2022 IL App (4th) 200315-U

NO. 4-20-0315

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 31, 2022
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
MICHAEL A. VEGELER,	)	No. 18CF302
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the trial court did not err in refusing to instruct the jury on the lesser-included offense of sexual abuse and (2) the evidence was sufficient to sustain defendant's conviction for criminal sexual assault.

¶ 2 In April 2018, a grand jury indicted defendant, Michael A. Vegeler, on two counts of criminal sexual assault, alleging defendant committed an act of sexual penetration with H.J. and the act involved (1) the penis of defendant and the vagina of H.J. and the act was committed at a time defendant knew H.J. could not give knowing consent (720 ILCS 5/11-1.20(a)(2) (West 2016)) (count I) and (2) the penis of defendant and the anus of H.J. and the act was committed at a time defendant knew H.J. could not give knowing consent (720 ILCS 5/11-1.20(a)(2) (West 2016)) (count II). In February 2020, a jury found defendant guilty of both counts. In July 2020,

the trial court sentenced defendant to consecutive terms of four years' imprisonment on each count.

¶ 3 Defendant appeals, arguing (1) the trial court erred by denying defendant's request for a jury instruction on the lesser-included offense of criminal sexual abuse because some evidence supported the instruction as an alternative to criminal sexual assault as alleged in count II of the indictment and (2) the State failed to prove defendant guilty of criminal sexual assault as alleged in count II of the indictment. For the following reasons, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In April 2018, a grand jury indicted defendant on two counts of criminal sexual assault, alleging defendant committed an act of sexual penetration with H.J. and the act involved (1) the penis of defendant and the vagina of H.J. and the act was committed at a time defendant knew H.J. could not give knowing consent (720 ILCS 5/11-1.20(a)(2) (West 2016)) (count I) and (2) the penis of defendant and the anus of H.J. and the act was committed at a time defendant knew H.J. could not give knowing consent (720 ILCS 5/11-1.20(a)(2) (West 2016)) (count II).

¶ 6 A. Jury Trial

¶ 7 In February 2020, the matter proceeded to trial where the jury heard the following evidence.

¶ 8 1. *Erika Jeffery*

¶ 9 Erika Jeffery testified she met H.J. at karaoke at a bar called Copper Top approximately three years earlier. On February 8, 2018, Jeffery had plans to meet H.J. at Copper Top to celebrate H.J.'s birthday. Jeffery testified she arrived at Copper Top around 10:15 or 10:30 p.m., greeted H.J., and offered to buy her a drink for her birthday. According to Jeffery,

she and H.J. each took a shot of Rumple Minze, an alcoholic beverage. Jeffery observed H.J. with another glass after the shot of Rumple Minze, but Jeffery did not know how much H.J. had to drink that evening. H.J. told Jeffery she had gone out to eat earlier with defendant. Jeffery saw H.J. talking with defendant and hugging him. Jeffery testified H.J. became intoxicated quickly and she was tripping over herself, her head was dangling like she was falling asleep, and her speech became increasingly incoherent. Around 11 p.m., Jeffery went outside to smoke, and when she came back into the bar, she heard H.J. had fallen. At that time, some friends helped H.J. to a seat and discussed getting H.J. home.

¶ 10 Another friend, Paula, called an Uber for H.J., and Jeffery testified she and Paula "virtually had to like carry [H.J.] on our shoulders and her feet were like dragging." According to Jeffery, one person had to hold H.J. up while the other strapped a seatbelt across her. While Jeffery helped H.J. to the Uber, defendant was at the bar and appeared to be paying the bill. Jeffery testified she knew H.J. had met defendant online and Jeffery asked defendant to see his identification and he gave her his wallet. Jeffery told the Uber driver that H.J. wanted to go home. Defendant came out before the Uber left and got into the vehicle.

¶ 11 Jeffery testified she texted H.J. and sent her messages on Facebook the next morning. According to Jeffery, she heard back from H.J. in the late morning or afternoon and H.J. was already at the hospital.

¶ 12 2. *H.J.*

¶ 13 H.J. testified she met defendant online a week or two prior to meeting. H.J. and defendant first began communicating on the website Match.com and eventually began text messaging. H.J. and defendant made plans to meet in Normal, Illinois, to have dinner at a restaurant called Medici to celebrate H.J.'s birthday. According to H.J., she met defendant in the

lobby of a Marriott hotel and they walked to Medici. H.J. did not recall what time they arrived at Medici, but she testified the restaurant was busy so they sat at the bar. H.J. testified she told defendant she had not had anything to eat. While at Medici, H.J. drank a cranberry and vodka, a chocolate martini, a house drink, and maybe a shot. H.J. could not recall what defendant was drinking but testified she drank more than he did.

¶ 14 H.J. testified she and defendant eventually left Medici to go to Copper Top. H.J. ordered an Uber because "[she] started to feel funny, like [she] would feel the effects of what [she] believe[d] was alcohol." H.J. remembered bits and pieces of the drive to Copper Top and testified defendant kissed her. H.J. recalled entering Copper Top and being very happy to see her friends. H.J. remembered taking a shot with Jeffery, but she did not recall anything after that. H.J. had no recollection of being affectionate toward defendant, falling down, being in an Uber, or walking into the hotel.

¶ 15 H.J.'s next memory was waking up face down with her face stuck to the bed with dried blood. According to H.J., she felt dizzy and, when she tried to stand up, she fell to the floor. H.J. testified she did not know where she was and she crawled into a bathroom where she began vomiting. H.J. eventually pulled herself up on the vanity and turned on a light. H.J. testified, "My nose had blood coming out of it and my eye from about right here, it was all bloody. And my lip on the inside of it had blood and then I had blood running down my leg." According to H.J., she began to panic because she knew she was not at home and she had no clothing on. H.J. testified the blood on her leg was running out of her body and it was "[w]orse than a period." When asked where the blood came from, H.J. stated, "Not just my vagina but also my butt. My butt was not running blood, but it was—there was blood." H.J. further testified, "I was touching myself because I was like where is it coming from. So from my butt it

could have been from my vagina too, going up by my butt, but I know that I was—something bad had happened." When asked if she could tell something had been inside her vagina, H.J. responded, "Something definitely had been inside of me." When asked if she could tell something had been inside her anus, H.J. responded, "Something had been inside of me for sure."

¶ 16 H.J. washed her hands and face, and she got dressed. H.J. found her wristlet but could not locate her larger purse, coat, phone, or one sock. Defendant was unconscious on one of the beds, and H.J. did not speak to him before she left. H.J. sought help at the hotel's front desk and took a cab home. H.J.'s sons, then aged 16 and 18 years old, were waiting for her because she had not responded to their texts and phone calls. H.J. went to bed, and when she eventually woke up, she took a shower and used her son's phone to contact the friends she had been with the night before. Her friends told her that she left the night before with defendant and they thought she went home.

¶ 17 H.J. arranged to collect her things from Paula and her friends eventually convinced her to go to the hospital. At the hospital, H.J. told a nurse what she could remember of the night before. H.J. testified she was concerned about sexually transmitted diseases and whether she had injuries given the bleeding in her vagina. H.J. was given sex assault paperwork and chose to allow the nurse to speak to police but elected not to speak to police herself. A few days later, H.J. initiated contact with police, and on March 2, 2018, she participated in an "overhear" where she called defendant.

¶ 18 H.J. testified she received two text messages from defendant later on the day she woke up in the hotel room. The messages asked whether H.J. had found her phone and coat. H.J. responded by calling defendant a monster and insinuating he raped her.

¶ 19 3. *Paula Chestney*

¶ 20 Paula Chestney testified that, on February 8, 2018, she had plans to meet H.J. at Copper Top to celebrate H.J.'s birthday. According to Chestney, H.J. arrived at Copper Top around 10 p.m. with defendant. Chestney greeted H.J., wished her a happy birthday, and said H.J. looked like she had a lot to drink. According to Chestney, H.J.'s eyes were glassy. Chestney acknowledged she was drinking on the night in question but testified her memory was not affected by how much she drank. Chestney testified she was playing darts and defendant joined the game.

¶ 21 Chestney finished playing darts and turned toward H.J., who fell face forward out of her chair. Chestney agreed it was fair to say defendant did not see H.J. fall out of her chair. Chestney went to help H.J. and H.J. was mumbling and slurring her words. According to Chestney, H.J. was "very, very out of it" and had her head down. Chestney testified H.J. had redness on the side of her face from the fall but she was not bleeding. Defendant said he was going to call a cab and take H.J. home. Chestney testified she and another person had to help H.J. to the cab and H.J. was not walking on her own. Once they got H.J. in the cab, H.J. fell over in the back seat and had to be helped up. After H.J. and defendant left, Chestney noticed H.J. left behind her coat that had her phone and keys in it.

¶ 22 Chestney testified she helped the Copper Top bartender obtain video footage from inside Copper Top the night of the incident. The parties stipulated to the foundation for the video footage and six videos, labeled as People's exhibit Nos. 4 through 9, were played for the jury. People's exhibit No. 4 showed the bar area of Copper Top. Chestney identified herself, H.J., and the bartender. The video showed H.J. and defendant getting drinks. The video showed

H.J., Chestney, and the bartender taking shots. The video showed H.J. greeting people with hugs and chatting and then H.J. and defendant walk out of the camera's view.

¶ 23 People's exhibit No. 5 depicted a different area of Copper Top with tables and people singing karaoke. The video shows defendant playing darts and H.J. chatting with friends. At one point, H.J. left the camera's view for a few minutes while defendant played darts. The video showed H.J. and defendant kissing, hugging, and otherwise engaging in affectionate behavior. At one point, defendant pulled out a chair, sat down, and pulled H.J. forward to stand between his legs. A short time later, H.J. sat down next to defendant at the table. Approximately five minutes later, Chestney came over, and defendant went back to playing darts. Between his turns playing darts, defendant and H.J. continued dancing and kissing. When defendant was playing darts, H.J. socialized with others.

¶ 24 People's exhibit No. 6 showed the same bar area from exhibit No. 4. The video showed H.J. socializing with defendant and others at the bar area. H.J. and a woman drank shots. People's exhibit No. 7 depicted the same area of Copper Top with tables as shown in exhibit No. 5. The video showed H.J. and defendant cuddling and kissing. Defendant sat down at a table and H.J. straddled his leg as the two kissed. They were interrupted when a man came over with a drink. H.J. drank the drink and hugged the man.

¶ 25 H.J. sat down by herself and appeared to be looking down at something when defendant returned, and she stood to kiss him. H.J. sat down again, and she and defendant continued to talk and kiss. At one point defendant walked away and H.J. sat motionless in the chair with her head tipped forward. Defendant returned and interacted briefly with H.J., who remained seated. Defendant returned to his darts game; H.J. picked up what appeared to be her wristlet from the table and immediately dropped the wristlet on the floor. H.J. leaned forward in

an attempt to pick up the dropped item with her left hand. Her right arm went slack, and she fell face first onto the floor. A few people helped get H.J. upright and seated again. Shortly thereafter, the video showed defendant on his phone. A woman was shown helping a seated H.J. to pull on a sweater. Defendant helped H.J. stand, and he and another man helped her toward the door.

¶ 26 People's exhibit No. 8 showed a video of the door leading out of Copper Top. The video showed two people helping H.J. toward the door with a third person following behind. The person on H.J.'s left side stumbled and reached for the wall for support as H.J. swayed into him. A couple minutes later, defendant left through the door. People's exhibit No. 9 showed footage from outside Copper Top depicting people helping H.J. out of the bar and toward a car. A couple minutes later, defendant exited the bar, got into the car, and the car drove away.

¶ 27 4. *Michael Huber*

¶ 28 Michael Huber testified that, in February 2018, he had been driving for Uber for approximately three years. Huber testified he would refuse to drive someone who was speaking incoherently or was incapable of walking. At some point, Huber learned that police wanted to speak with him about a ride he remembered vividly when told the pickup and drop off locations for the ride. Huber testified he arrived at Copper Top and saw people carrying somebody to his car. Huber locked his car doors because he would not give a ride to someone unable to carry their weight. However, Huber learned a male was going to be riding with her, so he allowed the people to assist the woman into his car.

¶ 29 The male got into Huber's car and helped the female sit up. Huber recognized the destination as the Marriott hotel. According to Huber, the male was not impaired. Specifically, Huber noticed the male was coherent, not slurring his speech, and was responsive to questions.

During the drive, the male told the woman to keep her head up 15 or 20 times. When asked if he observed anything else, Huber testified, "The sound of him kissing on her very, like, wet, slack sounding. It was gross." When they reached the hotel, the male went to assist the female out of the vehicle, and Huber jokingly asked if he should go to the front desk and get a wheelchair or a luggage cart to bring her inside. According to Huber, the woman "repeated, [']did you just say I needed a wheelchair?['] " Huber testified the woman needed less assistance than he expected after she got out of the car and the two went into the hotel. Huber identified photographs from security footage of his car dropping off two passengers at the Marriott.

¶ 30 5. *Logan Janicki*

¶ 31 Logan Janicki, an employee at the Marriott in February 2018, testified that, on February 9, 2018, at approximately 5 a.m. H.J. was visibly distraught and approached the front desk. According to Janicki, H.J. was confused about where she was and asked for help calling for a cab. Janicki identified H.J. in photographs taken from a security camera view of the front desk. Janicki called a cab for H.J. and observed a bit of a red mark on her head.

¶ 32 6. *Michelle Steele*

¶ 33 Michelle Steele testified she was a sexual assault nurse examiner (SANE) in the emergency room at St. Joseph Hospital. According to Steele, her SANE training qualified her to treat sex assault victims and offer evidence collection. The trial court ruled Steele was qualified to testify as an expert in the field of a SANE. On February 9, 2018, Steele examined H.J., who appeared to be traumatized and concerned for her health. According to Steele, the sexual assault examination involved looking at every single part of the victim's body, including the breasts, the vaginal area, and the anal area. The sex assault kit involved the collection of DNA evidence.

¶ 34 Steele testified she performed a head-to-toe examination of H.J. and observed a red abrasion near her left eye and an injured finger. H.J. reported painful urination with spotting and "mucousy, bloody stool." Additionally, H.J. was vomiting and felt dizzy. Steele performed a genital examination and observed a two-millimeter red laceration on the bottom portion of the labia minora called the fourchette. Steele also observed "a ton of red bruising, which would indicate that it's acute or new injury," around the hymen and connective soft tissue around the vaginal hole. Steele performed an internal examination and observed acute injuries in the vaginal canal and on the cervix. Steele opined the internal bruising was the result of penetrating blunt force trauma from a penis or an object. Steele examined H.J.'s anal area for injury and observed a three-millimeter laceration to her anus. Steele testified a very large, hard stool could cause such an injury. Steele also testified such a tear "could be caused by a fingernail." H.J. denied having any constipation or repetitive diarrhea, and she did not have an infection. According to Steele, the "laceration was more on the inside coming out." In Steele's opinion, H.J.'s anal injury was from penetrating trauma.

¶ 35 Steele testified a two-millimeter tear on the fourchette would not cause a trickle of blood, but would cause spotting while urinating. When asked if a three-millimeter tear in the anal area would cause blood to run down a person's leg, Steele responded, "I guess when you look at lacerations, you have to look at how deep it is. And there's no specific amount of blood that I can tell you comes out of a laceration." Steele testified she could not confirm whether the injuries were caused by consensual or nonconsensual sexual intercourse. Steele agreed her notes indicated H.J. said she had dinner at 7:15 p.m. at Medici.

¶ 36 7. *Brad Underwood*

¶ 37 Detective Brad Underwood testified he was assigned H.J.'s sexual assault investigation on February 12, 2018. According to Underwood, he had H.J. participate in an "overhear," which was a recorded conversation between H.J. and defendant where defendant did not know he was being recorded. Underwood testified defendant generally denied having any sexual relations with H.J. and said H.J. was highly intoxicated. Underwood did not tell H.J. what to say during her conversation with defendant or give her any directions as to how to engage in conversation. During the phone call, defendant told H.J. she was so intoxicated he considered calling 911. Defendant repeatedly denied having sexual intercourse with H.J.

¶ 38 On March 22, 2018, Underwood interviewed defendant. In the recording of defendant's interview, he told Underwood he met H.J. online and they made plans to meet. Defendant stated he had three drinks at Medici and defendant said H.J. had four drinks. Defendant explained they took an Uber to another bar to meet up with H.J.'s friends. Defendant explained they were drinking at the bar and he was playing darts. According to defendant, he was playing darts when someone told him H.J. fell out of her chair. Defendant told Underwood H.J. was hammered and could barely walk. According to defendant, H.J. hit her head either getting out of the car or entering the hotel. Defendant told Underwood he was not going to leave H.J. in that condition in the lobby of his hotel, so they went up to his room. After they entered defendant's room, H.J. started taking off her clothes to show off her tattoos. According to defendant, H.J. could barely stand and, once her clothes were off, she passed out on one of the beds. Defendant stated H.J. woke up around 4:30 a.m. and could not find her purse. Defendant stated he had a phone conversation with H.J. a couple weeks later. Defendant continued to deny having sexual intercourse with H.J. until approximately 38 minutes into the interview.

¶ 39 Underwood informed defendant he had a search warrant for defendant's phone. After learning this, defendant's position began to change, and he admitted he might have been in the bed with H.J. but stated "nothing happened." Defendant claimed he was wearing boxers while in the bed with H.J. but there was a portion of time he did not recall. Underwood explained the forensic examination would be conclusive as to whether sexual intercourse occurred. Defendant then stated that, if anything happened, it was consensual. Underwood asked if it was possible he and H.J. had sex that night, defendant answered, "I'm not saying yes, I'm not saying no now." A few minutes later, defendant admitted there was consensual sex. Defendant told Underwood H.J. grabbed his crotch, performed oral sex on him, and had consensual sex with him. Defendant admitted he placed his penis in H.J.'s vagina but denied anal penetration. When asked if H.J. was saying or doing anything, defendant said she was only laying on her side. Defendant said they were "spooning" and then laying down facing each other. Defendant again denied having anal sex; Underwood asked if there could have been accidental anal penetration, and defendant responded, "anything's possible." Defendant told Underwood he and H.J. were both intoxicated. When asked why he lied to H.J. about having sex, defendant said he was embarrassed and scared.

¶ 40 Underwood testified he obtained a search warrant for defendant's phone. Underwood did not find H.J.'s contact information or text messages between H.J. and defendant. Underwood found a search for H.J. through USPhonebook.com.

¶ 41 Underwood testified he interviewed Chestney on February 13, 2018. During the interview, Chestney told Underwood H.J. was "all over this guy." Chestney told Underwood H.J. "face planted into the floor" from her chair. Underwood recalled Chestney pointed to her head to indicate where H.J. hit her head after falling and his report indicated Chestney pointed to

the left upper forehead. Underwood also interviewed Huber, who told him the male passenger he gave a ride to was "[t]aller with dark hair, maybe gray." Underwood reviewed the video footage from Copper Top and from the Marriott and testified defendant was wearing a baseball cap and was bald.

¶ 42 8. *Defendant*

¶ 43 Defendant testified that, at some point in 2018, he used Match.com and sent a message to H.J. According to defendant, he initially communicated with H.J. through Match.com but eventually transitioned to communicating through text messages. Defendant testified he and H.J. made plans to meet on February 8, 2018, because he was going to be in the Bloomington/Normal area for work. Defendant met H.J. in his hotel lobby and the two walked to Medici between 7:30 and 7:45 p.m. Defendant testified they sat at the bar and he had two alcoholic beverages. According to defendant, H.G. had two cocktails with vodka and cranberry juice and a chocolate martini. Defendant testified he and H.J. had a good conversation and had some physical contact like touching each other's legs. Around 9:30 p.m., H.J. mentioned meeting her friends at a dive bar to celebrate her birthday and invited defendant to go with her. According to defendant, H.J. did not appear intoxicated when they left Medici to go to Copper Top.

¶ 44 H.J. ordered an Uber, and defendant testified they kissed outside Medici while waiting for the car. Defendant testified that H.J. was greeted by several people when they entered Copper Top and it appeared H.J. was very familiar and comfortable with being at Copper Top. Defendant testified he ordered another alcoholic beverage and H.J. had another alcoholic beverage and was poured a shot of Rumple Minze. According to defendant, it appeared H.J. knew everyone at the bar and introduced defendant.

¶ 45 Defendant testified he began playing darts with Chestney and two others shortly after arriving at the bar. Defendant's back was to the bar while he was throwing darts. When it was not defendant's turn to throw darts, he would return to the table where H.J. was sitting. According to defendant, his interaction with H.J. "progressively got a little bit more heated up as the night went on." Defendant stated, "Kisses were a lot longer, there was a lot more touching, she started to sit on my lap at points through the night." At the time, defendant did not know how much alcohol H.J. consumed. However, defendant acknowledged he was aware people were buying H.J. drinks all night to celebrate her birthday. As the evening progressed, H.J. became more energetic and friendly. Defendant observed H.J. dancing and testified she seemed aware of her surroundings and could follow conversation.

¶ 46 Defendant testified that one of the people he played darts with brought it to his attention when H.J. fell out of her chair. Defendant went to H.J., who appeared embarrassed and assured everyone she was okay. While H.J. was being helped up, Chestney asked defendant to order an Uber to get H.J. home. Defendant testified he ordered an Uber back to his hotel because that was where H.J.'s car was parked. Defendant closed out H.J.'s tab at the bar while others assisted H.J. to the car. According to defendant, H.J. "was being assisted, but walking on her own." Defendant did not see H.J. getting into the car or falling over in the car.

¶ 47 While they were in the Uber, H.J. appeared fine but still seemed embarrassed. Defendant testified he and H.J. were kissing and touching in the Uber and it appeared reciprocal. Defendant denied holding H.J.'s head up or telling her to keep her head up. According to defendant, H.J. was not impaired when they arrived at the hotel. H.J. was able to get out of the car, and defendant identified a photograph from the Marriott security footage of him and H.J. holding hands just before entering the hotel. As they walked into the Marriott, H.J. bumped into

a handicap-accessible automatic door. Defendant testified he was going to take H.J. to the second-floor parking garage where she parked her car. According to defendant, he would not have been able to drive legally and when the elevator opened on the second floor, they both decided it was probably best for H.J. to go upstairs to defendant's room.

¶ 48 After they entered defendant's room, H.J. stumbled over a bag defendant had on the floor and "fell into the armoire." Defendant stated the room was dark. Defendant testified H.J. began taking off her clothes to show defendant her tattoos. According to defendant, there was a lot of touching and kissing, and H.J. grabbed his crotch, undid his belt buckle, and took his pants off. Defendant testified H.J. was standing and had no trouble maintaining her balance. Defendant stated, "She then proceeded to perform oral."

¶ 49 According to defendant, H.J. took off her own clothes while defendant took off his clothes. They both got onto the bed, and defendant grabbed a condom from his bag. Defendant testified he put the condom on and H.J. got on top of him and put his penis inside of her. When asked if another position was taken during the sexual act, defendant stated, "There was. There was more of like a spooning-type position where she would be facing away from me and I was coming in like where her—I don't know. It's kind of like a spooning position." Defendant denied engaging in anal penetration. Defendant testified he ejaculated and flushed the condom down the toilet. According to defendant, H.J. used the bathroom and had no difficulty walking. Defendant and H.J. then cuddled and kissed, and then defendant went over to the second bed to sleep.

¶ 50 Defendant testified H.J. woke him up at approximately 4:30 a.m. to ask if he knew where her wallet, keys, and phone were. H.J. seemed annoyed she could not find her possessions. Defendant helped H.J. look for her possessions and located her wristlet. H.J. went

to the bathroom, flushed the toilet, and then began to get dressed. Defendant testified he offered to take H.J. home but she insisted she would take care of it. H.J. left at approximately 5 a.m., and defendant texted her later that day to ask if she found her keys and phone. Defendant did not receive a response, he sent H.J. the same text message the next day. Defendant received a response from H.J. later that read as follows:

> "I have debated since I woke up Friday morning naked and disoriented in your hotel room if I should respond to you. I want you to know that what you did to me is unforgiveable. I pray this isn't something you're doing to women all over. You are living proof monsters are human beings. I wake up everyday trying to put good and happiness into this world and I want you to know that I will not allow you to take my happiness. No reason to ever contact me again. But just know that while I may just be another statistic of women you rape and hurt[,] I won't let you destroy my life. I will continue to be kind."

¶ 51 Defendant testified his stomach dropped when he received H.J.'s text message and he was extremely disoriented. Shortly after he received H.J.'s text message, defendant deleted any information on his phone connected to H.J. When H.J. contacted defendant by phone, he was unaware the conversation was recorded. Defendant testified he denied having sexual intercourse with H.J. on the overhear because she falsely accused him in her text message. According to defendant, he told H.J. that she was hammered, unable to walk, and could not get in the cab or elevator because "[he] was trying to disassociate [himself] with her as much as possible." During his interrogation with Underwood, defendant initially attempted to conform

his responses with what he said to H.J. on the overhear. Defendant eventually told Underwood what happened because Underwood informed him a rape kit was being done and mentioned DNA.

¶ 52 Defendant testified there was no blood on the sheets or floor in the hotel room. Defendant did not hear vomiting sounds from the bathroom, and there was no vomit on the floor. Defendant testified he believed H.J. was in a condition that she could consent and she engaged in actions that led defendant to believe she could consent.

¶ 53 B. Jury Instructions

¶ 54 During the jury instruction conference, defense counsel asked the trial court to give a lesser-included offense instruction on count II, which alleged criminal sexual assault in that defendant committed an act of sexual penetration with H.J. and said act involved defendant's penis and H.J.'s anus. Specifically, defense counsel asked for an instruction on criminal sexual abuse and argued H.J. had no recollection of penetration and the only evidence that there was anal penetration was from defendant's interrogation where he denied there was penis to anus contact but conceded it possibly could have happened.

¶ 55 The trial court refused to give defendant's lesser-included instruction. The court noted that sexual conduct was defined as "knowing touching or fondling by the victim [or] the accused, either directly or through clothing, of the sex organs, anus, or breasts, of the victim or the accused." The court noted this definition did not apply to the facts of the case. The court further noted sexual penetration was "defined as any contact, however slight, between the sex organ [or] anus of one person and [an] object or the sex organ, mouth[,] or anus of another person or any intrusion, however slight, of any part of the body of one person." The court stated, "In this case, the only facts are that if there is any contact with the victim's anus, it was by the

defendant's penis. It was his sex organ, not his hands, for example, which could or might form the basis of without penetration, some type of sexual conduct lesser included instruction." The court then addressed whether there was evidence to support giving the instruction on sexual abuse as follows:

> "In addition, there has to be some evidence to support the giving of the instruction in any event. And [defense counsel] has posited that the evidence that would allow that to be considered by the Court in support of giving this particular instruction would be the defendant's portion of the interview or interrogation by Detective Underwood where he was asked whether he could have had sex, or is it possible he had sex with the victim? And his response was, I'm not saying yes. Not saying no. Anything is possible. Immediately thereafter, not only in that interview, but then consistent with the defendant's testimony at trial, he has vehemently denied there being any type of anal penetration on the date, time and place in question. And so, not only did the defendant testify consistent with a denial of any type of anal penetration with the victim by his penis, but also consistent with the other evidence which the jury heard, which is once the defendant said, okay, there was consensual sex, I didn't want to ruin my credibility and then described in detail what type of sex it was that he had with the victim which did not, once again, include any type of anal sex."

¶ 56 C. Verdict and Sentence

¶ 57 The jury found defendant guilty of both counts of criminal sexual assault. In July 2020, the trial court sentenced defendant to consecutive terms of four years' imprisonment on each count.

¶ 58 This appeal followed.

¶ 59 II. ANALYSIS

¶ 60 On appeal, defendant argues (1) the trial court erred by denying defendant's request for a jury instruction on the lesser-included offense of criminal sexual abuse because some evidence supported the instruction as an alternative to criminal sexual assault as alleged in count II of the indictment and (2) the State failed to prove defendant guilty of criminal sexual assault as alleged in count II of the indictment.

¶ 61 A. Lesser-Included Offense

¶ 62 Defendant argues the trial court erred by denying defendant's request for a jury instruction on the lesser-included offense of criminal sexual abuse because some evidence supported the instruction as an alternative to criminal sexual assault as alleged in count II of the indictment. The State asserts the evidence supports criminal sexual assault and "contra-indicates" the type of contact that would support a criminal sexual abuse allegation. Defendant acknowledges this issue was not preserved in a posttrial motion but asks this court to review the issue under the plain-error doctrine. Alternatively, defendant argues counsel provided ineffective assistance by failing to preserve the issue in a posttrial motion.

¶ 63 "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of

the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). The first step in plain-error analysis is to determine whether error occurred. *Id.*

¶ 64 As an initial matter, we note defendant argues this court should apply the charging instrument approach in determining whether the trial court should have instructed the jury on the lesser-included offense of criminal sexual abuse. Accordingly, defendant argues our review of whether criminal sexual abuse is a lesser-included offense of the greater offense of criminal sexual assault is *de novo*, and we review the trial court's decision to refuse the instruction for an abuse of discretion. The State argues this court "should apply a plain error standard of review."

¶ 65 "[T]he charging instrument approach applies when determining whether an uncharged offense is a lesser-included offense of a charged offense." *People v. Kennebrew*, 2013 IL 113998, ¶ 32, 990 N.E.2d 197. Under the charging instrument approach, we determine whether the allegations in the charging instrument describing the greater offense contain a "broad foundation" or "main outline" of the lesser offense. *People v. Kolton*, 219 Ill. 2d 353, 361, 848 N.E.2d 950, 954-55 (2006). "Because the charging instrument provides the parties with a closed set of facts, both sides have notice of all possible lesser-included offenses so that they can plan their trial strategies accordingly." *Id.*

¶ 66 In the first step of the charging instrument approach, this court must determine whether a particular offense is a lesser-included offense of the charged crime. *Id.* The second step is to "examine the evidence adduced at trial to decide whether the evidence rationally supports a conviction on the lesser offense." *Id.* The second step "should not be undertaken unless and until it is first decided that the uncharged offense is a lesser-included offense of a

charged crime." *Id.* Whether an uncharged offense is a lesser-included offense of the charged crime is a question of law we review *de novo. Id.* "If the charging instrument describes the lesser offense, the court moves to the second tier and determines whether the evidence adduced at trial rationally supports the conviction on the lesser-included offense." *People v. Sandefur*, 378 Ill. App. 3d 133, 139, 882 N.E.2d 1039, 1045 (2007). "[W]hen the trial court, after reviewing all the evidence, determines that there is insufficient evidence to justify the giving of a jury instruction, the proper standard of review of that decision is abuse of discretion." *People v. McDonald*, 2016 IL 118882, ¶ 42, 77 N.E.3d 26.

¶ 67 Here, the indictment for count II alleged defendant committed criminal sexual assault "in that defendant committed an act of sexual penetration with H.J., said act involved the penis of defendant and the anus of H.J., and said act was committed at a time the defendant knew the victim could not give knowing consent." As noted, defendant contends the trial court erred in refusing to instruct the jury on the lesser-included offense of sexual abuse, which involves "sexual conduct" rather than "sexual penetration." The statutory definition of sexual penetration is "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including, but not limited to, cunnilingus, fellatio, or anal penetration." 720 ILCS 5/11-0.1 (West 2016). Sexual conduct is defined as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the

victim, for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1 (West 2016).

¶ 68 Defendant contends sexual abuse is a lesser-included offense of the charged criminal sexual assault. Defendant argues H.J. could not remember the incident and Steele testified that the laceration on H.J.'s anus could have been caused by a fingernail. Essentially, defendant argues the trial court erred by refusing to give the lesser-included instruction of sexual abuse because the jury could have concluded that the laceration on H.J.'s anus was caused by something other than his penis.

¶ 69 In support of his argument, defendant cites *Kolton*, 219 Ill. 2d 353, and *Kennebrew*, 2013 IL 113998. We find both cases distinguishable. In *Kolton*, the trial court concluded the State failed to prove beyond a reasonable doubt that sexual penetration had taken place, but it found the defendant guilty of aggravated criminal sexual abuse as a lesser-included offense of predatory criminal sexual assault. *Kolton*, 219 Ill. 2d at 359. The supreme court concluded aggravated criminal sexual abuse was a lesser-included offense of predatory criminal sexual assault "where the indictment allege[d] 'sexual penetration' and d[id] not explicitly allege that the acts were done for the purpose of sexual gratification or arousal." *Id.* at 370. The supreme court found the purpose of sexual gratification or arousal could reasonably be inferred. *Id.*

¶ 70 In *Kennebrew*, the defendant was convicted of two counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse. *Kennebrew*, 2013 IL 113998, ¶¶ 4, 13. The appellate court reversed the defendant's conviction on one count of predatory criminal sexual assault due to a finding of insufficient evidence. *Id.* ¶ 13. The supreme court entered a supervisory order directing the appellate court to consider whether the evidence could

sustain a conviction on the lesser-included offense of aggravated criminal sexual abuse. *Id.* On remand, the appellate court concluded aggravated criminal sexual abuse was a lesser-included offense of predatory criminal sexual assault under the charging instrument approach. *Id.* ¶ 14. The appellate court further concluded the evidence was sufficient to uphold a conviction of aggravated criminal sexual abuse. *Id.* In affirming the appellate court, the supreme court concluded the defendant had reasonable notice of the potential for a conviction of aggravated criminal sexual abuse where the indictment for predatory criminal sexual assault of a child alleged sexual penetration and it could be inferred that the act was done with the purpose of sexual gratification or arousal. *Id.* ¶ 37.

¶ 71 As noted, we find both *Kolton* and *Kennebrew* distinguishable. Neither case involved a trial court's decision to refuse a lesser-included offense instruction. Rather, both cases involved situations where the evidence was insufficient to sustain a conviction for sexual assault but was sufficient to sustain a conviction for the uncharged lesser-included offense of sexual abuse. However, we acknowledge that both cases support the proposition that sexual abuse is a lesser included offense of sexual assault where the indictments alleged sexual penetration and the requirement that the act be done for purposes of sexual gratification or arousal could be inferred. However, that was not the basis for the trial court's refusal of defendant's sexual abuse instruction. The trial court refused defendant's instruction because the factual allegations in the indictment were related only to defendant's penis, not his hands, having contact with H.J.'s anus. The court further found no evidence supported the giving of the lesser-included offense instruction.

¶ 72 Even assuming sexual abuse is a lesser-included offense of sexual assault under these circumstances, we cannot say the trial court abused its discretion in refusing to instruct the

jury on sexual abuse. "Once a lesser included offense is identified, however, it does not automatically follow that the jury must be instructed on the lesser offense. [Citation.] A defendant is entitled to a lesser included offense instruction only if an examination of the evidence reveals that it would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit the defendant of the greater offense." *People v. Hamilton*, 179 Ill. 2d 319, 324, 688 N.E.2d 1166, 1169 (1997). Where there is no evidence to a support a jury rationally finding defendant guilty only of the lesser offense, a trial court does not abuse its discretion in refusing the lesser included offense instruction. *People v. Rebecca*, 2012 IL App (2d) 091259, ¶ 61, 969 N.E.2d 394.

¶ 73 Defendant argues some evidence supported instructing the jury on sexual abuse. Defendant argues there was conflicting evidence as to whether sexual penetration occurred. Specifically, defendant argues that H.J. testified there was blood by her anus but she admitted it could have come from her vagina. Defendant further argues Steele testified the laceration on H.J.'s anus could have been caused by a fingernail. Defendant argues that, because he "admitted to having sex with H.J. generally, at least some evidence supports that he engaged in something other than penis-to-anus 'contact,' such as touching her anal area during the act of intercourse." Defendant argues his response that "anything's possible" when Underwood asked if he could have accidentally engaged in anal sex is evidence that he touched H.J.'s anus with his hands. We disagree. There was no evidence of defendant touching H.J.'s anus with his hands. Although Steele did testify that a fingernail *could* have caused the laceration on H.J.'s anus, this was speculation. Steele did not testify that a fingernail *did* cause the laceration. In support of this argument, defendant cites *People v. Creamer*, 143 Ill. App. 3d 64, 492 N.E.2d 923 (1986). In *Creamer*, the appellate court noted the evidence most clearly supported the assault charge. *Id.* at

70. However, the appellate court concluded the trial court should have instructed the jury on the lesser-included offense of aggravated criminal sexual abuse where "the victim's testimony on cross-examination suggests the possibility that there was no penetration during the incidents." *Id.* The appellate court referred to cross-examination testimony where counsel asked the victim " 'But he didn't put his finger inside; is that right?' " and the victim responded, " 'Yeah.' " *Id.* at 67. Defendant does not point to similar testimony in this case.

¶ 74 Moreover, defendant's argument ignores H.J.'s testimony that "[s]omething had been inside of [her] for sure" when she was asked if she could tell something had been inside her anus. Additionally, Steele testified there was a three-millimeter laceration that "was more on the inside coming out." In Steele's opinion, H.J.'s anal injury was from penetrating trauma. Further, as the trial court pointed out, defendant did not testify he touched H.J.'s anus—he denied any anal contact whatsoever. His statement "anything's possible" was in response to being asked if he might have accidentally penetrated H.J.'s anus with his penis. Additionally, defendant testified he had sexual intercourse with H.J. in a "spooning" position, suggesting he penetrated H.J. from behind. We conclude no evidence supported a jury rationally finding defendant guilty only of the lesser offense. Accordingly, we cannot say the trial court abused its discretion in refusing the lesser included offense instruction. See *Rebecca*, 2012 IL App (2d) 091259, ¶ 61. Because the court did not abuse its discretion in denying the jury instruction on sexual abuse, no error occurred. Consequently, defendant's alternative claim of ineffective assistance fails where he cannot demonstrate prejudice.

¶ 75 B. Sufficiency of the Evidence

¶ 76 Defendant also argues the State failed to prove defendant guilty of criminal sexual assault as alleged in count II of the indictment. Specifically, defendant asserts he consistently

denied inserting his penis into H.J.'s anus, H.J. had no memory of what occurred, and Steele testified H.J.'s anal laceration could have been caused by something other than penile penetration.

¶ 77 A defendant may only be convicted upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged. *In re Winship*, 397 U.S. 358, 364 (1970). In determining the sufficiency of the evidence supporting a conviction, we do not retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178, 217 (2006). Instead, we must resolve " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We allow all reasonable inferences in the light most favorable to the State. *People v. Beauchamp*, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 323 (2011). We reverse only where the evidence is so unsatisfactory, unreasonable, or improbable that it raises a reasonable doubt as to the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209, 808 N.E.2d 939, 947 (2004).

¶ 78 To sustain the charge of criminal sexual assault, the State must prove beyond a reasonable doubt that defendant committed an act of sexual penetration and knew H.J. was unable to give knowing consent. 720 ILCS 5/11-1.20(a)(2) (West 2016). As noted above, " 'Sexual penetration' means any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to, cunnilingus, fellatio, or anal penetration." 720 ILCS 5/11-0.1 (West 2016). Consent refers to the victim's "freely given

agreement to the act of sexual penetration or sexual conduct in question." 720 ILCS 5/11-0.1 (West 2016). "The focus is on what the defendant knew or reasonably should have known regarding the victim's willingness or ability to give knowing consent. [Citation.] If defendant has reason to believe that the victim is unable to give consent, he should abstain from engaging in any sexual contact with the victim." *People v. Roldan*, 2015 IL App (1st) 131962, ¶ 19, 42 N.E.3d 836.

¶ 79 Viewing the evidence in the light most favorable to the State, we conclude the evidence was sufficient to prove defendant guilty beyond a reasonable doubt on count II. H.J. testified that "[s]omething had been inside of [her] for sure" when she was asked if she could tell something had been inside her anus. Additionally, Steele testified there was a three-millimeter laceration that "was more on the inside coming out." In Steele's opinion, H.J.'s anal injury was from penetrating trauma. Although defendant denied any anal contact whatsoever, he also initially denied vaginal penetration before admitting he placed his penis in H.J.'s vagina. He further stated "anything's possible" in response to being asked if he might have accidentally penetrated H.J.'s anus with his penis. Additionally, defendant testified he had sexual intercourse with H.J. in a "spooning" position, meaning he penetrated H.J. from behind. Under these circumstances, a reasonable jury could have found defendant lacked credibility.

¶ 80 Defendant argues Steele's testimony cannot support his conviction because she acknowledged that an anal laceration could be caused by several things, including a fingernail. In support, defendant cites *People v. Judge*, 221 Ill. App. 3d 753, 582 N.E.2d 1211 (1991) and *People v. Ehlert*, 211 Ill. 2d 192. In *Judge*, the physician testified that the victim's vaginal irritation could have been caused by an ointment she applied inside her vagina. *Judge*, 221 Ill. App. 3d at 762. The physician's testimony was based on the victim's testimony that she did in

fact apply an ointment to her vagina and was not mere speculation as Steele's testimony was. *Id.* Moreover, the evidentiary weaknesses in *Judge* were not limited to the physician's testimony but extended to the victim's unbelievable story and the mother's questionable veracity. *Id.* at 761. *Ehlert* involved a medical examiner who determined the cause of death and manner of death of an infant based on information from the police. *Ehlert*, 211 Ill. 2d at 208. Here, Steele did testify H.J. reported having no constipation or diarrhea, but her opinion was also based on her examination of H.J.'s anus.

¶ 81 Finally, although defendant does not raise the issue, we conclude the evidence was sufficient to show defendant knew H.J. could not knowingly consent. The evidence established H.J. was highly intoxicated. H.J. imbibed a significant quantity of alcohol, fell out of her chair, and required assistance to stand, get in the Uber, and remain upright in the car. Defendant acknowledged in his interview that H.J. was "hammered" and could barely stand when she began to undress in his hotel room. He additionally testified that H.J. tripped over a bag in his hotel room and fell into an armoire. Taken in the light most favorable to the State, this evidence established H.J. was obviously highly intoxicated and unable to knowingly consent. Moreover, as the State correctly points out, defendant does not contest his conviction on count I, which was also premised on H.J.'s inability to knowingly consent to vaginal penetration. Under these circumstances, we conclude the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of count II. Accordingly, we affirm the judgment of the trial court.

¶ 82 III. CONCLUSION

¶ 83 For the reasons stated, we affirm the trial court's judgment.

¶ 84 Affirmed.