No. 126918

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Illinois Appellate Court, Third District, No. 3-17-0848
Plaintiff-Appellant,	)	There on Appeal from the Circuit Court of the Fourteenth Judicial Circuit, Henry County, Illinois, Nos. 16 CF 411 & 16 CF 412
v.	)	
TRAVIS J. WILLIAMS,	)	The Honorable Jeffrey W. O'Connor,
Defendant-Appellee.	)	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

POINTS AND AUTHORITIES

NATURE OF THE ACTION

The People appeal from the judgment of the Illinois Appellate Court reversing defendant's convictions of predatory criminal sexual assault and criminal sexual assault and remanding for a new trial upon finding that the prosecutor had "misstated the law regarding hearsay" in rebuttal closing argument and that the prosecutor's remarks rose to the level of plain error because the evidence was closely balanced. *People v. Williams*, 2020 IL App (3d) 170848, ¶¶ 20-22.

ISSUE PRESENTED FOR REVIEW

Whether the prosecutor committed plain error during rebuttal closing argument when, in response to defense counsel's closing argument that the prosecution could have called certain witnesses to corroborate the victims' accounts with their out-of-court statements, the prosecutor remarked that she could not do so because out-of-court statements constitute inadmissible hearsay.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a) and 612(b), as this Court allowed the People's petition for leave to appeal on March 24, 2021.

STATEMENT OF FACTS

In 2016, defendant was charged in two separate cases for sexual offenses against his biological daughter, K.W., and his step-daughter, H.S. In case No. 2016 CF 411, the People charged defendant with ten counts of

predatory criminal sexual assault and five counts of criminal sexual assault against K.W. 411C15-20.[1] In case No. 2016 CF 412, the People charged defendant with five counts each of predatory criminal sexual assault and criminal sexual assault and two counts of aggravated criminal sexual abuse against H.S. 412C14-20.

Ultimately, the People elected to proceed on two counts each of predatory criminal sexual assault and criminal sexual assault against K.W. and one count each of predatory criminal sexual assault and criminal sexual assault against H.S. R93-94. The cases were tried together before a jury in September 2017, where the People presented testimony from K.W., H.S., and Johanna Hager, an expert in forensic interviewing and clinical psychology.

Testimony of K.W.

K.W. testified that, as a young girl, she lived with her mother and her younger sister, A.R. R257-59. When K.W. was in sixth grade, she and A.R. moved in with defendant, their father. R256, R258, R281-82. Although there were two bedrooms in defendant's house, he often had K.W. and A.R. sleep with him in his bed, with one girl on either side of him. R282-85. At night, defendant would rub K.W.'s back; he would ask her to remove her shirt, then move to her "front side." R285-87.

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[1] Citations to the common law record in case Nos. 2016 CF 411 and 2016 CF 412 appear as "411C_" and "412C_," respectively. Citations to the report of proceedings and the appendix to this brief appear as "R_" and "A_," respectively.

One night, while A.R. was asleep, defendant took K.W.'s hand and placed it on his penis. R290-91. K.W. tried to pretend she was asleep while defendant touched her both inside and around her vagina. R292-94. Defendant then took her pants off, got on top of her, and put his penis inside her vagina. *Id.* After what "seemed like forever," he stopped, and K.W. went to sleep. R294. K.W. testified that she recalled later sitting in her first period class at school and replaying the assault repeatedly in her head. R295. When defendant talked to her about it approximately one month later, he told her that it was his way of "teaching [her] and his way of showing [her] love." R297. K.W. was "pretty passive with [defendant]," and never "really doubted anything he said." *Id.*

Thereafter, defendant had sex with K.W. "almost nightly." R298. Defendant had sex with K.W. "pretty much every time the opportunity came," which she estimated was "hundreds" of times. R311. Defendant also performed oral sex on K.W. and had her perform oral sex on him. R310. Defendant did not use protection when he had sex with K.W. R309. He would ejaculate outside of her, R319, but on more than one occasion, when her period was late, K.W. worried that she might be pregnant with defendant's child and would punch her stomach in hopes of ending any pregnancy, R308-09. When K.W. expressed concern that she might be pregnant, defendant just "blew it off." *Id.*

Defendant continued having sex with K.W. while she was in seventh grade, when they moved from his house into an apartment, and while she was in eighth grade, when they moved in with defendant's parents. R298-99. The abuse stopped briefly when defendant moved in with some friends and K.W. and A.R. moved back in with their mother. R299-300. But after defendant moved into a house of his own, he resumed having sex with K.W. whenever she and A.R. would visit on weekends and during school breaks. R300-02.

Defendant later met Patti Altobelli, R259, who moved into defendant's home with her two daughters, H.S. and Camren. R302. Defendant and Patti later married and moved to a house in Orion, Illinois. R303-04. K.W. lived with them in Orion for a six-month period in 2009, R315-17, during which defendant continued to have sex with her in the bedroom that he shared with Patti; Patti held several jobs and was frequently away from home. R303-04.

In 2009, A.R. came forward about defendant's abuse of K.W., which led to the involvement of the police and Department of Children and Family Services (DCFS). R320, R322, R335-36. K.W. was interviewed as part of the DCFS investigation. R320. During the interview, she denied the abuse because she felt it "wasn't [A.R.'s] story to tell." R321-22, R335. K.W. had trusted A.R. with the "big secret" of what defendant had done to her, but A.R. broke that confidence in what K.W. believed was an effort to avoid being sent to live with defendant. R335-36. K.W. believed that A.R. knew that the

revelation that defendant had abused K.W. was "the ammo that she had to not live [with him]," and so A.R. came forward about the abuse to "forc[e] [K.W.'s] hand." *Id.* But K.W. was not ready to talk about what defendant had done to her. R336-37. In addition, she wanted to protect her father, R320-22, R345; she was "really close" to defendant, R262, and she "never wanted anything bad to happen to him," R345-46. Defendant would ask her if she was "going to protect him," and she would answer "[y]eah, of course." R346. K.W. also did not think it was necessary to come forward about defendant's abuse to protect H.S. or Camren because she did not think they were in danger; she believed that "if it was all happening to [her], then it wasn't going to happen to them" and that "if [she] took it, then nobody else would get hurt." R323; R337-39.

The abuse finally stopped when K.W. was 17 or 18 years old and a high school senior. R305. Defendant had sent her a text message summoning her to the bedroom, and she replied that she "didn't want to do that anymore." R305-06. After that, "it just stopped." R306. Around that same time, their relationship was "not so good"; K.W. had brought her girlfriend over to defendant's house, and he was "against [her] being gay." R326. They reconciled about a year later, and their relationship was better from 2011 until 2016 (that is, until the year of the charges), although they did things together less frequently than before because K.W. "had [her] own life" by that time. R327-28.

Around the time of K.W.'s falling-out with defendant in 2010, Patti gave birth to K.W.'s half-sister, Oliviya. R327. K.W. was very close with Patti, who was like K.W.'s "second mom," and became very close with Oliviya, whom she described as "like [her own] baby." R260-61, R271. After Patti and defendant divorced in 2012 and defendant moved out of the house in Orion, R328-29, K.W. continued to spend time with Patti and Oliviya. *See* R271.

In 2016, after spending the day with Oliviya, K.W. decided that she needed to tell Patti about the abuse to protect Oliviya from the same fate, R271-72, R331; although Patti had custody of Oliviya, defendant still had visitation rights, R328. K.W. told Patti that A.R.'s allegations about defendant's abuse of K.W. were true. R271-72. Soon after, K.W. was contacted by police and gave a statement to a detective. R273. Although K.W. had previously told people about defendant's abuse of her — she told her wife early in their relationship that defendant had abused her, R332-34, and told A.R., R306, R332-33 — the detective was the first person to whom she ever told the details of the abuse. R334.

As an adult, K.W. continued to visit defendant; she explained that "all the sexual stuff" was just "one side of [her] dad"; the other side was "how a dad should be," and they were "really close." R325. K.W. testified that she had no animosity toward defendant and had forgiven him for what he had done. R343. She still did not want anything to happen to defendant — even after the charges were filed, K.W. was "still very close" with him, R262 — but

she explained that "then [she] wasn't able to protect anyone, so now [she] fe[lt] like she need[ed] to" protect Oliviya. R307.

On cross-examination, defense counsel explored K.W.'s non-sexual relationship with defendant, establishing that although they were not as close in 2010 and 2011, after K.W. brought her girlfriend home in 2010, they restored their relationship, and it remained strong through to the time of trial. R326-27. Defense counsel also elicited testimony from K.W. that despite the fact that defendant had sexually abused her when she was younger, she still celebrated special occasions with defendant, including his birthday and Father's Day, and he remained welcome in her home even when her own children were present. R329-30. Defense counsel also elicited that K.W. had pleaded guilty to misdemeanor theft in 2009. R331.

Testimony of H.S.

H.S. testified that defendant was her "ex-stepfather." R351. Defendant married her mother, Patti, when H.S. was in the fifth grade, and defendant lived with Patti, H.S., and her sisters (Camren and, later, Oliviya) until her sophomore year of high school, when Patti and defendant divorced (*i.e.*, from when H.S. was 10 until she was 15). R351-57. K.W. and A.R. lived with them for a time. R376.

H.S. testified that defendant abused her when she was in the seventh and eighth grades. R377-78. The family moved to a house in Orion the summer before she started sixth grade, R357, where she occupied the attic bedroom for about a year, R358, before ceding it to Patti and defendant,

R363. Patti held several jobs and often worked in the evening. R364. On evenings when Patti was out and Camren was asleep, defendant began asking H.S. for backrubs, which seemed "fine" and "normal" until defendant began asking her to use lotion. R366-67. The backrubs then moved from the living room to H.S.'s bedroom, where defendant made H.S. touch his penis. R368-69. H.S. "kept trying to tell him no" and "trying to pull [her] hand away," but "nothing worked" — defendant "ke[pt her] hand on his penis, helping him masturbate." R369. Defendant forced her to masturbate him "on multiple occasions." *Id.* Defendant would masturbate to climax, clean himself up, and leave her room. R371.

Defendant's abuse escalated to acts of digital penetration, in which defendant touched both inside and outside her vagina. R370. Defendant asked H.S. if it felt good; when she responded that it hurt, he did not stop but instead replied that it was supposed to feel good. *Id.* H.S. did not remember exactly how many times defendant had touched inside and outside of her vagina, but she knew that it occurred at least twice. R386.

In 2009, a DCFS investigator spoke with H.S. R372. H.S. did not tell the investigator about the abuse because defendant had convinced her that if she did, she would break up her family, get defendant in trouble, and make her mother "very unhappy and very lonely." R373, R377 (abuse ongoing at time of 2009 investigation).

In 2012, Patti and defendant divorced, he moved out, and Patti was awarded custody of Oliviya, who would visit defendant on weekends. R379-80. H.S. did not report defendant's abuse after the divorce (or during defendant's and Patti's brief attempted reconciliation the following year) because she thought that Oliviya was too young for defendant to abuse and she did not want Oliviya to "grow up without her dad" as H.S. had done. R382. H.S. also believed that defendant would not abuse Oliviya because, unlike H.S., she was defendant's biological daughter. R382-83.

In June or July 2016, Patti called H.S. at work and asked whether defendant had ever "touched" her. R359-60. H.S. said that he had, and Patti ended the call in tears. R360. They resumed the conversation after work, Patti called the police, and an officer took a report that evening. R361. H.S. never intended to tell her mother about the abuse she had suffered in middle school, but when asked, she "figured it had been long enough" and disclosed it out of concern for her younger sisters. R362. H.S. never told K.W. about the abuse and did not know that defendant had abused K.W. until after Patti called to ask whether defendant had abused H.S. R388.

Testimony of Johanna Hager

Hager, a forensic interviewer at the Children's Advocacy Center, testified as an expert in forensic interviewing and clinical psychology. R395-401. Hager testified that it is not uncommon for children to wait days or even years to disclose abuse; in fact, "most children who have experienced sexual abuse go to their grave without ever telling anyone." R403. In Hager's

experience, children are much more likely to disclose "right away" if their abuser is not an immediate family member, but are "much more likely to keep it to themselves forever or for years if it is a family member because of their feelings for them." R405.

Hager further explained that when a child initially denies abuse that is later confirmed, the initial denial is usually due to "tentative disclosure," which occurs "when a child's kind of outed," in that "they did not volunteer the information," but instead "[s]omething else has caused people to believe that they had been sexually abused." R412. If a child is not yet ready to talk about what happened, the child will often deny the allegation. R406.

Defendant's case

Defendant presented no testimony or evidence. R428.

Closing arguments

During closing argument, defense counsel argued that the jury should discredit K.W.'s and H.S.'s accounts of defendant's abuse because they might have fabricated the 2016 accusations against defendant to provide Patti with some advantage in her 2012 divorce from defendant. R463. Counsel further suggested that K.W. might have fabricated the 2016 abuse allegations because she remained angry about her falling-out with defendant in 2010. *Id.*

Counsel further argued that the prosecution should have called A.R. and K.W.'s wife to testify about what K.W. told them about the abuse before she came forward in 2016. R472-73. Counsel argued that K.R.'s and H.S.'s

testimony was "uncorroborated" by any physical evidence, and that "[i]t would have been really easy to call [A.R.]" "to corroborate [K.R.'s] testimony and they didn't do it." R457-58. As counsel put it, "[K.W.] told [A.R.] about the abuse before [A.R.] made the complaint in 2009. Wouldn't that have been nice to have heard? Call [A.R.] to the stand. [A.R.], did she tell you about this back in 2009?" R472. Similarly, counsel asked why the prosecution did not "[p]ut [K.W.]'s wife on the stand" and ask her, "[i]n 2013, did [K.W.] tell you about the abuse?" R473.

During rebuttal argument, the prosecutor responded to defense counsel's argument that the prosecution should have called A.R. and K.W.'s wife to testify to K.W.'s out-of-state statements regarding the abuse:

> [Prosecution]: He makes a point of saying, well, why didn't they call [A.R.] as a witness? Well, first of all, the defense has subpoena powers just like the government.
>
> [Defense]: Objection, Your Honor.
>
> [Prosecution]: May we approach?
>
> (The following record took place in chambers.)
>
> The Court: Okay. The record will show we are in chambers out of the presence of the jury for an objection. So counsel?
>
> [Defense]: It's my objection, so I will have to state it. We have no burden of proof. We don't have to call witnesses. They can't argue during closing argument that we can do this. It's their burden.
>
> The Court: Response?

> [Prosecution]: There is current case law saying that when the defendant opens the door and makes comments that the State didn't call witnesses, we are allowed to respond.
>
> The Court: Anything further?
>
> [Defense]: She's probably way more familiar on the current case law than I am, so I don't have anything further.
>
> [Prosecution]: I will certainly specify to the jury that I'm not indicating they have the burden of proof, but when he makes a statement that I could have called X people, he can too. He has subpoena powers.

R486-87.

The court denied the defense objection, finding that the prosecutor's remarks did not shift the burden of proof and that they were appropriate to rebut defense counsel's suggestion that the People had "failed to do something that would have made the jurors' job so much easier," R487, and the prosecutor resumed her argument:

> The defendant has subpoena powers just like the State and I will note to you that I am not implying that the defendant has any kind of burden in this case. I fully accept the fact that we have the burden to prove this case beyond a reasonable doubt. But when the defendant stands here and tells you we could have subpoenaed and makes it sound like we are the only ones that can get people here, they have the right and the ability to subpoena anybody they choose to subpoena, also.
>
> In regards to telling [A.R.] — and we should have subpoenaed [A.R.] to come say what [K.W.] told her, many of you will be familiar with hearsay, which is something that's said outside of court. It's a rule we can't bring in hearsay, so for the defense to

> suggest to you that I should call [A.R.] to talk about what [K.W.] told her, he knows I can't do that.
>
> In regards to [K.W.'s] wife in that she told [K.W.] or [K.W.] told her what happened when they got married, again, hearsay. I can't do that. So what he's suggesting that I do, he knows very well that I can't.

R488-89. Defendant's counsel did not object to these remarks. *Id.*

The jury returned guilty verdicts on all counts. R504-05. In his motion for new trial, defendant contended that the trial evidence was insufficient and that "it was error to allow the State during rebuttal close to argue that the defendant could have called witnesses to testify regarding the corroboration or lack of corroboration" of the victims' testimony. 412C164. The People filed a response, 412C168, and, following a hearing, R514-18, the court denied defendant's motion, R518-19.

The court sentenced defendant to mandatory terms of life imprisonment on the predatory criminal sexual assault counts, plus three consecutive five-year terms on the criminal sexual assault counts. 411C213; 412C181; R545.

Appeal

On appeal, defendant argued that (1) the prosecutor's closing argument attempted to shift the burden of proof, misstated "the law on hearsay," improperly claimed that A.R.'s and K.W.'s wife's testimony would have been barred as hearsay, and improperly accused defense counsel of knowing that it was barred as hearsay; and (2) counsel was ineffective for

failing to object to testimony regarding K.W.'s lack of sexual history, potential pregnancy, and attempts to terminate pregnancy. *See* A4, 5, 7.

The appellate court held that the prosecutor's remarks did not impermissibly shift the burden of proof. A5. The court then held that defendant forfeited his argument that the prosecutor misstated the hearsay rule. A6. The majority found, however, that the prosecutor "committed a clear error when [she] misstated the law regarding hearsay and then compounded that with the implication that was why the witnesses were not called (the defendant 'knows I can't [offer] that')." *Id.*

The majority further found that the evidence was closely balanced. A6. The majority began by noting that "when the only evidence consists of two differing accounts of the same event, with no corroborating evidence, courts often find the credibility contest to be closely balanced." *Id.* (citing *People v. Naylor*, 229 Ill. 2d 584, 608 (2008), and *People v. Vesey*, 2011 IL App (3d) 090570, ¶ 17).

The majority then reasoned that

> Although the testimony of K.W. and H.S. contained some similarities, they testified regarding events that occurred during different time frames. The credibility of both K.W. and H.S. was challenged in that the defense elicited testimony that both had denied that the abuse occurred when they were questioned in 2009. There was no physical evidence, no third party testimony even putting the defendant alone with K.W or H.S., and no evidence suggesting the defendant's consciousness of guilt. *Cf. People v. Effinger*, 2016 IL App (3d) 140203, ¶ 26 [ ] (evidence was not closely balanced when two witnesses put the victim and the defendant together on a public sidewalk and the defendant gave a false name, which indicated a consciousness of guilt).

> Thus, we find that the case involved a credibility contest between K.W. and the defendant and H.S. and the defendant. As such, we find the evidence to be closely balanced for purposes of a plain error analysis.

A6-7. Accordingly, the court reversed defendant's conviction and remanded for a new trial and did not reach defendant's ineffective assistance claim. A7.

The dissent agreed that the prosecutor's remarks did not shift the burden of proof and, further, would have found that even assuming that the hearsay argument was error, the evidence was not closely balanced. A7-8 (Schmidt, J., dissenting). The dissent reasoned that the record evidence of defendant's guilt was "overwhelming" and disagreed that the case involved a credibility contest because "[n]ot one witness contradicted the victims' testimony." A8 (Schmidt, J., dissenting). The dissent distinguished *Naylor* and *Vesey*, upon which the majority relied, on the ground that here there was no competing version of events, "as defendant did not testify nor did he call any witnesses." *Id.* (Schmidt, J., dissenting). Thus, the dissent concluded, a "qualitative, commonsense evaluation of the totality of the evidence show[ed] that the evidence is not closely balanced," and therefore defendant's forfeiture should be enforced. *Id.* (Schmidt, J., dissenting).

STANDARD OF REVIEW

Whether a forfeited claim is reviewable as plain error is a question of law that is reviewed de novo. *People v. Johnson*, 238 Ill. 2d 478, 485 (2010).

ARGUMENT

I. Defendant's Claim Is Forfeited, and He Cannot Excuse His Forfeiture Under the Plain-Error Rule.

As the appellate court correctly concluded, defendant forfeited his contention that the prosecutor committed error during rebuttal closing argument by misstating the hearsay rule because defendant neither objected at trial, R4889, nor raised the issue in his post-trial motion, 411C194. A5; *People v. Enoch*, 122 Ill.2d 176, 186 (1988) ("*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial.") (emphasis in original); *People v. Sebby*, 2017 IL 119445, ¶ 48 ("Failure to do either results in forfeiture."). Therefore, the appellate court was barred from considering defendant's claim of error unless he satisfied the requirements of the plain-error doctrine. *People v. Jackson*, 2020 IL 124112, ¶ 81.

The plain-error doctrine "is a narrow and limited exception to the general rule of procedural default." *Id.* It "does not instruct a reviewing court to consider all forfeited errors." *People v. Herron*, 215 Ill. 2d 167, 177 (2005). Nor is it "a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court"; instead, "it is a narrow and limited exception to the general waiver rule." *Id.* (internal citations and quotations omitted). Unless the alleged error is akin to structural error, such 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," the plain-error doctrine permits a reviewing court to consider a forfeited claim of error "only when a clear and obvious error occurs" 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." *Jackson*, 2020 IL 124112, ¶ 81.

Defendant cannot excuse his forfeiture because he cannot satisfy either requirement of plain-error review; the prosecutor's remarks did not constitute clear and obvious error and the evidence was not closely balanced.

A. The Prosecutor's Remarks During Rebuttal Argument Did Not Constitute Clear and Obvious Error.

"In addressing an assertion of plain error, it is appropriate to determine whether reversible error occurred at all," *Jackson*, 2020 IL 124112, ¶ 81, for "[w]ithout reversible error, there can be no plain error," *id.* ¶ 88; *see People v. Sims*, 192 Ill. 2d 592, 623 (2000) (holding that because "no reversible error occurred," there was "no plain error"). This is because the plain-error doctrine merely excuses forfeiture, allowing the reviewing court to "consider unpreserved error[s]," *Jackson*, 2020 IL 124112, ¶ 81; it does not provide an independent substantive basis for relief. That is, a defendant cannot obtain relief on an unpreserved error under the plain-error doctrine if he would not have been entitled to relief on the same error if preserved. Therefore, to show clear and obvious prosecutorial error during rebuttal

argument, defendant must show that the error clearly and obviously would have entitled him to relief had he preserved it for review.

Had defendant preserved his claim of prosecutorial error during rebuttal argument, he would have had to establish "that the remarks were improper and that they were so prejudicial that real justice was denied or the verdict resulted from the error." *Id.* ¶ 83. Thus, to show that his *unpreserved* claim of prosecutorial error during rebuttal argument constitutes clear and obvious error, defendant must show that the comments to which he now objects were clearly and obviously both improper and so prejudicial as to deny him a fair trial. *Id.* ¶ 88 ("Without reversible error, there can be no plain error."). Defendant cannot meet this standard.

1. The prosecutor's remarks during rebuttal argument were not clearly and obviously improper.

To determine whether a prosecutor's comments during closing argument are improper, a reviewing court considers the closing argument as a whole, rather than focusing on isolated phrases or remarks. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). A prosecutor's challenged statements "must be viewed in their context," and "will not be held improper if they were provoked or invited by the defense counsel's argument." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009); *accord People v. Kliner*, 185 Ill. 2d 81, 156 (1998) ("This court has held that where the challenged remarks were invited, a defendant cannot assign them as error on appeal."). In addition, prosecutors enjoy wide latitude during closing argument, *People v. Runge*, 234 Ill. 2d 68,

142 (2009), and may comment on the evidence and on any fair and reasonable inference from the evidence, *Glasper*, 234 Ill. 2d at 204.

Here, the prosecutor's explanation of hearsay, although incomplete, was not clearly and obviously improper. Hearsay is defined as "an out-of-court statement offered to prove the truth of the matter asserted." *People v. Moss*, 205 Ill. 2d 139, 159 (2001); Ill. R. Evid. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). The prosecutor's remarks during rebuttal that "[i]t's a rule we can't bring in hearsay," which "is something that's said outside of court," and that defense counsel "knows" that the prosecution cannot present hearsay, R488-89, is at the very least consistent with the hearsay rule, and thus cannot be said to be clearly and obviously improper.

Moreover, the prosecutor was not clearly and obviously wrong to believe that any testimony from A.R. or K.W.'s wife about what K.W. told them regarding defendant's abuse would be inadmissible hearsay. Although the majority below suggested that the hearsay exception for prior consistent statements offered to rebut a charge that the witness recently fabricated her testimony "may have been applicable in this case," A6; *see* Ill. R. Evid. 613(c)(2), it was not at all clear before closing arguments that defense

counsel had leveled such a charge against K.W.[2] Although defense counsel argued in closing that K.W. fabricated her 2016 account of defendant's abuse in response to her 2010 falling-out with defendant or as an attempt to provide Patti some advantage in her 2012 divorce, *see* R463-64, he did not clearly imply either possible motive during K.W.'s cross-examination, *see* R312-32. Rather, he pursued two other theories that he then argued in closing: that the family must have collectively come up with K.W.'s and H.S.'s accusations against defendant, *compare* R470-71 *with* R332, and that it was implausible that K.W. would continue to be close to defendant and welcome him into her home after suffering years of abuse at his hands, *compare* R324-25, R329-30 *with* R474. Thus, at the time when the prosecutor could have called A.R. or K.W.'s wife to corroborate K.W.'s testimony with her prior consistent statements, the prosecutor reasonably believed those statements were inadmissible hearsay. Certainly, it was not clear and obvious that the prosecutor's belief was incorrect.

Furthermore, defense counsel invited the prosecutor's remarks when he argued that the prosecution should have called A.R. and K.W.'s wife to testify about what K.W. told them. R472-73; *see Kliner*, 185 Ill. 2d at 155 (prosecutor's rebuttal argument was invited by defense counsel's arguments

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[2] The majority also suggested that the hearsay exception for statements of identification under 725 ILCS 5/115-12 might apply, A6, but it is unclear how a statement by K.W. to her wife that defendant had sex with her hundreds of times when she was a child would qualify under this narrow hearsay exception.

regarding prosecutor's failure to call certain witnesses). In response, the prosecutor correctly noted that mere corroboration testimony would be hearsay. *See People v. Williams*, 147 Ill. 2d 173, 227 (1991) ("A witness may not be corroborated on direct examination by proof of prior statements consistent with his testimony."). Given defense counsel's use of the word "corroborate," it was not unreasonable for the prosecutor to have responded to defense counsel's arguments in this way, particularly where defense counsel did not object that the prosecutor had misunderstood or was not responsive to his argument.

Not only did the majority err in concluding that the prosecutor committed clear and obvious error by misstating the hearsay rule, but its reliance on *People v. Emerson*, 97 Ill. 2d 487 (1983), and *People v. Shief*, 312 Ill. App. 3d 673 (1st Dist. 2000), is misplaced. *Emerson* and *Shief* both concerned comments that suggested there was additional evidence of defendant's guilt that the defendant had prevented the prosecution from presenting to the jury. *Emerson*, 97 Ill. 2d at 496-97; *Shief*, 312 Ill. App. 3d at 79-80.

In *Emerson*, the circuit court had "prohibited any mention at trial of the reason for the [defendant's] arrest or the fact that he was armed at the time." 97 Ill. 2d at 498. After defense counsel argued in closing that defendant did not act like a guilty person when he was arrested and offered no resistance, the prosecutor responded during rebuttal that "we can't tell

you everything he did after his arrest and he knows it. Maybe when this is over I will tell you what he did when he was arrested." *Id.* at 496. Similarly, *Shief* concerned a prosecutor's comments suggesting that the defense was preventing the jury from seeing police reports that conclusively proved the defendant's guilt. 312 Ill. App. 3d at 677-78, 679-80. Both *Emerson* and *Shief* held that the challenged comments were improper because they "suggest that evidence of guilt existed which, because of defendant's objection, cannot be brought before the jury," and therefore invited the jury to speculate about the nature of that unpresented evidence. *Emerson*, 97 Ill. 2d at 497; *Shief*, 312 Ill. App. 3d at 679-80 (citing *Emerson*, 97 Ill. 2d at 497). But here, the prosecutor did not suggest that K.W.'s wife and A.R., if they could testify to K.W.'s out-of-court statements, would provide additional evidence of defendant's guilt. Indeed, she did not say *anything* about the substance of K.W.'s statements to her wife and A.R., but merely stated that the she could not call K.W.'s wife or A.R. "to come say what [K.W.] told [them]" because statements made out of court are hearsay. R488-49.

The impermissible remarks in *Emerson* and *Shief* also differed from the challenged remarks in this case in both substance and degree. In *Emerson*, "a new trial was granted in a capital murder case on the basis of multiple instances of prosecutorial misconduct." *People v. Perry*, 224 Ill. 2d 312, 351 (2007). *Emerson* found reversible error "where, among other things, the prosecutor suggested that defense counsel laid down a smokescreen

'composed of lies and misrepresentations and innuendoes,'" as well as that counsel, like all defense attorneys, tried to "dirty up the victim." *Id.* (quoting *Emerson*, 97 Ill. 2d at 497). Thus, "[t]he statement in the present case, even if improper, is readily distinguishable from the pattern of inflammatory and prejudicial statements that resulted in a new trial for the defendants in *Emerson*." *Perry*, 224 Ill. 2d at 351; *see also People v. Byron*, 164 Ill. 2d 279, 97 (1995) (distinguishing *Emerson* on the grounds that "the prosecutor, unlike in *Emerson*, did not allege that defense counsel had deliberately lied to the jury and fabricated a desperate defense" and "the impermissible closing arguments in *Emerson* were different in both substance and degree.").

The challenged remarks in *Shief* are similarly distinguishable. That case hinged on witness identification testimony, and the prosecutor's remarks suggested that all people, and particularly the victim, shared the prosecutor's own professed ability to identify an individual regardless of the circumstances under which the identification occurred, 312 Ill. App. 3d at 679, and further stated that if he had his way, he would hand the jury all of the (inadmissible) police reports and tell the jury to "go back in there and say he's guilty," *id.* at 678. These statements, which "went far beyond defense counsel's comments about the reports" and suggested that that the reports "unequivocally established defendant's guilt," *id.* at 679-80, are not comparable to the prosecutor's single comment here, made directly in

response to a question posed during defendant's closing argument, that out-of-court statements are inadmissible hearsay.

2. Even if the remarks were improper, they were not clearly and obviously reversible error.

Even if defendant could show that the prosecutor's comments were improper, he could not show that the improper comments were clearly and obviously reversible error. *Jackson*, 2020 IL 124112, ¶ 88 ("Without reversible error, there can be no plain error."). The bare fact that a prosecutor's comments during closing argument are improper does not establish reversible error; rather, comments must be "so prejudicial that real justice was denied or the verdict resulted from the error." *Id.* ¶ 83.

Here, the prosecutor's remark about hearsay being inadmissible was made in the course of an 18-page rebuttal argument. *See* R483-500; *Jackson*, 2020 IL 124112, ¶ 87 (explaining that "[t]he brief and isolated nature of [challenged comments], in the context of the entire lengthy closing argument, is 'a factor we have found significant in assessing the impact of such remarks on a jury verdict'") (quoting *Runge*, 234 Ill. 2d at 142). The challenged remark directly addressed a question posed by defense counsel during closing argument, did not urge the jury to rely on evidence that had not been presented or suggest that such evidence would establish defendant's guilt, and was not of a nature that might inflame the jury's passions against defendant. Given the substantial evidence of defendant's guilt — the consistent and credible testimony of his two victims, along with the credible

expert testimony addressing delayed disclosure, which was the main basis on which the victims' testimony might be viewed with skepticism — the prosecutor's passing comment regarding the admissibility of out-of-court statements, even if improper, was not clearly and obviously "so prejudicial that real justice was denied or the verdict resulted from the error." *Id.* ¶ 83; *see id.* ¶ 81 (holding that defendant's forfeiture of his claim of prosecutorial error during closing argument could not be excused under plain-error doctrine because, "forfeiture aside, the two challenged remarks were not so improper and so prejudicial that real justice was denied or that the jury's verdict may have resulted therefrom").

B. The Evidence Was Not Closely Balanced.

Even assuming that defendant could show that the prosecutor's remarks were clearly and obviously reversible error, his forfeiture must nonetheless be enforced because he cannot prove that "the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *People v. Adams*, 2012 IL 111168, ¶ 21. "In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53. "A reviewing court's inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id.*

The People presented ample evidence on the elements of the charged offenses. To sustain defendant's convictions of predatory criminal sexual assault, the People were required to prove that (1) he was 17 years of age or older, (2) he committed an act of sexual penetration, and (3) the victim was under 13 years of age. 720 ILCS 5/12-14.1(a)(1) (now codified at 720 ILCS 5/11-1.40(a)(1)). To sustain defendant's convictions of criminal sexual assault, the People were required to prove that (1) he committed an act of penetration, (2) the victim was a family member, and (3) the victim was under 18 years of age. 720 ILCS 5/12-13(a)(3) (now codified at 720 ILCS 5/11-1.20(a)(3)).

As part of the People's proof of these elements, K.W. clearly and consistently testified that beginning in the sixth grade, when she was 11 or 12 years old, and continuing until she was 17 years old, defendant had sexual intercourse with her on an "almost nightly" basis whenever she lived with him or visited on weekends and school holidays. R288-306. K.W. further testified that defendant is 20 years older than she, R311 (making him at least 31 at the time of his first offense against her and older still at the time of his first offense against H.S.), and that defendant was her father, R256. *See* 720 ILCS 5/12-12(c) (now codified at 720 ILCS 5/11-0.1) ("family member" includes parent and step-parent). Similarly, H.S.'s testimony established that defendant was her step-father when, beginning in the seventh grade, when she was 12 years old, and continuing into the eighth grade, defendant

had her masturbate him to climax and penetrated her vagina with his finger. R351, R368-72; R378. H.S. "specifically remember[ed]" two such acts of penetration. R386. Thus, the People presented abundant proof on each of the statutory elements.

The appellate majority incorrectly viewed the evidence as closely balanced because the case purportedly presented "a credibility contest between K.W. and the defendant and H.S. and the defendant." A7. But defendant did not testify, and so there was no "swearing contest" between two equally credible versions of events by equally credible witnesses, such that any error, no matter how minor, might have tipped the balance. That is why, as the dissent correctly noted, this case is unlike *People v. Naylor*, 229 Ill. 2d 584 (2008), or *People v. Vesey*, 2011 IL App (3d) 090570, which the majority relied upon. In *Naylor*, the evidence was closely balanced because it "boiled down to the testimony of . . . two police officers against that of the defendant," and both versions of events were credible. 229 Ill. 2d at 608. "Given the opposing versions of the event, and the fact that no extrinsic evidence was presented to corroborate or contradict either version," *Naylor* held that the evidence was closely balanced. *Id.* at 607. Similarly, *Vesey* relied on *Naylor* to conclude that the evidence of the defendant's drug possession was closely balanced because "the trial largely came down to [the correctional officer's] word against the defendant's" and there was "no corroborating evidence of guilt." 2011 IL App (3d) 090570, ¶ 17. But here, unlike in *Naylor* and *Vesey*,

defendant presented no competing account of events at trial. While that fact is not necessarily "fatal" to a closely-balanced-evidence claim, *People v. Piatkowski*, 225 Ill. 2d 551, 567 (2005) — for example, the evidence may still be closely balanced in a case involving uncontested eyewitness testimony if the forfeited error involves an erroneous jury instruction that "related to *how* the jury would assess the reliability of that eyewitness testimony," *id.* — it distinguishes *Naylor* and *Vesey* from a case like this, where the jury was not called upon to determine the *relative* credibility of any competing accounts.

Instead, K.W. and H.S. clearly, consistently, and credibly testified about defendant's repeated acts of abuse, and explained why they initially denied the abuse when questioned in 2009. K.W. testified that it was "very uncomfortable" and she did not want anything to happen to her father, R307, and H.S. testified that defendant threatened that if she confirmed the abuse, "he would get in trouble, [her] mom and him wouldn't be able to be together, and [her] mom would be very unhappy and very lonely," R373.

The victims' explanations for their initial denials and delayed disclosures were supported by Hager's expert testimony explaining that it is not uncommon for children to wait years to disclose abuse, that "most children who have experienced sexual abuse go to their grave without ever telling anyone," R403, and that children are "much more likely to keep [the abuse] to themselves forever or for years if it is a family member because of their feelings for them," R405. Hager further explained that when a child

initially denies abuse that is later confirmed, the initial denial is usually due to something known as "tentative disclosure," which occurs "when a child's kind of outed"; "they did not volunteer the information," and "[s]omething else has caused people to believe that they had been sexually abused." R412. In these situations, if a child is not yet ready to talk about what happened, the child will often deny the allegation. R406.

Consistent with this trial testimony, Illinois case law recognizes that "the failure of a young sexual assault victim to make a prompt complaint is easily understandable because of the natural sense of shame, fear, revulsion, and embarrassment felt by children under such circumstances." *People v. Priola*, 203 Ill. App. 3d 401, 414 (2d Dist. 1990); *see also People v. Sharp*, 391 Ill. App. 3d 947, 955-56 (4th Dist. 2009) (delay in reporting assault or initial denials of assault will not automatically render victim's statements unreliable and thus inadmissible under section 115-10 of the Code of Criminal Procedure); *People v. Zwart*, 151 Ill. 2d 37, 45-46 (1992) (same, and further recognizing that "victims of sexual abuse are often threatened not to tell anyone about the abuse, and that such threats may explain a child's delay in reporting abuse").

Moreover, though they did not speak with one another about defendant's abuse, K.W. and H.S. described similar, escalating patterns of abuse, which lends additional credibility to their accounts. Both victims testified that defendant began offending against them around age 11 or 12,

and that the cycle began with "backrubs" that quickly escalated to acts of penetration.

The appellate majority reasoned that the evidence was closely balanced, in part, because "[t]here was no physical evidence, no third party testimony even putting the defendant alone with K.W or H.S., and no evidence suggesting the defendant's consciousness of guilt." A7. But evidence is not closely balanced merely because the prosecution's case rests on eyewitness testimony rather than forensic evidence. Indeed, the absence of corroborating physical evidence is not uncommon in sex offense cases, and is likely even less uncommon in cases such as this one, which are prosecuted under the extended limitations period, *see* 720 ILCS 5/3-6(j). Moreover, "[i]n criminal sexual assault cases, the victim is typically the only witness (other than the perpetrator) to the crimes." *People v. Booker*, 224 Ill. App. 3d 542, 550 (4th Dist. 1992). Thus, it is not surprising that there would be no third-party eyewitness testimony or physical evidence of defendant's offenses. *See People v. Cookson*, 215 Ill. 2d 194, 215 (2005) (noting that "as in many if not most child sexual abuse cases, there was no testimony from third-party eyewitnesses"); *People v. Shum*, 117 Ill. 2d 317, 356 (1987) (lack of physical evidence does not establish that a sexual assault did not occur); *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 89 (collecting cases holding that proof of physical trauma is not required). By the majority's rationale, the evidence would be closely balanced in every sex offense case that does not involve

physical evidence or third-party testimony, regardless of the credibility of the witnesses and their testimony.

The appellate majority was also wrong to think the evidence closely balanced in the absence of third party testimony "putting the defendant alone with K.W or H.S." A7. In fact, such testimony would have undermined the prosecution's case, as it would have conflicted with both K.W.'s testimony that defendant offended against her between 25 and 50 times while they shared a mattress with a sleeping A.R., R318, and H.S.'s testimony that on a typical evening, her mother was working and she (H.S.) was home with defendant and Camren, R363-64, who was sleeping during defendant's offenses, R366.

Finally, although no formal statement of defendant was admitted into evidence, K.W. testified that defendant told her that his acts of sexual abuse were his way of teaching her and showing her love. R297. And defendant displayed consciousness of guilt when he told K.W. "You're going to protect me, right?" R346. Similarly, H.S. testified that defendant told her in 2009 that if she confirmed the abuse to the investigators, "he would get in trouble, [her] mom and him wouldn't be able to be together, and [her] mom would be very unhappy and very lonely." R373. Thus, the majority's reasoning does not withstand scrutiny.

Nor did defendant's closing argument undermine the victims' credibility. Defense counsel's suggestion that the victims may have come

forward to help provide Patti with an advantage in her divorce proceedings, R463, 473, was speculative at best, given that Patti and defendant divorced in 2012, years before K.W.'s 2016 outcry to Patti that precipitated these proceedings, Patti already had custody of Oliviya, and there was no apparent friction over defendant's visitation. Had K.W. or H.S. been motivated to help Patti gain an advantage in the divorce proceedings, they presumably would have done so at the time of the divorce in 2012, not four years after it was over. And there was no testimony suggesting that Patti and defendant were later engaged in any post-divorce custody or visitation dispute near the time of K.W.'s 2016 outcry. Defense counsel's further suggestion that K.W. might have accused defendant in an act of revenge because he disapproved of her "lifestyle choice," R463-64, is equally unpersuasive. Although K.W. testified that her relationship with defendant went through a "rocky" period in 2010 and 2011, she testified that they reconciled and that the relationship had improved between 2011 and 2016. R327-28. Indeed, even at of the time of trial, K.W. bore no animosity toward defendant and had forgiven him for his offenses. R343.

Accordingly, a "qualitative, commonsense assessment of the evidence within the context of the case," *Sebby*, 2017 IL 119445, ¶ 53, reveals that the appellate majority erred in holding that the evidence was closely balanced and therefore that the prosecutor's remarks were plain error.

CONCLUSION

This Court should reverse the appellate court's judgment and remand the matter to the appellate court with instructions to consider defendant's unaddressed *Strickland* claim.

July 7, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the proof of service, is 33 pages.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 7, 2021, the foregoing Brief of Plaintiff-Appellant, People of the State of Illinois, was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy via e-mail to the e-mail addresses listed below:

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APPENDIX

TABLE OF CONTENTS TO THE APPENDIX

2020 IL App (3d) 170848

Appellate Court of Illinois, Third District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Travis J. WILLIAMS, Defendant-Appellant.

Appeal No. 3-17-0848
|
Opinion filed December 31, 2020

Synopsis

Background: Defendant was convicted in the Circuit Court, Henry County, Jeffrey W. O'Connor, J., of predatory criminal sexual assault of a child and criminal sexual assault. Defendant appealed.

Holdings: The Appellate Court, O'Brien, J., held that:

state's rebuttal closing argument did not improperly shift any burden to defendant;

state's misstatement of law regarding hearsay rule constituted clear error; and

evidence was closely balanced for purpose of plain error review.

Reversed and remanded.

Schmidt, J., dissented with opinion.

Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois. Circuit Nos. 16-CF-411 & 16-CF-412, Honorable Jeffrey W. O'Connor, Judge, Presiding.

Attorneys and Law Firms

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OPINION

JUSTICE O'BRIEN delivered the judgment of the court, with opinion.

***1** ¶ 1 The defendant, Travis J. Williams, appealed his convictions of predatory criminal sexual assault of a child and criminal sexual assault.

¶ 2 FACTS

¶ 3 The defendant, Travis Williams, was charged on November 30, 2016, with 10 counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)) and five counts of criminal sexual assault (*id.* § 12-13(a)(3)) in case No. 16-CF-411, the victim being his biological daughter, K.W.

The allegations with respect to K.W. occurred between January 1, 2004, and January 30, 2005. Prior to trial, the State indicated that it would only proceed to trial on two of each count and dismiss the remaining counts. The defendant was also charged with five counts of predatory criminal sexual assault of a child, five counts of criminal sexual assault, and two counts of aggravated criminal sexual abuse (*id.* § 12-16(b)) in case No. 16-CF-412, the victim being his stepdaughter, H.S. The allegations with respect to H.S. occurred between January 1, 2007, and March 30, 2009. The State proceeded to trial in case No. 16-CF-412 on one count of predatory criminal sexual assault and one count of criminal sexual assault and dismissed the remaining counts.

¶ 4 Prior to trial, the State filed a motion to admit evidence of other sex crimes pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2016)). The State sought to introduce the testimony of K.W. at H.S.'s trial, and *vice versa*, along with allegations by two other minors to prove the defendant's intent and absence of mistake, as well as to show the defendant's propensity to commit sex offenses. After the trial court granted the motion, defense counsel agreed to the joinder of the two cases. The State also filed a motion *in limine* pursuant to section 115-7 of the Code (725 ILCS 5/115-7 (West 2016)) to prevent the defendant from introducing evidence of the victims' prior sexual conduct. The defense indicated that it would not be eliciting any such testimony, so the trial court indicated on the record that the matter was resolved.

¶ 5 The State presented three witnesses at the combined trial: K.W., H.S., and Johanna Hager, an expert witness in forensic interviewing and clinical psychology. K.W. testified that she was born on January 31, 1992, and the defendant was her father. K.W. testified that in June 2016 she had spent the day with the defendant's youngest daughter, O.A., and K.W. felt compelled to warn O.A.'s mother, Patti A., that the defendant had touched K.W. when she was younger. K.W. defined her relationship with the defendant as "good" and that he has "been like [her] best friend." She went on to testify that when she was in sixth grade, the 2003-04 school year, K.W. and her younger sister, A.R., had a bedroom at the defendant's home but, after the defendant's girlfriend moved out, K.W. and A.R. began sleeping in the defendant's bedroom on a mattress on the floor. The defendant started having K.W. remove her shirt to give her backrubs and then later started to rub her front, too. K.W. could not recall if A.R. was ever awake or said anything at the time. K.W. recalled, while she was still in sixth grade, that the defendant took her hand and rubbed it across his stomach, purposely having her touch his penis. K.W. faked that she was sleeping. The defendant then started touching K.W. in the vaginal area and then had sexual relations with her. K.W. and the defendant did not talk about it at the time, but about a month later they did discuss it, and the defendant told K.W. that it was his way of teaching K.W. and showing love. K.W. testified that sex with the defendant happened routinely, until K.W. texted the defendant when she was 17 or 18 years old and said she did not want to do it anymore. K.W. testified that there were times when she thought her period was late and she would tell the defendant "[b]ecause [she]

wasn't having sex with anyone else." K.W. remembered punching herself in the stomach, thinking that it would somehow make her not pregnant. K.W. also testified that the defendant would have her engage in oral sex.

***2** ¶ 6 At some point in 2009 or before, K.W. testified that she talked about the abuse with A.R. According to K.W., A.R. said something happened to A.W., but A.W. would not talk about it. In 2009, A.R. made allegations against the defendant, and the police and the Department of Children and Family Services (DCFS) investigated. K.W. was interviewed as part of the investigation and reported that nothing happened with the defendant. K.W. testified that she did so at the time because she felt that A.R. should not have reported the abuse against K.W. and because K.W. felt a need to protect the defendant.

¶ 7 H.S. testified that she was born on August 4, 1996, and the defendant was her former stepfather. The defendant was married to H.S.'s mother from about H.S.'s sixth-grade year to her sophomore year in high school, and H.S. lived in the home with the defendant during that time. H.S. was contacted by the police in June or July 2016, after receiving a call from her mother, Patti, asking if H.S. had ever been touched by the defendant. H.S. responded that she had. H.S. testified that she had lived with the defendant for about a year before the defendant began giving her backrubs and requesting backrubs. H.S. was uncomfortable when the defendant asked her to use lotion while giving the defendant a backrub. At first, it was just backrubs, but then the defendant made H.S. touch his penis and help him masturbate. The defendant then started touching H.S.'s vagina with his hand. When the DCFS investigator talked to H.S. in 2009, H.S. denied any touching by the defendant. H.S. testified that she denied the abuse in 2009 because the defendant had told H.S. that, if she told, the defendant would get in trouble and H.S.'s mother would be unhappy and lonely.

¶ 8 Johanna Hager testified that she was a forensic interviewer at the Braveheart Children's Advocacy Center. Hager testified that she did not interview K.W. or H.S. She testified generally that delayed disclosure of sexual abuse was common. Concern for a younger sibling is an external event that can cause a victim to speak up. And it was not uncommon for children to love their abuser.

¶ 9 During closing arguments, the State argued that the defendant was guilty but informed the jury that it was its job to judge the credibility of the witnesses. Both the State and defense counsel informed the jury that the State had the burden of proof and that the burden was proof beyond a reasonable doubt. Defense counsel argued that K.W.'s and H.S.'s testimony was uncorroborated and there was no physical evidence. To explain what uncorroborated meant, defense counsel argued that the State could have called A.R. to testify to corroborate K.W.'s testimony. Defense counsel also questioned why the State did not call any witnesses from the 2009 investigation. The State also did not put K.W.'s wife on the stand, even though K.W. testified that she had told her wife about the abuse. Defense counsel suggested that K.W. and H.S. fabricated their stories so that Patti would gain an advantage in her divorce from the defendant with respect to the custody of O.A. Defense counsel also

suggested that K.W. was angry at the defendant for his disapproval of her lifestyle choices.

¶ 10 In rebuttal to defense counsel's statements regarding A.R., the State said: "[Defense counsel] makes a point of saying, well, why didn't they call [A.R.] as a witness? Well, first of all, the defense has subpoena powers just like the government." Defense counsel objected, arguing that he had no burden of proof and did not have to call any witnesses. The trial court overruled the objection; it found that the comment had nothing to do with shifting the burden of proof but was rather rebutting the suggestion that the State failed to do something to make the case clearer. The State then clarified to the jury that, while the defendant had subpoena powers, he had no burden of proof in the case. The State went on to argue that it could not call A.R. to testify as to what K.W. told A.R. because it would be hearsay. The State defined hearsay as "something that's said outside of court." The State went on to say that "It's a rule we can't bring in hearsay, so for the defense to suggest to you that I should call [A.R.] to talk about what [K.W.] told her, he knows I can't do that." The State also argued that whatever K.W. told her wife was hearsay, so the State could not bring the wife in to testify about what K.W. said. The State argued that defense counsel knew that the State could not have K.W.'s wife testify for that reason. Defense counsel did not object to the State's definition of hearsay or its related argument explaining why the State could not call A.R. or K.W.'s wife to testify. The jury was given instructions, including instructions regarding credibility, but not given an instruction defining hearsay or its exceptions. The jury found the defendant guilty of all six charges, three counts of predatory criminal sexual assault of a child and three counts of criminal sexual assault.

***3** ¶ 11 The defendant filed a motion for a new trial, contending that there was insufficient evidence of his guilt and that it was error to allow the State to argue in rebuttal that the defendant could have called witnesses to testify. The trial court denied the motion and sentenced the defendant to mandatory life sentences on the predatory criminal sexual assault of a child convictions and five years' imprisonment on each of the criminal sexual assault convictions.

¶ 12 ANALYSIS

¶ 13 The defendant argues that he was under no obligation to produce any evidence and that the State's rebuttal argument improperly shifted the burden of proof. The defendant contends that the mistake was compounded by misstating the law on hearsay. The defendant contends he did not invite the State's comments. The State argues that its closing argument did not shift the burden to the defendant and, if there was any error, it was harmless error. The State contends that any challenge to an error in the hearsay comments was forfeited and there was no plain error because the evidence was not closely balanced.

¶ 14 Prosecutors are afforded wide latitude in closing argument, and even improper remarks do not merit reversal unless they result in substantial prejudice to the defendant. *People v. Olla*, 2018 IL App (2d) 160118, ¶ 40, 427 Ill.Dec. 426, 118 N.E.3d 627. The prosecutor may properly comment on the evidence

presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel that invite response, and comment on the credibility of witnesses. *Id.* We review the prosecutor's comments in the context of the entire closing argument. *Id.*

¶ 15 The first argument that the defendant contends was improper was made during the State's rebuttal. Following defense counsel's argument that the State should have called certain witnesses, specifically A.R., Patti, and K.W.'s wife, the prosecutor stated: "why didn't [the State] call [A.R] as a witness? Well, first of all, the defense has subpoena powers just like the government." The defense objected, and the trial court overruled the objection. The trial court found that the comment did not shift the burden of proof to the defendant and was responding to defense counsel's argument. The defendant raised the issue in his motion for a new trial.

¶ 16 As we found in *People v. Taylor*, 2019 IL App (3d) 160708, ¶ 31, 432 Ill.Dec. 832, 130 N.E.3d 83, our supreme court follows a two-step process for evaluating preserved error in a State's closing argument. First, we must determine whether the closing argument was improper. *Id.* If we find that the argument itself was improper, then we evaluate whether that improper closing argument unfairly prejudiced the defendant's right to a fair trial. *Id.* For the first step, we give deference to the trial court's determination of the propriety of the State's remarks, applying an abuse of discretion standard. *Id.* However, the second step of the analysis, whether the improper closing argument substantially prejudiced the defendant's right to a fair trial, involves a legal question that this court reviews *de novo*. *Id.* ¶ 32.

¶ 17 We find that the trial court did not abuse its discretion in finding that the State's rebuttal argument that the defendant also had subpoena powers was proper and did not improperly shift any burden to the defendant. In *People v. Kliner*, 185 Ill. 2d 81, 153, 235 Ill.Dec. 667, 705 N.E.2d 850 (1998), the Illinois Supreme Court found that the prosecutor's comments in rebuttal telling the jury that the defendant also had subpoena powers to call witnesses were not improper "because they were based on reasonable inferences drawn from the evidence or invited by the closing arguments of defense counsel." Similarly, considered in the context of these proceedings, the State's argument was invited by the closing argument of defense counsel. In addition, the jury was reminded contemporaneously that the State had the burden of proving the defendant guilty beyond a reasonable doubt and that the defendant had no burden. The jury was also instructed regarding that burden of proof, so it was made clear to the jury that the State could not shift the burden of proof to the defendant. *Id.*

***4** ¶ 18 Next, the defendant contends that, after the subpoena argument, the State misstated the law of hearsay, argued that the hearsay rule prevented it from calling K.W.'s wife and A.R. as witnesses, and argued that defense counsel knew the testimony was barred by the hearsay rule. Defense counsel did not object to the hearsay arguments, resulting in the forfeiture of that claim of error, but asks for plain error review, under both prongs of plain error. The first step in analyzing for plain error is determining if a clear or obvious error

occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 312 Ill.Dec. 338, 870 N.E.2d 403 (2007).

¶ 19 The State told the jury that hearsay was "something that's said outside of court," a definition that is, at best, incomplete and then argued that the hearsay rule prevented it from calling K.W.'s wife or A.R. as witnesses. The hearsay rule generally prohibits as evidence an out-of-court statement that is offered to prove the truth of the matter asserted. *People v. Williams*, 238 Ill. 2d 125, 143, 345 Ill.Dec. 425, 939 N.E.2d 268 (2010); Ill. Rs. Evid. 801(c) (eff. Oct. 15, 2015) and 802 (eff. Jan. 1, 2011). Also, there are exceptions to the hearsay rule that may have been applicable in this case. See *People v. Cuadrado*, 214 Ill. 2d 79, 90, 291 Ill.Dec. 638, 824 N.E.2d 214 (2005) (exception to the hearsay rule for prior out-of-court statement when it is suggested that the witness had recently fabricated the testimony or had a motive to testify falsely, and prior statement was made before the motive to fabricate arose); *People v. Newbill*, 374 Ill. App. 3d 847, 851, 313 Ill.Dec. 784, 873 N.E.2d 408 (2007) (statutory hearsay exception for statements of identification pursuant to section 115-12 of the Code).

¶ 20 We find that the State committed a clear error when it misstated the law regarding hearsay and then compounded that with the implication that was why the witnesses were not called (the defendant "knows I can't [offer] that"). It is error "to suggest that evidence of guilt existed which, because of defendant's objection, cannot be brought before the jury." *People v. Emerson*, 97 Ill. 2d 487, 497, 74 Ill.Dec. 11, 455 N.E.2d 41 (1983); *People v. Shief*, 312 Ill. App. 3d 673, 679, 245 Ill.Dec. 556, 728 N.E.2d 638 (2000) (prosecutor's remarks improperly inferred "that the defense intentionally kept the reports from the jury and that they contained information that would have unequivocally established defendant's guilt and made a trial unnecessary").

¶ 21 Although we have found clear error, we will remand for a new trial only if (1) the evidence is closely balanced or (2) the error was so serious it denied the defendant a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79, 294 Ill.Dec. 55, 830 N.E.2d 467 (2005). When determining whether the evidence is closely balanced, when the only evidence consists of two differing accounts of the same event, with no corroborating evidence, courts often find the credibility contest to be closely balanced. See *People v. Naylor*, 229 Ill. 2d 584, 608, 323 Ill.Dec. 381, 893 N.E.2d 653 (2008) (holding that evidence was closely balanced where "[t]he evidence boiled down to the testimony of the two police officers against that of defendant"); *People v. Vesey*, 2011 IL App (3d) 090570, ¶ 17, 354 Ill.Dec. 460, 957 N.E.2d 1253 (evidence was closely balanced when the trial came down to the correctional officer's word versus the defendant's). In determining whether the evidence is closely balanced, this court "must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *People v. Sebby*, 2017 IL 119445, ¶ 53, 417 Ill.Dec. 756, 89 N.E.3d 675. Although the testimony of K.W. and H.S. contained some similarities, they testified regarding events that occurred during different time frames. The credibility of both K.W. and H.S. was challenged in that the defense elicited testimony that both had denied that the abuse

occurred when they were questioned in 2009. There was no physical evidence, no third party testimony even putting the defendant alone with K.W or H.S., and no evidence suggesting the defendant's consciousness of guilt. *Cf. People v. Effinger*, 2016 IL App (3d) 140203, ¶ 26, 403 Ill.Dec. 348, 53 N.E.3d 985 (evidence was not closely balanced when two witnesses put the victim and the defendant together on a public sidewalk and the defendant gave a false name, which indicated a consciousness of guilt). Thus, we find that the case involved a credibility contest between K.W. and the defendant and H.S. and the defendant. As such, we find the evidence to be closely balanced for purposes of a plain error analysis. Finding plain error on the first prong of the analysis, we need not address the second prong.

***5** ¶ 22 We reverse the defendant's convictions and remand for a new trial. Since we find that the State presented sufficient evidence to sustain the defendant's convictions, a retrial will not subject defendant to double jeopardy. See *People v. Miller*, 2013 IL App (1st) 110879, ¶ 87, 373 Ill.Dec. 429, 993 N.E.2d 988 (citing *People v. Taylor*, 76 Ill. 2d 289, 309, 29 Ill.Dec. 103, 391 N.E.2d 366 (1979)). Since we are reversing on the closing argument issue, we need not address the defendant's ineffective assistance of counsel argument.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Henry County is reversed and remanded.

¶ 25 Reversed and remanded.

Justices McDade concurred in the judgment and opinion.

Justice Schmidt dissented, with opinion.

¶ 26 JUSTICE SCHMIDT, dissenting:

¶ 27 I agree with the majority's analysis of *People v. Kliner* and consequently the holding that the trial court correctly found that the State's rebuttal argument did not improperly shift the burden to defendant. However, the evidence was not closely balanced.

¶ 28 When determining whether the evidence is closely balanced, we conduct a qualitative, commonsense assessment of the totality of the evidence within the context of the case. *Sebby*, 2017 IL 119445, ¶ 53, 417 Ill.Dec. 756, 89 N.E.3d 675. Evidence is closely balanced "when the only evidence consists of two differing accounts of the same event, with no corroborating evidence." *Supra* ¶ 21 (citing *Naylor*, 229 Ill. 2d at 608, 323 Ill.Dec. 381, 893 N.E.2d 653; *Vesey*, 2011 IL App (3d) 090570, ¶ 17, 354 Ill.Dec. 460, 957 N.E.2d 1253).

¶ 29 After reviewing the record, the evidence of defendant's guilt is overwhelming. The jury heard the testimony of defendant's daughter and stepdaughter that he repeatedly sexually assaulted them over an extended period of time. They also heard from Johanna Hager, an expert witness in forensic interviewing and clinical psychology. Hager testified that a victim's delayed disclosure of sexual abuse by a family member is a common occurrence. It is also common for a victim to disclose sexual abuse after previous denials, a practice

called "tentative disclosure." Victims are more likely to keep sexual abuse by a family member private but can be motivated to disclose the abuse due to concern for a younger sibling.

¶ 30 The majority finds the evidence closely balanced because of a "credibility contest." *Supra* ¶ 21. What credibility contest? Not one witness contradicted the victims' testimony. In both *Naylor* and *Vesey*, cited by the majority for support, the defendant either testified or put witnesses on the stand to offer a competing version of events. Here, there is no competing version of events, as defendant did not testify nor did he call any witnesses. A qualitative, commonsense evaluation of the totality of the evidence shows that the evidence is not closely balanced.

¶ 31 Assuming the hearsay argument was error, it did not amount to plain error because as discussed above the evidence is not closely balanced but, rather, overwhelming. We must honor defendant's forfeiture.

¶ 32 We should affirm.

All Citations

--- N.E.3d ----, 2020 IL App (3d) 170848, 2020 WL 7779039

End of Document

INDEX TO RECORD ON APPEAL

Report of Proceedings

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 3-17-0848
	)	Circuit Court No: 2016CF411
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 4

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 3-17-0848
	)	Circuit Court No: 2016CF411
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 2 of 4

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 3-17-0848
	)	Circuit Court No: 2016CF411
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 3 of 4

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 3-17-0848
	)	Circuit Court No: 2016CF411
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 4 of 4

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 3-17-0848
	)	Circuit Court No: 2016CF412
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 3

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 3-17-0848
	)	Circuit Court No: 2016CF412
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 2 of 3

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 3-17-0848
	)	Circuit Court No: 2016CF412
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 3 of 3

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 3-17-0848
	)	Circuit Court No: 2016CF411
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

SECURED RECORD - TABLE OF CONTENTS

Page 1 of 1

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 3-17-0848
	)	Circuit Court No: 2016CF411
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 1

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 3-17-0848
	)	Circuit Court No: 2016CF411
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

SECURED RECORD - TABLE OF CONTENTS

Page 1 of 1

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 3-17-0848
	)	Circuit Court No: 2016CF411
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

SUPPLEMENT TO THE COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 1

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 3-17-0848
	)	Circuit Court No: 2016CF411
	)	Trial Judge: JEFFREY W OCONNOR
v	)	
	)	
	)	
WILLIAMS, TRAVIS J	)	
Defendant/Respondent	)	

EXHIBITS - TABLE OF CONTENTS

Page 1 of 1

Party	Exhibit #	Description/Possession	Page No
State's	1	PHOTO OF WHITE BOARD (KAYLA'S EXAM)-9_26_2017	E 2 - E 2
State's	2	PHOTO OF WHITE BOARD (HAILEY'S EXAM)-9_26_201	E 3 - E 3
State's	3	CURRICULUM VITAE_ JOHANNA HAGER-9_26_2017	E 4 - E 14