2021 IL App (2d) 191114-U
No. 2-19-1114
Order filed September 30, 2021

NOTICE: This order was filed under Supreme Court Rule 23(b) and is not precedent except in the limited circumstances allowed under Rule 23(e)(l).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CF-1208
MARK G. LEWIS,	)	Honorable John A. Barsanti,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Bridges and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: We honor the procedural default of defendant's claim that the admission of testimony concerning settlement of the victim's civil suit violated Illinois Evidence Rule 408. Assuming, without deciding, that there was error in admitting the settlement evidence, defendant's prong one plain-error argument fails, where the evidence (excluding the settlement testimony) was not closely balanced. Affirmed.

¶ 2 After a jury trial, defendant, Mark G. Lewis, was convicted of criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2014)). The trial court denied his posttrial motion and sentenced defendant to eight years' imprisonment. Defendant appeals, arguing that the admission at trial of the terms of a settlement agreement in the civil suit the victim, J.K., filed against him violated

Illinois Rule of Evidence 408 (eff. Jan. 1, 2011), and, where the evidence was closely balanced, the court committed plain error. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 6, 2014, defendant was charged by indictment with one count of aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(2) (West 2014)) and criminal sexual assault. The charges arose out of a November 17, 2012, incident during which, the State alleged, defendant placed his penis in J.K.'s anus, knowing she was unable to give knowing consent.

¶ 5 On May 7, 2015, while defendant was free on bond, the police executed a search warrant on his home and discovered 199 cannabis plants and about 11,727 grams of cannabis. The State charged defendant with unlawful possession or production of cannabis and unlawful possession of cannabis with intent to deliver. On January 17, 2018, defendant entered a non-negotiated guilty plea to two counts of unlawful possession of cannabis with intent to deliver (Kane County case No. 15-CF-726).

¶ 6 A. Trial

¶ 7 The jury trial commenced on September 23, 2019. The State's theory of the case was that defendant anally sexually assaulted J.K., who had passed out after consuming alcohol and certain prescription drugs and was not able to give knowing consent, and that defendant knew that she was unable to give knowing consent. This occurred after a party at his house, and J.K. recalled waking up at one point on a bedroom floor, naked below the waist, and with defendant next to her.

¶ 8 During opening statements, defense counsel stated that J.K. was taking several prescription drugs and that an expert would testify that those drugs could produce memory loss when combined with alcohol. Counsel also told the jury that it would hear evidence that, before defendant was charged in this case, J.K. sued defendant in civil suit. To protect his medical practice, defendant

settled the case and paid J.K. $50,000 and gave her a classic car (1959 Pontiac Bonneville). Defendant, counsel stated, would admit to consensual sex with J.K. Counsel characterized the case as a "he said/she said" case and stated that J.K. could not recall much information, but "what she does remember has changed quite a bit," as did defendant's wife's version of the events.

¶ 9 1. State's Case-in-Chief

¶ 10 *i. J.K.*

¶ 11 J.K. testified that, in November 2012, she was 26 years old, lived in Crystal Lake, and had begun a new job at St. Charles Chrysler Dodge Jeep. She had been dating Christopher MacDonald, who also lived in Crystal Lake, for three months. Christopher's mother was Linnea MacDonald. Linnea, a patient care consultant, licensed realtor, and licensed massage therapist, lived with defendant at 18 Squire Lane in St. Charles. Defendant's daughters and Emily MacDonald (Linnea's daughter and Christopher's sister) also lived at the home. Emily was 18 years old.

¶ 12 J.K. met defendant at a Halloween party at his home a few days prior to the alleged incident. Defendant, a doctor in internal medicine, had an office in Geneva. Between the party and the date of the incident, J.K. sought from defendant, but via Linnea, medical advice concerning stomach pains she had been experiencing. Linnea, who also worked in defendant's office, told J.K. to forward her medical records to defendant and to list him as her primary care physician when she went to the emergency room so that he could access her records. Defendant never physically examined J.K., nor did she ever go to his office. Through Linnea (via phone calls and text messages), defendant diagnosed J.K. as having ulcers but he did not prescribe medication for J.K. Prior to this time, J.K. treated her condition with Tylenol and other over-the-counter medications.

¶ 13 On October 29, 2012, J.K. went to Centegra Hospital in Woodstock for stomach problems. She was prescribed Norco (hydrocodone), as needed, for the pain. It was a short-term prescription,

she completed it one week before November 16, 2012, and J.K. did not refill the prescription. J.K. denied ever knowingly taking Demerol (merperidine) and testified that she was not familiar with it. She also denied ever taking meperidine or normeperidine. In November 2012, J.K. was regularly taking Klonopin (clonazepam) for anxiety. This was in her medical records, and defendant was aware she took it. Defendant never prescribed medication for J.K.'s anxiety.

¶ 14 On Friday, November 16, 2012, J.K. went to a party at defendant's house. Defendant and Linnea hosted a going-away party for a member of the office staff, and Linnea invited J.K. J.K. arrived at the house between 9 and 9:30 p.m. Christopher and Emily were not present; Christopher, whom J.K. had dated for three months, was in jail. J.K. did not know the other four to five guests who were there when she arrived. Over 2½ hours at the party, J.K. drank two half-glasses of wine, which defendant poured for her. Food had already been served by the time she arrived, and she did not recall having any snacks.

¶ 15 At about midnight, the other guests had left the party, and only J.K., defendant, and Linnea remained in the house. They were in the kitchen, and defendant and Linnea asked J.K. if she liked to drink anything other than wine. J.K. asked for whiskey and a Pepsi chaser. Defendant was out of her sight for a few minutes, retrieving the drinks. Defendant brought her a glass of Maker's Mark whiskey and a glass of Pepsi. Before drinking the whiskey and soda, J.K. did not feel the effects of the alcohol she had consumed up to that point.

¶ 16 J.K. drank "some" of the whiskey and soda. Defendant left to retrieve a box of cigars, and he returned. J.K. did not smoke any cigars. Shortly after drinking the whiskey and soda, J.K. "stopped remembering. I know everything just got—went blank after I saw—looked at one of the cigars in the box." It was sudden. She had been texting Emily, and her texts were jumbled.

¶ 17 The next thing J.K. recalled was waking up on the floor of Emily's room at about 4:30 a.m. Her stomach was sweaty, and her pants, underwear, and socks were off. She was naked from the waist down. Defendant was next to her on the floor, and his shirt was off. J.K. felt "[v]ery fuzzy. I didn't really understand what was going on." Defendant was awake when J.K. came to, and no one else was in the room with them. Defendant said that he was washing J.K.'s pants, they were in the washer, and she had urinated in them. She did not notice that her pubic region was sticky from urine. Defendant gave her a pair of Emily's pants to wear. J.K. was confused.

¶ 18 Defendant brought her downstairs to look at his cars and motorcycles in the garage. He wore a jacket. While looking at the cars in the garage, J.K. still felt "fuzzy."

¶ 19 At some point, J.K. returned to Emily's room, which was on the second floor. Defendant retrieved her pants and brought them to J.K. The pants were not washed. There were "things" on the bottom from walking outside. Defendant also returned J.K.'s socks. He held her underwear in his hands, raised them up to his nose, and smelled them. He did not return them to J.K.

¶ 20 Next, defendant gave J.K. six Xanax (alprazolam) pills. He told her he was giving her Xanax for her anxiety. He did not write her a prescription for the drug, and J.K. was not on Xanax. It had been months since she had last taken it. J.K. did not take a Xanax pill until later in the morning.

¶ 21 J.K. went to sleep in Emily's bed, and defendant left. (Emily's room was 20 feet down the hall and past the stairs from the master bedroom, where defendant and Linnea slept.) At about 8 or 9 a.m., J.K. awoke, and Emily was in the room. They had a conversation, and J.K. left less than one hour later.

¶ 22 Shortly after she left defendant's home, J.K. began to feel pain in her anal area. It felt like "something was stuck inside of me." She had experienced that pain "[w]hen I tried to do this

before," which was years earlier. As she went about her day, the pain did not go away. Also, she subsequently had pain on her left buttocks. When she went to the bathroom, she noticed bleeding from her anal area; she noticed it when she wiped herself, and she noticed this more than once.

¶ 23 That evening, J.K. went to Centegra Hospital, where a sexual assault kit was administered. A nurse told her that its purpose was to prove whether or not she had been sexually assaulted. J.K spent about five or six hours at the hospital. Blood was drawn, and swabs were used to take DNA samples from her vaginal and anal areas. J.K. also received medication, both oral and intravenous, and she was tested for sexually transmitted diseases and pregnancy.

¶ 24 While at the hospital, St. Charles police detective Eric Majewski arrived. He questioned J.K. and escorted her home to retrieve the black pants that defendant had returned to her.

¶ 25 Next, J.K. testified about the civil suit she filed against defendant in the fall of 2013. In 2014, defendant offered to resolve the suit by paying her money and giving her a car. (At this point, defense counsel objected to the characterization of the payment as an offer in a settlement. In a sidebar, counsel argued that the parties were not privy to the conversations on who made the offer. The trial court sustained the objection.) J.K. testified that her civil suit was resolved in 2014, and defendant gave her $50,000 and a 1959 Pontiac Bonneville. She testified that the vehicle was flooded out, rusted out, did not drive, and remained in an automobile junkyard. J.K. never took possession of it and sold it for about $100.

¶ 26 J.K. testified that she never had consensual sex or consensual anal sex with defendant.

¶ 27 On cross-examination, she denied that she told the assistant state's attorney that she could not recall the first time she met defendant, and she denied having seen him before the Halloween party. J.K. could not recall if she met Linnea before the Halloween party, but she spoke to her on the phone about her medical issues. She did not tell the assistant state's attorney that she was

taking Norco; she only mentioned Tylenol. J.K. testified that she could not recall if she told Detective Majewski that Christopher was out of town and could not recall if she told him that she had two glasses of wine.

¶ 28 According to J.K., defendant was her doctor, but she had never seen him in person or spoke on the phone with him. She told the assistant state's attorney that most of her discussions with defendant concerning her stomach pains were over the phone. She believed her medical records were sent to defendant because his office in Geneva called and confirmed this. On November 17, 2012, she told Detective Majewski that defendant was her doctor. J.K. spoke to Detective Andrew Lamela on June 25, 2014, and she did not recall denying that defendant was her doctor. However, during her civil suit, J.K. told her counsel that defendant was her doctor. (J.K.'s conversation with Detective Lamela occurred after her civil suit.)

¶ 29 J.K. could not recall telling Detective Majewski that she ate snacks when she arrived at defendant's party on November 16, 2012. While in the kitchen around midnight, after the other guests had left, Linnea was tending to new puppies and cleaning up. Defendant was also cleaning up. J.K. denied asking for whiskey. She was asked what other types of alcohol she drank besides wine. After she answered whiskey, defendant went to get it and the soda. While music was playing on the television, defendant and Linnea danced in the kitchen. J.K. may have discussed her diet issues related to her stomach. She denied flirting with defendant and denied asking for a Xanax. Also, she denied being at the front door with defendant and denied whispering in his ear. J.K. could not recall asking defendant to go outside to her car and get a cigarette, Linnea sitting her in a chair, Linnea taking her upstairs, or Linnea setting her on Emily's bed. She could not recall falling in Emily's room, hitting her head when she fell, waking up at 3:30 a.m., going downstairs, and trying to get water out of the refrigerator dispenser. She could not recall defendant coming

downstairs and giving her a bottle of water, the two of them going into the garage, and talking about the cars in the garage, smoking cigarettes, or agreeing to have sex with defendant. J.K. denied going back to Emily's room, having vaginal sex with defendant, falling asleep again in Emily's room, and defendant falling asleep next to her. J.K. further denied going downstairs with defendant, back into the garage, smoking another cigarette with him, talking about his motorcycles, or asking for Xanax.

¶ 30 When she awoke around 8 or 9 a.m. she knew something was wrong and told Emily that something was wrong. However, J.K. did not feel pain right when she awoke. She spoke to Emily for a couple of minutes, and they went downstairs to the kitchen. Linnea was there. J.K. denied having problems walking down the steps. She may have had two cups of coffee. Defendant may have come in and given her cream for her coffee. She conceded, however, that she may have told Detective Majewski that she had two cups of coffee and that defendant may have brought her something. At this point, she was not feeling pain in her anal area. When she left defendant's house at about 9 or 10 a.m., defendant waived at her. She was not wearing underwear.

¶ 31 J.K. reviewed her text messages to recreate a timeline of what happened because she could not recall after a certain period. At about 12:18 a.m., J.K. had texted Emily, "Come home," along with some jumbled letters. She recalled sending this text. At 12:30 a.m., she sent a text to a different friend, but she could not recall if she told the detective about this and could not recall if the text was jumbled. J.K. could not recall sending any text messages between 12:30 and 4:30 a.m.

¶ 32 A doctor from the Mathers Clinic prescribed Klonopin to J.K. in November 2012. In November 2012, she was not prescribed Xanax, but defendant gave it to her when she told him (in the garage) that she was experiencing anxiety issues and asked if he could help her because he was

her doctor. (She was anxious because she was confused as to what was going on; she had woken up with a man on the floor with her and she was naked from the waist down.) When J.K. went back up to Emily's room, defendant brought her the six Xanax pills. He put them on Emily's dresser.

¶ 33 J.K. felt pain in her anal area shortly after she left defendant's house. She met a friend and went to two Algonquin car dealerships to try to trade in a car. (The pain was a 6 out of 10 the whole day.) J.K. then picked up her son and took him out to lunch. J.K. went to the bathroom several times that day. When she wiped herself, she noticed blood. (She did not check her pants for blood.) J.K. dropped off her son at 8 p.m. at her parents' house and went to the hospital. (At some point during the day, she changed her pants.)

¶ 34 J.K. first mentioned her top being sweaty to the assistant state's attorney a couple of days before trial.

¶ 35 *ii. Linnea MacDonald*

¶ 36 Linnea testified that she lives in Arizona. She met defendant in 2004 or 2005, and they started dating in June 2006. They participated in a wedding ceremony in 2008 or 2009, but did not finalize it with legal paperwork. She called him her husband. Her relationship with defendant was "off-and-on all the time" but ended for good in, she first testified, 2012, or, she later testified, 2014, when defendant was charged. Linnea has two children from a prior relationship—Christopher and Emily. When she dated and lived with defendant, he had two daughters from a prior relationship.

¶ 37 Defendant was a doctor in internal medicine, and Linnea worked for him at his Geneva office, doing front desk work, patient check-out, insurance, and as a patient care technician. In November 2012, Linnea lived at defendant's house. The home was very large—about 5,000 or

6,000 square feet. Emily also lived at the house, at least part-time, and her bedroom was upstairs in the front of the house. The master bedroom was upstairs in the back of the house. Linnea and defendant slept in the master bedroom. The distance between the two bedrooms was 40 to 50 feet. There was a large spiral staircase between them. Linnea ran a white noise machine while she slept.

¶ 38 Linnea first met J.K. in person at a Halloween Party at defendant's house in 2012. Between the party and November 16, 2012, Linnea had phone and text conversations with J.K., including about her medical condition. J.K. had stomach problems, and Linnea recommended that she be seen by defendant. Linnea spoke to defendant on J.K.'s behalf and relayed information back and forth.

¶ 39 On the evening of November 16, 2012, there was a going-away party at defendant's house for an office manager. J.K. arrived at the party at about 9 p.m. Neither Christopher nor Emily was there. However, Linnea, defendant, and several office employees were present. Between 9 p.m. and midnight, the guests had food and drinks, attended to Linnea's dog's puppies, and danced. Linnea recalled that J.K. had three glasses of wine. Defendant drank wine and whiskey.

¶ 40 At midnight, the only people remaining at the house were defendant, Linnea, and J.K. While they were in the kitchen, defendant brought out cigars and whiskey. He retrieved the whiskey from a bar area around the corner and out of view from the kitchen. At this point, according to Linnea, J.K. had had about three glasses of wine and was "social" and complained of a stomachache. Linnea could not recall if J.K. drank any of the whiskey, but a glass was poured for her.

¶ 41 In Linnea's opinion, at this point, J.K. was not intoxicated. However, her condition suddenly changed, specifically, within minutes or a short time span after defendant brought out the whiskey. Linnea cleaned up after the party, and she went upstairs to put something away. She

heard talking by the front door and then found defendant and J.K. in an embrace. Linnea asked what was going on, and defendant stated that J.K. wanted her cigarettes from her car. Linnea testified that, during the time she saw defendant and J.K. embrace by the front door, she warned defendant, " 'Consider her state; she doesn't need another cigarette.' " Also, Linnea stated that smoking was not allowed in the house. Linnea walked downstairs and told defendant that he was not going out to retrieve the cigarettes. According to Linnea, J.K.:

> "was barely able to speak. She was barely able to stand, and I had to—I had a chair there by the front door, and I set her in the chair and I said 'Are you okay?'
>
> And she was slumped over (indicating) and slurring, asking for Emily to come home; and I said, 'You are drunk. I need to—you are staying here', and I took away her car keys."

¶ 42 When asked why she did not allow J.K. to go out and drive home, Linnea testified that J.K. "was too impaired. There was something wrong. There was no way." Defendant stood and watched.

¶ 43 Linnea, who is 5 feet 9 inches tall and described J.K. as "very little," put J.K.'s arm around her shoulder and carried her up the stairs to Emily's room. Defendant did not come upstairs. Linnea laid J.K. on the bed and told her she had to spend the night. Linnea described J.K. as "[p]assed out." This occurred at about midnight or 12:30 a.m. Linnea shut the door, walked around the house to turn off lights, and then went to bed. She was "exhausted."

¶ 44 Defendant came to bed right away and stated, " 'I thought I heard a thud. I should go check on her.' " Linnea responded, " 'She doesn't need to be checked on. She's a grown woman.' " She also stated, " 'So she fell. *** There's no reason to go check on her. She's in the room.

She's safe. Even if she had gotten up to get something, just let her be. There is no reason to go check on her. She's safe in that room.' "

¶ 45 The next thing Linnea recalled was waking up at 7:45 or 8 a.m. She went to Emily's room to check on J.K. There, she saw Emily and J.K. on the bed, talking. She did not overhear the conversation. Within one-half hour later, Linnea had coffee with J.K. and Emily in the sun room. J.K. seemed quiet.

¶ 46 On November 16 and 17, 2012, the two washing machines in defendant's home were not working, and defendant knew this because he hired a repairperson and Linnea had been doing laundry at a Laundromat.

¶ 47 Linnea has a nursing background and has some familiarity with prescription drugs. During the time of the incident, defendant had prescription drugs around the house that were not prescribed for anyone in the home. These included: Cialis, Viagra, Demerol, Adderall, and Xanax.

¶ 48 On cross-examination, Linnea testified that, on November 20, 2012, when she spoke to police detectives, she could not recall if she mentioned that defendant kept Demerol in the home (because she was unaware it was found in J.K.'s system or that it was important, and the officers never asked her about the drug), and it was possible that she did not mention that J.K.'s demeanor changed after being served whiskey or that she walked in on J.K. and Emily's conversation. When she saw defendant and J.K. embracing, it appeared that J.K. was coming on to defendant.

¶ 49 Linnea could not recall if she texted J.K. after November 17, 2012, to invite her over for Thanksgiving. Linnea told Detectives Majewski and Lamela that, when discussing her diet, J.K. said in a flirty way to defendant that she had been a good girl.

¶ 50 In the sunroom, while they had coffee on the morning of November 17, 2012, Linnea did not see J.K. vomit, nor did J.K. ask Linnea if she could lie down and rest.

¶ 51 *iii. Emily MacDonald*

¶ 52 Emily testified that, in November 2012, she had known J.K. for about six months. Emily and J.K. were friends.

¶ 53 On the evening of November 16, 2012, Emily did not attend the party at defendant's house. She never came home that evening. She arrived home at 7 or 8 a.m. the following morning. She went upstairs to her bedroom, and J.K. was there, standing next to one of the beds. Emily went inside the room and spent about 20 to 30 minutes there. She observed that J.K. "seemed out of it. She was stumbling, she was trying to get her things together in her purse and put her shoes on, and she just looked almost drunk. She couldn't really keep her balance." They spoke, and J.K. told Emily that she had woken up on the floor with her pants off, that she was next to defendant, and that he was shirtless. She also told Emily that defendant had her underwear and would not give it back.

¶ 54 On cross-examination, Emily testified that her bed was made that morning. After she and J.K. went downstairs, they had coffee in the sunroom. Defendant came in, looked at them, and then went back to the kitchen to eat breakfast. Emily and J.K. spent 20 minutes in the sunroom. J.K. did not vomit in the room. J.K. drove away in her car.

¶ 55 During her conversation with J.K. in her bedroom, Emily did not notice any blood stains on the beds or carpet, but she did not look. After J.K. told her what had happened, Emily suggested that J.K. obtain a rape kit. J.K. complained of pain and pointed to her "private area," saying it did not feel right and that it hurt; Emily could not recall if she told detectives about it. She was 18 years old in November 2012.

¶ 56 *iv. Kelley Minnick*

¶ 57 Kelley Minnick, an emergency room nurse at Centegra Hospital, testified that, on the night of November 17, 2012, at about 8:42 p.m., J.K. was admitted to the emergency room for a possible sexual assault. Minnick was her primary caregiver and the emergency room doctor was Dr. Oscar Habhab. J.K. was discharged around 1 a.m.

¶ 58 J.K. related to Minnick that she had been at a friend's house that evening and had woken up beside a man. She related that she was naked from the waist down, disoriented, and did not know what happened. She also had anal pain, an episode of anal bleeding, and pain in her left buttock. When asked at 9:35 p.m. to rate her pain level on a scale of 0 to 10, with 10 being the worst pain one has experienced, J.K. answered that her pain was a 6. Based on this response, J.K. was medicated with 600 milligrams of Ibuprofen for her pain. One hour later, J.K. rated her pain as a 2.

¶ 59 When Minnick asked J.K. if she had vomited that day, J.K. responded that she had done so early in the morning. J.K. also related that she had no vaginal discharge, but she had vaginal odor. A blood test done to screen for pregnancy, HIV, hepatitis, and syphilis. Minnick also had J.K. provide a urine specimen at 11:15 p.m. to submit to the Illinois State Police Crime lab.

¶ 60 During the pelvic examination, the doctor collected the vaginal and anal samples. Minnick identified swabs that were used to collect samples from J.K.'s anus.

¶ 61 On cross-examination, Minnick testified that a sexual assault kit's purpose is to collect DNA from a sexual assault victim, not to prove whether or not somebody has been sexually assaulted. While the doctor was doing the swab collection, Minnick stood either to his left or right side. When asked if she could see what he was doing, she replied, "I could see what he was doing, not internally but to the side; so, yes, I could see what he was doing." Minnick did not note any physical injuries, such as bleeding or scratches or dried blood, to J.K.'s anal area, nor did she note

any swelling, scratches, or bruising to the left buttock area. J.K.'s last menstrual period was on November 14, 2012.

¶ 62 *v. Detective Andrew Lamela*

¶ 63 St. Charles police detective Lamela collected a DNA sample, via buccal swab, from defendant in October 2013. He collected it at the police department and another individual was present with defendant.

¶ 64 *vi. Detective Eric Majewski*

¶ 65 St. Charles police detective Majewski testified that, on November 18, 2012, in the early morning hours, he met with J.K. and Minnick at Centegra Hospital. He received the urine sample that Minnick had collected, along with the sexual assault evidence collection kit.

¶ 66 Detective Majewski drove J.K. home and collected from her the clothing she wore the prior evening—a pair of black dress pants and a white sweater. He did not notice an odor of urine from the pants, nor did the clothes appear to be damp or wet. Two days later, Majewski retrieved the pants from the evidence locker and, with an evidence forensic investigator examined the clothing. He observed that the pants were stained, including on the bottom of both pant legs, around the knee area, and around the belt loop in the back of the pants. In general, the pants were not clean. He photographed the pants.

¶ 67 On cross-examination, Majewski testified that he did not observe any rips or tears in the pants, and they were not sent to the Illinois State Police crime lab for testing.

¶ 68 *vii. Stipulation*

¶ 69 The parties stipulated that forensic testing showed that the oral swabs samples taken from J.K. contained no semen. The vaginal swabs had semen on them, but no spermatozoa were observed. Thus, a no further DNA testing was conducted in order to determine a DNA profile.

The anal swabs contained a trace amount of semen and a DNA profile was determined from that semen.

¶ 70 The oral swabs from defendant were used to determine his DNA profile. A crime lab expert determined, after comparing the DNA profile from the anal swabs to the defendant's DNA profile, that the DNA from the anal swabs matched defendant's DNA profile. This would only be expected to occur in 1 in 1.6 sextillion Black, 1 in 100 quintillion White, or 1 in 38 quintillion Hispanic unrelated individuals.

¶ 71 J.K.'s urine specimen was tested for the presence of a number of categories of drugs. The specimen testified positive for the presence of merperidine (Demerol), a "strong opioid pain medication" and narcotic. Its possible side effects are severe drowsiness and memory issues. Alcohol should be avoided while taking Demerol.

¶ 72 Also detected was normerperidine, which is merperidine after it has been broken down in the body.

¶ 73 Next, clonazepam (Klonopin) was detected. It is a benzodiazepine and is prescribed, in part, to treat anxiety. Possible side effects include, but are not limited to, severe drowsiness and memory problems. Alcohol should be avoided while taking it.

¶ 74 The final drug detected was alprazolam (Xanax), a benzodiazepine, which is prescribed, in part, to treat anxiety. Its possible side effects include, but are not limited to, drowsiness and memory loss. Alcohol should be avoided while taking Xanax.

¶ 75 The State rested.

¶ 76 2. Defendant's Case

¶ 77 *i. Detective Andrew Lamela*

¶ 78 Defendant recalled Detective Lamela, who testified that he spoke to J.K. on June 25, 2014, via telephone. He asked her about the lab results of her urine test. Lamela asked if defendant was her doctor, and J.K. responded that he was not her doctor. He also asked about normeperidine, and J.K. responded that she was prescribed the medication for her stomach problems. (He could not recall if he also referred to the drug as Demerol to J.K.; he did refer to its brand name in his report.)

¶ 79 On cross-examination, Detective Lamela stated that the report from the crime lab did not list the brand names of the drugs, and he had to look them up. He was not aware that normeperidine is not Demerol, but a metabolite of that drug. Meperidine is Demerol, and J.K. stated that she was never prescribed it and did not know how it got in her system. Also, she had a physical response; she was "hysterical" on the phone (though he did not write this in his report; he wrote that she became upset and cried), and Lamela had to calm her down.

¶ 80 On re-direct, he conceded that he may have mispronounced normeperidine as "Norco" (the drug J.K. was prescribed in late October 2012 for her stomach pains).

¶ 81 *ii. Detective Eric Majewski*

¶ 82 Detective Majewski testified that J.K. told him that she had two glasses of wine at defendant's party. She did not state that she had two half glasses. Also, she stated that defendant offered her one Xanax pill, and she accepted it but did not ingest it in that timeframe. He could not recall if J.K. mentioned that she discussed her anxiety issues with defendant.

¶ 83 On November 20, 2012, Detective Majewski spoke to Emily, who was 18 years old, via telephone and in person. According to Majewski, she related (contrary to her testimony) that, during a conversation with J.K. in the early morning of November 17, 2012, J.K. never complained

of pain. Emily did not mention that J.K. pointed to her private area and stated that it did not feel right or that it hurt.

¶ 84 After November 17 or 18, 2012, Detective Majewski did not speak again to J.K.

¶ 85 *iii. Stipulation*

¶ 86 The parties stipulated that, on Saturday, September 21, 2019, *i.e.*, two days prior to trial, J.K. spoke to the assistant state's attorney and told the prosecutor that she could not remember the first time she met defendant. She said it was possible it was before the Halloween party because he gave her medical advice.

¶ 87 J.K. told the assistant state's attorney that the only medicine she took for her stomach pain was Ibuprofen and did not tell him she was taking Norco. She also informed him that she could not recall if she ever told defendant that she was taking Klonopin.

¶ 88 *iv. Dr. James O'Donnell*

¶ 89 Dr. James O'Donnell testified as an expert in pharmacology. The toxicology report for J.K. reported the presence of drugs or metabolites, but not the levels of the drugs. Generally, drugs are detectible in urine for 48 to 72 hours after ingestion. The following drugs were detected in J.K.'s urine: meperidine (Demerol); normeperidine; clonazepam (Klonopin); and alprazolam (Xanax).

¶ 90 Clonazepam (Klonopin) is prescribed for anxiety and some patients use it to help them sleep. Common side effects include drowsiness; sedation; and anterograde amnesia (*i.e.*, inability to remember what happened during the period the drug was active, followed by a period that is "blank or black"). A high amount of it can hypnotize someone.

¶ 91 Alprazolam (Xanax) is prescribed for anxiety and panic attacks. It has similar side effects to clonazepam, but a much shorter half-life (*i.e.*, length of time that it takes for half the drug that's absorbed in the blood to be eliminated) than it, meaning that it is not a good sleeping medication.

¶ 92 Meperidine (Demerol) is prescribed to relieve pain and is a synthetic opioid. It has a use post-anesthesia; it controls shivers. It is given in very low doses and used like morphine. Common side effects include sedation, perception, and memory disturbances.

¶ 93 Dr. O'Donnell opined that all of the drugs have the potential to impair the formation of memory (anterograde amnesia) and, thus, make it more difficult for J.K. to remember a period of time during which the drugs were used and active in her body. A doctor, nurse, or pharmacist would advise a patient not to drink alcohol when taking Xanax or clonazepam (Klonopin) or meperidine (Demerol) because the alcohol enhances the toxicity of any one of the drugs. A person who had ingested these drugs would appear normal, but they would experience blackout with use of alcohol. The blackout is similar to anterograde amnesia. "So you can have a person who is walking and talking, responding, engaging, interacting with a person or persons, yet they don't remember it the next day."

¶ 94 On cross-examination, Dr. O'Donnell testified that some of the foregoing drugs can be given involuntarily. If enough of the drugs were given to J.K., they could have completely sedated her, especially in combination with alcohol. If someone was blacked out from anterograde amnesia, they should not be signing a contract or driving a car.

¶ 95 Although there are three agents specifically identified as date-rape drugs, almost any drug could be used in a drug-facilitated sexual assault. Benzodiazepines (*e.g.*, Xanax, Klonopin, etc.) could be used as such, but Demerol "would be a real stretch"; however, Demerol could be used for sedation. Benzodiazepines have sedative properties, and their combination with alcohol is

drastic. They have properties of incapacitation, synergy with alcohol, and amnesia that easily could be used to sexually assault someone.

¶ 96 *v. Defendant*

¶ 97 Defendant, age 53, testified that he became a medical doctor in 1985 and operated a medical office with eight or nine employees in Geneva from 2006 through 2012. He had practiced medicine for 27 years at the time of the incident and was aware of the side effects of Xanax, Klonopin, and Demerol, both in combination with each other and with alcohol.

¶ 98 In 2012, he lived at 18 Squire Lane in St. Charles with Linnea, Emily, and his two daughters (who lived there part-time). Christopher did not live in the home at that time because he was in jail. In November 2012, the washer and dryer in the home were not working.

¶ 99 Defendant had no recollection of meeting J.K. prior to the going-away party. There were 50 or 75 people at his Halloween party that year, and he had no recollection of J.K. attending.

¶ 100 Defendant denied that, on November 16, 2012, he was J.K.'s primary care physician. Defendant also denied ever having a personal conversation with J.K. about her medical care, denied ever speaking to her directly on the phone, and testified she never visited his office.

¶ 101 On November 16, 2012, defendant and Linnea had a going-away party at their home for their office manager. There were seven or eight people in attendance before J.K. arrived. The party started at 7 p.m., and J.K. arrived around 9:30 p.m. By 11 p.m., defendant, Linnea, and J.K. were the only people left at the party. Defendant cleaned the kitchen, and Linnea and J.K. sat at the center island and conversed. At about 11:15 p.m., J.K. asked for whiskey. Defendant testified that he was unaware there was Maker's Mark whiskey, which J.K. had specifically requested, in the home, but he retrieved the bottle from the butler's pantry, as directed by Linnea. He set the

bottle in front of J.K. and Linnea. He did not bring any other kind of beverage, such as a soft drink, into the kitchen.

¶ 102 Defendant returned to cleaning up. The topic of cigars was mentioned, and Linnea asked defendant to show J.K. his cigars. Defendant retrieved a box of cigars and returned to the kitchen.

¶ 103 J.K. stood up and stood next to defendant as they passed cigars back and forth. Defendant believed that J.K. was flirting with him because she put her hand on his forearm several times as they passed the cigars back and forth. She was also smiling and engaging in conversation with him. "She had a very pleasant tone of voice. She was making eye contact."

¶ 104 After the cigar conversation ended, Linnea mentioned that J.K. was suffering abdominal pains. J.K. described her pain and mentioned she had a physician in Crystal Lake who had treated her with a pain medication. Defendant understood the medication to be a narcotic. J.K. also related that the medication did not help, and she twice went to the emergency room for the pain. J.K. did not mention her diet, and she did not slur her speech. J.K. did not appear to be intoxicated.

¶ 105 Linnea told defendant that J.K. would be spending the night at their home, and he responded that she could not leave her car on the street because she would get ticketed. He asked J.K. to get her car keys so that he could move her car to the driveway. Linnea went upstairs to prepare the guest room. Defendant stood by the front door, waiting for J.K. J.K. approached with her keys and embraced defendant. She whispered in his ear that they should go out and get her car and move it to the driveway. J.K. also kissed defendant's cheek. Defendant believed that, if he went outside with her, "she was going to blow me in exchange for a Xanax prescription." (Earlier, J.K. had asked for a prescription, and defendant had told her that he could not write her one.) He never went outside with J.K. Linnea walked by in the upstairs hallway and looked over the railing at defendant and J.K. Defendant turned toward Linnea and mouthed " 'help me.' " Linnea came

downstairs and separated defendant and J.K. and then led J.K. upstairs to the guest bedroom, which was also Emily's room. It was about midnight.

¶ 106 Defendant went outside and moved J.K.'s car to the driveway. He returned inside, cleaned up, checked on the dogs, went upstairs, and got ready for bed. Linnea was already in bed. Defendant went to bed at about 12:45 a.m. Within four or five minutes, defendant heard a "loud thump, and it was obvious somebody had fallen down." He asked Linnea if she had heard the sound, and she replied that she had. Defendant asked her to check on J.K., but she declined. He then asked if she should check on her, and Linnea replied, " 'No, you are staying here.' " Defendant stayed in bed and fell asleep.

¶ 107 Very early in the morning, before 3:40 a.m., defendant heard noises in the kitchen. It sounded like someone was trying to get water out of the refrigerator dispenser, which was broken. Defendant got out of bed, walked downstairs, and saw J.K. standing by the kitchen island. He asked if she was thirsty, and she replied that she was. Defendant retrieved a bottle of water for her from the pantry. He asked if J.K. was okay and if she had fallen. She replied that she fell while walking to the bathroom, hit her shoulder on the doorjamb, and had fallen on her buttocks. She stated that she was not hurt.

¶ 108 J.K. wanted a cigarette. They went to the garage, and defendant went outside to J.K.'s car to retrieve her cigarettes. He returned to the garage, sat next to J.K. on the steps leading into the garage from the house, and they shared a cigarette. They conversed, and J.K. had put her arm through defendant's arm and laid her head on his shoulder a couple of times. Their knees and shoulders were touching. J.K. spoke clearly.

¶ 109 Defendant's garage held six cars. There were five in the garage at that time, including three or four classic cars, along with several motorcycles. He discussed the cars with J.K., who

worked at a car dealership. They walked over to the cars, and J.K. helped defendant pull off the dust covers from several cars to view them. The first car they talked about was a Pontiac Bonneville. They sat again, smoked another cigarette, and then looked at another car. This occurred several more times. Defendant believed that J.K. was flirting with him, because she faced him, they had a very pleasant conversation, they made eye contact, and she smiled at defendant. After about 25 minutes, defendant asked J.K. if she wanted to have sex with him, and she said yes.

¶ 110 Defendant further testified that he took J.K. by the hand, they went upstairs to the guest room, and they had sex on the floor in front of the bed. According to defendant, they had vaginal sex, not anal sex. Afterward, defendant laid on the floor and briefly slept. When he awoke, J.K. stood up and texted on her phone. Defendant asked if everything was okay, and she replied in the affirmative. They returned to the garage, smoked cigarettes, and conversed about defendant's motorcycles and boats for about 15 minutes. Next, defendant asked J.K. not to tell Linnea that they had sex. J.K. did not answer the question, but asked defendant for a Xanax prescription. He replied that he did not have a prescription pad with him. At 4:50 a.m., they returned to the house, defendant took J.K. to the guest room to go to bed, and he went to sleep with Linnea.

¶ 111 Defendant awoke at 7:45 a.m. with Linnea. He showered and got dressed and went downstairs. There, he saw Linnea, J.K., and Emily in the sunroom, which was next to the kitchen. They were conversing and looking at the new puppies. Defendant said hello and made breakfast. Everyone had coffee. J.K. was quiet and reserved. She did not throw up or lie down. According to defendant, all four went to the sunroom and stood and conversed. J.K. left in her own car. Defendant was outside when she left, and they waved to each other before she left. He next saw J.K. as the trial commenced.

¶ 112 Defendant further testified that he was convicted of possessing cannabis with intent to deliver.

¶ 113 He and Linnea were together for eight years, and he considered her his wife. Their relationship ended on July 8, 2014, when defendant was arrested in this case.

¶ 114 Defendant explained that there was a civil suit associated with this case. J.K. filed the suit in August 2013 and defendant settled the suit on April 22, 2014. He was represented by counsel. He gave J.K. $50,000 and one of the classic cars she had viewed in his garage. J.K. picked up the 1959 Pontiac Bonneville. Defendant explained that he settled the civil suit because his counsel informed him that J.K.'s counsel was "being a real asshole, and the whole thing was about money." His counsel could not reason with J.K.'s counsel. Defendant's counsel presented the options as either proceeding to trial (where he advised that defendant would prevail "because the suit was groundless") and incur $150,000 to $175,000 in legal fees, or settle for fraction of the cost. Thus, it was cheaper to settle than to go to trial, and he made a "purely *** financial decision." At this time, defendant still had his business and had about eight or nine employees.

¶ 115 Defendant testified that, on November 16 and into the morning of November 17, 2012, he had sex with J.K. and first received her consent to have sex. After she consented to have sex, she never told defendant that she did not want to have sex with him. She appeared competent to give consent, and she was not unconscious when defendant had sex with her.

¶ 116 On cross-examination, defendant testified that he was aware of the side effects of Xanax and Demerol, but not as aware of the side effects of Klonopin, as he did not use it in his practice. He was also aware of the combination side effects of the drugs and the side effects of combining them with alcohol. Defendant knew that Klonopin and Xanax are benzodiazepines, that they can cause drowsiness, loss of orientation, loss of memory, and sedation.

¶ 117 Defendant explained that he was going to move J.K.'s car because Linnea had asked him to. He did not ask why J.K. could not do so.

¶ 118 When J.K. whispered in his ear, she said that they should go to her car and move it to the driveway. By this, defendant believed she was going to offer him oral sex. J.K. also kissed him. It did not repulse defendant, but he turned to Linnea and asked for help because Linnea was present. He was trying to disengage from J.K. and politely turn her down.

¶ 119 On re-direct examination, defendant testified that he was unaware of the dosage of J.K.'s medications and never obtained from her a full medical history. He was unaware of what specific medications she was taking that evening.

¶ 120 On re-cross, defendant stated that he never had a conversation with J.K. about Klonopin and she never told him she was taking it. She told him about her anxiety and asked for a Xanax prescription.

¶ 121 *vi. Stipulation*

¶ 122 The parties stipulated that, in Kane County case No. 15-CF-726, defendant was convicted in 2018 of unlawful possession of cannabis with intent to deliver.

¶ 123 3. Closing Arguments and Deliberations

¶ 124 During closing argument, defense counsel asserted that J.K.'s recall was inconsistent and that she could not "keep her stories straight." Counsel mentioned the civil suit and settlement. Noting that the jury would assess defendant's and J.K.'s credibility, counsel asserted the jury should look to their testimony concerning the settlement. Defense counsel stated that J.K.'s testimony "changed a little bit," in that J.K. settled for a classic car but referred to it as a " 'piece of junk.' " Counsel asserted that J.K. made a mistake in asking for that particular car, but the fact

that she asked for a car showed that J.K. recalled her conversation with defendant on the night of the incident.

¶ 125 During its rebuttal argument, the State, noting it had to prove that defendant knew J.K. was incapable of giving knowing consent and the unlikelihood that J.K. was aware of the State's burden during trial, asserted that it would have been easier if J.K. wanted to get defendant's $50,000, of which his counsel likely took 40%. Defense counsel objected at this point, and the trial court admonished the jury that it should disregard arguments made by the attorneys that were not based on the evidence.

¶ 126 During deliberations, the jurors asked the court to define "bodily harm." Over defendant's objection, the court provided the jury with the pattern instruction.

¶ 127 4. Verdict and Subsequent Proceedings

¶ 128 The jury found defendant guilty of criminal sexual assault and not guilty of aggravated criminal sexual assault. In his posttrial motion, defendant raised no issues concerning the admission of the civil settlement testimony. However, defendant referenced the settlement in asserting J.K. was not credible; specifically, arguing that she was not credible in testifying that she had little recall of the incident, but did recall the classic car and specifically requested it during settlement of the civil suit. The trial court denied the motion, and sentenced defendant to eight years' imprisonment. Defendant filed no postsentencing motion. He appeals.

¶ 129 II. ANALYSIS

¶ 130 Defendant argues that the trial court erred in admitting evidence of the terms of the settlement agreement of the civil suit J.K. filed against him, in violation of Illinois Evidence Rule 408. He contends that the jury likely considered that evidence to be an admission by him to the conduct alleged in this case. Defendant concedes that he failed to preserve this issue for review,

but requests that we review it under the plain-error doctrine, arguing the evidence was closely balanced. For the following reasons, we conclude that, assuming without deciding, that the admission of the settlement evidence was erroneous, the evidence, excluding that concerning the settlement, was not closely balanced. Thus, we honor the procedural default and affirm.

¶ 131 Illinois Supreme Court Rule 615(a) provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Under the plain-error doctrine, a reviewing court may consider an unpreserved error if (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, 564-65 (2007). Under either prong, the defendant bears the burden of persuasion. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The first step under either prong of the plain-error doctrine is to assess if a clear or obvious error occurred. *People v. Sebby*, 2017 IL 119445, ¶ 49.

¶ 132 Again, we shall assume, without deciding, that the trial court erred in admitting the settlement evidence. Thus, we turn to the second step in the plain-error analysis, specifically, whether the evidence of defendant's guilt was so closely balanced "that the error alone severely threatened to tip the scales of justice" against him. *People v. Sebby*, 2017 IL 119445, ¶ 51. Defendant bears the burden of persuasion of the question of whether the evidence was close enough to meet this standard. *People v. Choate*, 2018 IL App (5th) 150087, ¶ 52.

¶ 133 The State was required to prove beyond a reasonable doubt that defendant committed an act of sexual penetration and knew that J.K. was "unable to give knowing consent." 720 ILCS 5/11-1.20(a)(2) (West 2020). In this context, "consent," refers to the victim's "freely given agreement" to the act of sexual intercourse. 720 ILCS 5/11-1.70(a) (West 2020). The focus is on what the defendant knew or reasonably should have known regarding the victim's willingness or ability to give knowing consent. *People v. Whitten*, 269 Ill. App. 3d 1037, 1042 (1995).

¶ 134 Defendant argues that the evidence was closely balanced and that the case constituted a "he said, she said" credibility contest between him and J.K. He maintains that, by allowing the prosecution to elicit details of defendant's and J.K.'s settlement agreement, the trial court allowed the jury to hear that defendant admitted liability for that conduct. Defendant posits that, because the jury had to make a credibility determination between J.K.'s testimony and his testimony, it likely relied upon evidence of the civil settlement as an admission of guilt by defendant and, therefore, determined J.K.'s testimony to be more credible. The witnesses' credibility, he contends, was a crucial factor underlying the jury's determination of guilt. The question of whether defendant engaged in a sex act, he contends, was not in dispute. Rather, he notes, the sole question at trial was whether J.K. was capable of giving consent and whether she did, in fact, give consent. As such, defendant argues, the court's admission of the settlement agreement details, which the jury most likely interpreted as an admission of guilt by defendant, threatened to tip the scales of justice against him.

¶ 135 The State responds that the witnesses' testimony was not the totality of the evidence that should be considered in assessing whether the evidence was closely balanced. It contends that defendant ignores that the evidence showed that his semen was found in J.K.'s anus. Although he denied having anal sex with J.K., the swab administered from the sexual assault kit, which was

administered within 24 hours of the offense, contained the presence of semen that matched defendant's DNA profile. This evidence, the State asserts, contradicted defendant's version of the events. Furthermore, the State contends, defendant does not mention the testimony from Linnea and Emily concerning J.K.'s condition in the hours before and after the sexual penetration. The State contends that, because defendant's explanation was implausible and contrary to the physical and testimonial evidence, the case was not closely balanced.

¶ 136 Evidence has been found to be closely balanced where each side has presented credible witnesses or where the credible testimony of a witness is countered by evidence that casts doubt on his or her account. See *People v. Sebby*, 2017 IL 119445, ¶ 63; *People v. Jackson*, 2019 IL App (1st) 161745, ¶ 48. Further, evidence is closely balanced when the witnesses for the State and witnesses for the defense give plausible opposing versions of the events, neither of which is corroborated by extrinsic evidence. *Olla*, 2018 IL App (2d) 160118, ¶ 34. However, courts have found no "credibility contest" when one party's version of the events was either implausible or corroborated by other evidence. *Id.* ¶ 35. For plain-error purposes, evidence need not be overwhelming to be not closely balanced. *Id.* ¶ 38.

¶ 137 We agree with the State that the evidence was not closely balanced. Defendant was charged with placing his penis in J.K.'s anus, knowing she was unable to give knowing consent. Defendant's testimony that he did not have anal sex with J.K. was contradicted by the DNA evidence and was highly damaging to his credibility, where the DNA results corroborated J.K.'s testimony concerning her pain. We reject defendant's argument that Minnick's (the emergency room nurse) testimony that she did not perform the specimen collection, did not see from where the doctor collected the specimen, and saw no physical injuries to J.K.'s anal area cast doubt on

the DNA evidence. Without more, it is unreasonable to infer that the doctor's collection and categorization of the specimen was flawed.

¶ 138 Further damaging to defendant's credibility was the testimony concerning J.K.'s condition after the party. J.K. testified that, in late October 2012, she was prescribed Norco for her stomach pain, but had finished taking the drug one week before defendant's November 16, 2012, going-away party. She denied ever taking Demerol (meperidine) but testified that she took Klonopin (clonazepam) for anxiety at this time. At defendant's party, she recalled everything going "blank" after she drank the whiskey and soda that defendant served her. It was sudden, and she testified that her text messages from that time were jumbled. The next memory she recalled was waking up on the floor of Emily's room at 4:30 a.m. with defendant next to her. She felt "[v]ery fuzzy, I didn't really understand what was going on." J.K. also recalled that defendant brought her downstairs to look at the vehicles in his garage and that she felt "fuzzy" at this time. She later returned to Emily's room, and defendant gave her back her pants, which were dirty and not washed as defendant had claimed. J.K. testified that defendant also gave her six Xanax pills for her anxiety. (She took one later that morning.) J.K. went to bed again and awoke at 8 or 9 a.m., at which point Emily was in the room. She told Emily that something was wrong. They had a conversation, went to the kitchen, and J.K. left defendant's house within an hour.

¶ 139 J.K. denied having consensual sex or consensual anal sex with defendant. She denied flirting with defendant or asking for a Xanax pill (though she testified she told defendant she was experiencing anxiety because she was confused after waking up on the floor with him and asked if he could help her). She could not recall Linnea helping sit her in a chair and taking her upstairs and setting her in bed.

¶ 140 Contrary to defendant's assertion, we must assess all the evidence, not merely his and J.K.'s testimony, as it helps to cast light on defendant's and J.K.'s credibility. Linnea's testimony generally corroborated J.K.'s testimony. She testified that, although she did not see J.K. (who had had about three glasses of wine and did not appear intoxicated) drink the whiskey, J.K.'s condition suddenly changed after defendant brought her a glass of it. Linnea testified about J.K.'s and defendant's embrace (a memory J.K. did not recall), that J.K. appeared to be "coming on" to defendant, testified that J.K. "was barely able to speak" or "stand" at this point (defendant stood and watched, thus, he was aware of her condition), and that she assisted J.K. back to Emily's bedroom. She related the story of defendant stating that he heard a "thud" and wanting to check on J.K., telling him not to worry about her, waking up at around 8 a.m., checking on J.K., and seeing her and Emily talking on the bed.

¶ 141 Linnea conceded that it was possible that she did not tell detectives that J.K.'s demeanor changed after being served the whiskey. However, Emily's testimony was consistent J.K.'s and Linnea's testimony. She testified that she spoke to J.K. at 7 or 8 a.m. on November 17, 2012, and that J.K. "seem out of it," "was stumbling," and could not "keep her balance." According to Emily, J.K. related (consistent with J.K.'s own testimony) that she had woken up on the floor with her pants off, with a shirtless defendant next to her. She also testified that J.K. told her (consistent with J.K.'s testimony) that defendant had her underwear and would not return it. J.K. also complained of pain and pointed to her "private area," stating it hurt (although Detective Majewski testified that Emily stated that J.K. never complained of pain). Emily suggested that she submit to a rape kit, and J.K., in her own testimony, related her experience doing so. Nurse Minnick similarly related that J.K. told her that she had woken up beside a man, naked from the waist down, and that she was disoriented. She also complained of anal pain and bleeding.

¶ 142 Detective Majewski testified, consistent with J.K.'s testimony, that the pants she wore to defendant's party (and which defendant stated that he was washing when she first awoke) were not clean and were stained. Linnea testified that the two washers in the house were not working at the time of the incident, that defendant knew this and had called a repairperson, and that she had been doing laundry at a Laundromat.

¶ 143 J.K.'s urine test results showed positive results for Demerol (merperidine), a "strong opioid medication" and narcotic, which she testified she never knowingly took. Its possible side effects include severe drowsiness and memory issues, and alcohol should be avoided while taking it. Normerperidine, which is merperidine after it has been broken down in the body, was also detected in her urine, as were two additional drugs: (1) Klonopin (clonazepam), a benzodiazepine which is prescribed, in part, to treat anxiety; its side effects include severe drowsiness and memory problems and alcohol should be avoided while taking it; and (2) Xanax (alprazolam), also a benzodiazepine that is prescribed in part to treat anxiety; its possible side effects include drowsiness and memory loss, and alcohol should be avoided while taking it. J.K. denied ever taking Demerol, but Linnea testified that there was Demerol in defendant's home at the time. Dr. O'Donnell, the pharmacology expert, testified that Demerol could be used for sedation. He also testified that the combination of drugs found in J.K.'s urine, if given in sufficient quantities, could have completely sedated her, especially in combination with alcohol. Also, benzodiazepines (*e.g.*, Xanax and Klonopin) could be used in a drug-facilitated sexual assault. Benzodiazepines have sedative properties and, when combined with alcohol, the effect is drastic, including incapacitation and amnesia. He also opined that, if someone was blacked out from anterograde amnesia, they should not sign contract or drive a car, a reasonable inference from which is that the person is unable to give knowing consent. Dr. O'Donnell's testimony was consistent with J.K.'s and

Linnea's testimony about J.K.'s condition and was contrary to defendant's testimony that J.K. appeared fine and appeared competent to consent to have sex with him.

¶ 144 Defendant testified, contrary to J.K. and Linnea, that J.K. did not appear to be intoxicated after the party and that she did not slur her speech. His version of the circumstances of J.K. spending the night at his home were that Linnea informed him that J.K. was going to stay overnight; he did not offer an explanation as to why she was staying, even after Linnea observed J.K. allegedly embracing and kissing him and then separating the two. Defendant testified about the "thud" he allegedly heard shortly after going to bed, then about hearing noises and going downstairs at 3:40 a.m. and helping J.K. to obtain water. He stated that they went to the garage to smoke a cigarette, during which they sat close together and discussed cars. J.K. spoke clearly, she kissed defendant on the cheek, and he believed that she was flirting with him and, thus, asked her if she wanted to have sex. She allegedly replied that she did, and they went to Emily's room and had, according to defendant, consensual vaginal sex on the floor. They returned to the garage and then went to bed. Defendant maintained that J.K. consented to having sex with him, appeared competent to give consent, and was not unconscious when he had sex with her.

¶ 145 We conclude that, without the testimony about the civil suit, the evidence of defendant's guilt was not closely balanced. The DNA evidence contradicted defendant's version of the sexual encounter with J.K., thus, seriously undermining defendant's credibility overall and including on the consent issue. J.K.'s, Linnea's, and Emily's testimony about J.K.'s condition, which contradicted defendant's testimony, was consistent with the expert's testimony concerning the side effects of the drugs found in J.K.'s system. Defendant testified that he was aware of the side effects of Xanax, Demerol, and Klonopin, both in combination with each other and with alcohol and that Klonopin and Xanax can cause loss of memory and sedation. Again, defendant's

argument that this case was a credibility contest between him and J.K. fails because the forensic and testimonial evidence contradicted defendant's version of the events and highly damaged his credibility.

¶ 146 Thus, given that the evidence was not closely balanced, admission of the settlement evidence, which included J.K.'s testimony concerning the settlement amount and her opinion that the vehicle was worthless and defendant's testimony that he believed the suit was about money and his decision to settle was financial to avoid large legal expenses, would not have tipped the scales of justice against defendant.

¶ 147 In summary, defendant has failed to establish plain error, and we honor the procedural default.

¶ 148 III. CONCLUSION

¶ 149 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 150 Affirmed.