2016 IL App (2d) 150253-U
No. 2-15-0253
Order filed June 27, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-713
THOMAS G. REED,	)	Honorable Gordon E. Graham,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was proved guilty beyond a reasonable doubt of aggravated criminal sexual abuse and predatory criminal sexual assault. The cumulative effect of any trial errors did not deprive the defendant of a fair trial.

¶ 2 On June 25, 2014, following a jury trial, the defendant was found guilty of two counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) and one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)). The defendant received an aggregate prison sentence totaling 25 years. On appeal, the defendant argues that he was not proven guilty beyond a reasonable doubt and that cumulative error in *voir*

dire, admission of evidence, and prosecutorial misconduct deprived him of a fair trial. We affirm.

¶ 3 BACKGROUND

¶ 4 On September 27, 2012, the defendant was indicted on one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)) and two counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)). In the indictment, the State alleged that at the time of the charged acts, the defendant was over 17 years of age and the victim was under 13 years of age. The State alleged that the defendant committed aggravated criminal sexual abuse in that he committed an act of sexual conduct, by fondling the buttocks of the victim, for the purpose of sexual arousal. The State further alleged that the defendant committed predatory criminal sexual assault by committing an act of sexual penetration with the victim. One count alleged that the defendant penetrated the victim's vagina with his finger and the other alleged that he did so with his penis. A jury trial commenced on June 24, 2014.

¶ 5 At trial, the victim testified that she was 23 years old and lived in Maryland. She had a degree in biology and worked for the National Institutes of Health. She had a 27-year old brother. Her mother was 63 years old and worked as a horticulturalist at the Shedd Aquarium. The victim testified that she lived in McHenry from the time she was two years old until she moved away for college at age 18. The victim identified the defendant in court and stated that he was her mother's ex-boyfriend. Her biological father lived in Arkansas. Her mother and father divorced when she was seven years old. Her mother started dating the defendant very soon thereafter and the defendant moved into their home in McHenry. She was still seven years old when he moved in, and he lived with them for about seven or eight years. The victim's paternal grandfather also lived with them for a year when she was 11 years old. Her grandfather was in a wheel chair.

¶ 6 The victim further testified that her mother would leave for work at 6 a.m. and not return until 6:30 p.m. The defendant was usually there when she came home from school. Her brother was not always there. He was five years older and would often go to a friend's house. She did not like the defendant because he had a very short temper and yelled a lot. The defendant was inappropriate sexually, physically, and verbally. She remembered being spanked by the defendant once and described it as "a weird context." It occurred in the entry hall of the house because she had not done a chore. The defendant was angry. She stated that the spanking was "almost like a joke" and that the defendant "spanked [her] butt." She stated that she did not feel like she was being disciplined.

¶ 7 As far as being sexually inappropriate, her first memory was that when she was sleeping the defendant would come into her room, lift the blankets, and put his hand in her underpants. He would touch the outside of her vulva area. When she would wake up and notice what was happening, the defendant would "recoil and leave." This started when she was nine years old and lasted for about six years. She once told a friend's mother that the defendant would come into her room while she was sleeping and touch her inappropriately. The friend's mother called the Department of Children and Family Services (DCFS). As a result of the call to DCFS, the victim was interviewed at the Child Advocacy Center (CAC) in Woodstock in 2002. She was 11 or 12 at the time. She gave them "a vague outline" of what happened but did not give details and she omitted some facts. She only told the interviewers that the defendant would come in her room and put his hands under the blankets. She never said anything about the defendant touching her.

¶ 8 When asked about what she omitted, the victim testified that when she was nine years old the defendant had started bringing her into her mother's bedroom and having her sit on his lap. She was straddling him and facing him. They were both clothed. The defendant would put his

hand inside of her underwear and touch the inside and outside of her vagina with his fingers. This happened between 1 and 10 times per month for three or four years. On some occasions the defendant would remove her clothes and his clothes and "rape" her. This occurred about 5 to 10 times within about a one year period. It would start with her sitting on his lap and after he removed their clothes he would insert his penis into her vagina. The first time this happened she was 10 or 11 years old. It would happen either on her mother's bed or her brother's bed. Some of the times, when she just sat on his lap, occurred on the couch. When these occurrences happened she felt scared, confused, and embarrassed. When she was 10 years old, the defendant told her that she should not tell anybody what was happening.

¶ 9 The victim testified that the reason she did not tell everything at the CAC was because she was scared and she wanted to protect her mother. She knew her mother had financial issues and that the defendant was helping them financially. The defendant worked for a moving company. When the victim was 15 or 16 years old, she saw a counselor three times. She told the counselor about the abuse and the counselor called the police. As a result, in 2006, she was interviewed by a McHenry County detective. Her mother was present. She had never told her mother about the abuse. She did not tell the McHenry County detective of the abuse because her mother was still very good friends with the defendant's mother and the victim did not want to make her mother feel bad. She did not fill out a written statement because she was not ready and she was embarrassed.

¶ 10 From 2002 to 2006, the defendant was either living with them or just visiting and staying overnight. After 2006, the defendant did not live with them anymore. The last time she was abused by the defendant was in 2003 and 2004 and it involved some "lap sessions." However, in 2004 or 2005 the defendant stayed overnight at the house. She was sleeping with only a shirt on

and had a blanket over herself. The defendant lifted the blanket and started coming toward her. She asked him what he was doing so he left and went back to her mother's bedroom.

¶ 11 The victim described the house in McHenry, where she grew up, as having three bedrooms and one bathroom. The bathroom was long and skinny. There was a bathtub on the left, a toilet and sink on the right, and a window in the back. The shower curtain was see-through to let light in the shower. The defendant would frequently walk in the bathroom when she was showering or just using the toilet. He would apologize and walk out as if it was an accident. The defendant never walked in on her brother; this only happened to her. When she would shower, she would see the defendant in the backyard staring into the bathroom through the window. This would happen at least once a week and sometimes more.

¶ 12 In 2010, the victim began to see another counselor. She saw that counselor for at least three years. The main focus of the counseling was the defendant. In 2012, the victim went to the McHenry County police to tell them about the abuse. She finally had the courage to say something. When questioned further about the rape, she testified that the first time it occurred the defendant pulled her on top of him and he inserted about a fourth of his phallus. Then the front door opened and he stopped. She had blood in her underwear later that day. She could not recall whether the defendant ejaculated when he raped her. During the abuse she was really quiet and would do whatever he said. During the lap sessions, she would put her head on his shoulder and pretend to nap. She did not tell him to stop because he was over six feet tall and she was just a child. She did not think she had the power to tell him to stop.

¶ 13 When asked whether she had anyone to turn to during the abuse, she said she would just try to hang out with friends and get her mind off it. After she told her friend's mother and DCFS became involved, she felt like she just caused trouble and did not want to tell anyone else. She may have insinuated things to her friends. Some of her friends were not allowed to sleep over

because their parents thought the defendant was creepy. The victim acknowledged that she was friends with Kristen Alshanski since kindergarten. Alshanski lived down the street and often spent the night at her house while the defendant was living there.

¶ 14 On cross-examination, when asked whether she remembered lying to the police in 2006, she testified that she did not lie, she just did not tell them the whole truth. When asked whether she told the detective in 2006 that she lied in 2002, she stated that she could not remember. She answered a lot of questions in 2006 but she could not remember what she said. The detective had asked her to make a written statement but she never did. She acknowledged that on April 4, 2012, she told a detective about the defendant randomly walking in on her in the bathroom and bedroom. On May 1, 2012, she called the detective and stated that the defendant would walk in on her at least every other day. She also told him that when she was taking a bath the defendant would stay in the bathroom and use the toilet. She testified that when she came home from elementary school at 3:30 p.m., the defendant and her grandfather were usually there. Her brother was usually with friends. She told her friend Alshanski about some of the abuse in 2002 or 2003. She never gave her friends explicit details; she would just use very vague terms or insinuation. In 2005, she told her mother that she did not tell DCFS everything and that the defendant was inappropriate. A couple days later, her mother broke up with the defendant.

¶ 15 Christine N. testified that she was the victim's mother. She acknowledged that between 1999 and 2002, she lived with her two children, their grandfather, and the defendant. The grandfather came to live with them in 1998 and stayed for about a year and a half. She started working full-time at the Shedd Aquarium in 1998 and continued to work there. She leaves for work at 4:45 a.m. and returns home at 6:30 p.m. In 1998 she was making $24,000 per year and half of that went to the mortgage. She did not receive child support. In 1997 or 1998 she started dating the defendant. After about a year, the defendant moved into the house with her and the

family. The defendant worked irregular hours as a mover and as a home health care provider. Whatever money the defendant made was contributed toward family expenses.

¶ 16 The victim's mother further testified that the defendant was often at home when the children were not in school. The defendant had the authority to discipline the children. She acknowledged that the defendant's disciplinary style was a little harsh. He would scream a lot and grab the children. The children told her that he was not very nice. The defendant moved out of the house in 2005 or 2006. She acknowledged that there was one bathroom in the house and that one could see in from the outside if he was close enough. The shower curtain in the bathroom was clear.

¶ 17 The victim's mother also testified that, prior to 2002, the victim never told her she was being abused. In 2002, the defendant lived with them and there was a DCFS investigation. She, the victim and her son had to meet with the state's attorney, the child advocate, the police, and DCFS. She felt threatened at that meeting because she had no information and felt like she might lose her children. She remembered telling the victim the night before the meeting that she should be very careful about her accusations as it was a very serious charge. She also said something about not knowing how they were going to make it without the defendant's financial help. The victim never really told her what happened. She confronted the defendant, but he assured her that it was a misunderstanding.

¶ 18 The victim's mother remembered there was a subsequent investigation in 2005. She took the victim to the police station. On the way to the police station she reminded the victim that they needed the defendant's financial support. She kept asking the victim to tell her what happened but the victim would not answer. She told the investigator in 2005 that she did not want any more investigations and did not want to pursue any criminal charges. After the 2005 investigation she asked the defendant to move out of the house but she kept dating him. At some

point in 2006, the defendant admitted to her that he had been inappropriate with the victim. Based on their conversation, she interpreted his statement to mean that he had been sexually inappropriate with the victim. After that conversation, she thanked the defendant for being honest and never spoke to him again. She did not go to the police.

¶ 19 Daniel Kreassig testified that he was a McHenry City police officer. On April 3, 2006, he spoke with the victim and her mother in an interview room at the police department. The interview lasted about 20 minutes. At the end of the interview he asked for a written statement from the victim. Christine N. told him that she wanted to speak with him in private. She told him that she refused to have her daughter make a written statement and that she wanted the investigation to cease. After that, she took the victim and left the police station. Officer Kreassig testified that the victim had been willing to make a written statement. On cross-examination, Officer Kreassig acknowledged that there was no mention of sexual contact during the interview. They did not conduct any further investigation because the victim did not want to pursue it.

¶ 20 Kristen Alshanski testified that she was 24 years old. She grew up in McHenry and has been friends with the victim since kindergarten. They lived about a block apart. Between the years 1999 and 2002, she was between 9 and 12 years old. She slept over at the victim's house about once a week. The defendant lived with the victim at that time. The defendant had a temper and frequently had arguments with the victim and her grandfather. The defendant would frequently walk into the bathroom or the victim's bedroom when they were changing. This happened once or twice at every sleepover. They always closed the bathroom door. The bathroom door had a lock but it did not work. The victim's brother never walked in on them. In 2003 or 2004, she went for a walk with the victim and another friend. The victim told them that

the defendant raped her but did not give any details. Alshanski said she did not tell anyone because she did not think there was anything she could do.

¶ 21 On cross-examination, Alshanski acknowledged that she had been interviewed by a detective in McHenry in April 2012. She testified that she spoke to the victim before the interview but not after. In May 2012, Alshanski sent an email to the detective stating that a couple more things had occurred to her. In her April interview Alshanski indicated that the bathroom/bedroom incidents occurred 15 to 20 times. However, the May email indicated that it must have occurred about 156 times because once or twice a sleepover would far exceed 15 to 20 times.

¶ 22 Thereafter, the defendant moved for a directed verdict. As to the charge of aggravated criminal sexual abuse, the defendant argued there was no testimony about the defendant fondling the victim's butt and no evidence of sexual gratification such as a description of the defendant's penis or any comments indicating sexual arousal. As to the charges of predatory criminal sexual assault, the defendant argued that there was no evidence of penetration of either his finger or his penis into her vagina. The State argued that, as to aggravated criminal sexual abuse, it did not have to prove the specific conduct alleged in the indictment (fondling of the buttocks), it only had to prove sexual conduct. The State argued that the defendant having the victim straddle him while he touched her vagina area was clearly sexual conduct for the purpose of sexual gratification. The State also argued that there was overwhelming evidence of sexual penetration of the victim's vagina by the defendant's finger and penis. The trial court denied the motion for a directed verdict. The trial court found that the victim's testimony about the "weird context" of the spanking and that it was sexual, rather than disciplinary, was sufficient to deny the motion as to aggravated criminal sexual abuse. Additionally, the trial court found the evidence was sufficient to deny the motion as to the charges of predatory criminal sexual assault.

¶ 23 The defendant recalled Officer Kreassig to the stand. The defendant asked Officer Kreassig whether, during the 2006 interview with the victim, the victim indicated that she had lied during the 2002 interview. The State objected on hearsay grounds. The trial court sustained the objection. The defendant then called Roger Pechous. Pechous testified that he was employed by the McHenry police department in 2002 and had interviewed the victim and her mother. Pechous stated that he wrote a report but nothing happened after that.

¶ 24 Brian Aalto testified on behalf of the defendant that he was an officer for the McHenry police department. In April 2012 he was assigned to follow up on an investigation regarding the victim and the defendant. He reviewed the past investigations from 2002 and 2006. He also interviewed the victim, her mother, and Alshanski. He interviewed the victim on April 4, 2012, and May 1, 2012. He interviewed Alshanski on April 12, 2012, and he received an email from her on May 1, 2012. Thereafter, the defense rested.

¶ 25 Following closing argument, the jury found the defendant guilty on all counts. Following a sentencing hearing, the defendant was sentenced to four years' imprisonment for aggravated criminal sexual abuse and nine-year and twelve-year terms of imprisonment for predatory criminal sexual assault. All sentences were to run consecutively. Thereafter, the defendant filed a timely notice of appeal.

¶ 26 ANALYSIS

¶ 27 Sufficiency of the Evidence

¶ 28 The defendant's first contention on appeal is that he was not proved guilty beyond a reasonable doubt of aggravated criminal sexual abuse. Specifically, the defendant notes that the indictment charged that he had "fondled the buttocks" of the victim and argues that there was no evidence of this charge because the spanking incident did not amount to an act of sexual conduct. The defendant further argues that if the victim's testimony about touching her "vulva area" could

be considered the sexual conduct for the conviction, then there was no evidence to support a determination that this was done for the purpose of sexual gratification or arousal.

¶ 29 When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The weight to be given to the witnesses' testimony, the determination of their credibility, and the reasonable inferences to be drawn from the evidence are all matters within the jurisdiction of the trier of fact. *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *Collins*, 106 Ill. 2d at 261-62. Likewise, the resolution of any conflicts or inconsistencies in the evidence is also within the province of the fact finder. *Collins*, 106 Ill. 2d at 261-62. We will set aside a criminal conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Smith*, 185 Ill. 2d at 542.

¶ 30 A person commits the offense of aggravated criminal sexual abuse when he is 17 years of age or older and commits an act of sexual conduct with a victim who is under 13 years of age when the act is committed. 720 ILCS 5/11-1.60(c)(1)(i) (West 2012). "Sexual conduct" is defined, in part, as any knowing touching or fondling of any part of the body of a child under 13 years of age for the purpose of sexual gratification or arousal of the accused. 720 ILCS 5/11-0.1 (West 2012).

¶ 31 In the present case, the indictment for aggravated criminal sexual abuse alleged that the defendant committed the act of sexual conduct in that he "fondled the buttocks" of the victim. However, because the term "sexual conduct" is defined by statute, it was not necessary to allege in the charging instrument that the defendant touched a specific part of the victim's body.

People v. Priola, 203 Ill. App. 3d 401, 410-11 (1990). The words "fondled the buttocks" were not essential to support a charge of aggravated criminal sexual abuse. Rather, the words constituted mere surplusage. *Id.* Accordingly, evidence that the defendant committed any act of sexual conduct was sufficient to support his conviction.

¶ 32 Here, the victim testified that the defendant would come into her bedroom at night, lift up the blankets, put his hands in her underwear and touch her "vulva area." This testimony was sufficient to support a conviction for aggravated criminal sexual abuse. See 720 ILCS 5/11-0.1 (West 2012). The defendant argues that this testimony was not sufficient because there was no evidence that the defendant touched her vulva area for the purpose of sexual gratification or arousal. It is well settled, however, that "the intent to arouse or satisfy sexual desires can be established by circumstantial evidence, and the trier of fact may infer a defendant's intent from his conduct." *People v. Burton*, 399 Ill. App. 3d 809, 813 (2010). We think that a rational trier of fact could reasonably find, solely from the nature of the act, that the defendant intended to arouse or gratify himself sexually. To the extent the defendant argues that sexual arousal or gratification can only be inferred from the touching of the "sex organs, anus, or breast," we find such argument erroneous. The case law clearly holds that intent can be inferred from the circumstantial evidence (*id.*), regardless of whether the touching was of the "sex organs, anus, or breast" or any other part of the victim's body.

¶ 33 The defendant argues that there must be evidence that the defendant was actually sexually aroused or acted in a manner suggesting sexual arousal during the alleged conduct. The defendant relies on *In re A.P.*, 283 Ill. App. 3d 395, 402-03 (1996) (J. Welch, dissenting). In that case, the dissenting justice wrote:

> "the State must show more than a mere touching to establish an intent of sexual arousal. Some circumstances which show that a touching was done for the intent of sexual arousal

> include whether the defendant had an erection, what the defendant did and said during the touching, the duration of the touching, whether the touching was clearly deliberate, and where and how the touching occurred." *Id.*

Even assuming the standard set forth in Justice Welch's dissent is the appropriate standard to consider, we find that the standard was met in this case. The defendant would come into the victim's bedroom while she was sleeping, put his hands in her underwear, touch her vulva area, and then leave when she would wake up. The victim testified that this happened repeatedly over a number of years. This evidence shows the duration of the touching, that the touching was deliberate, and where and how the touching occurred. As stated, a rational trier of fact could have found that such conduct was for the purpose of sexual arousal. Because we find that the evidence of touching the victim's vulva area supported the conviction for aggravated criminal sexual abuse, we need not determine whether the evidence of the defendant spanking the victim would have been sufficient to uphold the conviction.

¶ 34 The defendant also argues that the evidence was not sufficient to support his conviction for predatory criminal sexual assault. Specifically, the defendant argues that the victim's testimony was too vague and did not explain how she was lured into the acts of sexual assault, how the defendant acted or reacted during the events, the pain or discomfort the victim felt, or how the incidents were concluded. The defendant also argues that the victim's testimony was not credible because she failed to disclose the abuse to authorities in 2002 and 2006 and because her testimony conflicted with that of Alshanski. As to the latter allegation, the defendant notes that Alshanski testified that on one occasion the victim told Alshanski that the defendant had raped her. The victim, however, testified that she did not give Alshanski details and just talked in vague terms about the abuse.

¶ 35 Section 11-1.40(a)(1) of the Criminal Code of 1961 provides:

"(a) A person commits predatory criminal sexual assault of a child if that person is 17 years of age or older, and commits *** an act of sexual penetration, and:

(1) the victim is under 13 years of age." 720 ILCS 5/12-14.1(a)(1) (West 2012).

The Code defines "sexual penetration," in part, as "any intrusion, however slight, of any part of the body of one person *** into the sex organ or anus of another person." 720 ILCS 5/11-0.1 (West 2012). Evidence is sufficient to convict if the victim describes: (1) the kind of act or acts committed to assure that unlawful conduct occurred; (2) the number of acts committed with sufficient certainty to support each of the counts alleged; and (3) the general time period in which the alleged acts occurred. *People v. Letcher*, 386 Ill. App. 3d 327, 334-335 (2008).

¶ 36 In the present case, the victim testified about the types of abuse, digital and penile penetration of her vagina by the defendant, and she provided details about the abuse such as where it occurred and how she would act when it was happening. She testified that the digital penetration happened between 1 and 10 times per month for three or four years and that the penile penetration occurred about 5 to 10 times. The victim also testified as to the general time frame in which the alleged acts occurred. This evidence was sufficient to support the convictions for predatory criminal sexual assault beyond a reasonable doubt. *Id.* The defendant argues that the victim was not credible because she failed to disclose the abuse in 2002 and 2006. However, it is well settled that "the failure of a young sexual assault victim to make a prompt complaint is understandable, since children have a natural sense of shame, fear, guilt, and embarrassment." *People v. Lybarger*, 198 Ill. App. 3d 700, 702 (1990). To the extent that the victim's testimony differed from other witnesses, we hold that these inconsistencies presented credibility questions to be resolved by the jury. *People v. Enis*, 163 Ill. 2d 367, 393 (1994) (it is the jury's function to weigh the credibility of the witnesses and to resolve conflicts or inconsistencies in their testimony).

¶ 37 Cumulative Error

¶ 38 The defendant's next contention on appeal is that his convictions should be reversed due to cumulative error. The defendant alleges error in *voir dire*, the admission of improper evidence, error in failing to allow impeachment of the victim with prior inconsistent statements, and improper prosecutorial comments in opening and closing arguments. We address whether there is error in each of these contentions individually and then address any cumulative error.

¶ 39 *Voir Dire*

¶ 40 The defendant argues that his convictions should be reversed because the trial court failed to include the reasonable-doubt principle of Illinois Supreme Court Rule 431(b)(2) (eff. July 1, 2012) in its questioning of three of the selected jury members. The defendant acknowledges that the argument is forfeited because he failed to contemporaneously object to the trial court's non-compliance with Rule 431(b). See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (failure to object at trial and in a posttrial motion generally results in forfeiture of the issue for review). However, he requests that we address his contention under the plain error doctrine.

¶ 41 Plain-error review permits us to consider a forfeited claim of clear error where the evidence is so closely balanced that the error alone might have resulted in the defendant's conviction, or where, regardless of the closeness of the evidence, the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). The first step in plain-error analysis is to determine whether a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 42 At the time of the defendant's trial, Rule 431(b) provided that the trial judge "shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or

her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 43 Our review of the record indicates that when admonishing three of the selected jury members of the Rule 431(b) principles, the trial court stated:

> "THE COURT: The concepts of law that I have gone over: the burden of proof that's upon the State; the presumption of innocence that's on the Defendant such that he does not have to present any evidence and he does not have to testify; and if he chooses to not testify cannot be held against him, do you understand and accept those concepts *** ?."

This admonition, although it references a burden of proof, does not state that the burden is beyond a reasonable doubt. Accordingly, the trial court erred when it failed to comply with the *voir dire* requirements of Rule 431(b).

¶ 44 Having established that the trial court erred when it failed to comply with the *voir dire* requirements of Rule 431(b), we must next determine whether, pursuant to the application of the plain-error doctrine, the error necessitates reversal and remand for a new trial. In this case, the defendant does not allege that the errors are reviewable under the second prong of the plain error doctrine listed above; rather, he contends only that the errors are reviewable under the first prong, *i.e.*, because the evidence in this case was closely balanced. *Sargent*, 239 Ill. 2d at 189. When reviewing a claim of error under the first prong of the plain-error doctrine, the evidence must not only be closely balanced, but must be "so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *People v. Wilmington*, 2013 IL 112938, ¶ 31.

¶ 45 In the present case, we cannot say that the evidence was so closely balanced that the Rule 431(b) error threatened to tip the scales of justice against the defendant. First, the victim provided credible testimony of the abuse she suffered at the hands of the defendant. Further, the defendant admitted to the victim's mother that he had been inappropriate with the victim and, based on the context of the conversation, the victim's mother interpreted that to mean "sexually inappropriate." Second, while not properly admonished of all the Rule 431(b) principles during *voir dire*, the jurors were well aware of the standard of proof. The three jurors that were not properly admonished as to the State's burden of proof were in the courtroom when the other jury members were admonished as to this principle. They heard this admonishment to other potential jurors over 10 times. Additionally, the jury was instructed prior to deliberations that the State had the burden of proving the defendant guilty beyond a reasonable doubt. Based on the evidence presented in this case, and because the jury was instructed as to the proper standard of proof, we cannot say that the Rule 431(b) error tipped the scales of justice against the defendant.

¶ 46 *Improper Evidence*

¶ 47 The defendant's next contention on appeal is that the trial court erred in allowing Alshanski's testimony that the defendant would frequently walk into the victim's bedroom and the family bathroom while the victim and Alshanski were present therein with the door closed. The State filed a motion *in limine* to admit this evidence pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-7.3 (West 2012)). The trial court granted that motion. The defendant argues that this was error because the conduct Alshanski described did not meet the statutory requirements as it was not a charged offense. The defendant acknowledges that he did not include this argument in his post-trial motion but requests that we review his contention under the plain-error doctrine on the basis that the evidence was closely balanced.

¶ 48 Generally, evidence of other crimes is inadmissible to show a defendant's propensity to commit a crime. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). The Illinois General Assembly, however, has created a limited exception to this general rule of inadmissibility for other-crimes evidence intended to show propensity. *People v. Ward*, 2011 IL 108690, ¶ 25. Specifically, if a defendant is tried on one of the enumerated sex offenses, section 115-7.3(b) of the Code (725 ILCS 5/115-7.3(b) (West 2012)) allows the State to introduce evidence that the defendant also committed another of the specified sex offenses. The statute expressly permits this other-crimes evidence to be admitted for any relevant purpose, including the defendant's propensity to commit the charged crime. 725 ILCS 5/115-7.3(b) (West 2008); see also *Ward*, 2011 IL 108690, ¶ 25 (other-crimes evidence is admissible under section 115-7.3(b) to show a defendant's propensity to commit sex crimes). The admissibility of evidence rests within the discretion of the trial court, and its decision will not be disturbed absent an abuse of discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12.

¶ 49 In the present case, the evidence sought to be introduced through Alshanski was not evidence of another offense of aggravated criminal sexual abuse or predatory criminal sexual assault. Accordingly, the evidence at issue was not properly introduced under section 115-7.3 of the Code. Nonetheless, this was harmless error. *People v. Nieves*, 193 Ill.2d 513, 530 (2000) (improper admission of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied the right to a fair trial). As stated earlier, when reviewing a claim of error under the first prong of the plain-error doctrine, the evidence must not only be closely balanced, but must be "so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *Wilmington*, 2013 IL 112938, ¶ 31. Here, we cannot say that Alshanski's testimony at issue tipped the scales of justice against the defendant. The fact that the testimony did not involve sex offenses similar to those charged diminished any potential negative impact of

the testimony. Further, Alshanski testified that the defendant never in fact saw her naked or in a state of undress.

¶ 50 Moreover, while evidence of other offenses or prior bad acts is not admissible for the purpose of showing the defendant's propensity to commit crime, such evidence is admissible where it is relevant for any other purpose (*People v. Illgen*, 145 Ill. 2d 353, 365 (1991)), including "to corroborate the victim's testimony concerning the offense charged" (*People v. Foster*, 195 Ill. App. 3d 926, 949 (1990)). Here, Alshanski's testimony was relevant to corroborate the victim's testimony of the defendant's desire to walk in on the victim in private spaces to catch her in a state of undress or in a compromising position. This evidence showed that the defendant had an attraction to or obsession with the victim. While Alshanski's testimony was not admissible under section 115-7.3 of the Code or as to a sex offense against Alshanski herself, it was admissible for the purpose of corroborating the victim's testimony. Evidence admissible for one purpose is not affected by inadmissibility for another. *People v. Johnson*, 2014 IL App (2d) 121004, ¶ 51. For this reason as well, the admission of Alshanski's testimony was harmless error.

¶ 51 In so ruling, we note that the defendant relies on *People v. Petitt*, 245 Ill. App. 3d 132 (1993), in arguing that Alshanski's testimony was improperly admitted. In *Petitt*, as a prelude to the sex offense at issue there, the defendant had the victim scratch his back. *Id.* at 135. At trial, two other children who resided in the defendant's home at the time of the sex offense at issue were allowed to testify that the defendant scratched their backs and asked them to scratch his back. *Id.* at 139. The reviewing court found that the testimony of the two other children was improperly admitted because back-scratching was not a crime and the only purpose of the testimony was to suggest that the defendant scratched the backs of young girls as a prelude to sexual abuse. *Id.* at 140. The reviewing court held that, because the two other children denied

that the defendant ever touched them inappropriately, their testimony was more prejudicial than probative. *Id.* at 141.

¶ 52 The defendant's reliance on *Petitt* is unpersuasive as it is distinguishable from the present case. In *Petitt*, the evidence was closely balanced. *Id.* at 139. In this case, as explained above, the evidence was not so closely balanced that the alleged error tipped the scales of justice against the defendant. The victim provided credible testimony about the abuse and the defendant admitted to the victim's mother that he had been inappropriate with the victim. In the context of the conversation, the victim's mother believed that this meant he was sexually inappropriate with the victim. Further, in this case, unlike *Petitt*, Alshanski's testimony involved conduct of the defendant directed not only at Alshanski but at the victim as well. Alshanski's testimony corroborated the victim's testimony and, as explained above, was admissible for that purpose.

¶ 53 *Impeachment with Prior Inconsistent Statements*

¶ 54 The defendant's next contention is that the trial court erred in preventing the defense from impeaching the victim with her prior inconsistent statements. Specifically, during its case, the defendant recalled Officer Kreassig to testify. Allegedly, the victim had stated to Officer Kreassig during the 2006 investigation that she lied in the 2002 investigation. The victim testified at trial that she omitted some facts in the 2002 investigation and the defense believed that her alleged statement to Kreassig that she "lied" in 2002 was impeaching. When defense counsel repeatedly asked Officer Kreassig whether the victim stated that she was truthful in 2002, the trial court sustained the State's objections based on hearsay. The defendant argues that because he sought to elicit the victim's 2006 statement to Officer Kreassig for purposes of attacking her credibility, and not to prove the truth of the matter asserted, that the trial court erred in sustaining the State's objections.

¶ 55 The admission of evidence lies within the discretion of the trial court, and we review the trial court's decision to admit evidence for an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). The general rule is that hearsay, defined as "an out-of-court statement * * * offered to prove the truth of the matter asserted," is inadmissible at trial. (Internal quotation marks omitted.) *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008); see also Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). There is an exception to the hearsay rule for prior inconsistent statements of a testifying witness, which may be admitted to impeach the witness's credibility. *People v. McCarter*, 385 Ill. App. 3d 919, 932 (2008).

¶ 56 In the present case, the trial court did not abuse its discretion in not allowing Officer Kreassig to testify that the victim stated that she had lied in 2002. The purpose of impeachment is to destroy credibility, not to prove the facts stated in the impeaching statement. *People v. McKee*, 39 Ill. 2d 265, 270 (1968). "If there is nothing inconsistent between the trial testimony and the prior statement, the court may properly prohibit the introduction of the prior statement." *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 80. Here the victim testified at trial that in 2002, she gave investigators "a vague outline" of what happened, but she did not give all the details and she omitted some facts. The victim also testified that in 2006 she did not tell the police about the abuse because her mother was friends with the defendant's mother and she did not want to make her own mother feel bad. She also testified that in 2006 she did not fill out a written statement because she was not ready and she was embarrassed. Accordingly, the victim's testimony indicated that she was not truthful about the abuse in both the 2002 and 2006 investigations because she was afraid and embarrassed. As such, any statement in 2006 that she lied in the 2002 investigation was not inconsistent with her trial testimony acknowledging that she was not truthful in 2002. Accordingly, the trial court did not abuse its discretion in sustaining the State's objections at issue.

¶ 57 *Prosecutorial Misconduct*

¶ 58 Prosecutor's Misstatements Regarding the Law

¶ 59 The defendant's first claim of prosecutorial misconduct is that the State improperly suggested that the defendant bore a burden of proof in this case. In closing, the State argued:

> "Physical evidence? Physical—I mean, what do we expect *** from this 9-year old? She's going to take her underwear, put it in a plastic bag, bottle it and seal it and hold it for ten years? *Don't blame us that there's no physical evidence. Blame him*." (Emphasis added).

The defendant objected. The trial court sustained the objection and stated that the jury could disregard anything that was not supported by the evidence. The defendant also claims error in the following statements:

> "MR. KENNEALLY [Assistant State's Attorney]: How dare any of us criticize [the victim] for doing this or not doing that, judging her because she didn't react the right way to being raped or as we—
>
> MR. ERWIN: Objection.
>
> MR. KENNEALLY: *** Why is she lying? Have we heard any evidence as to why she would come forward 12 years later? *** And if we're going to say [the victim] is a liar, what we're saying about her, we're saying she is a sociopath. ***
>
> Did you hear a thread of evidence that she stands to acquire money, property, benefit personally in any way if he's convicted?
>
> MR. ERWIN: Objection.
>
> THE COURT: Overruled."

The defendant argues that the foregoing implied that the defendant had a burden to adduce evidence to demonstrate the victim's reason for "lying." The defendant also argues that the

foregoing improperly intertwined the victim's credibility with the burden of proof. Specifically, the defendant asserts that a jury could have found that the victim's testimony was inadequate to meet the reasonable doubt standard even without finding that she was a sociopathic deliberate liar.

¶ 60 It is well settled that 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. Kitchen*, 159 Ill. 2d 1, 38 (1994). During closing argument, 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. *People v. Rader*, 178 Ill. App. 3d 453, 466 (1988). In reviewing whether comments made during closing argument are proper, we must review the closing argument in its entirety and view remarks in context. *Kitchen*, 159 Ill. 2d at 38. Our appellate courts are divided on the standard of review for closing remarks. *People v. Maldonado*, 402 Ill. App. 3d 411, 421 (2010). It is not clear whether the appropriate standard is *de novo* or abuse of discretion. *Id.* Because we would reach the same result under either standard in this case, we refrain from discussing the applicable standard until our supreme court resolves the conflict. See *People v. Anderson*, 407 Ill. App. 3d 662, 676 (2011).

¶ 61 In the present case, as to the State's comment that the defendant was to blame for the lack of any physical evidence, the trial court sustained the defendant's objection and instructed the jury to disregard anything that was not supported by the evidence. This is generally sufficient to cure any prejudice. *People v. Santiago*, 365 Ill. App. 3d 855, 866 (2006). Further, this remark did not result in substantial prejudice to the defendant. When read in context, the point of this statement was not to shift the burden of proof but to highlight the fact that the victim was young at the time of the alleged abuse and not likely to speak out. The State was blaming the defendant

for choosing a young victim and making a reasonable inference from the evidence that he chose her because there would not likely be an outcry. The State was not blaming him for the failure to present physical evidence on his own behalf. Further, later in its closing statement, the State also told the jury that they would "have to make a decision in this case as to whether or not the State has proved this case beyond a reasonable doubt." As such, any error in this comment was not substantially prejudicial.

¶ 62 As to the prosecutor's statements that the victim had no reason to lie, we find no error. The State was properly commenting on the credibility of the victim and not implying that the defendant had to produce evidence to show she was not lying. Further, contrary to the cases cited by the defendant in support of this argument, the State did not improperly argue that the defendant could only be acquitted if the jury believed the victim was lying. *People v. Banks,* 237 Ill. 2d 154, 185 (2010) (it is improper for a prosecutor to argue that a jury would have to believe the State's witnesses were lying in order to acquit defendant). Also, the State did not improperly intertwine the victim's credibility with the burden of proof. The jury first had to determine whether the victim was credible. If credible, the jury then had to decide whether the evidence met the proper burden of proof. The State's arguments went only to the victim's credibility. In fact, as noted above, within these comments as to the victim's credibility, the State specifically referred to the fact that it had to prove this case beyond a reasonable doubt.

¶ 63 Prosecutor's Misstatement of Facts

¶ 64 The defendant next contends that the State misrepresented the facts or argued matters not in evidence both in the opening statement and closing arguments. As to opening statements, the defendant argues that the following statements made by the prosecutor were not supported by the evidence: (1) that the defendant's spanking of the victim was sexual in nature; (2) that the victim's family was so destitute during her childhood that the victim had to steal food; (3) that

Alshanski would testify that she observed physical abuse of the victim by the defendant; and (4) that Alshanski would testify that the defendant repeatedly walked into rooms while she was naked.

¶ 65 An opening statement may include a discussion of the evidence and matters that may reasonably be inferred from the evidence. *People v. Smith*, 141 Ill. 2d 40, 63 (1990). Counsel may summarily outline the expected evidence and reasonable inferences from the evidence, but no statement may be made in opening that counsel does not intend to prove or cannot prove. *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). "[E]rrors in opening statements or closing argument must result in substantial prejudice such that the result would have been different absent the complained-of remark before reversal is required." *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993).

¶ 66 In this case, the statement as to the sexual nature of the spanking of the victim was a reasonable inference from the evidence. The victim testified that the spanking was "weird" and that it did not feel disciplinary in nature. The next three statements were not specifically borne out by the evidence. While the evidence indicated that the victim's family was poor, there was no testimony about stealing food. While Alshanski testified that the victim told her about being physically abused by the defendant, she did not testify that she witnessed any physical abuse. Finally, Alshanski did not testify that the defendant walked in on her when she was naked. Rather, she testified that the defendant repeatedly walked in on her and the victim while they were in the bathroom or bedroom and that it happened more than could be considered accidental. Nonetheless, we cannot say that the errors in opening statement resulted in substantial prejudice. The trial court informed the jury before opening statements that opening statements were not evidence. Also, the jury received a written instruction indicating that opening statements are not evidence and that any statement made that was not based on the evidence should be disregarded.

Illinois Pattern Jury Instructions, Criminal, No. 1.03 (3d ed. 1992). While the giving of this instruction alone is not always curative, it is a factor to be considered in determining the prejudice to defendant. *People v. Flax*, 255 Ill. App. 3d 103, 109 (1993). Under the circumstances in this case, we cannot conclude that the improper comments during opening statement were a material factor in the defendant's conviction. *Id.*

¶ 67 The defendant next complains about improper comments during closing and rebuttal closing argument. Specifically, during closing, the prosecutor stated, referring to the defendant walking in on Alshanski in the bathroom and bedroom, that "this weakness that he had, this insidious impulse in his body that makes him want to molest children, comes out in other ways. He can't bottle it up." The prosecutor further stated:

> "And it screams this guy is attracted to the flesh of young children, and he can't control it.
>
> He does everything he can to not get caught. He picks his victim carefully. But he's got to see it. He's got to walk in on it."

The defendant argues that this line of comment was prejudicial because it implied that the defendant had instances of misconduct with other children when there was no evidence of any other victims. In rebuttal closing, the prosecutor stated that it took "years of counseling" for the victim to be enabled to come forward with the allegations of abuse. The defendant argues that this was not supported by the evidence because the victim had testified only that she had seen a counselor for about three years and that the defendant was the main focus.

¶ 68 The prosecutor's comments, in part, are a reasonable inference from the evidence. It is a reasonable inference that the defendant's purpose in walking in on the victim and Alshanski was to see them in a state of undress. This supports the argument that the defendant is attracted to the flesh of young children. The prosecutor also only referenced only one victim when stating "[the

defendant] pick[ed] his victim carefully." However, it was not a reasonable inference from the defendant's act of walking in on the victim and Alshanski in the bathroom and bedroom that he necessarily wanted "to molest young children." Nonetheless, this remark did not result in substantial prejudice. The prosecutor did not state that the defendant in fact molested other children and did not imply that the defendant molested Alshanski.

¶ 69 The prosecutor's comment in rebuttal that it took the victim years of counseling to come forward with her allegations was not improper. The victim testified that she sought counseling in 2010 and that the main focus of that counseling was the defendant. She also testified that in 2012, she finally had the courage to go to the police to tell them about the abuse. It is reasonable to infer from the victim's testimony that her counseling is what enabled her to finally confront the defendant. Moreover, this statement was invited by defense counsel's closing argument where he asked the jury why the victim waited until 2012 to finally come forward with her allegations. Statements will not be held improper if they were provoked or invited by the defense counsel's argument. *People v. Kirchner*, 194 Ill. 2d 502, 553 (2000).

¶ 70 The defendant's next contention is that the State made inflammatory arguments in its closing statement. The defendant complains that the prosecutor referred to the defendant as a "horror of a human being," a "Casanova," "depraved," a "predator," and a "wolf." The defendant did not object to these comments during closing argument and the argument is technically forfeited. See *Enoch*, 122 Ill. 2d at 186. Nonetheless, we will review this contention for plain error. "'Improper comment is plain error [only] when it is either so inflammatory that the defendant could not have received a fair trial or so flagrant as to threaten a deterioration of the judicial process.'" *People v. Euell*, 2012 IL App (2d) 101130, ¶ 21 (quoting *People v. Yonker*, 256 Ill. App. 3d 795, 798 (1993)). We agree that it was improper for the prosecutor to refer to the defendant as an animal. *People v. Johnson*, 208 Ill. 2d 53, 80 (2003). Nonetheless,

none of the complained-of references denied the defendant a fair trial or were so flagrant as to require reversal. *Euell*, 2012 IL App (2d) 101130, ¶ 21.

¶ 71 The defendant also argues that the State made improper comments about defense counsel. When arguing that the victim had no motive to lie, the State said:

> "Have you heard any plausible motivation for why she would attempt to make these life-destroying allegations against an innocent man? *** Just for the fun of taking time off from her life in Washington, D.C., to come back here, subject herself to the anguish of cross-examination where she has to describe for a guy who is trying to discredit her how his client shoved his fingers up her vagina—raped her?"

The defendant did not object to this comment, so any impropriety will be reviewed for plain error. The defendant finds especially reprehensible the reference to defense counsel as a "guy who is trying to discredit" the victim. While the reference to defense counsel may have been unprofessional, we cannot say that it denied the defendant a fair trial or threatened the judicial process. That defense counsel was trying to discredit the victim was a reasonable inference from the evidence in light of counsel's arguments and thus did not prejudice the defendant.

¶ 72 The defendant also argues that the following comment about defense counsel's cross-examination of the victim was also improper:

> "What about dates? Well, you said 2004 but she said 2005. I mean, the defense attorney that couldn't cross people upon dates from ten years ago should have their law license pulled."

The defendant objected to this comment and the trial court sustained the objection by instructing the jury that its decision must be based on the evidence presented in court. This was sufficient to cure any error. *Santiago*, 365 Ill. App. 3d at 866. While the comment made here did not amount

to reversible error, we caution the prosecutors that our decision in no way condones the use of such improper arguments.

¶ 73 Finally, the defendant argues that the State made improper references about the victim. Specifically, the prosecutor commented that the victim was beautiful and emphasized that she was small in stature as an adult and even smaller as a young child. The defendant argues that the victim's size and looks were irrelevant to the charges, especially as to size because there was no allegation of the use of force by the defendant. The defendant also argues it was improper when the prosecutor stated:

> "*** this case is a tribute to [the victim], beautiful young girl, who despite this emotional scar that he seared into her soul, despite the fact that he chose his own orgasm, his own sexual perversion over the well-being of a child and she'll be forever haunted by that, she hasn't become a cynic. She hasn't given up. She continues to have faith in justice. And he deserves to be held accountable, which is a reckoning that is long overdue."

The defendant argues that the only purpose of this passage was to play on the sympathies of the jury.

¶ 74 The defendant did not object to these comments at trial, so they will be reviewed for plain error. Any impropriety in the comments will be plain error only when it is either so inflammatory that the defendant could not have received a fair trial or so flagrant as to threaten a deterioration of the judicial process. *Euell*, 2012 IL App (2d) 101130, ¶ 21. The complained-of comments do not meet this standard. That the victim was small and young could explain why she was scared to come forward with the abuse at an earlier time. The reference to the victim as a beautiful young girl could be interpreted as a reference to her innocence that was lost to the defendant's abuse. The comments that the defendant chose his own "orgasm" and that the victim will be "forever haunted" are reasonable inferences from the evidence.

¶ 75 *Cumulative Effect of Any Errors*

¶ 76 Finally, the defendant argues that even if any of these individual errors do not warrant reversal, the cumulative effect of the errors entitles him to a new trial. Cumulative error is applicable only where errors that are not individually considered sufficiently grave to entitle the defendant to a new trial cumulatively "create a pervasive pattern of unfair prejudice to defendant's case," in which case a new trial may be granted. *People v. Mendez*, 318 Ill. App. 3d 1145, 1154 (2001) (citing *People v. Blue*, 189 Ill. 2d 99, 139 (2000)). "While individual trial errors may have the cumulative effect of denying a defendant [the right to a fair trial], no such accumulated error occurs where none of the separate claims amounts to reversible error." *People v. Dresher*, 364 Ill. App. 3d 847, 863 (2006). In this case, we have concluded that none of the alleged errors were prejudicial or tipped the scales of justice against the defendant. Upon our review of the defendant's contentions and the record in this case, we are confident that the integrity, reputation, and fairness of the judicial process were not compromised. As such, the cumulative-error doctrine does not entitle the defendant to a new trial. *Id.* We note, however, that even though we have found that the alleged prosecutorial misconduct did not result in substantial prejudice or rise to the level of plain error in this case, we caution prosecutors to refrain from the use of unprofessional, sarcastic, and potentially inflammatory comments in the future.

¶ 77 CONCLUSION

¶ 78 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 79 Affirmed.