

NOTICE
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2014 IL App (5th) 120199-U

NO. 5-12-0199

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Williamson County.
)	
v.)	No. 10-CF-498
)	
MARCELINO WALLE,)	Honorable
)	John Speroni,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not commit any error in admitting certain testimony at defendant's trial.

¶ 2 Defendant, Marcelino Walle, was charged with criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2010)) for allegedly placing his finger in the vagina of the victim, and aggravated criminal sexual abuse (720 ILCS 5/12-16(f) (West 2010)) for placing his mouth on the victim's breasts. He was convicted after a jury trial of both counts and sentenced by the circuit court of Williamson County to a total of 15 years' imprisonment. Defendant argues on appeal that the trial court committed plain error in admitting into evidence certain testimony by a pediatrician who had examined the victim. We affirm.

¶ 3 The evidence presented at trial revealed that at age 11, the victim, C.E., moved from her father's house to her mother's home. Defendant, the longtime boyfriend of C.E.'s mother, also resided in the house along with other relatives. Several years later, on May 10, 2011, C.E. testified she went to her bedroom sometime during the evening and fell asleep on her bed. At midnight, she was awakened by defendant licking her vaginal area, buttocks, and breasts. She claimed she told him to get off of her while trying to push him off. Defendant ignored her attempts to get him to stop. Instead, he stuck his fingers in her vagina and then tried to insert his penis, but he was only able to enter part way. Before long, C.E. had the impression that "some stuff came out of his penis." At that point, defendant left her bedroom. C.E. got out of bed to use the bathroom. After wiping herself, she found a little bit of blood. She figured that her period had started and returned to bed. Defendant came back to her room, claiming that he had had a bloody nose. He took one of her t-shirts and tried to wipe the blood off her bed. C.E. had not noticed defendant bleeding.

¶ 4 C.E. testified that this incident of sexual abuse was not the first. She claimed that defendant had been regularly abusing her in similar fashion for several years. C.E. never told her mother about the abuse, fearing that her mother would not believe her and would blame her for the sexual assaults. C.E. was afraid that she would lose her mother. On May 11, 2011, however, C.E. informed a school counselor about the abuse, and the counselor immediately telephoned the police. C.E. stated she finally told someone about

the abuse because she was "tired of it" and "just didn't want that to be happening anymore."

¶ 5 Marion police sergeant Dawn Tondini and Tim Rice, an investigator with the Department of Children and Family Services (DCFS), both testified that they spoke with C.E. at the Marion police station on May 11, 2011. According to Tondini, C.E. did not cry or show any particular emotion during the 20 minutes that the two of them spoke. According to Rice, C.E. was "sobbing and crying" when her mother appeared at the station. Rice thought that C.E.'s mother, on the other hand, seemed "detached" as she repeatedly asked C.E., " 'Why are you doing this to us?' "

¶ 6 Marion police detective Maria Lara testified that, with the consent of C.E.'s mother, she searched C.E.'s bedroom that afternoon. Lara collected the garments that C.E. said she was wearing at the time defendant sexually assaulted her. On the sheet that covered C.E.'s bed, Lara observed "a dark brown/reddish stain" that appeared to be dry. Lara collected the sheet and the other bedding. On the bare mattress of C.E.'s bed, Lara observed two other dried "dark brown/reddish discolorations." Using moistened cotton swabs, Lara took a sample from each of the two areas of discoloration on the mattress.

¶ 7 On May 12, Lara accompanied C.E. to the office of pediatrician Dr. Kathy Swafford for a forensic medical exam. Dr. Swafford testified that during her examination of C.E., she observed "some increased redness" inside "the area between the labia just adjacent to the vaginal opening." This area is "not a readily accessible area for trauma," and a girl's legs would need to be "fairly far apart" in order to expose the area. On C.E., the redness was "fairly localized," suggesting that it was caused by some type of

"penetrating trauma." It was not the "more generalized" or "more diffuse" redness associated with, for example, poor hygiene, and it was not consistent with a disease or a skin condition. The trauma could have come from "a variety of sources," including C.E.'s scratching herself, or from someone else's "poking" C.E. with a finger, penis or object. Dr. Swafford characterized the redness as a "nonspecific" finding, meaning that it did not amount to definitive physical evidence of sexual abuse. According to Dr. Swafford, the lack of definitive physical evidence was "not surprising" since the medical literature indicated that only "between 2 and 8 percent of the time we will have physical findings even in children who have been sexually assaulted with witness [*sic*] sexual assault." Dr. Swafford opined that the redness and C.E.'s statements to authorities "were consistent with" sexual abuse. Dr. Swafford further noted that during her examination of C.E., she used one of the Illinois State Police's sexual assault kits in order to gather DNA specimens from C.E. Dr. Swafford collected pubic hair combings, buccal swabs, vaginal swabs, and anal swabs, as well as swabs from both of C.E.'s breasts, in the specific areas that C.E. indicated to her.

¶ 8 Suzanne Kidd, a forensic biologist with the Illinois State Police, testified that she used a blood sample from C.E. and buccal swabs from defendant and C.E.'s mother to develop DNA profiles. After performing DNA analysis on a swab of C.E.'s left breast, Kidd developed a single-source DNA profile which matched the DNA standard from defendant. Kidd did not perform any test to determine whether this DNA was from defendant's saliva, however. Kidd also tested both swabs from C.E.'s mattress for the presence of blood, and found that blood was present on both. She did not test the two

mattress swabs for any other bodily fluid. Kidd reported that one of the two mattress stains included DNA from two different people with C.E. being the "major" source of this stain. The "minor" contributor could not be determined, although defendant could not be excluded. The other mattress stain included DNA from three different people. C.E. again was the "major" source of this stain. The two "minor" contributors could not be determined, but neither defendant nor C.E.'s mother could be excluded. The vaginal swabs tested negative for the presence of semen.

¶ 9 Defendant contended that C.E. fabricated a story of sexual abuse in order to cause a rift between him and C.E.'s mother. C.E.'s mother testified in support that C.E. was a liar and a bully who picked on her younger brothers. She portrayed C.E. as manipulative and disrespectful toward defendant unless she wanted something. She further noted that C.E.'s door had a lock on it and that C.E. knew how to use it. To explain the presence of the blood on C.E.'s bedding, she claimed that she and defendant had engaged in sexual activities on C.E.'s bed after all the children had left that day. They stopped when defendant's nose started to bleed. Defendant's blood fell onto the middle of C.E.'s bed, but neither she nor defendant had time to clean up the mess at that time. By the end of the day, they both had forgotten about the bloody bedding in C.E.'s bedroom. She concluded by commenting that she never observed anything in C.E.'s behavior that might suggest that C.E. was being abused or that she was afraid of defendant.

¶ 10 The jury found defendant guilty on both counts. The circuit court subsequently sentenced defendant to 10 years of imprisonment for criminal sexual assault and 5 years

of imprisonment for aggravated criminal sexual abuse, with the sentences to run consecutively.

¶ 11 Defendant's sole argument on appeal focuses on the trial testimony of Dr. Swafford. Defendant argues that Dr. Swafford essentially vouched for the credibility of C.E. and thus invaded the province of the jury. See, e.g., *People v. Kokoraleis*, 132 Ill. 2d 235, 264 (1989) (questions of credibility are for the trier of fact to resolve, consequently one witness cannot properly vouch for the credibility of another). Defendant acknowledges that he has forfeited this issue by failing to make a contemporaneous objection at trial or including the issue in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant, however, urges this court to review the issue as plain error.

¶ 12 We will review a forfeited issue when a "clear or obvious" error was committed and either (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) the error was so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process. *People v. Taylor*, 2011 IL 110067, ¶ 30.

¶ 13 Dr. Swafford's testimony reveals that she received reports from law enforcement and DCFS about the nature of defendant's alleged sexual assaults upon C.E. She also interviewed C.E. personally, and conducted a physical examination of C.E. Her physical examination of C.E. revealed an area of increased and localized "redness *** between the labia just adjacent to the vaginal opening," which she explained was indicative of "penetrating trauma." Dr. Swafford did not testify unconditionally that C.E. had in fact

been sexually abused. Rather, she testified only that the physical findings and C.E.'s allegations were "consistent with" physical abuse. There simply was no error in this instance. Moreover, the evidence was not so closely balanced. C.E. testified in a straightforward, compelling, and believable manner. Her testimony was corroborated by Dr. Swafford's finding of "redness" between the labia adjacent to the vaginal opening, a redness indicative of "penetrating trauma." Additionally, defendant's DNA was found on C.E.'s naked left breast. Defendant's innocent explanations for this DNA evidence were fanciful at best and discounted entirely by the forensic biologist. The prosecutor certainly did not argue to the jury that it should believe C.E. because Dr. Swafford believed C.E., or that Dr. Swafford's believing C.E. was an indication that C.E. was telling the truth. Indeed, the prosecutor sought to portray the case as something more than a mere credibility contest, repeatedly mentioning that defendant's DNA was found on C.E.'s breast, and pointing to this DNA evidence as the principal reason to credit C.E.'s testimony. We therefore conclude the trial court did not err in admitting into evidence that portion of Dr. Swafford's testimony which defendant now challenges on appeal.

¶ 14 For the aforementioned reasons, we affirm the judgment of the circuit court of Williamson County.

¶ 15 Affirmed.