

2012 Ill. App. (2d) 100796-U
No. 2-10-0796
Order filed March 28, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-1720
)	
ANTOINE D. LAMB,)	Honorable
)	Daniel B. Shanes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Zenoff concurred in the judgment.

ORDER

Held: Various evidentiary rulings of the trial court did not deprive defendant of a fair trial; defendant was proven guilty of using force in the commission of a sexual assault; and the trial court did not err in imposing an indeterminate term of mandatory supervised release.

¶ 1

I. INTRODUCTION

¶ 2 Following a jury trial in the circuit court of Lake County, defendant, Antoine D. Lamb (defendant is sometimes referred to as Darnall), was convicted of one count of Criminal Sexual Assault (720 ILCS 5/12-13(a)(1) (West 2008), now codified at 720 ILCS 5/11-1.20(a)(1) (West 2012)) and sentenced to seven years' imprisonment. He now appeals, arguing (1) he was denied a

fair trial, (2) that the judgment should be amended to reflect that he committed the offense while holding a position of authority (see 720 ILCS 5/12-13(a)(4) (West 2008), now codified at 720 ILCS 5/11-1.20(a)(4) (West 2012)) rather than by use of force,¹ and (3) that the trial court erred in imposing an indeterminate term of mandatory supervised release (MSR). For the reasons that follow, we affirm.

¶ 3

II. BACKGROUND

¶ 4 The following evidence was presented at defendant's trial, which commenced on May 11, 2010. The State first called S.S. She testified that she was 17-years old at the time of the trial. She lived in Round Lake with L.D. (her mother) and her three brothers. In April 2009, defendant also resided at her home. Defendant was S.S.'s mother's boyfriend. S.S. testified that, prior to April 2009, defendant was "a friend, father" to her. During the spring of 2009, she and defendant did not "have any problems" or "get in any arguments." The group acted "like a family." They would sometimes play cards together.

¶ 5 On Saturday, April 25, 2009, "there was a card game that night." Defendant, L.D., S.S., and her older brother were playing cards in L.D.'s room. S.S.'s two younger brothers were also in the house. Defendant and L.D. were drinking vodka. The card game started around 9 p.m. or 10 p.m., and it went until midnight or 1 a.m. L.D. had one glass of vodka, and defendant drank the rest of the bottle. S.S. clarified that the bottle was not new, but there "wasn't that much missing when they

¹Defendant stood trial on three counts of a five-count indictment. The first charged criminal sexual assault by use of force; the second charged criminal sexual assault while holding a position of authority relative to the victim; and the fourth charged aggravated criminal sexual abuse. Counts III and IV were dismissed before trial. Defendant was convicted of all three counts, and the trial court found they merged into the first one.

started.” However, S.S. testified she that could not tell if defendant was under the influence of alcohol and that he was not acting abnormally. When the game ended, S.S. went downstairs to watch television. The living room is on the middle level of the house, which has three levels, along with a kitchen, bathroom, computer room, and S.S.’s older brother’s room. The house has three levels. The rest of the family’s rooms are on the top floor, along with a family room.

¶ 6 S.S. testified that she watched the end of a movie and then went to her room. She closed the door, but did not lock it. Defendant was in his own room. S.S. noted that her brothers were in the family room, but she did not know if they were sleeping. Their television was on, but the lights were off. S.S. was wearing “black track shorts, a tank top, a bra, and a sports bra. S.S. got into her bed, wearing this clothing. There were two blankets on the bed, but she only got under one of them. The lights were off.

¶ 7 S.S. heard the door of her room open. Defendant entered S.S.’s room and got into bed with her. S.S. testified that “[h]e started talking to me about like my dad and he is a father figure.” Defendant asked if he was a father figure to S.S. She said he was. Defendant left after 15 or 20 minutes, and S.S. also left the room. She went downstairs for a short time, but went back to her room when she heard a door open and shut, believing defendant had returned to his room. This time, she got under both blankets. Defendant returned. He also got under both blankets. S.S. stated, “[H]e actually started to touch me [this] time.” Defendant did not say anything. S.S. testified, “he touched like my butt and like he actually took off my shorts, and like started touching me even more.” He also touched S.S.’s “vaginal area.” Defendant then left the room.

¶ 8 After defendant left, S.S. got up and put her shorts back on. She testified, “I got back in my bed and laid there.” Defendant came back a short time later. Defendant got back in bed and asked S.S. why she put her shorts back on. She did not answer. Defendant told her to take them off, but

she did not comply. Defendant then removed her shorts. S.S. continued, “[H]e started touching me again, and then he actually tried to stick his penis inside my vagina area.” Defendant “was on top of” her. S.S. “started to scream, ‘oh, that hurts.’ ” Defendant “covered [her] mouth, and he held [her] mouth.” S.S. pushed defendant, and he left the room. Before leaving, he stated “ ‘I’m still the same old grouchy Darnall.’ ” This meant nothing to S.S., as she had never called him grouchy. S.S. testified that defendant was in her room for about 20 minutes on this occasion. She added that there was not a clock in her room. After defendant left, S.S. got dressed, and she placed the underwear that she had been wearing in the corner of her closet. She then went downstairs because she felt more safe there. She fell asleep watching television.

¶ 9 S.S. testified that she did not tell anyone of the incident that night. She knew it would hurt her mother, as L.D. “was like really in love with” defendant. She did not tell her mother anything the next day—Sunday—for the same reason.

¶ 10 On Sunday, she drove to Chicago with two of her brothers and defendant to visit her grandmother.² S.S. intended to tell her grandmother of the incident. However, S.S.’s grandmother had been sick recently, and she was not feeling well when they visited. Since her grandmother was feeling sick, S.S. decided not to tell her. She spent the whole day there. Defendant left to go to work and returned later.

¶ 11 S.S. testified that she went to school on Monday. She found one of her close friends and told her of the incident. Another friend arrived and saw that they were crying. S.S. told both of them what had happened. S.S.’s friends decided to take her to speak to one of her coaches. Subsequently, L.D. took S.S. to the hospital.

²The record refers to the person this group went to visit as S.S.’s grandmother and as her great-grandmother.

¶ 12 During cross-examination, S.S. testified that her older brother also “had a little bit” of the vodka that defendant was drinking prior to the incident. A glass was also poured for her, but she did not drink any of it, as “[i]t was during her track trial season.” At the time people started going to bed, everyone was on the top floor of the house. S.S. acknowledged that she had made a written statement where she said she went to the bathroom after defendant left her room. She explained that the bathroom she went to was downstairs. S.S. testified that she was already on her back the third time defendant entered her bedroom; however, in the written statement, she stated that defendant flipped her over. She then stated that defendant had been on her side. S.S. further acknowledged that she did not seek help from her mother or her brothers, who were close by. She stated that, during the next day while at her grandmothers, she did not tell her brothers anything because she believed that they could not do anything for her. S.S. agreed that she had gotten into trouble during the preceding February and been punished severely. Both defendant and her mother had punished her. S.S. stated that she did not recall telling her friends that she hid in the closet after the incident. During redirect-examination, S.S. testified that she was not trying to get back at defendant and that she held no grudges against him in April 2009. She got along with defendant; they did things as a family.

¶ 13 The State next called L.D. She testified that she was 40 years old and had four children—three boys and a girl. S.S. was born in 1993. L.D. resides in Round Lake with her children. L.D. stated that she and defendant “used to date.” He is also known as Darnall. Defendant was born on October 19, 1977. She and defendant had been involved in a relationship for about four years. Defendant was a father figure to her children. L.D. testified that “he enforced rules” and “made sure that they had what they needed.” He would pick them up from sports activities. They both took part in disciplining the children. L.D. was aware of no problems between defendant and

the children. L.D. recalled the card game on the night of April 25, 2009. She and her oldest son were drinking wine coolers, and defendant was drinking vodka. She only consumed one cooler, but defendant drank a lot of vodka. She opined that defendant was under the influence of alcohol on that night. S.S. was not drinking, and L.D. had never seen her drink. After the game ended, her oldest son went downstairs to clean the kitchen. S.S. went to her room, and defendant went downstairs. L.D. thought defendant was talking with her oldest son. L.D. stayed in her room. She testified that defendant was wearing a black tank top, and S.S. was wearing her pajamas, which were similar to capri pants, and a tee shirt.

¶ 14 L.D. fell asleep, and defendant came in a while later and woke her. She stated that defendant “tried to be intimate, but he couldn’t be intimate, so he just got into bed and went to sleep.” She did not recall what time it was. L.D. awoke during the middle of the night and went to the bathroom. She shut the television in the family room off and got back into bed. She awoke again because the bed was wet. L.D. stated that defendant “had used the bathroom in the bed.” L.D. went to sleep on the couch, which was in her room. A while later, S.S.’s alarm went off. S.S. did not turn it off, so L.D. went to turn it off. S.S. was not in her room. S.S. sometimes sleeps in the living room.

¶ 15 She spoke with S.S. the next day, having “general conversation, like every Sunday.” S.S. went with defendant and her brother to her grandmother’s house. L.D. did not note anything out of the ordinary about S.S. that day.

¶ 16 During cross-examination, L.D. largely reiterated the testimony she gave during direct-examination. She added that by the time S.S.’s alarm clock went off, defendant had moved over to the couch with her. She also testified that she remained home all day on Sunday, and S.S. never told her about the incident that day.

¶ 17 The State next called Shawn, one of S.S.'s younger brothers. At the time of the trial, he was 14-years old. In April 2009, defendant resided with Shawn's family. Shawn's relationship with defendant was "pretty good." He recalled the card game on April 25, 2009. All of the adults were drinking alcohol. Shawn believed defendant was under the influence of alcohol. After the card game, defendant "was like falling over a bit" as he walked. Defendant told Shawn to go to bed. Shawn went to the family room and fell asleep on the floor in front of the television. As he was falling asleep, he heard a door shut twice. Shawn then slept through the night and did not notice anything out of the ordinary. On cross-examination, Shawn acknowledged that he did not know who opened and shut the door.

¶ 18 Anhar M. next testified for the State. She stated that she is a close friend of S.S.'s. On Monday, April 27, 2009, at about 7:20 a.m., she arrived at school and went to her locker. S.S. was standing by the locker and appeared "kind of upset." S.S. told Anhar that she had been sexually assaulted over the weekend. The more S.S. talked, the more she got upset. Another girl approached. They took S.S. to the bathroom so she could wash her face. They then "took her to a few teachers that she trusted." Anhar testified that it was unusual that S.S. was upset and that she had not noticed S.S. behaving similarly prior to this day. During cross-examination, Anhar stated that S.S. had told her that she hid in a closet for the rest of the night after the incident.

¶ 19 The State then called Officer Adam Arnold of the Round Lake police department. The department received a report of a sexual assault at about 9 a.m. on April 27, 2009. He interviewed defendant later that day at about 5:30 p.m. Arnold and his partner waited for defendant to return home. Defendant arrived at about 5 p.m. They approached defendant and identified themselves. Defendant accompanied them to a facility where the police conduct interviews. Defendant was not

under arrest. Arnold read defendant his *Miranda* warnings. Detective Bell was also present. Defendant indicated he understood his rights and that he wished to speak to the officers.

¶ 20 Defendant told Arnold that he had been dating L.D. for about four years and they reside together. Her children are like children to him. Arnold asked defendant about the card game, and defendant related who was participating. He stated that he and L.D. were drinking. S.S. was not drinking. Defendant said that he had consumed an entire bottle of vodka. The card game ended about midnight. Defendant went to bed, passed out, and then woke up on the couch. Defendant initially stated he did not remember anything after the game until he woke up on the next morning, but subsequently, he recalled certain details. About an hour into the interview, Arnold told defendant that S.S. had made an allegation that defendant had assaulted her. Defendant denied the allegation for about 10 minutes. He stated that he does not look at S.S. in that manner and that he is not that sort of person. After about 10 minutes, he stated that “if it happened, it was an accident.” Defendant then stated: “I didn’t do it. I don’t remember, but it’s possible if she says it.” He acknowledged that he never knew S.S. to lie and stated that “she would not make it up.” No one else in the house had a reason to lie. Defendant said that his biggest fear regarding the case is that “he did it” and that he owed S.S. an apology. Arnold asked if defendant was still denying the allegation. Defendant replied that he was “not denying anything,” but that he “just [did not] remember.” Arnold asked defendant about the term “grouchy,” and defendant said that “that’s what the kids call him.”

¶ 21 Defendant also provided a written statement. In it, he stated that he was accused of doing something that was not in his character. He did not believe, however that “a person would lie for no reason.” He denied remembering anything from that night; however, he apologized to S.S. and L.D. The interview ended after defendant completed the written statement.

¶ 22 Arnold conducted a second interview of defendant the next day. He initially stated he did not remember anything after the card game. However, when asked whether he remembered seeing one of S.S.'s brothers, he acknowledged that he did. S.S.'s brother went into another brother's room, where they were playing a video game. Defendant told them to shut the game off. Defendant also stated that "even when he's sober, his memory is not 100 percent." Arnold asked if defendant recalled getting into bed with S.S. Defendant replied, "I don't doubt that it probably happened."

¶ 23 During cross-examination, Arnold acknowledged that defendant was "completely cooperative" from the start of the investigation. When Arnold first related the accusation to defendant, he was upset and crying. In fact, defendant was emotional throughout the entire interview. Arnold also testified that defendant remained cooperative during the second interview.

¶ 24 The State then called Elizabeth B., another of S.S.'s friends. On Monday, April 27, 2009, she went to school. When she arrived, she saw S.S. by a locker. S.S. appeared "very upset." Anhar M. was also present. After about five to seven minutes, they took S.S. to see some of her teachers. On cross-examination, Elizabeth testified that S.S. never told her that she hid in a closet all night, but Anhar did tell Elizabeth that S.S. had done so.

¶ 25 Detective Robert Bell next testified for the State. Bell testified that he is employed by the Round Lake police department. The police received a complaint of a sexual assault. Bell was the lead detective. He interviewed S.S. on April 27, 2009, at approximately 11:30 a.m. L.D. was present. They spoke for an hour. S.S. was quiet and cried at times. Bell also characterized her demeanor as hesitant and nervous. After the interview, he met with Arnold. Bell went to S.S.'s home and "conducted a walk-thru." [*Sic.*] He took pictures and collected evidence, specifically, the clothing defendant and S.S. were wearing on the night of the incident. On April 28, a nurse at Midwestern Regional Medical Center, administered a "sexual assault evidence collection kit."

¶ 26 The State's next witness was Sarah Owen, who is a forensic scientist at the Northeastern Illinois Regional Crime Laboratory. Owen tested a pair of S.S.'s underwear. A chemical test indicated the presence of semen. However, no seminal fluid was detected when Owen tested the swabs taken when the nurse at Midwestern Regional Medical Center, administered the "sexual assault evidence collection kit." During cross-examination, Owen agreed that an acid phosphate test "is not a confirmatory test" for the presence of semen. Further, she did not observe sperm or seminal fluid on any of the swabs that had been collected during the administration of the "sexual assault evidence collection kit."

¶ 27 The State then called Kenneth Pfoser, also a forensic scientist from the Northeastern Illinois Regional Crime Laboratory. He works in the DNA section. Pfoser analyzed three items pertinent to this case: a sample collected from S.S.'s underwear, a saliva sample from defendant, and a saliva sample from S.S. He separated the sample from S.S.'s underwear into a spermatozoa fraction and a nonspermatozoa fraction. The latter matched the saliva sample taken from S.S. The former, however, "failed to yield a sufficient amount of DNA for analysis." During cross-examination, Pfoser agreed that he did not mean to say whether there was spermatozoa in what he called the spermatozoa fraction.

¶ 28 Rebecca Singzon testified for the State that she is a registered nurse at Midwestern Regional Medical Center. She explained that she is a SANE nurser, which stands for Sexual Assault Nurse Examiner. As a SANE nurse, she performs physical examinations of sexual assault patients and collects evidence. Singzon conducted an examination of S.S. on April 28, 2009. She first obtained a history of the incident from S.S. Over defendant's objection, Singzon testified that S.S. told her "that her mom's boyfriend tried to have sex with her, but he stopped because she started screaming." Singzon then conducted a physical examination. She noted no trauma to S.S.'s genital region.

Singzon explained that it was not unusual to find no trauma in a sexual assault examination. Singzon also performed an anal examination. Next, she collected swabs, hair combings, and fingernail scrapings. However, S.S. refused to submit to a speculum examination and a blood test. During cross-examination, Singzon agreed that she was unable to find any sign of trauma anywhere on S.S.'s body. Additionally, Singzon testified that S.S. was calm and cooperative throughout the examination. Following Singzon's testimony, the State rested.

¶ 29 Defendant made a motion for a directed finding, which was denied. The trial court confirmed that defendant did not wish to testify. The defense then rested without presenting any evidence. Subsequently, the jury convicted defendant of one count of aggravated criminal sexual abuse and two counts of criminal sexual assault (one based on use of force, the other based on the fact that defendant held a position of authority relative to S.S.). The trial court found that all three counts merged and imposed sentence on the first criminal sexual assault count (use of force) (720 ILCS 5/12-13(a)(1) (West 2008)). Defendant now appeals.

¶ 30

III. ANALYSIS

¶ 31 On appeal, defendant raises three main issues. First, he contends he was denied a fair trial because the trial court improperly allowed the State to present hearsay evidence in the absence of a proper exception and testimony that was not relevant. Defendant also complains of the State's use of this evidence in closing argument. Second, he argues that the State failed to prove that he used force in the commission of the assault and that his conviction should be vacated and replaced with a conviction on the second criminal sexual assault count based on his holding a position of authority. Third, defendant asserts that it was error to sentence him to a indeterminate term of mandatory supervised release. We will address defendant's arguments in turn.

¶ 32

A. Fair Trial

¶ 33 We will first address defendant's contention that he was denied a fair trial. This claim is based on a number of related contentions. First, defendant complains that the trial court permitted a witness to testify that S.S. told her that she had been assaulted where the conversation took place approximately 30 hours after the assault. Second, defendant alleges error in the trial court permitting nurse Singzon to testify to statements S.S. made in the course of her examination. Third, defendant questions the relevance of the testimony of two friends of S.S. His fourth and final contention concerns the State's use in closing argument of the testimony to which defendant here objects.

¶ 34 Evidentiary rulings are generally reviewed using that abuse-of-discretion standard. *People v. McRae*, 2011 IL App (2d) 090798, ¶25. Defendant contends, however, that *de novo* review is appropriate, as the trial court's ruling on the first issue was based on documentary evidence and no issues of fact or credibility were involved. See *People v. Munoz*, 3348 Ill. App. 3d 423, 438 (2004). Its ruling on the second issue, according to defendant, was based on an erroneous rule of law. The State agrees with respect to the first issue but not the second one. We agree with the State. In our view, the second issue turns on the propriety of the trial court's application of a correct rule of law rather, than as defendant suggests, whether the rule of law of law applied by the trial court was a correct one. As such, we will apply the abuse-of-discretion standard in reviewing this issue. See *People v. Purcell*, 364 Ill. App. 3d 283, 293 (2006). An abuse of discretion occurs only where no reasonable person could agree with the position taken by the trial court. *In re M.P.*, 408 Ill. App. 3d 1070, 1073 (2011). That standard also applies to the third and fourth issues. See *People v. Anderson*, 407 Ill. App. 3d 662, 673 (2011) (relevance); *People v. Thedos*, 2011 IL App. (1st) 103218, ¶97. Since the parties are in agreement regarding the first issue, we will review that issue *de novo*. We now turn to the substance of defendant's arguments.

¶ 35 Defendant's first contention is that the trial court should not have permitted two witnesses—Anhar and Elizabeth—to give hearsay testimony that corroborated S.S.'s testimony. Defendant acknowledges that Elizabeth's testimony contained no hearsay. Therefore, regarding the hearsay issue, we limit our analysis to the testimony of Anhar.

¶ 36 We initially note that the State asserts that this issue is waived due to defendant's failure to include it in his posttrial motion. See *People v. DiPace*, 354 Ill. App. 3d 104, 107 (2004). Defendant does not explain why this issue should be reviewed as plain error. In any event, plain error review is appropriate where the evidence is closely balanced or the error was so grave that it denied defendant a fair trial. *People v. Nieves*, 192 Ill. 2d 487, 502 (2000). However, before there can be plain error, there must be error. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). Thus, we first consider whether the trial court erred in permitting the testimony at issue, and if we conclude that it did, we will then turn to the question of whether it constituted plain error.

¶ 37 An out-of-court statement offered to prove the truth of the matter asserted is hearsay and is typically inadmissible. *People v. Banks*, 237 Ill. 2d 154, 180 (2010). Exceptions exist, one of which is where a victim of a sexual assault makes a prompt complaint of the incident. See *People v. Brown*, 258 Ill. App. 3d 544, 549 (1994). The rationale for this exception is that "it is entirely natural that the victim of a forcible sexual assault would speak out regarding it and, conversely, that the failure to do so would, in effect, be evidence that nothing violent had occurred." *People v. Evans*, 173 Ill. App. 3d 186, 199 (1988). The exception exists to rebut any presumption that might arise from a victim's apparent silence. *People v. Ware*, 323 Ill. App. 3d 47, 51 (2001). Such statements are admissible if they "have been made without any inconsistent or unexplained delay" and they were "voluntary and spontaneous, rather than the product of a series of questions." *Id.*

(citing *Evans*, 173 Ill. App. 3d at 199). However, there is no set time limit for a victim to make such a complaint. *Evans*, 173 Ill. App. 3d at 199.

¶ 38 In this case, the assault occurred early on Sunday morning and S.S.'s statement to Anhar occurred at about 7:30 a.m. on Monday. Defendant fairly characterizes this time period as being about 30 hours. He argues that S.S.'s statement does not constitute a prompt complaint because of the lengthy time period between the assault and the statement. Further, defendant points out, S.S. was surrounded by family members and had numerous opportunities to complain to several different people. We agree with defendant.

¶ 39 Quite simply, by the time S.S. made her statement to Anhar, she had gone through a full day's activities. She and two of her brothers went to visit their grandmother. They drove with defendant to their grandmother's house. Defendant then left to go to work, and S.S. remained with her brothers and grandmother for the day. Defendant returned later and drove them home. S.S. explained that she did not tell her mother because she believed it would hurt her, as L.D. was "really in love with" defendant." She did not tell her brothers because she did not believe they could do anything. Though S.S. intended to report the assault to her grandmother, she ultimately chose not to because her grandmother was sick. Under these circumstances, her statement cannot be deemed a prompt complaint. We in no way mean to diminish the trauma that S.S. experienced; rather, we are—as we must—applying the legal rules of evidence and concluding that the statement was not admissible at trial.

¶ 40 In *People v. Houck*, 50 Ill. App. 3d 274, 285 (1977), the court reviewed cases where delays were found to be neither inconsistent nor unexplained. It observed the following: "The common thread which binds these divergent fact patterns is that during the delay the complainants were incoherent, fearful, hysterical, and/or emotional and, when they found a place or person lending them

security, they made the charge as an outpouring of injury.” *Houck*, 50 Ill. App. 3d at 285. We have no doubt that S.S. experienced many of the emotions described in the this passage; however, we cannot see how her grandmother’s house can be characterized as anything other than a “place *** lending [her] security.” That S.S. regarded her grandmother’s house as a safe place is clearly evident from the fact that S.S. intended to tell her grandmother of the assault and only chose not to do so due to her grandmother’s illness. While we admire S.S.’s concern for her grandmother being sick as well as her desire to shield her mother from emotional pain, these are not the sorts of delays recognized by the case law that would allow S.S.’s statement to fit within an exception to the hearsay rules. See *Houck*, 50 Ill. App. 3d at 285. In other words, the trial court erred in allowing Anhar to testify about the statement.

¶ 41 Before considering whether this error constituted plain error, we must address the State’s reliance of *People v. Williams*, 146 Ill. App. 3d 767 (1986), a case that bears several similarities to this one. In that case, a 12-year-old sexual assault victim went home after the assault, but did not tell her mother she was assaulted. The next day she told one of her teachers. The teacher testified that “prior to this conversation, [the victim] had been sitting by herself, with her head down, quietly shaking, mumbling, and crying.” *Id.* at 769. The victim stated “that she did not feel she could speak freely with her mother.” *Id.* at 771. Indeed, when the teacher and the victim called the victim’s home to tell her mother about the assault, the mother hung up the telephone. The court determined that the overnight delay in making the statement did not bar its admissibility. *Id.* While *Williams* and this case are similar in the length of the delay, we find *Williams* distinguishable on other grounds. In *Williams*, there were facts indicating that the victim did not have a good relationship with her mother. Thus, one could conclude that the victim did not believe she had “found a place or person lending them security” (*Houck*, 50 Ill. App. 3d at 285) when she arrived

home. Conversely, in this case, there is no evidence that S.S.'s relationship with L.D. was strained in any way; indeed, there are indications that it was good. Moreover, S.S. interacted with several other family members on the day after the assault. Accordingly, *Williams* does not compel a different conclusion.

¶ 42 However, though there was error in the trial below, we cannot conclude that it was plain error. First, the evidence was not closely balanced. To succeed here, defendant would have to show that the evidence was so closely balanced that this error alone could have affected the outcome of the trial. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). However, in this case, only the State presented evidence. While defendant is entitled to rely upon the presumption of innocence, doing so leaves us with no evidence to consider in this portion of the plain-error inquiry. We recognize that the trier of fact could have rejected the State's evidence. If we were to give effect to such a principle, all cases would be closely balanced, because it is always possible for a trier of fact to reject even uncontradicted evidence. See *People v. Owens*, 323 Ill. App. 3d 222, 233 (2001); *People v. Cosme*, 247 Ill. App. 3d 420, 429 (1993); *People v. McCoy*, 140 Ill. App. 3d 868, 873 (1986). Whether evidence is closely balanced cannot, therefore, rest entirely on questions of credibility. Cf. *People v. Naylor*, 229 Ill. 2d 584, 608-09 (2008) (holding that evidence was closely balanced where police officers and the defendant testified to different versions of event and only way to resolve conflicts was credibility determinations *between* the witnesses, but denying the court was announcing a *per se* rule where evidence was always closely balanced where trier of fact might resolve credibility contest in the defendant's favor).

¶ 43 In the second instance, a defendant must establish that the error was so serious that it had an impact on the fairness of the proceedings. *Herron*, 215 Ill. 2d at 187. In making this determination, "we ask whether a substantial right has been affected to such a degree that we cannot

confidently state that [the] defendant’s trial was fundamentally fair.” *People v. Blue*, 189 Ill. 2d 99, 138 (2000). The error must “severely threaten” the fairness of the trial. *People v. Durr*, 215 Ill. 2d 283, 298 (2005). A defendant has a right to have his or her case decided by an impartial jury. *People v. Stewart*, 406 Ill. App. 3d 518, 534 (2010). When the trier of fact is presented with evidence that should have been excluded, this is the right that would most likely be implicated. Hence, the question before us is whether Anhar’s testimony that S.S. told her that she had been sexually assaulted over the weekend caused the jury to be biased. We cannot conclude that it did. We note that errors such as this one are generally “considered harmless where the testimony was supported by other corroborative evidence.” *Evans*, 173 Ill. App. 3d at 200. In the trial below, Singzon testified that S.S. “told me that her mom’s boyfriend tried to have sex with her, but he stopped because she started screaming.” Since cumulative evidence was presented, any error in allowing Anhar’s testimony was harmless.³ See *People v. Monroe*, 366 Ill. App. 3d 1080, 1091-92 (2006). In turn, we fail to see how the harmless error in this case could “severely threaten” (*Durr*, 215 Ill. 2d at 298) the fairness of defendant’s trial.

¶ 44 Neither prong of the plain-error test is applicable here. Therefore, this issue is procedurally defaulted. It provides no basis for us to disturb the jury’s verdict in this case.

¶ 45 Defendant next challenges Singzon’s hearsay testimony identifying him as S.S.’s attacker. Specifically, Singzon testified that S.S. told Singzon that defendant tried to have sex with her. This is clearly hearsay. The question we face is whether it fits within an exception to the hearsay rule.

¶ 46 Section 115-13 of the Code of Criminal Procedure of 1963 provides, in pertinent part, as follows:

³Defendant challenges the admission of Singzon’s statement; however, as we explain below, his challenge is not well taken.

“In a prosecution for [certain sex crimes including criminal sexual assault], statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom [*sic*], pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.” 725 ILCS 5/115-13 (West 2008).

A trial court is vested with discretion in determining whether a statement was made “for the purpose of medical diagnosis or treatment.” *People v. Davis*, 337 Ill. App. 3d 977, 989 (2003). Thus, we will disturb the trial court’s decision on this issue only if the court abused its discretion. *Monroe*, 366 Ill. App. 3d at 1093. An abuse of discretion occurs only where no reasonable person could agree with the position taken by the trial court. *In re M.P.*, 408 Ill. App. 3d at 1073.

¶ 47 Generally, while statements regarding the cause of an injury are admissible, statements identifying an offender are beyond the scope of this exception. *People v. Hudson*, 198 Ill. App. 3d 915, 921-22 (1990). However, our supreme court has held that “at least in the family setting, a victim's identification of a family member as the offender is closely related to the victim's diagnosis and treatment in cases involving allegations of sexual abuse, and thus we agree with those decisions that have permitted the admission of such hearsay evidence.” *People v. Falaster*, 173 Ill. 2d 220, 230 (1996). In support of its holding, the court explained, “ [C]hild abuse involves more than physical injury; the physician must be attentive to treating the emotional and psychological injuries which accompany this crime. [Citations.] The exact nature and extent of the psychological problems which ensue from child abuse often depend on the identity of the abuser.’ ” *Id.* (quoting *United States v. Renville*, 779 F.2d 430, 437 (8th Cir. 1985)). Similarly, this court has held that “the

statement of a 14-year-old girl that her father had abused her was most certainly reasonably pertinent to diagnosis and treatment.” *People v. Park*, 245 Ill. App. 3d 994, 1007 (1993).

¶ 48 Defendant unpersuasively attempts to distinguish these cases. First, he asserts that he was not actually S.S.’s father and merely lived with the family. We note that both S.S. and L.D. testified defendant was like a father to S.S. Furthermore, in his written statement, defendant said that he looked at S.S. “as a daughter.” Thus, the trial court could have reasonably concluded that the nature of the relationship between defendant and S.S. was such that defendant’s identity was pertinent to her diagnosis and treatment. Defendant tries to distinguish *Park* because, he states, in that case, there was testimony that the victim would be admitted to a program where she would be evaluated by specialists, diagnosed and treated (*Park*, 245 Ill. App. 3d at 1007) while no similar testimony exists in the instant case. While there was testimony concerning a specific course of treatment in *Park*, we do not read that case as establishing such testimony as the *sine qua non* for the admissibility of the identity of an attacker. S.S. was speaking to a medical provider. A reasonable person could therefore conclude that the statement was made for the purpose of medical diagnosis and treatment, even though *Park* differs in this respect. Though *Park* may be distinguishable on this point, the distinction is not meaningful. Finally, even without *Park*, *Falaster* supports our conclusion. Hence, the trial court did not abuse its discretion in admitting this testimony.

¶ 49 Defendant also argues that the testimony of Anhar and Elizabeth regarding their encounter with S.S. at school on Monday morning was not relevant. A trial court’s decision regarding relevance is reviewed using the abuse of discretion standard. *Anderson*, 407 Ill. App. 3d at 673. Defendant further notes that even relevant evidence must be excluded where probative value is substantially outweighed by its potential to cause unfair prejudice. *People v. Moore*, 2011 IL App (1st) 100857, ¶47.

¶ 50 Defendant's argument is somewhat unfocused. We take his complaints to be (1) that testimony about S.S.'s emotional state on Monday morning was both irrelevant and designed to evoke sympathy for S.S. and (2) the jury was invited to find S.S. credible because her friends found her credible. The State points out—and defendant does not respond—that this issue was forfeited due to defendant's failure to include it in his posttrial motion. See *DiPace*, 354 Ill. App. 3d at 107. As such, we also review this issue for plain error. *People v. Luna*, 409 Ill. App. 3d 45, 48 (2011).

¶ 51 Evidence is relevant if it tends to make a fact at issue more or less likely. *People v. Hoerer*, 375 Ill. App. 3d 148, 157 (2007). That S.S.'s demeanor was appropriate when she was relating to her friends that she had been sexually assaulted certainly adds weight to her testimony and the trial court could therefore reasonably conclude that it was relevant. We find wholly unpersuasive defendant's claim that "it is contrary to human experience to abruptly become agitated a day and a half after an upsetting event." Indeed, the opposite is consistent with "human experience"; people often become emotional when recounting a traumatic event. However, we have already determined that it was error, though not plain error, to allow testimony regarding S.S.'s complaint to her friends. Thus, we will accept that it was error to permit testimony regarding the circumstances of her complaint as well. Again, we do not find it to rise to the level of plain error. Initially, as noted above, the evidence is not closely balanced.

¶ 52 Moreover, as with the admission of S.S.'s statement to Anhar that she had been sexually assaulted, this error did not "severely threaten" the fairness of the trial (*Durr*, 215 Ill. 2d at 298). The relevant fundamental right affected would again be the right to an unbiased jury. See *Stewart*, 406 Ill. App. 3d at 534. The way testimony about S.S.'s demeanor might have affected this right is by adding weight to S.S.'s statement that she had been sexually assaulted. We have already determined that the admission of that statement did not amount to plain error; we must now consider whether

its admission along with testimony about S.S.'s demeanor did so. In *People v. Becker*, 239 Ill. 2d 215, 240-41 (2010), the supreme court found that the erroneous admission of a cumulative statement of a victim relating that she had been sexually assaulted was harmless where it was cumulative of other evidence in the record. The court first noted that other testimony was more detailed. *Id.* at 240. In this case, the cumulative testimony from Singzon (which we relied on earlier in finding Anhar's testimony about S.S.'s statement harmless) was more detailed in that it expressly identified defendant as the attacker. Furthermore, the supreme court held the error harmless despite the fact that the erroneously admitted statement contained an additional element in that, unlike earlier statements, it mentioned that the victim was afraid of her father (the attacker). It explained:

“While that [it] be true [that the erroneously admitted statement contained this additional element], it would hardly be revelatory, as the only basis for fear would have been the action of defendant in hurting her, which she mentioned in her earlier statements, and in the very statement at issue. The average citizen serving on a jury understands that.” *Id.* at 240-41.

Similarly, the average citizen also understands that the victim of a sexual assault is going to be upset by having been assaulted. To the extent that S.S.'s being upset may have evoked sympathy, we note that the testimony of the victim in *Becker* that she was afraid was of a similar character. Accordingly, we cannot find that testimony about S.S.'s demeanor on Monday morning “severely threatened” (*Durr*, 215 Ill. 2d at 298) the fairness of defendant's trial.

¶ 53 Next, to succeed on his argument that this testimony was designed to evoke sympathy, defendant must show that its prejudicial effect in this respect substantially exceeded its probative value. See *Moore*, 2011 IL App (1st) 100857, ¶47. A reasonable person could conclude that it did not. In *People v. Jackson*, 203 Ill. App. 3d 1, 6 (1990), the trial court allowed rather detailed testimony that a child sexual assault victim—who had spent the night after the assault in the

hospital—had become afraid of her house. The reviewing court rejected the defendant’s argument that this testimony was an improper appeal to the jury’s sympathy, noting that the trial court did not allow the State to delve into details of the victim’s subsequent therapy. *Jackson*, 203 Ill. App. 3d at 14. Similarly, in this case, though the court permitted testimony regarding S.S.’s mental state on the Monday after the assault, no further testimony on this issue was allowed into evidence. Since the trial court’s decision finds closely analogous support in the case law, it is clear that a reasonable person could agree with the trial court. As such, we can find no abuse of discretion here. *In re M.P.*, 408 Ill. App. 3d at 1073.

¶ 54 Defendant further argues that the testimony of Anhar and Elizabeth regarding the events that took place on Monday morning following the assault should not have been admitted to show a course of conduct. This purported error was also not included in defendant’s posttrial motion, resulting in its forfeiture. See *DiPace*, 354 Ill. App. 3d at 107. As we have already determined that the admission of this testimony did not constitute plain error, finding that it was erroneously admitted to show course of conduct would provide no basis to grant defendant relief. As such, we need not address this issue further.

¶ 55 Defendant’s next argument concerns the State’s closing argument. Such concerns are typically reviewed using the abuse-of-discretion standard. *Theodos*, 2011 IL App. (1st) 103218, ¶97. Initially, defendant complains of the State’s repeated references to the testimony of Anhar and Elizabeth. This issue is also not included in defendant’s posttrial motion, making plain-error review appropriate. *Luna*, 409 Ill. App. 3d at 48. We have already found that the admission of this testimony did not amount to plain error, and we unable to conclude that its repetition in closing argument could constitute a severe threat (*Durr*, 215 Ill. 2d at 298) to the fairness of defendant’s trial. Defendant also complains of the use of Singzon’s testimony in closing argument; however, as

we explain above, that testimony was properly admitted. Further, his suggestion that the State attempted to use Singzon's testimony to garner sympathy is not well founded. The State argued that there was no reason for S.S. to undergo Singzon's examination other than to prove her story was true. That is a legitimate inference, and the State is allowed to comment on "all inferences reasonably yielded by the evidence." *Blue*, 189 Ill. 2d at 127. Only argument that "serves no purpose but to inflame the jury constitutes error." *Id.* at 128. Since the State's comment served a purpose other than inflaming the jury, no error occurred.

¶ 56 Defendant complains that the State "asked the jury to consider why S.S. did not tell her friends [of the assault] 'in more elaborate detail.'" Defendant points out that Anhar was properly precluded from testifying to details regarding what S.S. told her by the trial court. See *Ware*, 323 Ill. App. 3d at 51 (Pursuant to the prompt-complaint exception to the hearsay rule, "only the fact of the complaint is admissible; neither the details of the complaint nor the identity of the named perpetrator is admissible."). The State's rhetorical question was certainly disingenuous, and we caution the State to refrain from such comments in the future. We do not, however, believe that this rose to the level of plain error. As defendant notes, the implication of the State's question was that "S.S. was too upset to describe the occurrence." We have already held that the admission of evidence of S.S.'s demeanor on the Monday following the assault did not constitute plain error. Accordingly, we fail to see how a reference to this evidence could constitute a severe threat (*Durr*, 215 Ill. 2d at 298) to the fairness of the trial.

¶ 57 Defendant also points to a portion of the State's argument where it suggested that S.S. did not have the "vocabulary" to tell someone what took place. Defendant asserts that this was not based on any evidence in the record. Assuming, *arguendo*, that S.S.'s age was an insufficient basis to make this argument, the jury was instructed that arguments are not evidence and anything not based

on the evidence should be disregarded. This is sufficient to cure the error of which defendant complains. *People v. Kopczik*, 312 Ill. App. 3d 843, 851 (2000) (“Improper prosecutorial remarks can be cured by an instruction to the jury to disregard argument not based on the evidence and to consider instead only the evidence presented to it.”). Thus, these comments did not amount to error, much less plain error.

¶ 58 Finally, defendant contends that the State’s argument that S.S. did not tell anyone about the assault on Sunday because she did not want to create “turmoil” in the household was not based on the evidence. This is simply false. S.S. testified that she knew that this would hurt her mother because her mother loved defendant and they had been talking about getting married. S.S. also testified that she knew “this was going to kind of hurt [her] family.” The State simply drew a fair inference from S.S.’s testimony, as it is entitled to do. *Blue*, 189 Ill. 2d at 127.

¶ 59 In sum, defendant was not denied a fair trial based on the admission of the various items of evidence he has identified in this argument. While a few minor errors occurred in connection with the testimony regarding S.S.’s statement to Anhar, they did not amount to plain error. Indeed, if they had been properly preserved, they likely would have been deemed harmless. Defendant’s first set of arguments provides us with no reason to disturb the judgment of the trial court.

¶ 60 B. Sufficiency of the Evidence

¶ 61 Defendant next argues that the State failed to prove that he used force in the commission of the sexual assault, as required for a conviction under section 12-13(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-13(a)(1) (West 2008), now codified at 720 ILCS 5/11-1.20(a)(1) (West 2012)). He asks that the judgment be vacated and a conviction for a violation of section 12-13(a)(4) (720 ILCS 5/12-13(a)(4) (West 2008), now codified at 720 ILCS 5/11-1.20(a)(4) (West 2012)) based on

his holding a position of authority relative to S.S. be imposed in its place, as was charged in the second count of the indictment.⁴

¶ 62 When a defendant challenges the sufficiency of the evidence, the question before a reviewing court is, whether, construing the evidence in the light most favorable to the State, a rational trier of fact could have found the elements of the crime charged beyond a reasonable doubt. The sole element at issue here is the use of force in the commission of the offense. See 720 ILCS 5/12-13(a)(1) (West 2008). The following testimony is dispositive of this issue:

“Q. And then what did he do?

A. He started touching me again. And then he got on top of me and tried to stick his penis into my vaginal area.

Q. Could you — now, you said he tried to put his penis into your vaginal area?

A. Yes.

Q. Did you see him do that?

A. I felt it because I thought that I started to scream, ‘oh, that hurts.’ And then he covered my mouth, and he held my mouth. I was pushing him and then after I started pushing him, I guess he got the idea that he was hurting me and he got off.”

From this testimony, it is inferable that the assault began; S.S. screamed; defendant placed his hand over S.S.’s mouth; S.S. started pushing defendant; and defendant “got the idea” and discontinued the assault. A rational trier of fact could conclude that defendant used force by placing his hand over S.S.’s mouth during the commission of the sexual assault. See *People v. Thompson*, 57 Ill. App. 3d

⁴The trial court found that this count merged into the first count, which was based on the use of force.

134, 141 (1978) (“[The d]efendant contends that the victim's own testimony shows that she willingly inserted his penis into her vagina with no struggle. However, the victim testified that she was yelling and screaming when she was pulled onto the seat and that [the] defendant clapped his hand over her mouth and told her to shut up. Following this she obeyed his orders to submit to intercourse. We find such testimony sufficient to support the trial court's finding of force in this case.”). Hence, in this case, defendant was proven guilty beyond a reasonable doubt of using force.

¶ 63 C. Mandatory Supervised Release

¶ 64 Defendant’s final contention is that the court erred in imposing an indeterminate term of MSR. Subsequent to the parties briefing this appeal, the supreme court decided *People v. Rinehart*, 2012 IL 111710, ¶30, and held that the legislature intended courts to impose indeterminate terms of MSR for sex offenses. In light of *Rinehart*, defendant’s argument is not viable.

¶ 65 IV. CONCLUSION

¶ 66 In light of the foregoing, the judgment of the circuit court of Lake County is affirmed.

¶ 67 Affirmed.