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2016 IL App (3d) 140546-U

Order filed November 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0546
v.	)	Circuit No. 12-CF-1635
	)	
THEODORE A. HARRIS,	)	Honorable
	)	Robert P. Livas,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice O'Brien concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held*: The cumulative effect of the errors committed by the State prejudiced the defendant's trial; therefore, the defendant's convictions are reversed and the cause is remanded for a new trial.

¶ 2 The defendant, Theodore A. Harris, appeals from his aggravated criminal sexual abuse convictions and sentences. The defendant argues that: (1) he was denied his right to a fair trial by the cumulative effect of the State's prosecutorial misconduct; and (2) his sentence was the result of an abuse of discretion.

¶ 3 FACTS

¶ 4 The defendant was charged by indictment with six counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b), (d) (West 2010)). The State elected to *nolle prosequi* three of the counts. The case proceeded to a jury trial on the remaining three counts.

¶ 5 T.H. testified that she was 12 years old. Katrina W. is T.H.'s mother and the defendant is T.H.'s father. In the summer of 2010, T.H.'s parents were no longer in a relationship, and the defendant lived in a separate house with his girlfriend, Conee Kelly. Despite their separation, T.H. recalled that the defendant and Katrina had a cordial relationship. During the summer of 2010, T.H. spent every other weekend and some weekdays at the defendant's house. On the weekdays, Kelly went to work around 6 a.m. and returned at 3 p.m. One weekday, around 7 a.m., T.H. was lying on the couch in the living room when the defendant came in and carried T.H. to his bedroom. The defendant laid T.H. on the bed, removed her pants, and placed T.H.'s hand on his penis. The defendant directed T.H. to move her hand up and down on his penis. After 20 minutes, T.H. felt "[w]et stuff" on her hand. The defendant told T.H. to take a shower, and after her shower, T.H. acted as if nothing had happened. T.H. said this type of incident occurred nearly every time she stayed with the defendant and Kelly went to work. The incidents stopped in the fall of 2010. T.H. estimated that the defendant forced her to touch his penis five times. Despite these incidents, T.H. had an "okay relationship" with the defendant and she still loved him.

¶ 6 In April 2011, the defendant visited T.H. at Katrina's home. The defendant placed T.H. on his lap and moved T.H. around. T.H. felt the defendant's "private area" on her buttocks. The defendant touched T.H.'s breast and asked if T.H. liked the touch. The room where this incident

occurred was dark, and the other individuals in the room did not see the defendant's actions. On his subsequent visits, the defendant squeezed T.H.'s buttocks when he hugged her.

¶ 7 In December 2011, T.H. and her half-sister, T.M., were talking about their respective fathers[1] when T.M. said the defendant was a "rapist." T.M. told T.H. that the defendant had inappropriately touched her, and both girls started crying. T.H. told Donald Woods that she was crying because the defendant had molested her. Woods told T.H. to contact her godmother, Frona Hinton. T.H. told Hinton that the defendant had inappropriately touched her, and Hinton called Katrina. After the call, Hinton took T.H. to the police station. Officer David Remer gave T.H. some documents, which T.H. filled out in front of Remer and Hinton. T.H. told Remer about the defendant's sexual abuse and T.M.'s report of sexual abuse. After the police interview, Hinton took T.H. to Katrina's house where T.H. told Katrina about the defendant's sexual abuse. T.M. was also present and told Katrina about the defendant abusing her.

¶ 8 On March 27, 2012, T.H. participated in a forensic interview at the Will County Child Advocacy Center. The court played the video recording of the forensic interview for the jury. On the video, T.H. said she was at the meeting because of her father, the defendant. T.H. recounted an incident of sexual abuse that occurred approximately one year before the interview. T.H. had spent the night at Kelly's house with her brother and sister. Around 6 a.m., Kelly went to work. At 8 a.m., the defendant picked T.H. up off the couch in the living room and placed her on the bed in Kelly's bedroom. The defendant removed T.H.'s pants, climbed onto the bed, and forced T.H. to touch his penis. The defendant directed T.H. to move her hand up and down on his penis. T.H. noticed that the defendant's penis felt slimy and wet. The defendant then told T.H. to go to the bathroom and clean up. T.H. said she was subject to this type of abuse every time she stayed

[1] Katrina is T.M.'s mother, but defendant is not the father of T.M.

at the house and Kelly went to work. During a visit to T.H.'s house, the defendant touched T.H.'s breast under her clothes. T.H. said this touching occurred on other occasions, and that the defendant also squeezed her buttocks. T.H. also said that the defendant placed T.H. on his lap, and the defendant moved in such a way that T.H. could feel his penis on her buttocks. T.H. also saw the defendant touch T.M.'s breast and push T.M. onto a bed. T.M. told T.H. that the defendant had touched her buttocks and tried to touch her genitals.

¶ 9 Donald Woods testified that he was friends with T.H.'s family members, and he knew the defendant. In December 2011, Woods walked into the kitchen of T.H.'s home. Woods saw T.H. and T.M. crying at the table. T.H. said that the defendant had inappropriately touched her. Woods told T.H. to tell Hinton about the defendant's inappropriate contact.

¶ 10 Frona Hinton testified that she was a friend of Katrina. Hinton said she and T.H. had a close relationship. On December 22, 2011, T.H. told Hinton that the defendant had "made her touch him until something came out." Hinton called Katrina and told her about T.H.'s statements. Katrina was initially skeptical of T.H.'s allegations, but she asked Hinton to take T.H. to the police station. At the police station, Officer Remer conducted an interview with T.H. and T.H. filed a written report.

¶ 11 Hinton knew the defendant and said that his prior interactions with the children seemed normal with the exception of a few interactions with T.H. In particular, T.H. protested going to the defendant's house but T.H. did not tell Hinton the reason for her protests.

¶ 12 Officer David Remer testified that he took a report from T.H. on December 22, 2011. T.H. told Remer that, approximately one year before the interview, she was sleeping with her brothers on a couch. The defendant came into the room, carried T.H. from the couch to a private area, and he made T.H. touch his "privates." At the time, Kelly was at work. T.H. said that she

had spoken to her sister about the sexual abuse and she had not previously spoken to an adult because she was afraid. Remer asked T.H. to discontinue her story at this point so that he could have a detective continue with the interview. Remer had T.H. fill out a complaint. Remer read T.H.'s statement into the record:

> "I was sleeping with my brother and my sister and it was 5:00 or 6:00 a.m. and he came into the living about 8:00 (sic). When he came into the living room and took me into the room, then he made me touch his private part. And when he was finished, he told to wash my hands; and I took a shower."

¶ 13 Conee Kelly testified that, in 2010, she lived with the defendant in Joliet. On the weekends, T.H. and her siblings stayed with Kelly and the defendant. At that time, Kelly worked Monday through Friday from 8 a.m. to 4:30 p.m. The defendant's children occasionally stayed at the house with the defendant while Kelly was at work. Kelly said the children were "crazy about" the defendant. Kelly recalled that the defendant and Katrina were friends, and the defendant also visited his children at Katrina's house. Kelly said when the children stayed at her house they either slept on the couch, or if the defendant was gone, they occasionally slept with her in a bed. Kelly thought that the defendant had a normal father-daughter relationship with T.H.

¶ 14 T.M. testified that she lived with Katrina, T.H., and her other siblings in a house in Joliet. T.M. recalled that, in the summer of 2010, T.H. occasionally spent the weekends with the defendant. The defendant also visited the children at Katrina's house. T.M. said that she had a normal relationship with the defendant, and Katrina and the defendant were cordial.

¶ 15 While T.M. was living at Katrina's house, the defendant came into her bedroom, touched T.M.'s breasts and thigh, and kissed T.M. The defendant tried to remove T.M.'s pants, but T.M.

resisted. The defendant then placed T.M.'s hand on his penis. T.M. said that on a different occasion, the defendant also touched her buttocks and breasts in the kitchen. T.M. recalled that the defendant had touched her breasts in the house on multiple occasions over a period of several months. Despite the defendant's sexual abuse, T.M. acted normal when the defendant was around because she was afraid.

¶ 16 One day, T.M. was arguing with T.H. in the kitchen. T.H. called T.M.'s father a derogatory name, and T.M. responded that the defendant was a "rapist." T.H. began to cry and told T.M. that the defendant had inappropriately touched her. In reply, T.M. told T.H. that the defendant had also inappropriately touched her. As the girls discussed their respective incidents of abuse, Donald Woods walked into the room. Woods asked why the girls were crying, and T.H. told Woods that the defendant had sexually abused her. Thereafter, T.H. went to the police station. Later that day, T.M. told Katrina that the defendant had also sexually abused her.

¶ 17 At the conclusion of T.M.'s testimony, the State rested. The defense called Wondra Harris as its first witness. Wondra testified that she is the defendant's sister. Wondra had a good relationship with T.H. and she did not notice anything unusual about T.H.'s relationship with the defendant. Wondra noted that T.H. seemed happy to see the defendant and T.H. did not appear scared. Wondra was surprised by T.H.'s sexual abuse allegations.

¶ 18 The defendant testified that he and Katrina had three children together, including T.H. In 2004, the defendant's relationship with Katrina ended. Thereafter, the defendant tried to maintain a relationship with his children. The defendant loved his children, and, between May 2010 and 2011, he had a good relationship with T.H. In May 2010, the defendant was in a relationship with Kelly. During the summer of 2010, the defendant's children occasionally spent some weekends at the house the defendant shared with Kelly. The defendant said the visits always

occurred on the weekends when Kelly was not working. The defendant said that he never took T.H. into the bedroom, removed her pants, or made T.H. touch his penis. The defendant denied having any inappropriate sexual contact with T.H. at the house where he and Kelly lived.

¶ 19 The defendant said that he occasionally visited the children at Katrina's house. The defendant said the environment at Katrina's house was "[c]haotic." The defendant indicated that his three biological children lived at the house along with Katrina's other children. The defendant said that he never touched T.M.'s breast or buttocks, he did not kiss T.M. on the lips, he never pulled down T.M.'s pants, and he never made T.M. touch his penis. The defendant also said that he never touched T.H.'s chest, squeezed T.H.'s buttocks, or placed T.H. on his lap and moved her around. The defendant did not think any of his contact with T.H. or T.M. would be construed as inappropriate sexual contact.

¶ 20 On cross-examination, the defendant said that between 2004 and 2010, he did not see his children very often. In March 2010, the defendant moved back to the Joliet area and was able to start seeing his children again. The defendant said that his visits only occurred on the weekends. During the defendant's examination, the following exchange occurred:

"Q. And you are sitting here today and you are denying everything?

A. That's correct.

Q. So, you are saying that [T.H.] is lying?

[Defense Counsel]: Objection.

THE COURT: Sustained.

BY [counsel for the State]:

Q. So [T.H.] is making up a story?

[Defense counsel]: Objection.

THE COURT: Sustained.

BY [counsel for the State]:

Q. You heard everything that [T.H.] said?

A. Correct.

Q. And you are standing here–I mean sitting here and saying you never did those things to [T.H.]?

A. That's also correct.

Q. So she is making it up?

[Defense counsel]: Objection.

THE COURT: Do you want to keep doing this? Sustained."

¶ 21 Later during cross-examination, the defendant agreed that in May 2010, when the children visited his house, they slept in the living room and they remained asleep until after Kelly left for work. The defendant said that he never brought T.H. into his bedroom. The defendant also said that he visited the children at Katrina's house, but he never placed T.H. on his lap.

¶ 22 During recross-examination, the State posed the following questions:

"Q. When you were playful with your daughter, did you play with her with taking her hand and putting it on your penis and–

[Defense counsel]: Objection.

THE COURT: Finish the question.

BY [counsel for the State]:

Q. Taking her hand, placing it on your penis and making her masturbate you, did you consider that to be playful?

[Defense counsel]: Objection.

THE COURT: Overruled.

THE WITNESS: Never.

BY [counsel for the State]:

Q. So when you went up [T.H.'s] shirt and you touched her breast and pinched her nipple, did you consider that to be playful?

[Defense counsel]: Objection, your Honor, that's not a question.

THE COURT: Rephrase it.

BY [counsel for the State]

Q. Would you consider going up your daughter's chest, pinching her nipple to be playful?

A. No, I don't.

Q. Do you consider placing your daughter on your lap and rubbing your hard penis against her butt to be playful?

A. No, I don't.

Q. Then why did you do those things to her?

THE COURT: Sustained."

At the conclusion of this exchange, the defense rested, and the case proceeded to closing arguments. Part of the defendant's closing argument focused on the fact that T.H.'s sexual abuse allegations came forth in December 2011, 19 months after the incident. Defense counsel

questioned why T.H. and T.M. waited so long before notifying an adult or authority figure about the sexual abuse.

¶ 23 During its rebuttal argument, the State argued:

> "[Defense counsel] is correct. We do have to prove this case beyond a reasonable doubt; and, ladies and gentlemen, we accept that burden and we have overcome that burden.
>
> Beyond a reasonable doubt isn't that we have to prove this case 100 percent, no doubt, absolute. It's not true. Reasonable doubt is what you individually–
>
> [Defense counsel]: Judge, objection to defining reasonable doubt.
>
> THE COURT: Sustained.
>
> [Counsel for the State]: What you believe is reasonable–
>
> [Defense counsel]: Judge, objection.
>
> THE COURT: We are going to go back through this.
>
> Do you know what the definition of reasonable doubt is?
>
> [Counsel for the State]: There is no definition for reasonable doubt.
>
> THE COURT: Stop right there. You're telling them what it is. You're starting to define something which is undefinable.
>
> Sustained."

¶ 24 Immediately after the court sustained the defendant's objection, the State began discussing the evidence. The State noted:

> "Now the first witness that you heard from was [T.H.], and [T.H.] took that stand and she was unimpeached. What I mean by unimpeached, there was nothing brought forth to provide you, ladies and gentlemen of the jury, that there is any doubt that she was not telling the truth."

¶ 25 Later during its rebuttal, the State argued that it was not unusual for a victim to wait 18 or 19 months before making an outcry. The defendant objected to the argument as it contained facts not in evidence. The trial court overruled the defendant's objection.

¶ 26 The jury found the defendant guilty of the charged offenses, and the case proceeded to a sentencing hearing. The court found no factors in mitigation, but noted the following factors in aggravation: the uncertainty of the future harm caused by the defendant's conduct, the defendant's criminal record, a sentence was necessary to deter others from committing the same offense, and the defendant held a position of trust. The court imposed consecutive sentences of 22 years' imprisonment on each of the three charges for a total sentence of 66 years' imprisonment. The defendant appeals.

¶ 27 ANALYSIS

¶ 28 The defendant argues that he was deprived of his right to a fair trial due to the cumulative effect of the State's misconduct. The defendant argues that the State: (1) asked improper and inflammatory questions of the defendant on cross-examination and recross-examination; (2) started to define reasonable doubt during its rebuttal argument; (3) attempted to shift the burden of proof to the defendant; and (4) argued facts not in evidence.

¶ 29 Our analysis is derived from our supreme court's decision in *People v. Blue*, 189 Ill. 2d 99 (2000). In *Blue*, our supreme court individually reviewed each of the defendant's multiple contentions of error. *Id.* at 119-120. The supreme court found that some of the defendant's issues

amounted to error. *Id.* at 120. Ultimately, the supreme court concluded that the combination of the errors "may have coerced the jury into returning a verdict more likely grounded in sympathy than on a dispassionate evaluation of the facts." *Id.* at 120.

¶ 30 We find that the *Blue* structure is applicable to the present case because the defendant raises four contentions of error and argues that these errors, together, constitute reversible cumulative error. As the supreme court held in *Blue*, multiple errors that do not individually warrant reversal may require corrective action if the errors, together, create a pervasive pattern of unfair prejudice that deprives the defendant of his right to a fair trial. *Id.* at 138. A new trial is required where we conclude that the defendant did not receive a fair trial. *Id.* at 139. We begin by examining each alleged error individually.

¶ 31 A. Contentions of Error

¶ 32 1. Examination of the Defendant

¶ 33 First, the defendant argues the State committed prosecutorial misconduct when it conducted an improper cross-examination and recross-examination of the defendant. Specifically, on cross-examination, the State asked the defendant if T.H. was lying and repeated the question after the court had sustained the defendant's objection. The defendant also argues that, on recross-examination, the State posed several inflammatory questions including whether the defendant thought that touching T.H.'s breast, making T.H. touch his penis, and placing T.H. on his lap and rubbing his penis on T.H.'s buttocks was "playful." This line of questioning concluded with the accusatory question of why the defendant committed these acts.

¶ 34 Generally, it is improper for the prosecution to ask a defendant's opinion on the veracity of another witness' testimony. *People v. Turner*, 128 Ill. 2d 540, 558 (1989). Such questions (1) invade the province of the jury; and (2) subject the defendant to ridicule. *People v. Hainline*, 77

Ill. App. 3d 30, 33 (1979). Here, the State asked the defendant three times if he thought the victim was lying. In its appellee's brief, the State recognizes that "this form of cross-examination is widely condemned as improperly asking defendant to proffer his opinion on the veracity of other witnesses." Indeed, the courts of this State have repeatedly condemned the practice of asking a defendant to comment on the veracity of a prosecution witness. See *People v. Young*, 347 Ill. App. 3d 909, 926 (2004) (collecting cases). While we acknowledge that the trial court sustained all three of the defendant's objections, we find the curative effect of the court's sustentions was limited by the State's repeated questions that asked the defendant to comment on T.H.'s credibility. See *People v. Williams*, 333 Ill. App. 3d 204, 213 (2002) (noting that it is improper for a prosecutor to persist in an improper argument after receiving an adverse ruling). Stated another way, the State's persistence eliminated the salutary effect of the court's ruling. *Id.* This portion of the State's cross-examination was improper.

¶ 35 In addition to the above-discussed questions, on recross-examination, the State repeatedly questioned the defendant if various acts of sexual misconduct were considered "playful," and it asked "[t]hen why did you do those things to [T.H.]?" These questions were phrased in a way that implied or presumed the defendant's guilt of the charged offenses. Each of the successive questions were premised on the fact that the defendant had some familiarity with conduct that fit within the description of the charged offenses. We acknowledge that the trial court sustained the defendant's objections. However, like the analysis above (*supra* ¶34), we hold the curative effect was limited by the State's persistent questions. This portion of the State's recross-examination was improper.

¶ 36 2. Reasonable Doubt

¶ 37 Second, the defendant argues that the State impermissibly attempted to define reasonable doubt during its rebuttal argument. Our supreme court has "long and consistently held that neither the trial court nor counsel should define reasonable doubt for the jury." *People v. Downs*, 2015 IL 117934, ¶ 19 (collecting cases). "Reasonable doubt" is a self-defining term that requires no further definition. *Id.* However, the State may discuss reasonable doubt, suggest whether the evidence presented supports reasonable doubt or argue that the State does not have to prove the defendant's guilt beyond any doubt, that the doubt must be a reasonable one. *Moody*, 2016 IL App (1st) 130071, ¶ 61.

¶ 38 Here, the State started to define reasonable doubt in its rebuttal argument stating "[b]eyond a reasonable doubt isn't that we have to prove this case 100 percent, no doubt, absolute. It's not true. Reasonable doubt is what you individually–." Following defense counsel's objection, which the court sustained, the State began to argue "[w]hat you believe is reasonable–." Defense counsel objected again, and the State responded "[t]here is no definition for reasonable doubt." The court, clearly frustrated, said: "[s]top right there. You're telling them what it is. You're starting to define something which is undefinable." Generally, the court's response would be sufficient to cure this error. See *id.* ¶ 60. However, in this case, the State's repeated attempts to define reasonable doubt was part of a rebuttal argument that further attempted to shift the burden of proof. See *infra* ¶ 42-43. These impermissible arguments were improper.

¶ 39 3. Burden of Proof

¶ 40 After the State attempted to define reasonable doubt, it posited that T.H. was unimpeached and the defense did not otherwise provide evidence to disprove T.H. Specifically, the State argued "there was nothing brought forth to provide *** that there is any doubt that

[T.H.] was not telling the truth." This argument erroneously implies that the defendant bore the burden of disproving the State's evidence. The concepts that a criminal defendant is presumed innocent and is under no obligation to produce any evidence are fundamental to our legal system. See *People v. Zehr*, 103 Ill. 2d 472, 477 (1984) (holding that it is essential to the qualifications of the jurors in a criminal case that they know that a defendant is presumed innocent and he is not required to offer any evidence on his own behalf). Although the above statement formed a small part of the State's rebuttal, we emphasize that it was made immediately after the State had impermissibly attempted to define reasonable doubt. Viewing this argument in context, we find that it was improper.

¶ 41 4. Facts Not in Evidence

¶ 42 Finally, the defendant argues that the State argued facts that were not in evidence when it contended that it was not unusual for a victim to of sexual abuse to wait 19 months before reporting the sexual abuse. While the defendant did correctly point out the fact that T.H. waited 19 months before reporting the alleged abuse, the State never presented any testimony, lay or expert, establishing that victims commonly wait several months before reporting sexual abuse. Stated another way, the defendant's argument referenced a specific fact whereas the State's argument involved a general opinion that was not based on any evidence presented at trial. It is improper for a party to argue assumptions or facts that are not based upon the evidence presented at trial. *People v. Kliner*, 185 Ill. 2d 81, 151 (1998). The State's unsupported comments were improper.

¶ 43 B. Cumulative Effect of the Errors

¶ 44 We find that the defendant has raised four valid errors. Independently, each of these errors is insufficient to warrant reversal. However, together, these errors created a pervasive

pattern of unfair prejudice that deprived the defendant of his right to a fair trial. See *Blue*, 189 Ill. 2d at 138. In making this finding, we emphasize that no physical evidence was presented with regard to the charged conduct, and therefore, the case ultimately boiled down to credibility.

¶ 45 Accordingly, we reverse the defendant's convictions and remand the cause for a new trial. In reaching this conclusion, we note that some of the defendant's arguments were not properly preserved for appellate review. However, because we found that the arguments constituted error and were part of a pervasive pattern of unfair prejudice to the defendant's case, which deprived the defendant of his fundamental right to a fair trial, we need not apply the plain error test. See *id.* at 138 (same test is employed in second-prong plain error review and cumulative error review to determine if a defendant's right to a fair trial has been violated).

¶ 46 CONCLUSION

¶ 47 The judgment of the circuit court of Will County is reversed and remanded for a new trial.[2]

¶ 48 Reversed and remanded.

¶ 49 JUSTICE SCHMIDT, dissenting.

¶ 50 I agree with the majority's conclusion that the State committed prosecutorial misconduct when, on cross-examination, the prosecutor continuously asked defendant if T.H. was lying. As the majority acknowledges however, this is not an independently reversible error. *Supra* ¶ 44. Because I disagree that the remaining "errors" were errors at all, I respectfully dissent.

[2] The defendant also argues that his sentence was the result of an abuse of discretion. However, we need not address this issue, as our resolution of the first issue has rendered it moot.

¶ 51 First, I see no problem with the State's line of questioning concerning whether defendant considered various acts of sexual misconduct playful. These questions were directly related to defendant's testimony that his relationship with T.H. was playful and that he did not think any of his conduct toward her could be construed as sexually inappropriate. While I do agree that it was clearly wrong for the prosecutor to then ask defendant "[t]hen why did you do those things to [T.H.]?", the trial court promptly cured this error when it sustained defense counsel's objection. See *People v. Johnson*, 208 Ill. 2d 53, 116 (2003). Similarly, the court cured whatever error or prejudice may have arisen from the prosecutor's failed attempt to define reasonable doubt when it sustained defense counsel's objections and told the prosecutor to "[s]top right there."

¶ 52 I also find no error in the State's comment that "there was nothing brought forth to provide *** that there is any doubt that [T.H.] was not telling the truth." Setting aside the fact that the State's comment was true, it is not improper for a prosecutor to comment on the uncontradicted nature of her evidence. *People v. Skorusa*, 55 Ill. 2d 577, 584 (1973); see also *People v. Banks*, 237 Ill. 2d 154, 185 (2010) (distinguishing between situations "where a prosecutor permissibly argues that a jury would have to believe the State's witnesses were lying in order *to believe* the defendant's version of events and where a prosecutor improperly argues that a jury would have to believe the State's witnesses were lying in order *to acquit* defendant." (Emphasis in original.)).

¶ 53 Last, I disagree with the majority's finding that defendant's closing argument referenced a specific fact (that T.H. waited 19 months before reporting the sexual abuse) while the State's closing argument contained an opinion that was not based on any evidence presented at trial (that 19 months is not an unusual amount of time for sexual abuse victims to come forward).

¶ 54 In support of defendant's theory that T.H. and T.M. were "making up a story," defense counsel repeatedly insinuated that 19 months was an unusual amount of time for victims of sexual abuse to wait before coming forward with their allegations. Specifically, he stated: "that's 19 months later. Why did they wait so long? *** Nineteen months, ladies and gentlemen, that's a long time. What is going on? They kept that silent for 19 months."

¶ 55 Prosecutors are allowed to respond to comments that, like these, clearly invite a response. *People v. Hall*, 194 Ill. 2d 305, 346 (2000); see also *People v. Hudson*, 157 Ill. 2d 401, 445 (1993) ("[W]hen defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial."). Here, the State chose to respond by urging the jurors to use their experiences and commonsense to disregard the emphasis defense counsel placed on the nature of the timeline. Viewed in context of the closing arguments as a whole, I do not believe this was improper. See *People v. Perry*, 224 Ill. 2d 312, 347 (2007) ("Reviewing courts will consider the closing argument as a whole, rather than focusing on selected phrases or remarks.").

¶ 56 For these reasons, I would affirm defendant's convictions.