2017 IL App (5th) 140200-U

NO. 5-14-0200

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 12-CF-1066
	)	
HARVEY BURK SIMINGTON,	)	Honorable
	)	Kyle Napp,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Moore and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's convictions are affirmed where the State did not fail to prove the *corpus delicti* of his predatory criminal sexual assault charge; the trial court's alleged violation of Supreme Court Rule 431(b) was not plain error; and the trial court did not abuse its discretion in admitting the child victim's statements to three witnesses pursuant to the hearsay rule exceptions in sections 115-10 and 115-13 of the Illinois Code of Criminal Procedure (725 ILCS 5/115-10, 115-13 (West 2010)).

¶ 2 The defendant, Harvey Burk Simington, was charged by indictment with predatory criminal sexual assault of a child (count I) and two counts of aggravated criminal sexual abuse (counts II and III). An amended indictment, filed on June 14, 2012, dismissed count III. The remaining charges alleged that the defendant committed an act of sexual

penetration when he placed his finger in the sex organ of his daughter, M.S., who was under the age of 13 (count I), and that he fondled the sex organ of M.S., who was under the age of 18, for the purpose of the sexual arousal or gratification of the defendant or the victim (count II), with the acts allegedly occurring between January 1, 2011, and June 30, 2011, in Madison County, Illinois. A jury found him guilty of these charges on December 12, 2013. On April 28, 2014, he was sentenced to consecutive terms of 25 years and 7 years in the Illinois Department of Corrections. The defendant appeals these convictions. For the following reasons, we affirm.

¶ 3 Before trial, the State filed a notice of intent to present hearsay evidence pursuant to the exceptions available in section 115-10 of the Illinois Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-10 (West 2010)). The State indicated that it intended to call Lisa Kuhl and Kimberly Mangiaracino to testify regarding out-of-court statements M.S. allegedly made to them about the sexual abuse. A hearing was held on the admissibility of this evidence on December 9, 2013. The following evidence was adduced from that hearing.

¶ 4 In April 2012, four-year-old M.S. was living in temporary foster care with Lisa and Chris Kuhl. Lisa Wells (Wells) testified that on April 13, 2012, Lisa Kuhl (Kuhl) brought M.S. to the Wells home for a visit because the Wellses were interested in adopting M.S. The Wellses' six-year-old son, Thad, was also home, and he and M.S. went downstairs to play. Wells noticed that it became quiet downstairs and went to investigate. She testified that Thad and M.S. acted "sheepishly" when she inquired what they were doing. Wells asked M.S. what was going on, and M.S. said that she did not

want to tell her. Wells told M.S. that she would not be in trouble, and M.S. started to cry. Wells asked M.S. if it had ever happened before, and M.S. replied yes, back home in Roxana. Wells asked what happened, and M.S. replied that it was a secret. M.S. was sobbing and told Wells that she would not get to go back home. M.S. told Wells that she would tell Kuhl what happened. Wells called Kuhl to tell her "something was going on" and drove M.S. back to the Kuhls'.

¶ 5 Lisa Kuhl testified that M.S. lived with her family from August 2011 until September or October 2012. M.S.'s sister, S.S., was also placed in the Kuhls' home.

¶ 6 Kuhl testified that when Wells returned M.S. to the Kuhls' home that day, Kuhl asked M.S. what had happened at the Wells' house. M.S. told her that Thad got in trouble because they had showed each other their private parts. M.S. cried and apologized. Kuhl asked M.S. if she had seen her brother's private parts, and M.S. responded that they had taken baths together before. Kuhl asked M.S. what her brothers call their private parts; M.S. responded, "a wiener." Kuhl asked what Thad's wiener looked like; M.S. responded "small and soft." Kuhl asked what her dad's wiener looked like; M.S. responded, "it was hairy." M.S. laughed at this, and Kuhl laughed with her to show her that she was not in trouble. Kuhl asked when M.S.'s dad showed her his wiener. M.S. responded that "he would come into my bedroom at night and pick me up and take me into the living room and watch movies" while the other children and her mother were sleeping. M.S. said her dad would turn a movie on and would give her food "after he would do things." Kuhl asked if M.S.'s dad's wiener ever got hard; M.S. responded no, but he would pee inside of her and she would run to the bathroom quietly. M.S. told Kuhl that she could not tell

anybody her secret because her dad would be really mad. Kuhl testified that M.S. appeared very upset during this conversation and was whispering. M.S. told Kuhl that it made her sad what her dad did to her and that it hurt her.

¶ 7 The next morning, M.S. asked Kuhl if they could talk more about the secret. M.S. started crying again and told Kuhl that "it makes me sad that he touched me." Kuhl asked if M.S.'s dad ever put his mouth on her bottom, pointing to M.S.'s vagina; M.S. responded "yeah." M.S. stated that this occurred when she was lying with him in bed. M.S. explained that she would sometimes cuddle in bed with her parents, and her dad would put his mouth down on her private parts while her mom was asleep. Kuhl asked if M.S.'s dad ever put his wiener in her private parts and pointed to her vagina; M.S. responded "yeah." M.S. pointed to her "butt area" and said he would put it in there, too. Kuhl asked if it hurt. M.S. said yes, but that she would watch Twister or Dora to keep her mind off of it. Kuhl asked if it hurt when her dad put his wiener in her vagina area. M.S. said no. Kuhl thereafter called the abuse hotline.

¶ 8 On cross-examination, Kuhl testified that she suspected M.S. was being sexually abused as far back as November 2011 because M.S. was "touchy-feely" and would put her hands on her and her husband's inner thighs, which was unusual behavior for a child. M.S. would also grab S.S.'s private parts. Kuhl also noted that when M.S. was hugging someone, she would put her knee up and push it into the person's groin area. Kuhl reported these occurrences to M.S.'s social worker, as well as her observation of M.S. sucking her father's thumb and caressing it "like a penis" in January 2012.

¶ 9 Kim Mangiaracino testified that she was a forensic interviewer at the Madison County Child Advocacy Center (CAC). She testified that the CAC provides a neutral third party interviewer for investigating situations where there are allegations of child abuse for the children of Madison County. Mangiaracino interviewed M.S. on April 17, 2012. Mangiaracino testified that she used the RATAC (rapport, anatomical identification, touch inquiry, abuse scenario, and closure) interviewing technique with M.S., which is a "child-led" protocol. She noted that M.S. was conversational and had no issues communicating and that she used open-ended questions when talking with M.S. The DVD-recorded interview was played for the court.

¶ 10 In the interview, M.S. was shown pictures of anatomical male and female drawings and was asked to name body parts of the female. When Mangiaracino pointed to the vagina, M.S. referred to it as a "wiener." She stated that "boobies" were "for wiggling" and used her hand to rub her chest. M.S. referred to her bottom as her "pincushion" which was for "going poop." M.S. indicated that these three areas were a girl's "private parts" and that you keep private parts to yourself. M.S. said that Thad's mom taught her that if someone asked to touch her private parts she was to say, "no, this is my own body."

¶ 11 M.S. shook her head in response to Mangiaracino's asking if anything had happened to her pincushion, her wiener, or her boobies. M.S. denied telling anyone about someone touching her wiener, boobies, or pincushion. When asked if anyone ever got into trouble "for that," M.S. talked about a friend who touched someone's wiener and

pincushion "but I didn't want to see it." Mangiaracino asked M.S. to tell her more, but M.S. replied, "I don't want to."

¶ 12 M.S. asked to talk about the boy parts. Mangiaracino asked if M.S. had seen a boy's wiener, and M.S. responded that she had seen her baby brother's wiener and that it was "little." After stating that she had not seen anyone else's wiener, she said that her dad had shown her his wiener "for a little bit," and that it was "hairy." She told Mangiaracino to keep it a secret and that her dad played with her wiener. M.S. stated that she "did not really care if he did that" because she thought that it was okay because he was her dad. She clarified that by "dad," she was talking about the defendant.

¶ 13 Mangiaracino asked M.S. to tell her about the defendant playing with her wiener. M.S. replied that he tickled it with his hands and that this felt "ticklish." M.S. again said that she really did not want to talk about it.

¶ 14 Mangiaracino asked if M.S. had told anyone else about defendant touching her wiener, and M.S. whispered, "my mom," referring to Kuhl. M.S. stated that she and Kuhl kept it a secret. Mangiaracino asked M.S. to tell her about keeping it a secret, to which M.S. replied that "I don't really want to tell you. I just don't." M.S. told Kuhl that her dad played with her wiener.

¶ 15 Mangiaracino got out some markers and allowed M.S. to start drawing. She asked M.S. where the defendant was when he touched her wiener. M.S. said it happened in the living room and that no one saw it happen. Mangiaracino asked what M.S.'s clothes were like when her dad touched her wiener, and M.S. replied that she took them off and her dad played with her wiener "for a little bit." When asked to show what her dad would do

with his hands when he played with it, M.S. wiggled her fingers up and down. Mangiaracino asked what her dad would be saying when he played with it. M.S. stated that the defendant said to keep it a secret and to not tell anyone. Mangiaracino told M.S. that it was right that she told this secret and that secrets about private parts should not be kept.

¶ 16 Mangiaracino asked M.S. to tell her about seeing her dad's wiener and asked her where the hair was at. M.S. said, "on the front" and indicated the area by pointing. She stated that her dad's wiener looked like the male drawing, but with hair. M.S. wrote the word "no" when asked if the defendant's wiener had anything else on it. When asked if anything else happened with the defendant's wiener, M.S. said, "yes." M.S. repeated that the defendant told her to keep it a secret and that he would be mad if she did not.

¶ 17 Mangiaracino asked if M.S.'s mom or anyone else knew what the defendant was doing. M.S. said Christine, her mother, did not but that her siblings knew because they had looked over the fence. M.S. said that the defendant told her siblings to "stay in there while he did stuff with [M.S.]"

¶ 18 Mangiaracino told M.S. she knew there were things that M.S. did not want to talk about but that she wanted to talk so that she had it right. Mangiaracino said, "we were talking about him playing with your wiener with his hand, did anything else happen to your wiener?" M.S. slowly said, "no." Mangiaracino asked, "did any other part of your dad touch your wiener," and M.S. responded "no." M.S. shook her head when asked if anything happened with her boobies or pincushion.

¶ 19 Mangiaracino asked M.S. to tell her what was happening when she saw the defendant's wiener. M.S. said, "somebody else touched it." Mangiaracino reminded M.S. that she told her that she saw her dad's wiener, and asked her what was happening when she saw it. M.S. replied, "he said, can I play with yours, and I didn't really answer." Mangiaracino asked, "and then what happened?" M.S. asked if she really had to tell her and why she had to tell. Mangiaracino told M.S. it was important about being safe. M.S. proceeded to talk about the TV shows and movies that the defendant put on, and Mangiaracino said, "I'm asking you about his wiener and I want to make sure that I understand, because it seems like you're not answering my question." M.S. replied, "that's true." Mangiaracino asked, "did something happen with his wiener?" M.S. said no, and pointed to the word "no" she had written earlier. Mangiaracino asked M.S. to tell her what happened when the defendant showed her his wiener. M.S. said that he asked if he could play with hers, and then he tucked her into bed.

¶ 20 Mangiaracino left the room for a short period of time. Upon her return, she asked M.S. if there was anything they forgot to talk about. M.S. said no. Mangiaracino then asked M.S. to tell her what she told Kuhl about what happened with the defendant. M.S. said that she did not remember. M.S. told Mangiaracino that there was something that she did not want to tell her. Mangiaracino told M.S. that before she goes, she would like it if M.S. would tell her a little bit more about the defendant playing with her wiener. M.S. said that "he tickled it three times" and then put her to bed. Mangiaracino asked, "and how about his wiener?" M.S. asked if she had to tell about it. Mangiaracino replied, "I want you to tell me about it." M.S. said "his was hairy a lot." M.S. said

nothing else happened and that the defendant did not want anything else to happen. Mangiaracino asked, "did anything happen that you just don't want to talk about?" M.S. said no. M.S. said that she told Kuhl about things happening but did not reply when asked, "tell me what you told [Kuhl]."

¶ 21 M.S. was quiet and playing with her drawing paper for a period of time. Mangiaracino asked M.S. to say how she was feeling. M.S. said that she was sad because she missed her mom and dad. Mangiaracino ended the interview.

¶ 22 Mangiaracino testified that she used open-ended questions with M.S. and did not believe M.S. to be easily suggestible because she had acknowledged understanding the directions for the interview, corrected her several times during the interview, and was outgoing and talkative. She noted that M.S. initially denied that anything had happened to her "pincushion" or "wiener," which is very common, as the child could be embarrassed, afraid, or "just not ready to tell a stranger something like that." Mangiaracino agreed that M.S. was reluctant to talk to her about the alleged abuse, having told her several times in the interview that she did not want to talk about it. Mangiaracino confirmed that this interview was child-led.

¶ 23 The court ruled that M.S.'s statements to Kuhl and Mangiaracino were sufficiently reliable to be admissible under the hearsay exception in section 115-10 of the Code (725 ILCS 5/115-10 (West 2010)).

¶ 24 A jury trial was held from December 10-12, 2013. During jury selection, the trial court admonished the potential jurors that the charges against the defendant were solely a means of placing someone on notice that they were charged with a crime and that such

charges were not evidence against the defendant and could not be considered as evidence against him. The court told the jurors:

> "[The defendant] is presumed innocent of the charges against him, and that presumption remains with him throughout every aspect of this trial unless and until a jury of his peers finds otherwise. But he is presumed innocent, and I want you to keep that in mind throughout every portion of this trial."

After reading the charges to the jury, the court again admonished them that the defendant was presumed innocent. Thereafter, the court questioned the potential jurors:

> "The defendant is presumed innocent of the charges against him. This presumption remains with him throughout the trial and it is not overcome unless by your verdict you find that the State has proven the defendant guilty beyond a reasonable doubt.
>
> Is there anyone who disagrees with this rule of law? ***
>
> ***
>
> Is there anyone who cannot follow this law?
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> ***
>
> The second presumption is that the State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden remains on them throughout the entire trial.
>
> Is there anybody who disagrees with this presumption of law ***?
>
> ***
>
> Is there anyone who cannot follow this proposition of law ***?
>
> * * *
>
> The third presumption is that the defendant is not required to prove his innocence. He does not have to prove anything. He is allowed to sit there throughout this entire trial and never have his attorney ask one question of any witness or present any evidence in this case at all because he is presumed innocent.

Is there anyone who disagrees with this proposition of law ***?

* * *

Is there anyone who cannot follow this proposition of law ***?

* * *

Finally, the last question I need to ask you about is that the defendant has the absolute right to remain silent. He has the right to elect not to testify in this trial, and if he chooses not to testify you cannot hold it against him, you cannot consider it in any way during your deliberations because he is presumed innocent and he doesn't have to prove anything.

Is there anyone who cannot follow this proposition of law ***?

***

Is there anyone who disagrees with this proposition of law ***?"

All of the potential jurors indicated "no" to each of these questions.

¶ 25 At the jury trial, the evidence showed that M.S. was born on May 13, 2007. Until August 2011, she lived in South Roxana with her father, the defendant, her mother, Christina S., and her five brothers and sisters. In August 2011, M.S. lived in a temporary foster home placement with the Kuhls.

¶ 26 During her trial testimony, M.S. identified her father as the defendant. The following exchange took place between the prosecutor and M.S.:

"Q. [Prosecutor]: Did anything ever happen to your private parts when you were living in South Roxana?

A. [M.S.]: Well, my dad, at night sometimes he would carry us – me or [S.S.] into the front room and he would, you know, do some of that not good things to us.

Q. [Prosecutor]: When you say not good things, did he touch your private parts?

A. [M.S.]: Yeah.

Q. [Prosecutor]: What did he touch your private parts with?

A. [M.S.]: His mouth.

Q. [Prosecutor]: And what else? Any other part of his body that touched your private parts?

A. [M.S.]: Not that I can remember of.

Q. [Prosecutor]: Anything with his hands or fingers?

A. [M.S.]: [No response.]

Q. [Prosecutor]: And it's okay. We're going to take our time and you just think about it, okay?

A. [M.S.]: I think some."

M.S. testified that this occurred in the front room of her house, and she would watch television "while he did it to me." M.S. stated that these incidents occurred more than once.

¶ 27 M.S. testified that boys' private parts are "the front fanny and the back fanny" and that she saw the defendant's "front fanny." She told the prosecutor that "it was big and round and it felt squishy" and that there was a lot of hair. M.S. agreed that the defendant told her not to tell anybody about the touching but that she told Kuhl about it. On cross-examination, M.S. stated that she understood the difference between a truth and a lie. She testified that she had spoken to the prosecutor before the trial, but she was not told what to say; the prosecutor "would ask me do you have any questions about this." On redirect examination, M.S. confirmed that she was telling the truth about what happened with the defendant.

¶ 28 Lisa Wells recounted the story about the incident with M.S. and her son, Thad, in April 2012. She testified that M.S. told her that she was too embarrassed to tell what happened with Thad and began crying. Wells asked M.S. if "what had gone on had ever happened before," and M.S. said yes. Wells testified that M.S. was sobbing and told Wells that "if she told me she wouldn't get to go back home." Wells stated that, after it was clear that M.S. was not going to tell her what happened, Wells calmed her down, and they played games and ate snacks until it was time for M.S. to return to her foster parents' home.

¶ 29 The next day, outside the presence of the jury, the prosecutor indicated to the court that she intended to call nurse practitioner Cara Christanelli to the stand. The prosecutor stated that, during a physical examination, M.S. had told Christanelli that her dad had touched her private parts. The prosecutor argued that the statement was admissible as a hearsay exception for statements made to medical personnel for the purposes of diagnosis and treatment pursuant to section 115-13 of the Code (725 ILCS 5/115-13 (West 2010)). Defense counsel objected on the grounds that the statement was irrelevant, cumulative of M.S.'s testimony, and prejudicial. The court found that the probative value outweighed the prejudicial value and allowed the statement.

¶ 30 Christanelli testified that she is a pediatric nurse practitioner with a specialty in sexual abuse, currently working at Cardinal Glennon in St. Louis. She stated that she examined M.S. on May 17, 2012, because M.S. was referred to Cardinal Glennon after disclosing sexual abuse. During the examination, M.S. told Christanelli that her dad

touched her privates. Christanelli did a full medical work-up, including sexual abuse infection testing, and recommended counseling and therapy for M.S.

¶ 31 Christanelli testified that she examined M.S.'s genitalia and that the examination was "normal," with no evidence of injury or scarring. However, Christanelli noted that a normal genital exam does not rule out the occurrence of sexual abuse. She stated that in 90% to 95% of cases, the victim will have a normal examination because perpetrators try not to hurt the child because they do not want to be caught and because a child's body can heal within hours or days. Christanelli also agreed that many victims of sexual abuse act out sexually.

¶ 32 Christina S. testified that she married the defendant in October 2005 and that they had seven children together. When the family lived together in South Roxana, the boys slept in one bedroom, the girls slept in another bedroom, and she and the defendant slept in their own room. She testified that M.S. never slept in the bed with her and the defendant. She stated that M.S. never told her that the defendant had sexually abused her and that he never had an opportunity to be completely alone with M.S. in order to do that. She testified that they had a gate inside the house to prevent the children from coming into their bedroom. Christina also testified that she and the defendant had sexual relations prior to the children's placement in foster care in August 2011 and that the defendant's genital area was "pretty much shaved" and was not "a big hairy penis."

¶ 33 Kim Mangiaracino gave trial testimony similar to her testimony at the pretrial hearing. The DVD of her interview with M.S. was played for the jury. Mangiaracino testified that, in her expert opinion, by asking "do I have to tell you," M.S. was asking not

whether she had to tell Mangiaracino the "other parts of the body" but rather "do I have to tell you the other parts that happened." Mangiaracino testified that she never suggested to M.S. what her answers should be.

¶ 34 Lisa Kuhl's trial testimony was consistent with her testimony at the pretrial hearing.

¶ 35 Lieutenant Bob Coles testified that he has been with the South Roxana police department for 16 years. He has been to multiple interrogation schools where he learned advanced interview techniques, and he agreed that building a rapport in an interview makes a suspect much more likely to talk to him.

¶ 36 In April 2012, the CAC notified Coles about the investigation into M.S.'s sexual abuse allegations against the defendant. Coles watched Mangiaracino's interview of M.S. at the CAC, where he was concealed behind a two-way mirror. Based on what he learned from M.S.'s interview, he sent an officer to the defendant's house to ask him if he was willing to come to the police station for an interview. The defendant voluntarily came to the station, and Coles conducted a "soft" interview. Coles described this as an interview where the interviewer minimizes the severity of the criminal conduct and acts jovially with the defendant. Coles explained that he then attempts to gauge the suspect's body language and reactions to the questions. The April 17, 2012, interview was video recorded. The 38-minute interview was played for the jury.

¶ 37 Coles set a friendly tone, asking the defendant about his family, his work and military service history, and his health. Approximately 10 minutes into the interview, Coles informed the defendant that M.S. had revealed that he had improperly touched her

private parts. Coles told the defendant that the point of the interview was to get information so the experts could put a safety plan in place to remedy the situation. The defendant stated that he did not remember touching M.S.'s vagina; he asserted that he may have unknowingly touched M.S. and that the only time that that could have happened was when M.S. was in bed with him and his wife. When asked how many times he thinks he had fondled M.S.'s genitals, the defendant said he was aware of two or three times. The defendant denied putting his fingers or his penis in her vagina, saying he just touched her. When asked if M.S. had ever kissed his penis, the defendant responded that if she did, he did not know about it; he denied kissing her vagina. After more questioning, the defendant said he may have reached over in bed and fondled her vagina and that his finger may have been in her vagina. Coles referenced M.S.'s medical examination, stating that a doctor can tell when a hymen has broken. The defendant responded that a finger can break a hymen, and Coles agreed. The defendant stated that "either I broke it or she broke it."

¶ 38 Coles testified that the fact that the defendant did not object to M.S.'s allegations was informative, as it is common for an accused person to make hard denials. Coles also felt that the defendant's body language indicated that he was uncomfortable with the questions. Coles testified that the defendant's comment about M.S.'s hymen "really drew my attention" and was the reason why he needed to ask the defendant for a second interview.

¶ 39 At Coles' request, the defendant returned to the station the next day for further questioning. The second interview was also recorded and played for the jury.

¶ 40 Coles read the defendant his *Miranda* rights, and the defendant verbally waived those rights. Coles again stated that the purpose of the interview was to work out a resolution to the problem. The defendant claimed that he never touched M.S.'s vagina and that he has erectile dysfunction. Coles told the defendant that the doctors had determined that M.S. was abused, and the goal was to prevent the abuse from happening again. Coles told the defendant that if he was completely truthful, the Illinois Department of Children and Family Services (DCFS) could work something out so that he would not lose his visitation with the children.

¶ 41 Coles asked when the abuse of M.S. began, and the defendant said that he did not remember because half of the time, he was asleep. He stated that he would wake up, and his hand was touching her vagina; when he caught himself touching, he would pull away his hands and send her back to her own bed. Coles told the defendant that the doctors had determined that M.S. performed oral sex on him. The defendant said that if it happened, it happened while he was asleep and that M.S. would take his hand and play with herself. The defendant stated that two or three times he woke up and M.S. was kissing or touching his penis, and that two or three times he inadvertently placed his finger in her vagina while he was asleep. He agreed that he felt bad about what occurred and that he has no "urges" anymore.

¶ 42 The defendant did not testify, and the defense did not present any evidence. The jury found the defendant guilty of predatory criminal sexual assault of a child and aggravated criminal sexual abuse. The defendant appeals.

¶ 43 On appeal, the defendant argues (1) that the State failed to prove the *corpus delicti* of the charge of predatory criminal sexual assault of a child, where no evidence independent of his statement tended to prove that he placed his finger into M.S.'s vagina; (2) that the trial court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) in questioning the jury; and, (3) that he was denied a fair trial where the trial court erroneously admitted (a) M.S.'s statement to two witnesses as an exception to the hearsay rule pursuant to section 115-10 of the Code (725 ILCS 5/115-10 (West 2010)) because the statements were not sufficiently reliable, and (b) M.S.'s statement to a registered nurse because the statement was also unreliable and added to the cumulative effect of the error. We address these contentions in turn.

¶ 44 The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). When a court reviews a conviction to determine whether the constitutional right recognized in *Winship* was violated, it must ask "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). In other words, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Id.* at 319. Our supreme court has adopted the *Jackson* formulation of the standard of review for

claims that the evidence was insufficient to sustain a conviction. *People v. Collins*, 106 Ill. 2d 237, 261 (1985); *People v. Cunningham*, 212 Ill. 2d 274, 278-79 (2004).

¶ 45 The reviewing court must view the evidence in the light most favorable to the prosecution; this means that the reviewing court may not retry the defendant, but rather must allow all reasonable inferences from the record in favor of the prosecution. *Cunningham*, 212 Ill. 2d at 279-80. A conviction may not be reversed simply because the evidence is contradictory or because the defendant claims the witnesses were not credible. *People v. Ivy*, 2015 IL App (1st) 130045, ¶ 56. An appellate court may not substitute its judgment for that of the trier of fact on matters of credibility or weight of the evidence. *People v. Beasley*, 384 Ill. App. 3d 1039, 1046 (2008).

¶ 46 The defendant offers a sufficiency-of-the-evidence challenge to his conviction, arguing that the State failed to offer sufficient proof of the *corpus delicti*. The *corpus delicti* of an offense is simply the commission of a crime, which, along with the identity of the offender, is one of two propositions the State must prove beyond a reasonable doubt. *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 114 (citing *People v. Lara*, 2012 IL 112370, ¶ 17). As a general rule, the *corpus delicti* cannot be proven by a defendant's admission, confession, or out-of-court statement alone; rather, the State must also provide independent corroborating evidence. *Id.*

> " 'To avoid running afoul of the *corpus delicti* rule, the independent evidence need only *tend to show* the commission of a crime. It need not be so strong that it alone proves the commission of the charged offense beyond a reasonable doubt. If the corroborating evidence is sufficient, it may be considered, together with the defendant's confession, to determine if the State has sufficiently established the *corpus delicti* to support a conviction.' " (Emphasis in original.) *Id.* (quoting *Lara*, 2012 IL 112370, ¶ 18).

¶ 47 As the defendant correctly notes, the *corpus delicti* may not be proved merely by offering evidence that any offense occurred, but rather the State must introduce corroborating evidence that relates to the specific events on which the prosecution is predicated. *People v. Sargent*, 239 Ill. 2d 166, 185 (2010). Accordingly, the defendant asserts that the prosecution was required to introduce corroborating evidence specifically showing that he inserted his fingers into M.S.'s vagina, as opposed to merely touching it. He cites *People v. Richmond*, 341 Ill. App. 3d 39 (2003), and *People v. Sargent*, 239 Ill. 2d 166 (2010), in support of his contention.

¶ 48 In *Sargent*, the defendant was convicted of one count of predatory criminal sexual assault of his minor stepson, J.W., for allegedly placing his penis in J.W.'s anus; three counts of predatory criminal sexual assault of J.W.'s younger brother, M.G., for allegedly placing his finger in M.G.'s anus; and two counts of aggravated criminal sexual abuse of M.G. for allegedly fondling M.G.'s penis. *Sargent*, 239 Ill. 2d at 169. As to the aggravated criminal sexual abuse convictions, the court found that the testimony that the defendant penetrated M.G.'s anus with his finger and J.W.'s anus with his penis did not provide sufficient corroboration that the defendant also fondled M.G.'s penis; no evidence corroborated that the defendant fondled, or even came into contact with, M.G.'s penis other than the defendant's confession. *Id.* at 184.

¶ 49 Similarly, in *Richmond*, the defendant was charged with two counts of predatory criminal sexual assault based on penis-to-vagina contact and penis-to-anus contact with the victim during the same incident. *Richmond*, 341 Ill. App. 3d at 43. The defendant gave a statement admitting that both types of conduct occurred. *Id*. at 46. However, the

evidence of contact between the defendant's penis and the victim's vagina came entirely from the defendant's statement; all the other evidence provided by the State at trial proved only anal penetration. *Id*. The defendant's confession required corroboration for both criminal counts, where the two criminal counts each alleged contact with separate parts of the victim's body. *Id.*

¶ 50 We find these cases distinguishable. First, these cases held that testimony regarding certain sexual acts involving one part of the body could not corroborate a confession to different sexual acts involving different parts of the body. Here, the abuse happened to one part of M.S.'s body: the defendant gave two statements in which he admitted touching M.S.'s vaginal area and to putting his finger inside her vagina on at least two or three occasions. These statements were corroborated by the following evidence presented to the jury: M.S.'s statement to Kuhl that it made her sad that the defendant touched her; M.S.'s statement to Mangiaracino that the defendant tickled her wiener with his hands, and she wiggled her fingers to show how he played with it; M.S.'s statement to Christanelli that the defendant had touched her private parts; and M.S.'s testimony at trial that she thought that the defendant touched her private parts with his hands and fingers.

¶ 51 While the corroborating evidence reiterated above does not, as the defendant notes, explicitly reference penetration, more recent case law has clarified that such specific evidence is not required to satisfy the *corpus delicti* requirement. In *Sargent*, the supreme court noted that "circumstances where criminal activity of one type is so closely related to criminal activity of another type that corroboration of one may suffice to

corroborate the other." *Sargent*, 239 Ill. 2d at 185. The supreme court clarified this reasoning in *People v. Lara*, 2012 IL 112370.

¶ 52 In *Lara*, the defendant was charged with two counts of predatory criminal sexual assault of eight-year-old J.O. *Id.* ¶ 5. The defendant confessed to penetrating the victim's vagina on two separate occasions while she slept at his apartment. *Id.* ¶ 5. The evidence introduced at trial, however, showed only that J.O. had said in an interview, and repeated in her trial testimony, that defendant touched her "private" twice while she was at his apartment, with no explicit reference to penetration. *Id.* ¶ 10. The appellate court held that the *corpus delicti* rule required the State to produce independent evidence of the element of penetration. *Id.* ¶ 2. The Illinois Supreme Court reversed. *Id.* ¶ 3.

¶ 53 Using the case to clarify the *corpus delicti* rule discussed in *Sargent*, the court held that not all elements of each offense must be expressly corroborated in all criminal cases. *Id.* ¶ 26. *Lara* makes clear that the *Sargent* court did not countenance the use of evidence establishing the defendant's digital penetration of the victim to prove the fondling allegation because the latter constituted an entirely different type of assault affecting a different part of the victim's body, whereas in *Lara*, the same type and point of contact was alleged in both counts filed against the defendant. *Id.* ¶¶ 24-25.

¶ 54 The defendant argues that *Lara* is distinguishable because here, there is no corroborating evidence showing the number of incidents or showing penetration. First, we note that M.S. told Mangiaracino in the interview that the defendant "tickled her wiener" "two or three times," which does, in fact, precisely corroborate the defendant's confession as to the number of instances. Regardless, the *Lara* court was exceedingly

clear that an exact match between the independent evidence and the details of the defendant's confession is not required. *Id.* ¶ 42. "The independent evidence need not precisely align with the details of the confession on each element of the charged offense, or indeed to any particular element of the charged offense." *Id.* ¶ 51. This interpretation of the *corpus delicti* rule supports the jury's role as the fact finder, responsible for evaluating the credibility of the witnesses, weighing the conflicting evidence, and drawing appropriate inferences from the evidence. *Id.* ¶ 50.

¶ 55 Therefore, we find the defendant's argument unpersuasive. Though M.S.'s statements to Kuhl, Mangiaracino, and Christanelli and her testimony at trial did not precisely corroborate the defendant's confession as to penetration, the evidence, viewed together with reasonable inferences, sufficiently corresponds with the confession and tends to support the commission of the crime. Thus, we find that the State provided sufficient independent corroborating evidence upon which the defendant's conviction for predatory criminal sexual assault could be based.

¶ 56 The defendant next argues that the trial court committed reversible error because it did not comply with the *voir dire* requirements of Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). These requirements are commonly known as the "*Zehr* principles": that the defendant is presumed innocent; that the State bears the burden to prove the defendant guilty beyond a reasonable doubt; that the defendant has no obligation to present evidence; and that the defendant's choice to not testify cannot be held against him. See *People v. Zehr*, 103 Ill. 2d 472, 477 (1984).

¶ 57 Rule 431(b) provides that the trial judge "shall ask each potential juror, individually or in a group, whether that juror understands and accepts" the four *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). The defendant asserts that the trial court's phrasing, *i.e.*, "is there anyone who does not agree with this law" and "is there anyone who cannot follow this law," is insufficient to meet the requirements of Rule 431(b). The defendant notes that " 'the language of Rule 431(b) is clear and unambiguous; the rule states that the trial court "shall ask" whether jurors understand and accept the four principles set forth in the rule. The failure to do so constitutes error.' " *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 23 (quoting *People v. Belknap*, 2014 IL 117094, ¶ 45).

¶ 58 However, the defendant concedes that he did not raise the issue of the trial court's Rule 431(b) errors at trial or in a posttrial motion, and therefore this issue is procedurally forfeited. See, *e.g.*, *People v. Naylor*, 229 Ill. 2d 584, 592 (2008) (to properly preserve alleged trial error, defendant must object at trial and include claim of error in written posttrial motion). The defendant asserts that the trial court's error is nonetheless subject to plain-error review.

¶ 59 "The plain-error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Wilmington*,

2013 IL 112938, ¶ 31. Here, the defendant contends only that the errors are reviewable under the first prong, *i.e.*, because the evidence in this case was closely balanced.

¶ 60 The first step of plain-error review is to determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). However, assuming *arguendo* that the trial court erred by failing to strictly comply with Rule 431(b), the evidence is not so closely balanced that the error alone threatened to tip the scales of justice against the defendant.

¶ 61 When reviewing a claim of error under the first prong of the plain-error doctrine, "a reviewing court must undertake a commonsense analysis of all the evidence in context" to determine if the evidence is closely balanced. *People v. Belknap*, 2014 IL 117094, ¶ 50. That assessment must be "a qualitative, as opposed to a strictly quantitative," assessment and must take into account "the totality of the circumstances." *Id.* ¶¶ 53, 62. The evidence must not only be closely balanced; it must be "so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *People v. Wilmington*, 2013 IL 112938, ¶ 31. Under either prong of the plain-error doctrine, the defendant bears the burden of persuasion. *Id.* ¶ 43.

¶ 62 The defendant asserts that the evidence was closely balanced as to both of his convictions. He substantially reiterates his first argument, *i.e.*, that the evidence was insufficient to convict him of predatory criminal sexual assault because the element of sexual penetration was not established. He notes that no physical evidence showed that M.S. had been vaginally penetrated. However, we find this argument unavailing. Medical evidence is not required to sustain a conviction for these offenses, and a lack of

injury does not disprove sexual abuse. *People v. Fryer*, 247 Ill. App. 3d 1051, 1058 (1993); *People v. Davis*, 260 Ill. App. 3d 176, 189 (1994). Moreover, Christanelli testified that 90% to 95% of children's sexual abuse examinations will be normal, even where the perpetrator admitted the abuse, because the perpetrator generally tries not to physically injure the child and because children heal quickly. The absence of medical evidence was unremarkable and did not render the evidence so closely balanced as to require reversal.

¶ 63 The defendant also asserts that the evidence was closely balanced regarding the aggravated criminal sexual abuse charge. He argues that "M.S.'s young age and the time lapse between the alleged incidents and her disclosure of the abuse and trial testimony make the accuracy and reliability of her claims questionable." He cites *In re E.H.*, 377 Ill. App. 3d 406 (2007), in support of his contention.

¶ 64 In *In re E.H.*, a grandmother overheard a conversation between her granddaughters, K.R. and B.R., and asked them what they were talking about. *Id.* at 409. K.R. stated that they were talking about the defendant, who had made them suck her "puckets" (the girls' word for breasts) and lick her "front behind" and "back behind" while the defendant babysat them. *Id*. B.R. also told her grandmother that the defendant had sexually abused her, using the exact same language as K.R. *Id*. The girls reported the sexual abuse in November 2000, approximately one year after the alleged acts took place. *Id*. at 408. K.R. was five years old at the time of the alleged abuse, and B.R. was two years old. *Id.* at 409. B.R., who was three years old at the time of the trial, did not testify at the defendant's bench trial. *Id*. at 407, 414.

¶ 65 On appeal, the court held that the admission of B.R.'s statement was an abuse of discretion. *Id.* at 414. The court found that the one-year passage of time between the alleged acts and B.R.'s revelation weighed against the reliability of her statements; while the one-year delay did not in and of itself make B.R.'s statements unreliable, they became less reliable when viewed in conjunction with her age. *Id*. The court found that, given the similarity between the girls' testimony, B.R. may have simply been repeating what K.R. told their grandmother. *Id*. The court found error because B.R. never testified, and there was no evidence in the record that the trier of fact interviewed B.R. or considered her age and maturity when determining her credibility and the weight to be given to her statement. *Id*. at 415.

¶ 66 We disagree that *In re E.H.* supports the defendant's contention. The court did not hold that young age and delay in reporting sexual abuse inherently renders a victim's report unreliable. Rather, the court determined that, based on a combination of factors, the statements made by a three-year-old child, who was two at the time of the incident and who never testified at trial, should not have been admitted into evidence. This is easily distinguishable from the facts before us, where M.S. testified at trial, and the jury was given the opportunity to determine the credibility and weight to give the evidence given her age and the passage of time since the alleged sexual abuse.

¶ 67 Moreover, a delay in reporting incidents of alleged child abuse does not render a victim's statements unreliable or inadmissible; this is particularly true when the defendant is the victim's father. *People v. Land*, 241 Ill. App. 3d 1066, 1081-82 (1993). The evidence reflects that the defendant, M.S.'s father, told her not to tell anyone about their

secret and that she believed that her father would get mad at her for telling. Again, the jury was given the opportunity to assess the time delay's impact on M.S.'s credibility. We find that M.S.'s statements were not so unreliable as to make the evidence closely balanced.

¶ 68 The defendant also contends that M.S.'s statements were unreliable because "there is overwhelming consensus that children are suggestible." The defendant presented no evidence to the jury regarding M.S.'s suggestibility; furthermore, we note that the defendant's assertion is rebutted by Mangiaracino's testimony at trial that M.S. was not suggestible. As the strength or sufficiency of the State's evidence may not be challenged on appeal based upon information and evidence not presented in the trial court (*People v. Heaton*, 266 Ill. App 3d 469, 476 (1994)), we also find this argument unpersuasive.

¶ 69 The defendant also contends that the trial court erroneously admitted the hearsay testimony of Kuhl and Mangiaracino pursuant to the hearsay exceptions available in section 115-10 of the Code (725 ILCS 5/115-10 (West 2010)). The defendant argues that the statements were not sufficiently reliable to be admissible.

¶ 70 Statements made by a sexual assault victim under the age of 13 describing the sexual assault, including the essential elements of the offense, may be admitted as substantive evidence as an exception to the hearsay rule. 725 ILCS 5/115-10(a) (West 2010). Before admitting such a statement, the court must hold a hearing outside the presence of the jury to determine if the circumstances of the statement provide sufficient safeguards of reliability. 725 ILCS 5/115-10(b) (West 2010). To determine reliability, the court must evaluate the totality of the circumstances surrounding the hearsay

statement; relevant factors include (1) the spontaneity and consistent repetition of the statement; (2) the mental state of the child in giving the statement; (3) the use of terminology not expected in a child of comparable age; and (4) the lack of a motive to fabricate. *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 95.

¶ 71 The State bears the burden of establishing that the statements were reliable, and the admission of evidence pursuant to section 115-10 of the Code is reviewed for an abuse of discretion. *Id*. ¶ 96. 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. *Id*.

¶ 72 In the case before us, the trial court found M.S.'s statements to Kuhl and Mangiaracino to contain sufficient safeguards of reliability. The defendant argues that M.S.'s statements were not reliable because they were not spontaneous and were undermined by inconsistencies.[1] However, the State's evidence in this case belies this claim.

¶ 73 M.S.'s statement to Kuhl regarding the abuse was not suggested by Kuhl; when asked what her father's penis looked like, M.S. volunteered the information about its appearance and the location of the abuse. M.S. was upset by the conversation, but she voluntarily returned to it the next day. The fact that M.S.'s statement was made in

[1]The defendant again returns to his argument that M.S.'s young age and the delay in reporting the sexual abuse affected the reliability of her statements. We also reject this contention in the context of this argument.

response to questions does not render it inadmissible under section 115-10. *People v. Anderson*, 225 Ill. App. 3d 636, 650 (1992). Similarly, when interviewing M.S., Mangiaracino primarily used open-ended questions, which discouraged yes-or-no responses. Her terminology in the interview was age-appropriate. In both scenarios, there was no evidence that M.S. had motive to lie; indeed, she was clearly reluctant to discuss the abuse (particularly with Mangiaracino), as she appeared to understand that it would affect her ability to return to her home. The statements were also consistent in several aspects: M.S. told both Kuhl and Mangiaracino that she saw the defendant's wiener and it was hairy; that the abuse happened in her living room while watching television; and that the defendant told her the abuse was a secret and not to tell anyone. The trial court weighed all of these factors−M.S.'s age, the delay in reporting, the questions asked of her, and the differences between her statements−and determined that the statements were reliable enough to allow the jury to determine the weight to be given to the statements. We cannot say that the trial court abused its discretion in finding M.S.'s statements reliable.

¶ 74 Finally, the defendant contends that the trial court erroneously admitted Christanelli's testimony as an exception under section 115-13 of the Code (725 ILCS 5/115-13 (West 2010)). The defendant asserts that M.S.'s statement to Christanelli, that the defendant had touched her private parts, was not relevant to M.S.'s diagnosis and treatment, but rather the exam was performed solely as part of a criminal investigation.

¶ 75 Statements made by victims of sexual offenses to medical personnel for the purposes of medical diagnosis or treatment shall be admitted as an exception to the

hearsay rule. 725 ILCS 5/115-13 (West 2010). The trial court is vested with discretion in determining whether a victim's statements to a physician fall within this medical diagnosis exception, and the determination may only be reversed for an abuse of discretion. *People v. Spicer*, 379 Ill. App. 3d 441, 450 (2007).

¶ 76 The record refutes this claim. Christanelli testified that a full medical work-up was performed, and counseling and therapy were recommended. We cannot say that the trial court abused its discretion in determining that the examination was also for medical purposes, to treat M.S. for injures, emotional trauma, or diseases she may have received as a result of the sexual abuse. Moreover, even if the exam was a means of developing evidence for a subsequent prosecution, this is not incompatible with a diagnostic purpose. See *People v. Falaster*, 173 Ill. 2d 220, 230 (1996). The trial court did not abuse its discretion in this instance.

¶ 77 The defendant also argues that hearsay testimony was an inadmissible prior consistent statement and cumulative of M.S.'s testimony, noting that a witness's prior consistent statement is hearsay and thus inadmissible to bolster a witness's trial testimony. *People v. Richardson*, 348 Ill. App. 3d 796, 802 (2004). However, as we have explained, Christanelli's testimony was properly admitted within the statutory exception to the hearsay rule, and it was therefore admitted as substantive evidence; when a prior statement is offered at trial as substantive evidence under an exception to the hearsay rule, the mere fact that the statement is consistent with the trial testimony does not render the statement no longer admissible. See *People v. Stull*, 2014 IL App (4th) 120704, ¶¶ 100-101. As such, the jury could consider Christanelli's testimony

substantively, along with all of the other evidence in the case. The rule that the defendant cites does not apply here.

¶ 78 For the foregoing reasons, we affirm the defendant's convictions.

¶ 79 Affirmed.