrees. When presented with a challenge to the sufficiency of the evidence, a reviewing court's function is not to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). Rather, we consider " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Davison*, 233 Ill. 2d 30, 43, 906 N.E.2d 545, 553 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). " 'Under this standard, the reviewing court does not retry the defendant, and the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence.' " *People v. Washington*, 2012 IL 107993, ¶ 33, 969 N.E.2d 349 (quoting *People v. Ross*, 229 Ill. 2d 255, 272, 891 N.E.2d 865, 876 (2008)). Further, we note a reviewing court will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Givens*, 237 Ill. 2d at 334, 934 N.E.2d at 484.

¶ 55

This was a very difficult case with conflicting evidence, and the trial court did an excellent job of setting forth its credibility findings. This case came down to credibility, and the trial court found the victims, their mother, and the State's expert more credible than defendant and his expert.

"As a reviewing court, we lack the trial judge's advantage of observing the appearance and demeanor of the witnesses as they testified. It is for precisely this reason that this court lacks the authority to reweigh the trial judge's determinations on the credibility of witnesses. [Citation.] Indeed, we may overturn a conviction only if the evidence is 'so unsatisfactory' and the witness' testimony 'so lacking in credibility that a reasonable doubt of guilt remains.' " *People v. Campbell*, 252 Ill. App. 3d 624, 628, 625 N.E.2d 130, 133 (1993) (quoting *People v. Schott*, 145 Ill. 2d 188, 206-07, 582 N.E.2d 690, 699 (1991)).

In this case, we can observe the victims' demeanor during their interviews by Sipes, but that fact does not change the aforementioned deference to the trial court's credibility determinations. Moreover, our review of the interviews does not raise any concerns about the trial court's credibility determinations.

¶ 56 On appeal, defendant is essentially rearguing his case. The trial court already dealt with the internal inconsistencies in the victims' statements, and the inconsistencies between Z.T.'s and Amanda's statements were presented to the trial court, as well as the conflicting expert testimony about sexual, physical injuries to prepubescent females. We do not find the inconsistencies in the State's evidence create a reasonable doubt of defendant's guilt, especially the victims' internal inconsistencies because of their ages and the fact it is not unreasonable for more details to come out over time. Moreover, while defendant denies it, the State did impeach his exculpatory evidence.

¶ 57 We further note defendant places a great deal of emphasis on the chlamydia testing. As to La. C.'s positive chlamydia test, it established La. C. was sexually abused, as defendant's own expert testified it was "[h]igh unlikely" the source of the chlamydia was not sexual contact. Thus, while the test did not establish defendant was the abuser, it was significant in establishing La. C. was, in fact, sexually abused. The experts' testimony the disease was easily caught and easily cured by antibiotics for other ailments showed defendant's October 2010 negative chlamydia test did not negate the possibility La. C. could have gotten chlamydia from defendant some other time during the time period the alleged abuse occurred. The State's expert also explained why La. C.'s anal chlamydia test could have been negative despite La. C.'s allegations of anal contact by defendant. Thus, defendant's negative chlamydia test in October 2010 did not exclude him as the possible abuser.

¶ 58 Additionally, Z.T.'s use of the term "rape" in her *trial testimony* did not undermine her credibility, given she had talked with her mother during the pendency of defendant's criminal case and met with the prosecutor before trial. Z.T. did not use the term in reporting the abuse to her mother and Sipes. Z.T.'s calm demeanor during Sipes's interview also does not undermine her credibility, as the abuse was not recent and she had reported it to her mother beforehand.

¶ 59 Here, both victims consistently named defendant as the person who sexually abused them and the main details of their reports of abuse have been consistent over time. We do not find their credibility so lacking that a reasonable doubt of guilt remains. Accordingly, we find the State's evidence was sufficient for the trial court to find defendant guilty beyond a reasonable doubt.

¶ 60 E. Trial Court's Findings

¶ 61 Last, defendant raises two issues based on the trial court's oral finding in its explanation for finding defendant guilty of the charges. Specifically, he asserts (1) the court improperly shifted the burden to defendant to prove his innocence and (2) a fatal variance existed between the information in La. C.'s case and the court's finding of when the abuse occurred, exposing him to double jeopardy.

¶ 62 *1. Shifting the Burden of Proof*

¶ 63 Defendant argues the trial court improperly shifted the burden of proof by finding him guilty because he could not prove he did not have chlamydia at the time he was alleged to have abused La. C. The State asserts defendant failed to raise this issue in his posttrial motions, and thus he has forfeited it. In response, defendant requests our review under the plain-error doctrine. Thus, we again begin our analysis by determining if any error occurred.

¶ 64 Defendant takes issue with the following statement by the trial court:

"I recognize the Defendant tested negative for the disease in October 2010; but there was no evidence to suggest that he could not have had it earlier in the year when the alleged sexual assault occurred, that he had not been on any antibiotics at all during that time that could have clear[ed] it up. It was simply a test that was submitted that at one point in time he has a negative, but the alleged sexual assaults occurred before that time."

¶ 65 In a criminal trial, the burden of proof never shifts to the accused. *People v. Weinstein*, 35 Ill. 2d 467, 470, 220 N.E.2d 432, 434 (1966). In accord, a defendant does not have a duty to present exculpatory evidence. *People v. Euell*, 2012 IL App (2d) 101130, ¶ 20, 969 N.E.2d 935. However, when a defendant does present exculpatory evidence, it is proper to

comment on the quality and credibility of that evidence. *People v. Gorosteata*, 374 Ill. App. 3d 203, 218, 870 N.E.2d 936, 949 (2007).

¶ 66 As explained with defendant's last argument, the evidence showed La. C. tested positive for chlamydia in November 2011, and the medical experts agreed it was highly likely she got it from sexual contact. In his defense, defendant submitted the fact he tested negative for chlamydia in October 2010. The medical experts also agreed chlamydia is very infectious and easily cured by antibiotics used to treat other common ailments, such as ear infections. Such evidence permitted the fact finder to reject defendant's assertion he did not have chlamydia during the entire period the assaults of La. C. were alleged to have taken place. Thus, we agree with the State that, with the above-quoted statements, the trial court was explaining why defendant's negative chlamydia test, the exculpatory evidence that he presented, did not create a reasonable doubt of his guilt. We do not find the trial court improperly shifted the burden of guilt to defendant and thus do not address plain error.

¶ 67 *2. Fatal Variance*

¶ 68 Last, defendant argues a fatal variance existed between the information in La. C.'s case and the proof at trial, which misled him as to his defense and exposed him to double jeopardy. The State again asserts defendant forfeited this issue by failing to raise it in his posttrial motion, and defendant again requests we apply the plain-error doctrine. Accordingly, we begin by determining whether any error occurred.

¶ 69 When a defendant attacks an information for the first time on appeal, the information is "sufficient if it 'apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecutions arising out of the same conduct.' " *People v. Benitez*, 169 Ill. 2d 245, 257, 661

N.E.2d 344, 350 (1996) (quoting *People v. Gilmore*, 63 Ill. 2d 23, 29, 344 N.E.2d 456, 460 (1976)). Our supreme court has found the following: "The date alleged in a charging instrument need not ordinarily be proved precisely. If there is an error in the indictment, and upon trial the proof establishes that the offense was committed on a date other than the precise date alleged, that irregularity will not constitute a fatal variance." *People v. Alexander*, 93 Ill. 2d 73, 77, 442 N.E.2d 887, 889 (1982).

¶ 70 As mentioned in the previous argument, the trial court, in discussing the negative chlamydia test, stated "there was no evidence to suggest that he could not have had it earlier in the year when the alleged sexual assault occurred." Defendant asserts that language suggests the trial court found the sexual assaults occurred before August 26, 2010, the first date listed in the informations in La. C.'s case. However, also in its ruling, the trial court found credible La. C.'s statement the sexual assaults happened when she was six, which is the time period set forth in the information. Thus, it appears the trial court misspoke in suggesting the assaults occurred earlier in 2010. Regardless, defendant fails to establish a fatal variance.

¶ 71 Initially, we note the potential time period at issue is relatively small. La. C. testified the incidents happened during her weekend visitation with defendant, and defendant testified the parties broke up in May 2010. Thus, the only time the sexual assaults could have happened outside the time listed in the information is between May 2010 and August 26, 2010. Defendant first claims prejudice based on the fact he could have presented evidence showing he did not have chlamydia between May and late August 2010. However, even if he had done so, we have previously explained why the October 2010 negative test did not exonerate him for the entire period set forth in the information. Moreover, defendant further claims prejudice based on the fact he could not plead his resulting convictions as a bar to future prosecution for sexually

assaulting La. C. before August 26, 2010. To the contrary, an information no longer defines the limits of double jeopardy, and a defendant can prove a prior prosecution of the same facts by resorting to the record. *Gilmore*, 63 Ill. 2d at 31, 344 N.E.2d at 461.

¶ 72 Accordingly, we find defendant has not established a fatal variance.

¶ 73 III. CONCLUSION

¶ 74 For the reasons stated, we affirm the judgment of the Livingston County circuit court. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 75 Affirmed.