Order filed September 27, 2019. Modified upon denial of rehearing December 17, 2019.

2019 IL App (5th) 190006-U

NO. 5-19-0006

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Saline County.
	)	
v.	)	No. 12-CF-247
	)	
JACOB E. AUSTIN,	)	Honorable
	)	Walden E. Morris,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Overstreet concurred in the judgment.
Justice Cates dissented.

ORDER

¶ 1 *Held*: The defendant's convictions for aggravated sexual abuse are affirmed where: (1) the evidence was sufficient for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt; (2) prosecutors' questions during *voir dire* did not quantify the reasonable doubt standard and therefore did not amount to plain error; (3) the record is inadequate to determine whether the defendant was prejudiced by the circuit court's refusal to allow cross-examination of the State's medical expert regarding the victim's sexual history because the defendant did not make an offer of proof; and (4) although some of the prosecutors' comments during the defendant's presentation of the evidence and closing argument were improper, the defendant forfeited the issue of whether the evidence was closely balanced because he did provide citation to authority or argument in his brief on appeal.

¶ 2 The defendant, Jacob E. Austin, appeals from the September 26, 2013, judgment of conviction of the crime of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2012)), which was entered by the circuit court of Saline County after a jury verdict. In this appeal, the defendant makes the following claims of error: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) he was denied a fair trial due to the State's repeated quantification of reasonable doubt for the venire; (3) he was denied his constitutional right to present a defense when he was prevented from questioning the doctor who examined the victim about her sexual history because such evidence would provide an alternative explanation for the doctor's physical findings; and (4) he was denied a fair trial by repeated misconduct on the part of the prosecutors during the defendant's presentation of evidence and during closing argument. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 On August 3, 2012, the defendant was charged by information with three counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2012)) of the victim, M.W. Count I alleged that, in March 2012, the defendant placed his penis in the vagina of M.W., who was at least 13 years of age but under 17 years of age, and the defendant was at least five years older than M.W. Count II made the same allegations as count I but included an incident date of "between March 1, 2012, and May 22, 2012." Count III alleged that the defendant placed his finger in the vagina of M.W. during the same time frame.

¶ 5 On September 11, 2012, the State filed a motion *in limine*, pursuant to section 115-7 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7 (West 2012)), requesting the court to enter an order prohibiting introduction of evidence of any prior

sexual activity or the reputation of M.W. On October 19, 2012, the defendant filed a response to the State's motion *in limine*. According to the response, the State had provided in discovery a videotaped recording of an interview with M.W. in which she stated that she had not had any prior sexual engagement with any person before the alleged conduct with the defendant. Upon information and belief, M.W. had previously been the victim of a sexual encounter with a juvenile offender, L.F., who was subsequently charged for an offense against M.W. According to the defendant's response to the motion *in limine*:

> "Upon information and belief, said sexual encounters would have occurred within the last three years and would have consisted of conduct similar to that which is alleged against the defendant. As this matter is a juvenile case, the specific allegations and contents of the [p]etition in this case are unavailable to the defendant at this time and will be sought via subpoena once it is determined by the [c]ourt that the same will be admissible at trial. *** Upon information and belief, the prior sexual conduct of the alleged victim with L.F. would support the defendant's theory of the case that such detail regarding sexual encounters could have been provided after that encounter as opposed to relying on any alleged encounter with the defendant."

¶ 6 During a hearing on November 20, 2012, the defendant requested that the court conduct an *in camera* review of the juvenile proceedings against L.F. in which M.W. was the victim, in order to determine whether the sexual encounter in that case was similar to that in the case at bar. Thereafter, the parties submitted supplemental briefing to the circuit court on the motion *in limine*. In a supplement to his response to the motion, the defendant

reiterated the basis for his position that evidence of M.W.'s prior sexual activity was admissible to "rebut inferences that flow from the common perception that children are sexually innocent and that a child of tender years must have acquired knowledge of sexual acts from the defendant because she could not have acquired it in any other way." In an affidavit attached to this supplement, the defendant averred that M.W. talked to him and told him that no one will ever know what L.F. did to her because it was so despicable. The affidavit referenced the State's representation that the allegations of abuse of M.W. in the juvenile case against L.F. were different than those against the defendant, speculating that M.W. did not tell "other people" the nature of the contact she had with L.F. The defendant's supplement suggested that he be permitted to conduct an examination of M.W. outside the presence of the jury in order to inquire as to the nature of that contact so that the circuit court could make a proper determination as to its admissibility.

¶ 7 On December 7, 2012, the circuit court entered, via docket entry, an order granting the State's motion *in limine*, barring any evidence of M.W.'s prior sexual activity pursuant to 115-7 of the Code. 725 ILCS 5/115-7 (West 2012). The circuit court found that the defendant failed to show that any prior sexual contact of M.W. with another minor is directly relevant to the issues in the case. Further, the circuit court found that exclusion of such evidence would not deprive the defendant of his right of confrontation and effective cross-examination or his ability to present his theory of the case. On December 11, 2012, the State filed a supplement to its discovery responses, disclosing for the first time its intent to call Dr. Kathy Swafford of Children's Medical Resource Network as a witness.

According to the supplement, the State provided the defendant with 22 pages of medical records documenting Dr. Swafford's medical examination of M.W. on July 26, 2012.

¶ 8 A jury trial commenced on April 24, 2013. At the commencement of the trial, the parties stipulated that the defendant was born on July 29, 1989. E.J. Foster testified that he is M.W.'s stepfather and has raised M.W. since she was two months old. Mr. Foster met the defendant when a friend of Mr. Foster's wife started dating the defendant in the summer of 2011. During that time, the defendant became a close friend of the Foster family. He visited the Foster house daily. After the defendant and Mrs. Foster's friend stopped dating, the defendant remained a close friend of the Foster family. The defendant offered to babysit M.W., as well as the other Foster children, on several occasions. At the time, M.W. was 13 years old. Mr. Foster recalled one instance when the Foster children stayed overnight at the defendant's house where the defendant lived with his grandmother. Mr. Foster testified he was a coal miner who worked overnight shifts and slept during the day.

¶ 9 Mr. Foster testified that a month or two prior to May of 2012, he became suspicious of a relationship between M.W. and the defendant. He talked to M.W. about his suspicions and "accepted her answer." In approximately May of 2012, Mr. Foster heard from the mother of M.W.'s friend, S.F., that S.F. had information about such a relationship. After speaking with M.W.'s friend, Mr. Foster questioned M.W., then called the defendant and "flew off the handle." The defendant said nothing in response to Mr. Foster's accusations. Mr. Foster then called the police. On cross-examination, Mr. Foster was asked about a conversation he had with the defendant about a rumor going around town. Specifically, Mr. Foster was asked whether he had assured the defendant that he knew there was no

relationship between the defendant and M.W. Mr. Foster testified he did not recall such a conversation.[1]

¶ 10 M.W. testified that she was born in August of 1998. She met the defendant when Mrs. Foster's friend brought him to their home. After the defendant and Mrs. Foster's friend stopped dating, the defendant began making flattering remarks to M.W. Specifically, the defendant told M.W. she was beautiful, had a good head on her shoulders, and he wished one day he could marry her. M.W. and the defendant began kissing, hugging, and holding hands when they were alone together. The defendant told M.W. she was young and that he could go to jail and lose rights to his daughter if anybody found out.

¶ 11 M.W. testified that she first had sexual intercourse with the defendant in November of 2011 at the defendant's house. She and her sisters spent the night at the defendant's house on that evening. Mr. Foster had surgery and the defendant was babysitting them. M.W. testified that they were all watching a movie and her sisters fell asleep on the sectional while the defendant sat in a recliner. M.W. got up from the sectional and went to the bathroom. When she returned, her sisters were still asleep and the defendant was gone from the recliner. M.W. went to look for the defendant and located him in his bedroom. She asked the defendant what he was doing, and the defendant said, "Come here." They began kissing and the defendant began fondling her breasts. They then moved to the bed and had sexual intercourse with both digital and penile penetration. The defendant then ejaculated on the floor. M.W. testified she went to the bathroom afterward and there was

[1]Mr. Foster was unable to testify as to details of the conversations between himself and M.W., S.F., or the defendant because of the defendant's objection that such testimony would be hearsay.

blood on her tissue. She then returned to the living room, sleeping on the couch with her sisters while the defendant slept in the recliner.

¶ 12 M.W. testified that after the first time she had intercourse with the defendant, she felt more attached to him. They text messaged each other often and told each other they loved one another. She reiterated that the defendant told her not to tell anyone because he could go to jail, lose rights to his daughter, and lose the Fosters as his family. M.W. testified she and the defendant had sexual intercourse a second time at the defendant's home in March of 2012, when she was there helping prepare for a birthday party for M.W.'s stepmother. M.W. could not remember what time of day it was, but did remember there was penile penetration on this occasion, but no digital penetration.

¶ 13 M.W. testified that she and the defendant also had sexual intercourse at M.W.'s house on two occasions. These instances occurred soon after she returned home from school and the defendant came to her house after work. Her dad was sleeping in his bedroom on these occasions. The first time they had sexual intercourse in the living room on the couch, involving penile and digital penetration. The second time they had sexual intercourse in her bedroom and the defendant again ejaculated on the floor.

¶ 14 M.W. testified that her friend, S.F., observed her and the defendant kissing in the basement of the Foster family home during M.W.'s sister's birthday party. M.W.'s relationship with the defendant ended by agreement by the time of M.W.'s eighth grade graduation on May 22, 2012. She and the defendant agreed to end the relationship because people were getting suspicious. When Mr. Foster first came to her asking about whether she had a relationship with the defendant, she denied any such relationship. However, when

Mr. Foster approached M.W. and seemed angry in May of 2012, she admitted "everything" to him. When she spoke to investigator Rick White about what occurred, she did not tell him as many details as she had during her testimony at trial.

¶ 15 On cross-examination, M.W. confirmed that the defendant had approached her parents about rumors of a relationship between her and the defendant, and they had assured him they knew that those rumors were untrue. M.W. also admitted that she was flattered by the rumor. She admitted that she first told S.F. that she had "an older boyfriend" in September or October of 2011 and that S.F. had told police that M.W. told her she had sex with the defendant twice a week since then, rather than the four times to which M.W. had testified. M.W. testified she did not notice any scars on the defendant's body. M.W. testified the defendant was the first person she ever had sex with, and she was no longer a virgin. M.W. denied that the defendant told her they could never have a relationship and denied "poking" the defendant on Facebook on one occasion after the defendant's arrest on these charges.

¶ 16 S.F. testified that she has been M.W.'s best friend since fourth grade. In April 2012, she was at M.W.'s birthday party and witnessed the defendant and M.W. kissing in the basement and the defendant fondling M.W.'s breasts. She talked to the defendant later that night and the defendant admitted to having sex with M.W. She told her mom about this in May 2012. She also testified to seeing texts from the defendant to M.W. On cross-examination, S.F. testified that M.W. told her she had sex with the defendant twice a week between September of 2011 and May of 2012.

¶ 17 Dr. Kathy Swafford testified that she is a pediatrician who participates in the Children's Medical Resource Network and is a trained sexual abuse forensic examiner. She conducted a medical examination of M.W. on July 26, 2012. Dr. Swafford testified that the condition of M.W.'s hymen during the examination indicates that there had been penetration at some point in the past. Dr. Swafford testified that the condition of M.W.'s hymen was therefore consistent with the history M.W. provided of having "penile penetration" during sexual intercourse with the defendant. Dr. Swafford testified that some other type of penetration may be able to explain her physical findings, and standing alone, the physical findings would be indeterminate for a finding of abuse. Dr. Swafford confirmed that her finding of abuse was based on the physical findings coupled with the history she was provided that there had been sexual intercourse with the defendant. However, Dr. Swafford also testified that "when we see children, we don't expect any findings, so findings are significant." She also testified that "if a girl is a virgin, this is not the examination results you would expect."

¶ 18 After the State directly examined Dr. Swafford as indicated above, defense counsel requested a sidebar outside of the jury's hearing, which culminated in a more extensive argument outside of the jury's presence. We quote portions of this argument here, as it bears on our disposition of the issues raised on appeal:

> "DEFENSE: [The State] just asked [Dr. Swafford] if it would be consistent with not being a virgin. I feel that she is opening the door, Judge. She is making [the] implication that the defendant—or the alleged victim would otherwise be a virgin but for the accused abuse. They are opening it. *** Your Honor, based on

[the State]'s questioning, I intend to ask this doctor what [M.W.] disclosed to her, because her disclosure is inconsistent with the testimony in this action.

STATE: It is not.

***

DEFENSE: I would move for the [c]ourt to vacate the [o]rder *[i]n [l]imine* and allow us to proceed asking questions with this witness that [the State] has clearly opened the door to."

¶ 19 During this sidebar argument, defense counsel represented to the circuit court that M.W. had disclosed to the doctor that she was sexually active with someone else, while the State represented she had not. The defense insisted that M.W. had in fact disclosed to Dr. Swafford that she "had sex, one time with one other boy and no condom." The State insisted that defense counsel had misread Dr. Swafford's report. After a recess, the circuit court denied the defense's motion to vacate its order *in limine*.

¶ 20 Special Agent Bryan Harms of the Illinois State Police testified that he investigated the allegations of sexual abuse that M.W. made against the defendant in this case. Agent Harms testified that he attempted to contact the defendant on his cell phone on July 16, 2012, but reached the defendant's voicemail. Agent Harms left a voicemail letting the defendant know he needed to speak with him. The defendant called him back six to seven days later and told Agent Harms that he had been out of state. At that time, the defendant told him he resided on Legion Road in Carrier Mills.

¶ 21 On cross-examination Agent Harms testified that the defendant was cooperative and agreed to meet and speak with him. The defendant denied having any sexual contact with

M.W. This was the only time that Agent Harms met with the defendant, and he did not go to the defendant's home or M.W.'s home to conduct any forensic examination. He talked with S.F., Mr. Foster, and the defendant's former girlfriend, and Detective Rick White talked with M.W. This was the extent of the investigation. Agent Harms confirmed that S.F. told him that the sexual intercourse between M.W. and the defendant occurred approximately twice a week and that this began in September 2011. Agent Harms also related S.F.'s account of having seen the defendant and M.W. kissing and the defendant rubbing M.W.'s breasts, and S.F.'s conversation with the defendant later that night wherein the defendant admitted to having sex with M.W. On recross, defense counsel questioned Agent Harms further about his decision not to search the residences for potential DNA evidence, given M.W.'s account that the defendant had ejaculated on the floor. Agent Harms testified that it was unlikely any such evidence would have been recovered due to the passage of time.

¶ 22 After the State rested, the defendant testified on his own behalf. He testified that he did not live on Legion Road in Carrier Mills in November of 2011, but rather lived on Harrison Street. He did not move to Legion Road until January of 2012, and his grandmother did not move in with him there until March 15, 2012. The defendant testified that he did not have any sexual contact with M.W. at any time from November of 2011 to the date of his testimony. When Mr. Foster called him in July of 2012 and told him he better hope the cops find him before Mr. Foster did, he tried to ask Mr. Foster what he was talking about, but Mr. Foster hung up the phone before he had a chance to speak.

¶ 23 The defendant testified about getting to know the Foster family and his close relationship with Mr. and Mrs. Foster. His relationship with the Foster family began in September of 2011 and ended July 16, 2012, when Mr. Foster called him and accused him of having a sexual relationship with M.W. The defendant testified that M.W. and her sisters were like sisters or nieces to him. At one point, he heard a rumor in the community that he and M.W. had a relationship and spoke with Mrs. Foster about it. He told her that he wanted to assure her that nothing was going on, and wanted her to assure him that she knew that was the case. The defendant testified that Mrs. Foster assured him that she believed nothing was going on, and she would make sure that Mr. Foster also knew this to be true.

¶ 24 The defendant testified that he had scars located on his pelvic area and displayed that part of his body for the jury to see. The defendant testified that M.W. started text messaging him early in 2012, often late at night. He never responded to her messages. He testified that M.W. sent him a Facebook "poke" on February 14, 2013, and a print out of this activity taking place on the defendant's Facebook account was admitted into evidence. The defendant testified that at the time he was contacted by Agent Harms, he was out of the state to meet a friend and accompany her to a family reunion. He left soon after he received the telephone call from Mr. Foster, but did not know the police were looking for him when he left. He contacted Agent Harms immediately upon his return. The defendant denied the incident in the basement that was testified to by M.W. and S.F., and denied that he had a conversation with S.F. on the same night in which he admitted sexual contact with M.W.

¶ 25 The defendant testified that he could tell that M.W. had a crush on him due to her always trying to be near him. He further testified that he told M.W. that a relationship between the two of them could never happen. After the defendant's testimony, the defense rested and the jury heard closing arguments. After a period of deliberation, the jury rendered a verdict of guilty of counts I (penile penetration during March 2012) and II (penile penetration between March 1, 2012, and May 22, 2012) but not guilty on count III (digital penetration between March 1, 2012, and May 22, 2012). The circuit court entered a judgment on the jury verdict on April 27, 2013. On September 26, 2013, the circuit court sentenced the defendant to 36 months' probation. The defendant did not file a posttrial motion.

¶ 26 On October 17, 2013, the defendant filed his first notice of appeal in this matter, which was docketed as 5-13-0509. During the first appeal, the State moved to supplement the record on appeal with the report of Dr. Swafford's medical examination of M.W. This court granted the motion and the report was supplemented into the record on appeal. On March 28, 2017, this court entered an order remanding this matter with directions for the circuit court to conduct an *in camera* review of the juvenile record involving the charges of sexual abuse against L.F. *People v. Austin*, 2017 IL App (5th) 130509-U. The purpose of the *in camera* review was for the circuit court to determine whether L.F.'s abuse of M.W. was sufficiently similar to constitute an exception to the general inadmissibility of evidence of prior sexual conduct of M.W. *Id.*

¶ 27 On June 30, 2017, the circuit court conducted an *in camera* review of the juvenile case involving L.F. and determined that the sexual abuse that L.F. committed against M.W.

in that case was in no way similar to the allegations against the defendant and would not have changed the outcome of the trial had it been disclosed. On August 3, 2017, the defendant filed a second notice of appeal. On November 9, 2018, this court issued an order remanding this case a second time with directions that the circuit court conduct an *in camera* review of all of the State's notes from interviews with the victim to determine whether a discovery violation occurred. *People v. Austin*, 2018 IL App (5th) 170289-U. Upon remand, the circuit court ordered the State to produce all notes of any such interviews for *in camera* review. On December 13, 2018, the circuit court entered an order on remand finding that, while the notes from Detective Rick White's interview of M.W. were improperly withheld by the State, there was no prejudice because the actual interview was recorded and provided to the defense in discovery. The circuit court found no other discovery violations. On January 2, 2019, the defendant filed a third notice of appeal, raising all of the issues that he had raised, but that were not addressed, in the first two appeals.

¶ 28 On September 27, 2019, we issued our original disposition in this matter. On October 16, 2019, the defendant filed a petition for rehearing. After considering the argument set forth in the defendant's petition, we now issue this modified disposition upon denial of rehearing. Additional facts will be set forth as necessary for our analysis of the issues the defendant raises on appeal.

¶ 29 ANALYSIS

¶ 30 1. *Sufficiency of the Evidence*

¶ 31 The first issue the defendant raises on appeal challenges the sufficiency of the evidence to convict him of aggravated criminal sexual abuse. Our standard of review for a challenge to the sufficiency of the evidence in a criminal case has been stated by our supreme court as follows:

> "When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, this court will not retry the defendant. [Citation.] Rather, in such cases the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] Thus, it is our duty in the case at bar to carefully examine the evidence while giving due consideration to the fact that the court and jury saw and heard the witnesses. [Citations.] If, however, after such consideration we are of the opinion that the evidence is insufficient to establish the defendant's guilt beyond a reasonable doubt, we must reverse the conviction. [Citations.] The testimony of a single witness, if it is positive and the witness is credible, is sufficient to convict. [Citations.] While credibility of a witness is within the province of the trier of fact, and the finding of the jury on such matters is entitled to great weight, the jury's determination is not conclusive. Rather, we will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. [Citations.]" *People v. Smith*, 185 Ill. 2d 532, 541-42 (1999).

¶ 32 The defendant's convictions for aggravated criminal sexual abuse required the State to prove that he was 17 years of age or over and committed an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and he is at least five years older than the victim. 720 ILCS 5/11-1.60(d) (West 2016). Here, the only issue is whether the defendant committed an act of sexual penetration or sexual conduct with M.W., as it is undisputed that the defendant was at least 17, that M.W. was between the age of 13 and 17, and that the defendant was more than five years older than M.W. Here, the defendant argues that his convictions require reversal because they were based solely on M.W.'s credibility, which was "severely undermined by her repeated inconsistencies between her trial testimony and what she had previously told [S.F.], her parents, and the police." We disagree.

¶ 33 Assuming, *arguendo*, that M.W.'s testimony was of questionable credibility, we find sufficient corroborating evidence in the record of the trial in this case to sustain the jury's verdict. First, S.F. testified that the defendant told her that he had sex with M.W., and that she had witnessed the defendant kissing M.W. and rubbing M.W.'s breasts in the basement of the Foster home during a birthday party. Mr. Foster testified that he had his own suspicions about the defendant and M.W., but M.W. initially denied there had been a relationship. In addition, the defendant admitted there were rumors around town that such a relationship existed. It was only after S.F. told Mr. Foster about the relationship that M.W. confessed that sexual intercourse had occurred. To the extent that there were conflicts in the evidence, it was the function of the jury to resolve them. *People v. McPherson*, 306 Ill. App. 3d 758, 766 (1999). We cannot say the inconsistencies in M.W.'s

testimony compel the conclusion that no reasonable person could accept M.W.'s account of what occurred beyond a reasonable doubt. See *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Accordingly, we cannot reverse the jury's verdict of conviction on the grounds of insufficient evidence.

¶ 34 2. *Quantification of Reasonable Doubt During Voir Dire*

¶ 35 We now turn to the defendant's argument that the State violated his rights "to due process and a fair trial by repeatedly quantifying reasonable doubt in percentages for the venire." According to the defendant, the State's line of questioning of potential jurors during *voir dire* invited the jury to convict the defendant under a constitutionally deficient definition of reasonable doubt. This line of questioning was initiated by the State after a statement made by a potential juror. In response to the State's question as to whether the juror would be able to convict the defendant if the juror determined that the defendant was guilty beyond a reasonable doubt, the juror answered that he would have to be "100 percent certain" of the defendant's guilt in order to convict him. The State then asked the panel of jurors whether anyone else agreed with the juror that 100 percent certainty was required. The circuit court overruled the defendant's objection to these questions.

¶ 36 After the circuit court overruled the objection, the State stated to the jury as follows:

> "So we all understand; is that right? You understand the burden of proof is on the People to establish the defendant's guilt beyond a reasonable doubt? That doesn't mean all doubt, every possible doubt, it's beyond a reasonable doubt. Do each of you understand that is the law that's applicable to this case?"

¶ 37 A prospective juror then asked whether the circuit court could explain reasonable doubt, to which the court answered, "No I can't. That's for you to determine." The State then expanded on the circuit court's answer, stating: "It is a concept that's difficult and we can't—the judge can't and the attorneys cannot define it for you. Each of you have to determine in your mind in looking at the evidence if it's proven beyond a reasonable doubt." Later, during the questioning of a different prospective juror, the State indicated, "Now I can't explain to you, nor can anyone else in this courtroom, including the judge, what reasonable doubt means. But do you believe it means all doubt?" The following colloquy between that juror and the State followed:

"STATE: Well, let me put it this way. Would you agree there is a difference between reasonable doubt and unreasonable doubt?

JUROR: Yeah, probably.

STATE: Okay. So what if there was a doubt which in your mind was unreasonable, and everything else pointed to the fact that the People proved the defendant guilty beyond a reasonable doubt, maybe not 100 percent, like you've heard earlier in the courtroom, but beyond a reasonable doubt, not something that's unreasonable? I can tell you—if I'm charged with murder, I can tell you I was on the moon at the time that somebody was supposedly killed by me. Now, would that be reasonable doubt?

JUROR: How do I say this? The way you present it to me if I have any doubt at all then, no, he won't be guilty. I would have to be sure that he's going to be guilty if I say he is."

¶ 38 The State continued to question the jurors as to whether they understood that there is a difference between reasonable doubt and all doubt. The State posed a hypothetical to the jurors as to whether there would be reasonable doubt if a person were accused of shooting another person and the accused's alibi was that he was on the moon, asking, "that wouldn't really be reasonable doubt, would it?" The jurors to which this hypothetical was posed agreed that it would not.

¶ 39 The defendant acknowledges that he failed to object to the alleged improper questioning of the venire at trial, and thus our review of this issue is limited to whether plain error occurred. Plain error review is appropriate where the evidence is closely balanced or the error affects a substantial right. *People v. McGee*, 2015 IL App (1st) 130367, ¶ 58 (citing *People v. Herron,* 215 Ill. 2d 167, 178-79 (2005)). A plain error analysis begins with the determination of whether error occurred. *Id.* Here, we find no error. First, it is important to note that, unlike the cases cited by the defendant, the questioning of which the defendant complains did not occur as part of the circuit court's instructions to the jury, but rather during the State's questioning of potential jurors during *voir dire.* Accordingly, the defendant's reliance on *People v. Downs*, 2015 IL 117934, ¶ 1, is misplaced. Here, the defendant's due process rights were not compromised because the circuit court did not give the jury a constitutionally deficient instruction as to the burden of proof for conviction. *C.f. Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). Rather, in this case, the circuit court clearly instructed the jury that the burden was on the State to prove the defendant's guilt beyond a reasonable doubt and admonished the jury during the complained-of questioning of the venire that it could not define reasonable doubt. *C.f. id.*

¶ 40 Although it is clear that no constitutional violation occurred here because there was no improper jury instruction as to the burden of proof, we recognize that " '[a]ttempts to explain the reasonable-doubt standard have been disfavored by the courts because "no matter how well-intentioned, the attempt may distort the standard to the prejudice of the defendant." ' " *McGee*, 2015 IL App (1st) 130367, ¶ 57 (quoting *People v. Burney*, 2011 IL App (4th) 100343, ¶ 67, quoting *People v. Keene*, 169 Ill. 2d 1, 25 (1995)). However, " '[a] prosecutor may argue that the State does not have the burden of proving the guilt of the defendant beyond *any* doubt, that the doubt must be a reasonable one. Such an argument does no more than discuss the grammatical fact that the word "reasonable" modifies the word "doubt." ' " (Emphasis in original.) *Id.* (quoting *People v. Carroll*, 278 Ill. App. 3d 464, 467 (1996)). Our review of the record indicates that this is the exact nature of the prosecution's questioning of the venire here. For these reasons, we will not disturb the jury's verdict in this case based on this line of questioning during *voir dire*.

¶ 41 3. *Cross-Examination of Dr. Swafford as to M.W.'s Reported Sexual History*

¶ 42 The defendant next argues that the circuit court erred when it refused to vacate its pretrial order *in limine* to allow him to cross-examine Dr. Swafford as to M.W.'s reported sexual history. Section 115-7(a)(2) of the Code (725 ILCS 5/115-7(a)(2) (West 2016)) provides that, in prosecutions for, *inter alia*, aggravated criminal sexual abuse, the prior sexual activity of the alleged victim is inadmissible except when constitutionally required to be admitted. In some instances, due process requires the admission of evidence of the victim's sexual history where that evidence is relevant to a critical aspect of the defense. *People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 186 (2001). Evidence of the victim's prior

sexual history may be admissible when that history explains some physical evidence, such as physical indications of intercourse. *Id.* (citing *People v. Sandoval*, 135 Ill. 2d 159, 185 (1990)).

¶ 43 Here, Dr. Swafford testified that the condition of the M.W.'s hymen during the physical examination indicated vaginal penetration. Although she wavered in her remarks about whether these physical findings were conclusive as to sexual intercourse, the State elicited testimony from her that would indicate that absent sexual intercourse, she would expect a child to have an intact hymen. Accordingly, if M.W. had, in fact, had a history of sexual intercourse with someone other than defendant, evidence of such a history may have become relevant at that juncture, and thus constitutionally required to be admitted. See *id.* However, on the record before us, we cannot determine whether this is the case.

¶ 44 The defense requested the circuit court reconsider its prior order *in limine* following Dr. Swafford's testimony on direct examination. In so doing, the defendant claimed that M.W. gave her a history that she had sexual intercourse with someone other than the defendant. The State denied that this was the case. The record on appeal contains a copy of Dr. Swafford's report because this court allowed the State's request that the report be made part of the record on appeal. However, this report was never before the circuit court. This court has reviewed the report and takes note that in the "Past Medical History" section of the report, next to a preprinted line stating, "consensual sexual activity?" there is a checkmark in the box marked "yes" and a handwritten notation stating that per "patient," "one time, no condom; only been one boy." At the bottom of the medical history section

of the report, the report indicates that the history was obtained by Ginger Meyer, who was not a witness at trial.

¶ 45 Although the defense requested the circuit court to allow the cross-examination of Dr. Swafford regarding this history, it did not request to make an offer of proof, or to examine M.W. in an offer of proof. "To preserve a claim on appeal, a party is required to make 'considerably detailed and specific' offers of proof after a denial of a request to admit evidence if the substance of the witness's answer is unclear." *People v. Patterson*, 2014 IL 115102, ¶ 118. At the time the circuit court made its ruling, it had no way of knowing whether M.W. actually gave Dr. Swafford, or anyone else, a history of sexual intercourse with someone other than the defendant. While this court has the benefit of actually reviewing Dr. Swafford's report, it is unclear from the report whether Dr. Swafford would have been able to testify as to any history apparently given to Ginger Meyer, or what Dr. Swafford's testimony in response to any line of questioning by the defendant would have been. Furthermore, this court has no way of knowing what M.W.'s testimony would have been if the defense had requested to examine her on this issue, outside the presence of the jury, in the form of an offer of proof. For these reasons, the circuit court did not err in denying the defendant's motion to vacate its order *in limine*.

¶ 46 4. *Prosecution's Commentary During Evidence and Closing Arguments*

¶ 47 Finally, the defendant argues that he was deprived of a fair trial by the prosecutors' "repeatedly committing misconduct in closing argument." However, we note that the defendant also complains of comments during the portion of the trial where the defendant displayed his pelvic area to the jury in order to demonstrate that he had scarring in that

area. During this portion of the trial, the prosecutor made the following comments: (1) "I don't know what that showed, and I don't want to. I couldn't see *** we don't know what was seen, what was shown" and (2) "I don't see anything." The defendant objected, and the circuit court admonished the prosecutors to refrain from such comments. The defendant takes issue with the following statements made by the prosecution during closing arguments:

> "I want you to go back and think, if you can— [Juror] Patterson has had three daughters—how you would feel, any of you, if your 13-year-old daughter, who is now 14, is sitting there and had to tell each one of you, all of us and the whole world, that she had had sex with a 22-year-old man, and yeah she probably enjoyed it. I'm sure she did. [(Comment 1)]"
>
> "If you find, ladies and gentlemen, that the defendant is not guilty in this case, it is my opinion that the seduction of [M.W.] will have been complete. [(Comment 2)]"
>
> "You have two 13-year-old girls, as [the State] told you, who took that witness stand and beared [*sic*] their souls to the world, especially [M.W.]. She'll be scarred forever, no matter what the outcome of this case. She can't escape the fact that it's now public record that she had sex and maybe even enjoyed it with a 22-year-old male. She'll never be able to escape that the rest of her life. [(Comment 3)]"
>
> "Thirteen[-]year[-]old girls are highly impressionable, they're vulnerable, they're weak. And that's why we have laws such as those that the defendant was

charged with, to prevent our young children from being preyed upon. If not for those laws, all hell would break loose. And how many of these kids—how many of these kids would be damaged forever? [(Comment 4)]"

"I think we all need to remember, 14-year-old girls put in this witness seat to testify in front of, what, between 20 and 25 strangers who are adults. They're 14. I mean, those girls are young. That would be daunting, intimidating to any of us, to me as a person who is in this courtroom all the time. I can tell you I was a witness once and it was terrible. It was terrible. And those girls are 14. [(Comment 5)]"

"It's hard to imagine having to testify to that in front of 20 to 25 strangers when you're 14 years of age. [(Comment 6)]"

"So to believe this defendant you have to disbelieve the medical evidence. You have to think that [M.W.] shoved something up her vagina and caused these injuries and this healed trauma, or something else caused it, which there was no evidence whatsoever— [(Comment 7)]"

¶ 48 The defendant acknowledges that he did not object to most of the remarks he now challenges. In addition, he did not file a posttrial motion. The failure to raise an issue in a written motion for a new trial results in forfeiture of that issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 185 (1988). However, this court may consider arguments that are otherwise forfeited under the plain error doctrine. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). That doctrine allows us to overlook forfeiture of issues "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Id.*

¶ 49 Because we only need to apply the plain error doctrine if there was error, we will first examine the prosecutorial statements referenced above to determine whether, either alone or cumulatively, they constituted error. See *id.* at 187. A defendant arguing that reversal of his conviction is warranted based on improper closing argument faces a difficult burden. *People v. Gutierrez*, 402 Ill. App. 3d 866, 895 (2010). Even when the defendant objects to all of the remarks he challenges on appeal, reversal is warranted only if those remarks resulted in substantial prejudice to the defendant. *People v. Abadia*, 328 Ill. App. 3d 669, 678 (2001). In other words, reversal is warranted only if those remarks were a material factor in the jury's verdict. *Gutierrez*, 402 Ill. App. 3d at 895. If a prosecutor's remarks have the "effect of undermining the entire trial, reversal for a new trial is warranted." *People v. Brooks*, 345 Ill. App. 3d 945, 953 (2004). With these standards in mind, we turn to the comments at issue.

¶ 50 First, regarding the prosecutors' comments during the defendant's demonstration of the scarring in the area of his pelvis, we agree with the defendant that it is improper for the prosecution to make comments expressing an opinion as to the evidence being offered. See *People v. Lee*, 229 Ill. App. 3d 254, 260 (1992). However, from the record, the statements could be construed as communicating the prosecutors' physical inability to see the demonstration. In any event, the circuit court's ruling that sustained the defendant's objection at the time of the statements, as well as its instruction to the jury that the comments of the attorneys do not constitute evidence, alleviated any prejudice to the defendant as a result of these statements. See *People v. Harris*, 225 Ill. 2d 1, 33 (2007).

¶ 51 Moving to the prosecutors' statements during closing argument, the defendant makes the following arguments on appeal: (1) Comment 1 constitutes an improper invitation to place the jurors "in the shoes" of the parties (see *People v. Spreitzer*, 123 Ill. 2d 1, 38 (1988)); (2) Comment 2 suggested to the jury that its job was to find the defendant guilty or that the jury would be complicit in the crime if it returned a verdict of not guilty (see *People v. Peete*, 318 Ill. App. 3d 961, 970-71 (2001) (citing *United States v. Young*, 470 U.S. 1, 18 (1985))); (3) Comment 4 improperly focused on the remediation of society's problems rather than the question of the defendant's guilt (see *People v. Johnson*, 208 Ill. 2d 53, 77-78 (2003)); (4) Comments 3, 4, 5, and 6 improperly emphasized M.W.'s age (see *People v. Clark*, 335 Ill. App. 3d 758, 764-65 (2002)); and (5) Comment 7 was improper because it emphasized the medical testimony when the defendant was not permitted to cross-examine Dr. Swafford regarding M.W.'s sexual history.[2]

¶ 52 We agree with the defendant that some of the complained-of statements by the prosecution were error. However, we cannot say the comments were so improper as to warrant reversal of the defendant's convictions. Viewing the comments in the context of the entire trial, we find the comments did not substantially prejudice the defendant. See *Harris*, 225 Ill. 2d at 33. Considering the circuit court's instructions to the jury that the comments and closing arguments made by counsel were not evidence, we find that the remarks were not a material factor in the jury's verdict. See *Gutierrez*, 402 Ill. App. 3d at

[2]We are unable to assess the propriety of Comment 7 on this record, for the same reasons that we are unable to assess the propriety of the circuit court's refusal to allow for the cross-examination of Dr. Swafford as to M.W.'s sexual history.

895. Accordingly, we conclude that the comments do not amount to reversible error. See *id.*

¶ 53 In his petition for rehearing, the defendant argues that because this court found error in some of the prosecutors' comments, we are required to conduct an analysis of whether the evidence was closely balanced in order to foreclose his argument that these comments constitute plain error. See *People v. Sebby*, 2017 IL 119445, ¶¶ 64-69. Upon review of the defendant's opening brief, we note that the defendant did not cite any authority or articulate to this court the legal analysis that leads to a conclusion that the evidence is closely balanced. Rather, he referenced those portions of his brief in which he argued that the evidence was insufficient for the jury to convict the defendant. "Whether the evidence is closely balanced is, of course, a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge." *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). " '[A] reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented.' " *People v. Oglesby*, 2016 IL App (1st) 141477, ¶ 242 (quoting *Bartlow v. Costigan*, 2014 IL 115152, ¶ 52). Accordingly, we find that the defendant has forfeited this argument for purposes of this appeal. See *Oglesby*, 2016 IL App (1st) 141477, ¶ 242 (citing *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010); Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)).

¶ 54 CONCLUSION

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

¶ 56 Affirmed.

¶ 57 JUSTICE CATES, dissenting:

¶ 58 Upon further consideration of the issues raised in defendant's petition for rehearing, I now dissent from the majority view on one issue. In my view, the representations made by defense counsel to the trial court outside the presence of the jury were sufficient to raise the question of whether the prior sexual activity of the minor, was "constitutionally required" to be admitted.

¶ 59 Pursuant to a motion *in limine* by the State, the trial court entered an order prohibiting defense counsel from introducing the prior sexual activity of M.W. Preliminarily, the ruling of the court was correct under the rape shield statute. 725 ILCS 5/115-7 (West 2012). Subsection (a) of this statute, however, contains two very narrow exceptions for the admission of prior sexual activity by the victim. The first exception relates to prior sexual activity with the defendant, and whether consent may have been involved. 725 ILCS 5/115-7(a)(1) (West 2012). This subsection, presumably, would not be applicable in this case. The second subsection pertains to those circumstances where the prior sexual activity is "constitutionally required to be admitted." 725 ILCS 5/115-7(a)(1) (West 2012). Under the circumstances presented in this case, the substance of the offer of proof made by defense counsel was sufficient to cause the prior sexual history of M.W. to be "constitutionally required."

¶ 60 The majority states that the offer of proof had to be "considerably detailed and specific, *** if the substance of the witness's answer is unclear," relying on *People v. Patterson*, 2014 IL 115102, ¶ 118. In making this very broad statement, the majority left out the internal case citation, which was *People v. Peeples*, 155 Ill. 2d 422, 457 (1993).

Peeples was a death penalty case and did not involve the rape shield statute. In *Peeples*, our Illinois Supreme Court described the general rules for avoiding waiver of an issue on appeal where counsel fails to make an adequate offer of proof. The court held that a party must present a "considerably detailed and specific" offer of proof when it is unclear what testimony the witness will provide or the witness's basis for that testimony. *Peeples*, 155 Ill. 2d at 457. A detailed offer of proof is necessary to inform the court, opposing counsel, and the reviewing court of the nature and substance of the evidence that the party is seeking to introduce. *Peeples*, 155 Ill. 2d at 457.

¶ 61 In the *Patterson* case, relied upon by the majority, the victim's treating physician noted "some cervical redness that was consistent with sexual intercourse." *Patterson*, 2014 IL 115102, ¶ 116. In a sidebar, defense counsel then asked the trial court for leave to question the doctor as to whether or not sperm was found in the victim's vagina. *Patterson*, 2014 IL 115102, ¶ 116. Defense counsel offered no basis for doing so, except to state that the doctor's statement was consistent with the inference that the victim had engaged in prior intercourse. *Patterson*, 2014 IL 115102, ¶¶ 116, 119. Under the circumstances presented in *Patterson*, our Illinois Supreme Court found no abuse of discretion in the trial court's denial of the motion, as defendant offered no detail, much less a considerable amount of detail, in making his request to the trial court. *Patterson*, 2014 IL 115102, ¶¶ 119, 123. The *Patterson* court held, without discussing the subsections of the rape shield statute, that because the defendant did not provide a sufficient offer of proof, his claim that the trial court erred in denying his evidentiary request was not subject to review. *Patterson*, 2014 IL 115102, ¶ 123.

¶ 62 Here, unlike in *Patterson*, there was a valid evidentiary basis for defense counsel making a request to admit a fact that was present in the medical record of the State's witness, Dr. Swafford. During questioning by the State, Dr. Swafford was asked very specific questions with regard to whether the victim was a "virgin." The State then asked the following sequence of questions of Dr. Swafford on direct examination:

> "Q. My question, and I'll ask it again, is this evidence that you've described to the jury consistent with a penile—a penis entering the vagina in a sexual intercourse act?
>
> A. Yes.
>
> Q. And is it consistent with a penis entering the vagina on more than one occasion?
>
> A. We can't comment to the number of times that there was penile penetration, or any penetration, just that there's absolute evidence of penetration at the time of the exam.
>
> Q. All right. And was this consistent with the history that you were given by the child?
>
> A. It would be consistent with the history of penile penetration that she had provided."

¶ 63 This series of questions left the jury with the no other explanation of how the victim's hymen had been penetrated, other than by the defendant.

¶ 64 On cross-examination, defense counsel asked Dr. Swafford for a copy of her report. After a few preliminary questions, defense counsel confirmed with the doctor that her

opinions were based, in relevant part, upon the history given by M.W. In response to further questioning by defendant's attorney, Dr. Swafford indicated she relied on "the history that was given in the forensic interview at the Child Advocacy Center, as well as what [M.W.] talked with us about."

¶ 65 Prior to finishing his examination of Dr. Swafford, defense counsel asked the trial court to reconsider its motion *in limine* prohibiting questions pertaining to the victim's prior sexual activity. Outside the presence of the jury, defense counsel indicated that he intended to ask Dr. Swafford about the victim's prior sexual history, as the State had opened the door on that issue by implying that M.W. was either a virgin or abused. When the court asked what the State had done to open the door on the protections afforded by the rape shield statute, defense counsel responded, in pertinent part:

> "[M.W.] disclosed to the doctor being sexually active with someone else. And the doctor's rendering an opinion that the physical evidence is consistent with her having been sexually active. [The State] wants to imply to the jury that, therefore, must necessarily mean she was active with [defendant].
>
> * * *
>
> She told that—her sexual history to the doctor was not I had sex with this 22[-]year[-]old guy, her disclosure to the doctor was I had sex one time one other boy and no condom. One time would completely contradict everything [Dr. Swafford] testified to. I'm entitled to use prior inconsistent statements to impeach the credibility of [M.W.], and she made that inconsistent statement to this doctor."

¶ 66 Defense counsel argued that his client's constitutional rights would be compromised if the court did not allow Dr. Swafford to give testimony regarding this history with the "one boy, one time."

¶ 67 Defense counsel did not ask to admit the medical record from which Dr. Swafford was testifying.[3] However, defense counsel informed the court that what he had indicated to the court was contained in Dr. Swafford's record. He stated:

> "We argued in the Motion in Limine that impeachment necessitated the ability to use that information because we foresaw this very circumstance coming. We saw it in discovery. We knew it was coming."

¶ 68 There can be no doubt from the report of proceedings that what defense counsel was referencing was Dr. Swafford's medical record. Dr. Swafford's medical record is available for our review. The record reveals the following:

> "Consensual sexual activity? Per Patient ☒ Yes ☐ No **One time no condom; only been one boy**"

¶ 69 Defense counsel's representation of the contents of the medical record was almost identical to what was contained in Dr. Swafford's report. Other than admitting the report itself, defense counsel could not have done much more to clarify the substance of his offer of proof. Counsel indicated the substance of the information reported by the victim, almost verbatim. Counsel also informed the court that this "inconsistent statement was made to the doctor." The fact that it was made during Dr. Swafford's interaction with M.W. when she was seen at the Two Rivers Child Advocacy Center on July 26, 2012, provided the

[3]Dr. Swafford's medical record was never introduced into evidence at trial. On appeal, this court granted the State's motion to supplement the record with Dr. Swafford's report.

court with the date of M.W.'s report. Therefore, the offer of proof made by defense counsel was adequate to inform the court of the nature and substance of the testimony sought to be introduced.

¶ 70 The majority also questions whether Dr. Swafford's report was admissible, or what testimony would have been given by M.W., once the information was introduced. Engaging in this kind of conjecture is not relevant to the question of whether the trial court abused its discretion in denying defense counsel the opportunity to question Dr. Swafford regarding this statement in her report, and whether the reporting of this one incident was consistent with penile penetration. Section 115-13 of the Code of Criminal Procedure of 1963 allows statements made by a victim to medical personnel for the purpose of medical diagnosis and treatment to be admitted as an exception to the hearsay rule during the prosecution for certain crimes, including aggravated criminal sexual abuse under (720 ILCS 5/11-1.60 (West 2012)). 725 ILCS 5/115-13 (West 2012). This statutory hearsay exception applies even when the medical professional testifying relied upon the victim's statement to a different medical professional. See *People v. McNeal*, 405 Ill. App. 3d 647, 665-67 (2010).

¶ 71 As previously noted, the question for the court to have answered was whether the information given to Dr. Swafford by M.W., and recorded in her medical report was "constitutionally required" to be admitted, as argued by defense counsel. 725 ILCS 5/115-7(a) (West 2012). The protections found both in the due process clause of the fourteenth amendment (U.S. Const., amend. XIV) and the confrontation clauses of the federal and state constitutions (U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8) guarantee criminal

defendants a meaningful opportunity to present a complete defense. *People v. Santos*, 211 Ill. 2d 395, 412 (2004). The rape shield statute is designed to yield to these constitutional protections to ensure a fair trial. *People v. Hill*, 289 Ill. App. 3d 859, 862 (1997). The statutory shield is not intended to preclude relevant evidence that bears directly on the question of guilt or innocence. *Hill*, 289 Ill. App. 3d at 862. That is why evidence of the victim's prior sexual history may be admissible to explain some physical evidence, including pregnancy, the presence of semen, or physical indications of intercourse. *People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 186 (2001).

¶ 72 In this case, the trial court abused its discretion when it failed to allow defense counsel to question Dr. Swafford on the prior sexual history given by M.W. The court should have crafted a narrow exception that would have allowed defense counsel to ask limited questions tailored to the physical findings Dr. Swafford found on her physical exam and whether the prior sexual history given by M.W. of, "one time, one boy," could have caused the same physical findings. In crafting its order *in limine*, the trial court could have allowed defense counsel to conduct a simple question-and-answer examination of Dr. Swafford outside the presence of the jury.

¶ 73 Here, defense counsel made an adequate offer of proof, and the trial court abused its discretion by not allowing the defendant to introduce the very limited evidence that M.W. reported that her sexual history included a single act of sexual intercourse with someone other than the defendant. By fashioning a limited inquiry, the public policy behind the rape shield statute would not have been offended, and the constitutional rights of the defendant would have been preserved. Although I believe there was sufficient evidence to

convict the defendant for the crimes as charged, the trial court's error was of such magnitude that the judgment must be vacated, and this cause remanded for a new trial. *People v. Fillyaw*, 409 Ill. App. 3d 302, 319 (2011) (violation of due process and confrontation clause rights affects substantial rights and satisfies the second prong of the plain error analysis).