2016 IL App (4th) 140549-U

NO. 4-14-0549

FILED
November 7, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Logan County
ANTHONY P. RAHN,	)	No. 11CF153
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas W. Funk,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction is reversed where the trial court erred in failing to properly admonish the jury during *voir dire* and the evidence was closely balanced.

¶ 2 In March 2014, a jury convicted defendant, Anthony P. Rahn, of aggravated criminal sexual abuse (720 ILCS 12-16(b) (West 2010)). In June 2014, the trial court sentenced defendant to three years' imprisonment.

¶ 3 Defendant appeals, arguing the trial court erred (1) by failing to ask any of the jurors during *voir dire* whether they understood the principles stated in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), and (2) in failing to *sua sponte* give the jury a limiting instruction regarding other uncharged conduct. We reverse and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 On October 31, 2011, the State charged defendant, by indictment, with aggravated criminal sexual abuse (720 ILCS 12-16(b) (West 2010)). Specifically, the indictment alleged defendant committed an act of sexual conduct when he fondled the chest of his then 10-year-old daughter, S.R. (born May 11, 2000), for the purpose of his sexual arousal.

¶ 6 A. Section 115-10 Hearing

¶ 7 On September 12, 2012, the State filed a motion under section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2012)) seeking to admit S.R.'s out-of-court statements to her mother, a school counselor, and a forensic interviewer with the Sangamon County Child Advocacy Center (CAC). The CAC interview was videotaped. The State also sought to introduce that video during trial. Following a March 28, 2013, hearing on the State's motion, the trial court found those statements and the video were admissible.

¶ 8 B. *Voir Dire*

¶ 9 During *voir dire*, the trial court asked the prospective jurors, who were eventually selected, whether they accepted the four *Zehr* principles (see *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984)). However, the parties agree the court did not ask them if they also understood those principles.

¶ 10 C. Trial Testimony

¶ 11 1. *State's Case*

¶ 12 Elizabeth Rahn, S.R.'s mother, testified she and defendant had triplets, S.R. and her brothers, B.R. and M.R. Elizabeth and defendant had been divorced since October 2002. It was a contentious divorce. S.R. lived with Elizabeth and defendant had court-ordered visitation rights. Defendant was visiting with S.R. and B.R. on the day of the incident. Elizabeth testified

when S.R. returned from the visit, she told Elizabeth defendant had inappropriately touched her. Elizabeth could not deal with what S.R. was telling her and told S.R. she would find someone who could help her. The next day, Elizabeth called her school and asked to have S.R. speak with a school counselor.

¶ 13 On cross-examination, Elizabeth agreed the children were well aware she did not like their father. Defendant enjoyed unrestricted visitation with the children prior to the complaint being filed. At that point, visits were suspended for approximately a month while the Department of Children and Family Services (DCFS) investigated the matter. However, the visits resumed after the investigation concluded. Elizabeth testified neither she, DCFS, nor the police intervened to stop the visitations once they resumed. Visitations were ultimately halted after the trial court issued a no-contact order and defendant was charged with the instant offense.

¶ 14 The following colloquy took place between defendant's trial counsel and Elizabeth on cross-examination:

> "Q. Your daughter and your son *** came home from that Thursday visit; is that right?
>
> A. Yes.
>
> Q. And it's at that point—at some point where your daughter then revealed to you that [defendant], her dad, had touched her in some fashion; is that correct?
>
> A. Yes.
>
> Q. In fact, [S.R.] had come into the bedroom, your bedroom; do you recall that?

A. Yes.

Q. And said that—and made this revelation [defendant] had touched her in some manner; is that correct?

A. Yes.

Q. And she told you that she had been sitting on a chair with [defendant], right?

A. Yes.

Q. She told you [defendant] had put his hand across her chest? Isn't that what she said?

A. Yes.

Q. She did not tell you [defendant] had been rubbing her chest? She didn't say that to you, did she?

A. No.

Q. She didn't say [defendant] had rubbed her chest underneath her clothes, did she?

A. No.

Q. She said her clothes were on, right?

A. It wasn't specified.

Q. And that was the extent of it. She said, [defendant] put his hand across the chest and that was it, right?

A. Yes.

Q. No other mention of anything else; isn't that correct?

A. Yes.

Q. But yet that conversation was about 10- to 15-minutes long, was it not?

A. About that.

Q. And during that 10- to 15-minute conversation that was the only thing that she told you about that particular incident?

A. Yes."

¶ 15 Teresa Aeilts, S.R.'s school counselor, testified she met with S.R., who told her she was upset with her visits at defendant's house. Aeilts testified S.R. told her defendant "would ask her inappropriate questions or about her body and touch her in different ways that made her uncomfortable." According to Aeilts, S.R. reported defendant would ask "about her body growing and changing, like her breasts and things like that." Aeilts testified S.R. stated defendant would rub across her chest and see if her breasts had grown. When asked how many times S.R. said that took place, Aeilts testified S.R. stated "two or three times" and that it took place on the outside of her clothes. As a mandated reporter, Aeilts referred the matter to DCFS.

¶ 16 Paul Adams, a Lincoln police detective, testified he interviewed defendant in conjunction with the DCFS investigation. According to Adams:

"We were talking about essentially his relationship with his daughter, about her blossoming, and coming to an adult. And he stated that at one point he sat her down and essentially went over the basics with her about her development, including that she would start to essentially bleed down there, and that she would be forming

> breasts. He said his daughter was a little bit squeamish about that and didn't want to talk about it. And he left it alone at that. He also talked to her at one point watching a Disney program of which they were sitting watching the Disney program and he pointed out that one of the girls had started to blossom in the Disney program, and she didn't want to talk about it so he left it at that."

¶ 17 On cross-examination, Adams testified defendant told him he had given all three children a lecture on privacy because their bodies were going to start changing. Defendant told Adams it was around this time S.R. asked defendant when she was going to start growing breasts.

¶ 18 Tracy Pearson, a forensic interviewer with CAC, testified she interviewed S.R. on February 22, 2011. That interview was recorded and admitted into evidence pursuant to the trial court's ruling following the section 115-10 hearing. The video was then played for the jury.

¶ 19 In the video, S.R. stated defendant had "been touching areas he shouldn't" on her. When asked specifically where she was touched, S.R. indicated defendant had been touching her chest area. When she told defendant to stop, defendant told her to "calm down," "it's ok, there's nothing there," and he would stop "when she gets older." S.R. stated defendant would hug her around her stomach and move his hands up and rub them across her chest over her clothes. Defendant did not touch her under her clothes. Usually it took place while they were sitting side by side together in the recliner. S.R. stated it also happened when she was younger but stopped and had not happened again until recently. S.R. also stated it recently occurred two or three times and could have happened more but for the fact she moved away when defendant did it.

She said it would occur during defendant's visits with her and her brother, B.R. S.R. stated B.R. did not know what was going on despite being in the room with them when the touching occurred.

¶ 20 S.R. also stated defendant talked to her about puberty in terms of her voice changing and hair growing "down below," which made her uncomfortable. S.R. stated she was more comfortable talking about the issue with her mother. S.R. talked about a time when she had just gotten out of the shower and was wearing a towel. Defendant was sitting in the recliner and he asked whether she had grown any hair down below. S.R. stated she did not answer and continued on to the bedroom to get dressed. S.R. stated defendant's question made her uncomfortable.

¶ 21 S.R. took the stand and testified during trial. S.R., then 13 years old, testified her parents had been divorced for as long as she could remember. Defendant lived with his mother in a trailer at a trailer park. The living room contained a couch, a recliner, and a television. Defendant's mother recently had knee surgery and was confined to a hospital bed, which was also located in the living room. S.R. testified the incident in question took place on January 31, 2011, while she was sitting with her father on the recliner. Specifically, S.R. testified about the incident as follows:

> "Q. During this visit, do you remember your dad touching you in an unusual way? Is that a yes?
>
> A. Yes.
>
> Q. Where were you when this touching occurred?
>
> A. I was in the reclining chair on his lap.

Q. Was there anyone else until the room?

A. My grandma was, but I'm pretty sure she was asleep.

Q. And was your brother in the room?

A. He was on the couch. Yes.

Q. And how did you get onto your father's lap?

A. He told me to come sit with him and it ended up with me sitting on his lap, about halfway on his lap.

Q. And were you facing your father, chest to chest, or facing [a]way, the same direction as your dad?

***

A. I was facing away from him.

Q. Okay. So your back was to his chest?

A. Yes.

Q. And what do you remember about the touching? What part of his body did he use to touch you?

A. His hand.

Q. Do you remember if it was one hand or two hands?

A. One hand.

Q. Before the touching started, where was his hand?

A. On my stomach. About right there.

Q. Okay. So you're sitting on his lap—

A. M-hm.

Q. —in the recliner, his hands are around your waist? And what does he start to do with his hands?

A. Slowly slide up.

Q. And you said it was one hand?

A. M-hm.

Q. You said slowly—

A. M-hm.

Q. —rise up? Where—did his hand ever stop at any particular area on your body?

A. I don't believe so.

Q. Okay. He just slid it up?

A. M-hm.

Q. Where he did hand stop sliding up?

A. About right here.

Q. Your shoulder area?

A. M-hm."

S.R. testified defendant's mother did not see defendant touch her because she was asleep in the hospital bed at the time.

¶ 22 S.R. also testified regarding comments defendant made to her at around the same time as the incident took place. S.R. testified about a time when she had just gotten out of the shower. She was wearing a towel and was on her way to get dressed when defendant stopped

her and asked if she "was growing any hair down there, if it was itchy or anything." S.R. testified she "really didn't answer" him.

¶ 23 S.R. testified about another occasion when she and defendant were watching the Disney Channel and he remarked to her one of the girls "was starting to blossom." S.R. testified when she explained she did not understand what he meant because she was "really young" at the time, defendant "motioned around [her] chest." At the time, S.R. was seated on the recliner in the same position on defendant's lap as when the other touching took place.

¶ 24 2. *Defendant's Case*

¶ 25 Defendant testified he and Elizabeth had a bad divorce and she had "been coming at [him] left and right with charges on everything" from the point they were separated. Elizabeth was awarded custody and defendant received visitation rights. Defendant lived with his mother in her mobile home. Defendant described the mobile home as a three-bedroom trailer with two bathrooms. At the time of the incident, defendant's mother was recovering from knee surgery and was confined to a hospital bed, which was located in the family room. According to defendant, "[t]hat room had a rocker. The TV was in the corner and it had a couch. And then the back corner originally was the recliner, which it got moved to the center of the room. And her hospital bed was put in that corner." Defendant estimated the hospital bed was located approximately four or five feet from the recliner. Pictures were admitted into evidence showing the layout of the room and the location of the bed relative to the recliner. The recliner was referred to as "a big-man's chair" because "it is wider than the average recliner."

¶ 26 During visits, defendant would sit in the recliner with the children. When asked if it was all the children, defendant testified, "[t]he boys were kind of outgrowing that part" and

"[i]t was mainly [S.R.] at that time." Defendant testified, when he sat with S.R., he "would scoot all the way to one side and there would be plenty of room for her to be right along my other side." When asked what activities they would engage in while in the recliner, defendant testified he would "[m]ainly just put my arm around her and sit and watch whatever show we were watching."

¶ 27 Defendant testified approximately a year prior to the allegations, he felt it necessary to discuss privacy issues with the children. S.R. was complaining about one of the boys "barging into her bedroom at her mom's house when she was trying to get dressed for the day." Defendant told them "the reason for privacy is that they were all going to go through changes in the near future." Defendant testified around the same time, S.R. approached him and asked about her development, including when her breasts were going to grow. Defendant testified he responded by telling her "there was no exact answer" and "that every girl is different." Approximately four or five months prior to the allegations, defendant had a specific conversation with S.R. about further physical changes.

¶ 28 With regard to S.R. getting her period for the first time, defendant testified he was trying to get both S.R. and himself ready for it. Defendant did not want her to be "terribly afraid, scared, [or] screaming." Defendant "gave her the bare basics that three or four days every month a small amount of blood would be coming out, the process of a woman." Defendant characterized S.R. as "very squeamish" during the conversation. Defendant maintained he used the Disney program to further his discussion with S.R. about her body. With regard to that exchange, defendant testified the show was "one that we had been watching for quite a while, and the youngest girl on the show was starting to develop, and I pointed out to her that even she

started to blossom. And once again she got squeamish on me and didn't want to talk anymore." The following colloquy then took place:

"Q. Were you trying to be sexual in nature with your daughter, somehow trying to get an arousal out of talking about these issues with your daughter?

A. Not at all.

Q. When you sat on that chair, whether it be the week of January 31st or anytime with your daughter, do you believe that you touched her in an inappropriate fashion?

A. No.

Q. Would there be times when you would have rubbed your daughter's belly or shoulder area for example?

A. Many times.

Q. Why would you do that?

A. Just playing with my daughter.

Q. Would there be times that you would have—and, again, at this point was she developed at all in the chest area?

A. Not at all.

Q. We're talking about a 10-year-old girl, correct?

A. Yes, sir.

Q. Did you ever focus in and rub on her what now would be her—not trying to be graphic, her breast area, nipple area, or

anything like that?

A. No.

Q. Did you ever rub her chest and say your boobs are getting better or bigger or words to that effect?

A. Not at all.

Q. Could there have been a time when you had your arms or arm around your daughter that you may have inadvertently went a little too high on her chest area? Could that have happened, I suppose?

A. Could have happened I guess.

Q. Do you specifically recall that?

A. No."

¶ 29 Defendant's counsel also asked him whether, on the occasion in question or at any other time, he ever touched S.R.'s chest inappropriately or for the purpose of sexual arousal. Defendant responded by stating, "Never." Counsel then asked defendant if he ever engaged in conversations with S.R. about puberty and her body for the purpose of sexual arousal. Defendant again responded, "Never."

¶ 30 Defendant testified he was furious when DCFS contacted him and visits were suspended. Defendant had no visits from mid-February to March 18, the day he was interviewed by police. Defendant got his children back "that very afternoon" he talked with the police and enjoyed "completely unrestricted" visits with them after that, from March 18 to November 1. Defendant was arrested on November 1 for the charge in this case.

¶ 31 On cross-examination, the State asked whether defendant asked S.R.'s mother if he could discuss puberty-related topics with S.R. Defendant replied he was S.R.'s father and did not need Elizabeth's permission. The State also asked about the sleeping arrangements in the mobile home. It is a three-bedroom trailer. Defendant's mother has the master bedroom and defendant has the second bedroom. The third bedroom is used for storage and does not contain a bed. A set of bunk beds are in defendant's room. The bottom bunk is twin sized and the upper bunk is slightly smaller. One of the children would sleep with defendant on the larger bottom bunk and the other would sleep in the upper bunk. The children would alternate between the bunks from night to night.

¶ 32 On redirect, defendant testified, other than the fact the bottom bunk did not get any of the air from the ceiling fan, the children never complained about the sleeping arrangements.

¶ 33 Ellen Keyes, defendant's mother, testified defendant had lived with her since his 2001 separation from Elizabeth. Ellen testified she had a second knee replacement surgery in January 2011. The doctor told her not to place any weight on it for six weeks. As a result, she was bedridden for six weeks. According to Ellen, the hospital would not let her go home "unless they ordered a bed be placed there." The hospital bed was placed in the family room. Ellen was just home for a few days when the complained of conduct was alleged to have taken place. Defendant was playing and interacting with S.R. and B.R. as usual. They played in the snow, made cupcakes, and watched television together. Ellen testified it was common to see S.R. sitting in the recliner next to defendant. Ellen estimated the recliner was four to six feet away from her hospital bed. She had a clear view from her bed to the recliner. The recliner faced the television and Ellen had a clear view of defendant and S.R. when they were seated in the

recliner. Ellen denied ever seeing defendant doing anything inappropriate with S.R. Ellen also denied ever seeing defendant rubbing S.R.'s chest or hearing him make any comments about her breast size. Ellen admitted taking some pain medication, which she testified could have caused her to doze off during the day.

¶ 34 Thereafter, the jury found defendant guilty of aggravated criminal sexual assault.

¶ 35 On April 7, 2014, defendant filed a posttrial motion for a new trial, arguing, *inter alia*, the State failed to prove him guilty beyond a reasonable doubt.

¶ 36 On June 13, 2014, the trial court denied defendant's posttrial motion and sentenced him to a 30-month prison term. However, later that same day, the State informed the court the mandatory minimum sentence was three years. As a result, the court imposed a 36-month prison sentence. According to the Illinois Department of Corrections' website, defendant's projected discharge date is "12/08/2016" (https://www.illinois.gov/IDOC/OFFENDER/Pages/InmateSearch.aspx) (last visited October 14, 2016)).

¶ 37 This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 On appeal, defendant argues the trial court erred (1) by failing to ask any of the jurors during *voir dire* whether they understood the *Zehr* principles, and (2) in failing to *sua sponte* give the jury a limiting instruction regarding other uncharged conduct.

¶ 40 Defendant argues the trial court erred by failing to ask any of the jurors who were eventually seated whether they understood the *Zehr* principles.

¶ 41 The State argues defendant has forfeited review of the issue because he did not object at trial or include the issue in his posttrial motion. Defendant acknowledges he forfeited

the issue but urges our review under the plain-error doctrine.

¶ 42 The plain-error doctrine provides a narrow exception to the general rule of forfeiture. *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009). It allows a reviewing court to reach an unpreserved error in two circumstances: (1) where the evidence is closely balanced, regardless of the nature of the error; or (2) where the error is so serious that the defendant was denied a substantial right and a fair trial, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467, 475 (2005). Prior to determining whether plain error occurred, however, we first determine whether error occurred at all. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009).

¶ 43 In *Zehr*, 103 Ill. 2d at 477, 469 N.E.2d at 1064, our supreme court held essential to the qualification of a jury in a criminal case is each juror's knowledge of the following four principles: (1) a defendant is presumed innocent, (2) he is not required to present evidence on his own behalf, (3) the State must prove him guilty beyond a reasonable doubt, and (4) his decision not to testify may not be held against him. The subject matter of these principles should be addressed in the course of *voir dire* as a juror's prejudice as to any of them would not be automatically cured with closing remarks by counsel or jury instructions from the trial court. *Zehr*, 103 Ill. 2d at 477, 469 N.E.2d at 1064.

¶ 44 In 1997, our supreme court adopted Rule 431(b) to embrace the *voir dire* principles established in *Zehr*. Ill. S. Ct. R. 431(b) (eff. May 1, 1997). The original rule provided, "[i]f requested by the defendant, the court *shall* ask each potential juror, individually or in a group, whether that juror understands and accepts" the four *Zehr* principles. (Emphasis added.) Ill. S. Ct. R. 431(b) (eff. May 1, 1997). At that time, the trial court had no obligation to *sua sponte*

question jurors as to the *Zehr* principles. *People v. Graham*, 393 Ill. App. 3d 268, 272, 913 N.E.2d 99, 103 (2009), *appeal denied and judgment vacated, People v. Graham*, 239 Ill. 2d 565 (2011) (directing the First District to vacate its order and reconsider in light of *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010)).

¶ 45 However, effective May 1, 2007, the supreme court amended the language to require trial courts to question jurors on the Rule 431(b) principles without a defendant's prompting, providing:

> "The court 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 behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 46 In this case, the State concedes the trial court erred by not asking the potential jurors whether they understood the *Zehr* principles. We accept the State's concession. Our review of the record reveals although the trial court asked the prospective jurors whether they had any disagreement, problem, issue, or difficulty with, or any opposition to, the Rule 431(b) principles, it did not ask them if they understood those principles. The supreme court has made

it clear such a failure is error. See *People v. Belknap*, 2014 IL 117094, ¶ 46, 23 N.E.3d 325 (trial court must ask prospective jurors *both* whether they understand and accept the principles set forth in Rule 431(b) and the court's failure to ask whether the jurors understood the principles constitutes error alone); *Thompson*, 238 Ill. 2d at 607, 939 N.E.2d at 410 (trial court must ask each potential juror whether he understands and accepts each of the enumerated principles); *People v. Wilmington*, 2013 IL 112938, ¶ 32, 983 N.E.2d 1015 (trial court's failure to ask jurors if they both understood and accepted the enumerated principles of Rule 431(b) was "error in and of itself").

¶ 47 Having found an error occurred, we next examine whether that error rises to the level of plain error. Because defendant only argues plain error under the closely-balanced-evidence prong of the plain error doctrine, we limit our analysis to that prong of the test. See *Herron*, 215 Ill. 2d at 178, 830 N.E.2d at 475. Indeed, we note Rule 431(b) errors are no longer recognized under the second prong of plain-error analysis. See *Belknap*, 2014 IL 117094, ¶ 47, 23 N.E.3d 325; *Thompson*, 238 Ill. 2d at 610-11, 939 N.E.2d at 411-12.

¶ 48 The State maintains the error does not rise to the level of plain error as the evidence at trial was not closely balanced. Defendant argues the evidence was closely balanced where, *inter alia*, the evidence consisted only of S.R.'s allegations and defendant's denial of those allegations.

¶ 49 Defendant was charged with aggravated criminal sexual abuse, a Class 2 felony (720 ILCS 12-16(b), (g) (West 2010)). An accused commits aggravated criminal sexual abuse when he commits an act of sexual conduct with a victim who is under 18 years of age and a family member. 720 ILCS 5/12-16(b) (West 2010) (now known as 720 ILCS 5/11-1.60(b) (West

2014)). " '[S]exual conduct' " involving a victim under the age of 13 years includes the touching or fondling of " 'any part of the body' " for the purpose of sexual gratification or arousal of the accused. *People v. Nibbio*, 180 Ill. App. 3d 513, 517, 536 N.E.2d 113, 116 (1989).

¶ 50 Whether evidence is closely balanced is a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable-doubt challenge. *People v. Piatkowski*, 225 Ill. 2d 551, 566, 870 N.E.2d 403, 411 (2007). The evidence will only be deemed closely balanced if the defendant can demonstrate, "but for the error, the outcome of the trial would likely be different." *People v. Sebby*, 2015 IL App (3d) 130214, ¶ 51, 32 N.E.3d 689. This criterion has been met in cases amounting to "credibility contests," where defense and prosecution witnesses give conflicting accounts of the incident and there is no extrinsic evidence to corroborate or contradict either version. See, *e.g.*, *People v. Naylor*, 229 Ill. 2d 584, 608-09, 893 N.E.2d 653, 668-69 (2008); *People v. Getter*, 2015 IL App (1st) 121307, ¶ 65, 26 N.E.3d 391; *People v. Miller*, 2013 IL App (1st) 110879, ¶¶ 56, 58, 993 N.E.2d 988. The defendant bears the burden of persuasion to demonstrate the evidence was closely balanced. *Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015.

¶ 51 We disagree with the State's argument the evidence in this case was overwhelming. To the contrary, a qualitative analysis of the State's evidence reveals the evidence was in fact closely balanced. This court has previously examined the closely-balanced-evidence concept as follows:

> "The State's evidence consisted almost entirely of [the victim's] statements. In his interview with [the police detective] and his trial testimony, [the] defendant outright denied [the victim's]

> accusations. Although the State presented four additional witnesses *** to testify about what defendant did to [the victim], those witnesses simply repeated what they heard from [the victim]. We hesitate to add weight to [the victim's] claims simply because they were repeated through the testimony of four other witnesses. Because neither [the victim's] statements nor [the] defendant's testimony were 'inherently incredible or severely self-contradictory' [citation], the evidence came down to a matter of credibility. Accordingly, we conclude that the evidence was closely balanced." *People v. Boling*, 2014 IL App (4th) 120634, ¶ 131, 8 N.E.3d 65.

¶ 52 As was the case in *Boling*, the State's evidence against defendant here consisted entirely of the victim's statements, which were repeated by the other witnesses. No eyewitness testimony from anyone observing the charged act was presented. Thus, the State's entire case relied on the credibility of witnesses. Although S.R. stated in her videotaped interview multiple instances of touching took place, during trial she testified about just one instance. Defendant's mother, who was in the room at the time of the alleged act, denied seeing defendant doing anything inappropriate with S.R. Further, while S.R. stated in the videotaped interview defendant touched her chest area, she did not specifically testify during direct examination defendant touched her chest. Instead, S.R. testified defendant slid his hand up to her shoulder area without stopping at any particular area on her body. S.R. testified defendant "motioned around" her chest while they were watching the Disney show. While the State's witnesses'

testimony was consistent with S.R.'s videotaped allegations defendant touched her chest, defendant's testimony to the contrary was also consistent with his previous statements to police.

¶ 53 Indeed, our review of the record reveals defendant's denials and corresponding explanations for his actions were reasonable and not contradictory. See *People v. Gray*, 406 Ill. App. 3d 466, 474, 941 N.E.2d 338, 345 (2010) (finding the evidence closely balanced because the case came down to the credibility of the conflicting witnesses' testimony, which was not inherently incredible or contradictory). For example, while defendant testified it was possible he could have inadvertently touched S.R.'s chest, he was adamant he never did so inappropriately or for the purpose of sexual arousal. Further, while defendant admitted talking to S.R. about hair growth and the Disney character's development, he testified he did so in the context of preparing her for puberty.

¶ 54 Although a jury could infer from the entirety of the evidence presented defendant touched S.R. for the purpose of sexual gratification, it could also reasonably find defendant's actions and intent were innocent. "The trier of fact is in the best position to judge the credibility of witnesses, the weight to be given to testimony, and the reasonable inferences to be drawn from such testimony." *People v. Hernandez*, 319 Ill. App. 3d 520, 532-33, 745 N.E.2d 673, 684 (2001) (citing *People v. Byron*, 164 Ill. 2d 279, 299, 647 N.E.2d 946, 955-56 (1995)). Whether S.R.'s accusations or defendant's explanations are more credible is a question for a properly instructed jury.

¶ 55 In sum, our commonsense, qualitative analysis of the evidence, viewed within the totality of the circumstances, leads us to find defendant met his burden of showing the evidence was so closely balanced the trial court's Rule 431(b) error threatened to tip the scales of justice

against the him. See *Herron*, 215 Ill. 2d at 193, 830 N.E.2d at 483 (when a defendant meets "the burden of persuasion and convinces a reviewing court that there was error and that the evidence was closely balanced, the case is not cloaked with a presumption of prejudice," but the error is instead "actually prejudicial" to the defendant). Accordingly, we are left with no choice but to reverse defendant's conviction. See *Herron*, 215 Ill. 2d at 193, 830 N.E.2d at 483 ("When there is error in a close case, we choose to err on the side of fairness, so as not to convict an innocent person.").

¶ 56 Although we conclude the evidence is closely balanced, our review of the record reveals the evidence was sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt. As such, there is no double jeopardy impediment to a new trial. *People v. Ward*, 2011 IL 108690, ¶ 50, 952 N.E.2d 601. In so finding, however, we reach no conclusion as to defendant's guilt that would be binding on retrial. *Naylor*, 229 Ill. 2d at 611, 893 N.E.2d at 670. Because we are reversing defendant's conviction, we need not address at this time his remaining contentions of error related to his first trial.

¶ 57 III. CONCLUSION

¶ 58 For the foregoing reasons, we reverse defendant's conviction and remand for further proceedings.

¶ 59 Reversed and remanded.