2017 IL App (1st) 143034-U
No. 1-14-3034

THIRD DIVISION
May 24, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12 CR 11625
	)	
ALBERTO ROSANO,	)	
	)	The Honorable
Defendant-Appellant.	)	Rosemary Higgins,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's convictions on two counts of predatory criminal sexual assault of a child were affirmed where the State presented sufficient evidence of sexual penetration between the defendant's penis and the victim's anus; the instructions as a whole made clear to the jury the sexual acts on which the charges were based; and the allegedly improper rebuttal arguments by the State did not contribute to the defendant's conviction.

¶ 2 Following a jury trial, the defendant, Alberto Rosano, was convicted of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)) and sentenced to consecutive sentences of 15 years' imprisonment on each count. On appeal, the

defendant argues that (1) the State failed to present evidence of his guilt beyond a reasonable doubt on count 1, (2) the trial court erred in instructing the jury when it failed to distinguish between the acts of penetration to be proved under each count, and (3) prosecutorial misconduct during closing arguments denied him a fair trial. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On June 25, 2012, the defendant was indicted on four counts of predatory criminal sexual assault of child (720 ILCS 5/12-14.1(a)(1)). Counts 1 and 3 alleged that between December 2006 and December 2008, the defendant knowingly committed an act of sexual penetration with A.C., who was under the age of 13 at the time, by making contact between his penis and her anus. Counts 2 and 4 alleged that within the same timeframe, the defendant knowingly committed an act of sexual penetration with A.C., who was under the age of 13 at the time, by making contact between his penis and her vagina. Counts 3 and 4 were *nolle prosequie'd* and the defendant was tried on only counts 1 and 2.

¶ 5 A.C. took the stand first at the defendant's trial and gave the following testimony. At the time of trial, she was 16 years old and lived in an apartment that she shared with her mother, older brother, and younger sister. When she first moved into that apartment at the age of four, the defendant, who was her mother's then-boyfriend and the biological father of A.C.'s younger sister, also lived in the apartment. A.C. treated the defendant like a father.

¶ 6 Between 2006 and 2008, when A.C. was between the ages of 9 and 11, A.C.'s mother worked in the evenings, so the defendant would care for A.C. after school until she went to bed. On some occasions while her mother was at work, the defendant would send A.C.'s siblings outside, leaving the defendant and A.C. alone together in the apartment. The defendant would then take A.C. to the bedroom the defendant shared with A.C.'s mother, where he would either

take off her clothes or tell her to take off her clothes. The defendant would also take off his clothes. A.C. would then lay on the bed on her stomach, with her legs apart and the defendant standing behind her. The defendant would then put his penis in her vagina and around her butt and move his penis back and forth. A.C. described this as painful. A.C. clarified that when the defendant would touch her butt with his penis, he would touch "the line" of her butt, and he would move his penis back and forth, which hurt A.C. While the defendant was doing this, he would be breathing hard. When asked if the defendant's penis would go inside of her "vagina part" and "butt part," A.C. responded yes. At the time of these incidents, the defendant's penis was hard.

¶ 7 After the defendant was done moving his penis back and forth, he would put his penis on A.C.'s back, and she would feel something on her back, which the defendant would then wipe off with a paper towel. The defendant then told her not to tell her mother. A.C. would put her clothes back on, go to her room, and cry. Over the two year span, this occurred four or five times. She did not tell her mother what happened because it was uncomfortable to talk about.

¶ 8 One Sunday in March 2012, when A.C. was in the eighth grade, the family was preparing to go do laundry. As the defendant was exiting the apartment, A.C.'s two dogs ran out of the apartment, and A.C. heard the defendant hit the dogs. This angered A.C., who then yelled at the defendant, after which A.C.'s mother came to speak to her. During their conversation, A.C. told her mother that the defendant had sexually abused her, but she did not go into detail about the abuse. A.C.'s mother called the defendant into the room and asked him if it was true. Initially, the defendant denied it and left the room. He then returned, admitted what happened, and said that he was sorry. He told A.C.'s mother that she could call the police if she wanted to. The defendant then left the house, but returned later that day or the next. Although he continued to

stay in the house, he did not share a room with A.C.'s mother, and A.C.'s mother did not allow the defendant to be alone with A.C. again.

¶ 9 On cross-examination, A.C. explained that while speaking with police in May 2012, she did not use words like penis and vagina. Instead, she referred to her private, her butt, and the defendant's private. A.C. understood that a girl's butt would have two cheeks, a line, and a hole. When she spoke to the interviewer, A.C. reported that the defendant's private would go in and out through the line of her butt; she never reported to the interviewer that it went in or touched the hole of her butt. A.C. also understood the reference to her private to be to her vagina and that it had two sides, a line, and a hole. When speaking with the interviewer, A.C. said that the defendant's penis went in the line of her vagina; she never reported to the interviewer that his penis went in or touched the hole of her vagina.

¶ 10 A.C. acknowledged that prior to speaking with the interviewer, she spoke with a counselor at her school and a police detective about the allegation that the defendant had sexually abused her but that she did not provide those individuals with any details regarding the abuse. With respect to the detective, A.C. explained that the reason that she did not go into detail with him is because she felt more comfortable speaking with the female interviewer. A.C. also acknowledged that in November 2013, she met with the prosecutor, the defendant's defense attorney, and an investigator for the defense, but that she declined to speak with them about any of the allegations against the defendant. In addition, although A.C.'s mother offered to take her to the doctor for a medical examination, A.C. refused.

¶ 11 A.C.'s mother, Gloria, testified next and gave the following testimony. Between December 2006 and December 2008, she lived in an apartment with the defendant and three of her children, including A.C. Although Gloria and the defendant were not officially married, she

referred to him as her husband, as they had lived together for a long time and shared a daughter, Yajaira. During that time, Gloria worked the second shift at a factory, during which time the defendant would watch the children.

¶ 12 On March 25, 2012, as the family was going to do laundry, the dogs ran out of the apartment. The defendant attempted to get the dogs. A.C. ran out and asked Gloria why she allowed the defendant to hit the dogs and told Gloria that the defendant had abused her. A.C. then returned to her room. When the defendant returned to the apartment, Gloria told him that A.C. told her that he had abused A.C. The defendant put his head down and stayed that way for awhile and then later told her that he had touched A.C. Gloria went to A.C.'s room and asked A.C. to tell her what happened with the defendant. A.C. just cried. The defendant came to the room and asked for forgiveness. He also told Gloria that she could call the police if she wanted and that he knew that he had to pay for what he had done.

¶ 13 Gloria did not contact the police "[b]ecause of Yajaira," but did take A.C. to speak with the police once a detective contacted Gloria about the allegations in May 2012.

¶ 14 Detective Jose Castaneda of the Chicago Police Department Special Investigations Unit gave the following testimony at trial. On May 29, 2012, he was assigned to investigate allegations of sexual abuse of A.C. The allegations had been reported to the Child Abuse Hotline, which then reported them to the Chicago Police Department. After speaking with the social worker who had made the initial report, Castaneda contacted Gloria to schedule a meeting with A.C. On May 31, 2012, A.C. came to the Child Advocacy Center where she spoke with Castaneda, who arranged a forensic interview of A.C. Because A.C. told Castaneda that she was not comfortable speaking with men, he arranged for a female interviewer. Castaneda observed

that interview, after which he spoke with A.C.'s brother Eduardo. The defendant was arrested later that evening.

¶ 15 Castaneda spoke with the defendant at the police station following the defendant's arrest. When Castaneda spoke with the defendant, he spoke in Spanish. The conversation between Castaneda and the defendant began at approximately 1:00 a.m. At the time, the defendant was not handcuffed, and Castaneda was dressed in plain clothes. Also present during the conversation was Castaneda's partner, Detective Mark Dimeo. Castaneda introduced himself to the defendant, explained that this was a criminal investigation, and gave the defendant his *Miranda* rights. The defendant indicated that he understood all of his rights and that he wished to cooperate with the investigation.

¶ 16 The defendant told Castaneda that on two occasions, when A.C. was approximately 11 or 12 years old, he abused A.C. These two instances occurred two to three months apart, happened at night, and took place in A.C.'s bedroom. During the first instance, the defendant entered A.C.'s bedroom where he found her lying on her back. The defendant turned her over and pulled down her pants to expose her buttocks. He then pulled his penis from his pants and placed it between A.C.'s buttcheeks. He held his penis to her buttcheeks with his hand, rubbing and masturbating himself until he ejaculated on A.C.'s back. He then used a paper towel to clean A.C.'s back. The second incident occurred in a similar fashion to the first, the only exception being that the defendant did not have to turn A.C. onto her stomach because she was already lying on her stomach when he entered the room. The defendant also told Castaneda that when he was confronted about the abuse by Gloria, he told Gloria that he had had sexual contact with A.C. The defendant also reported asking A.C. for forgiveness.

¶ 17 Castaneda denied making any threats or promises to the defendant to get him to make the above statements.

¶ 18 After conversing with the defendant, Castaneda contacted Assistant State's Attorney Rusch regarding the matter. Castaneda also contacted Officer Reyes with the Chicago Police Department to serve as a Spanish translator during Rusch's conversation with the defendant. Castaneda contacted Reyes because he wanted an independent translator, and Reyes had not been involved in the investigation prior to Castaneda requesting that she serve as translator.

¶ 19 Rusch took a typed statement from the defendant in which the defendant admitted to the allegations of abuse of A.C. In detailing the abuse, the defendant told Rusch essentially the same thing that he had told Castaneda earlier. After Rusch finished typing the statement, he, Reyes, and the defendant reviewed it and made any necessary corrections, including some made at the request of the defendant. After reviewing the statement, the defendant, Castaneda, Rusch, and Reyes all signed each of the pages.

¶ 20 Reyes' testimony corroborated Castaneda's account of the taking of the defendant's typed statement and established Reyes' fluency in Spanish.

¶ 21 Rusch testified that when he first met with the defendant, he gave the defendant his *Miranda* rights, which Reyes translated into Spanish. Through Reyes, the defendant indicated that he understood his rights and was willing to speak with Rusch. Rusch and the defendant then proceeded to have a conversation, after which Rusch asked if the defendant would be willing to put what the defendant said during that conversation into the form of a typed statement, and the defendant stated that he was so willing. After the written statement was prepared, Rusch went through the statement line by line with the defendant. Any corrections that were made were initialed by Rusch, the defendant, Castaneda, and Reyes. In addition, they all signed the bottom

of each page of the statement. According to Rusch, the defendant agreed to answer all of Rusch's questions voluntarily and that he did so of his own free will.

¶ 22 Following Rusch's testimony, the parties stipulated that the defendant was born on August 22, 1968.

¶ 23 The defendant's written statement was admitted into evidence. In it, Alberto stated that on two occasions when A.C. was somewhere between the ages of 9 and 12, he entered A.C.'s bedroom while she was sleeping, pulled down her pants and underwear, and placed his penis between A.C.'s butt cheeks. He then masturbated and ejaculated on A.C.'s back and cleaned the semen from her back using a paper towel.

¶ 24 In his case, the defendant first called Maria Pascarella, who testified as follows. On May 29, 2012, she was employed as a school social worker at an elementary school in the Chicago Public Schools. On that day, Pascarella received a phone call from a school social worker at a local high school, after which Pascarella met and spoke with A.C. in her office. Although she could not recall the details of her conversation with A.C., Pascarella recalled that A.C. told her that she had been sexually abused by her stepfather and that after A.C. left her office, she called the sexual abuse hotline. A few days later, she received a phone call from a detective, and she told him what A.C. had reported to her.

¶ 25 Maria Rosano, Ruben Nolasco, and Azucena Rosano, the defendant's sister, nephew, and niece, respectively, all testified that, between 2006 and 2008, they lived within walking distance of the defendant's apartment. During that time period, they saw the defendant and A.C. on at least a weekly basis for family gatherings. More often than not, these gatherings would occur at their home, as opposed to at the defendant's home. At no point during these gatherings did Maria, Ruben, or Azucena observe any inappropriate behavior between the defendant and A.C.,

nor did they observe A.C. avoid the defendant or behave in any way that aroused their suspicions.

¶ 26 Following deliberations, the jury found the defendant guilty of both count 1 and count 2.

¶ 27 Following an unsuccessful posttrial motion, the defendant was sentenced to 15 years' imprisonment on each count, with the sentences to run concurrently. The defendant filed a motion to reconsider the sentence, which was denied.

¶ 28 The defendant then filed this timely appeal.

¶ 29 ANALYSIS

¶ 30 On appeal, the defendant argues that (1) the State failed to present evidence of his guilt beyond a reasonable doubt on count 1, (2) the trial court erred in instructing the jury when it failed to distinguish between the acts of penetration to be proved under each count, and (3) prosecutorial misconduct during closing arguments denied him a fair trial. We address each of these contentions in turn.

¶ 31 Sufficiency of the Evidence

¶ 32 The defendant first argues that the State failed to prove him guilty beyond a reasonable doubt on count 1, because it failed to present sufficient evidence that his penis came in contact with A.C.'s anus. In a challenge to the sufficiency of the evidence, we will not reverse a criminal conviction unless the evidence "is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *People v. Moore*, 2015 IL App (1st) 140051, ¶ 19. The question we are charged with answering is whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. It is not our function to retry the defendant and we must remember that it is the trier of fact's province to

assess credibility and assign the appropriate weight to the testimony. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 18. All reasonable inferences are to be made in favor of the State, but where the record supports conflicting inferences, the resolution of the conflict is best left to the trier of fact. *People v. Jones*, 2014 IL App (3d) 121016, ¶ 19.

¶ 33 To prove the defendant guilty of predatory criminal sexual assault of a child, the State was required to prove that the defendant was 17 years old or older and that he committed an act of "sexual penetration" with a person who was under the age of 13 at the time the act was committed. 720 ILCS 5/12-14.1(a)(1). The term "sexual penetration" is defined in relevant part as "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person ***." 720 ILCS 5/12-12(f) (West 2006). As charged in the indictment, in count 1, the defendant was alleged to have committed the offense of predatory criminal sexual assault when he caused contact between his penis and A.C.'s anus.

¶ 34 The defendant contends that the State failed to prove beyond a reasonable doubt that there was actual contact made between the defendant's penis and A.C.'s anus. Rather, according to the defendant, the only evidence presented was that the defendant put his penis between A.C.'s butt cheeks and there was no evidence from which the jury could infer that the defendant's penis made contact with A.C.'s anus. We disagree.

¶ 35 Viewing the evidence and drawing all reasonable inferences in favor of the State, as we must, we conclude that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt of making contact with A.C.'s anus with his penis. With respect to count 1, A.C. testified that while she was lying on her stomach on the bed with her legs spread, the defendant would place his hard penis in the "line" of her butt and move it in and out and back and forth. This hurt A.C. When asked if the defendant's penis went inside her "butt part," A.C.

testified that it did. From this, we find it more than reasonable for a trier of fact to have concluded that the defendant's penis made contact with A.C.'s anus. Even if the defendant's penis did not go inside of A.C.'s anus, A.C.'s testimony nevertheless clearly allows for an inference that it touched A.C.'s anus, which is all that is required in this context. 720 ILCS 5/12-12(f) ("any contact, however slight ***"). More specifically, given the general size difference between an adult male and an adolescent girl (evident in this case from pictures introduced by the defense at trial), it is reasonable to infer that when an adult male places his erect penis between the butt cheeks of an adolescent girl and moves his penis back and forth and in and out of the girl's butt cheeks, to the point of causing the girl pain, such actions will necessarily result in at least some contact between the man's penis and the girl's anus.

¶ 36 The defendant argues that A.C. never specifically testified that the defendant's penis touched her anus or the "hole" of her butt and, in fact, testified that she never reported that the defendant's penis touched her anus. We do not disagree that A.C. did not directly testify that the defendant's penis touched her anus, but caselaw is clear that the requirement of actual contact between the defendant's sex organ and the victim's sex organ or anus is not the same as a requirement of direct evidence of contact. See *People v. Raymond*, 404 Ill. App. 3d 1028, 1040 (2010) ("While direct evidence in the form of testimony from the victim or in some other form would clearly be helpful in determining whether there was penetration, it is not required. The trier of fact is allowed to make reasonable inferences based on the evidence presented, and may find penetration in the absence of direct evidence."). As discussed, it was entirely reasonable for the jury to infer contact between the defendant's penis and A.C.'s anus based on the defendant moving his erect penis back and forth and in and out of A.C's butt cheeks.

¶ 37 Moreover, A.C.'s testimony that she never told the interviewer that the defendant's penis touched her anus or the "hole" does not change our analysis. Although the defendant argues this testimony as if it were a denial by A.C. that such contact ever occurred, it is simply testimony that A.C. did not *tell the interviewer* that such contact occurred. The jury heard this evidence and was free to weigh it against the other evidence on count 1 as it saw fit, and apparently the jury chose to credit the testimony that supported a finding of contact. As the reviewing court, we are not in a position to reweigh the evidence. *Maldonado*, 2015 IL App (1st) 131874, ¶ 18.

¶ 38 Accordingly, we conclude that the State presented sufficient evidence to allow a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt of the charges alleged in count 1.

¶ 39 Jury Instructions

¶ 40 The defendant next contends that the trial court erred in the manner in which it instructed the jury regarding the elements of counts 1 and 2. The State's instruction number 15, which pertained to count 1, read as follows:

> "To sustain the charge of predatory criminal sexual assault of a child, to wit: contact, however slight between the penis of Alberto Rosano and the anus of [A.C.], the State must prove the following propositions:
>
> First: That the defendant knowingly committed an act of sexual penetration with [A.C.]; and
>
> Second: That the defendant was 17 years of age or older when the act was committed; and
>
> Third: That [A.C.] was under 13 years of age when the act was committed.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

The State's instruction number 16, which pertained to count 2, read as follows:

"To sustain the charge of predatory criminal sexual assault of a child, to wit: contact, however slight between the penis of Alberto Rosano and the vagina of [A.C.], the State must prove the following propositions:

First: That the defendant knowingly committed an act of sexual penetration with [A.C.]; and

Second: That the defendant was 17 years of age or older when the act was committed; and

Third: That [A.C.] was under 13 years of age when the act was committed.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

The trial court also gave the jury the following definition of "sexual penetration": "The term 'sexual penetration' means any contact, however slight, between the sex organ or anus of one person and the sex organ of another person."

¶ 41 According to the defendant, these instructions did not properly instruct the jurors of the charged offenses, causing them confusion and allowing them to convict the defendant of uncharged crimes. More specifically, the defendant complains that instruction 15 does not specify that to convict the defendant on count 1, the jury must find that the sexual penetration consisted of contact between the defendant's penis and A.C.'s anus. Likewise, the defendant claims that instruction 16 needed to specify that to convict the defendant on count 2, the jury must find that the sexual penetration consisted of contact between the defendant's penis and A.C.'s vagina. The defendant argues that as a result of this lack of specificity, the general definition of sexual penetration as including contact with either the victim's sex organ or the victim's anus, and the trial evidence of multiple incidents of contact with both A.C.'s anus and vagina, the jury could have convicted the defendant based on two incidents of anal contact or two incidents of vaginal contact, rather than one count of each, as alleged in counts 1 and 2.

¶ 42 The State argues that the defendant has waived consideration of this issue on appeal for failing to object to the instructions at issue and for failing to raise the issue in his posttrial motion. The defendant acknowledges the failure of trial counsel to preserve this issue for appeal, but argues that we should nevertheless review the claimed error under Supreme Court Rule 451(c) (eff. April 8, 2013), which provides that "substantial defects [in jury instructions] are not waived by failure to make timely objections thereto if the interests of justice require." This rule is coextensive with the plain-error doctrine under Supreme Court Rule 615(a) and is interpreted identically. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007).

> "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the

> seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Id.* at 565.

In either case, the first step under the plain-error doctrine is to determine whether an error occurred. *Id.* Without an error, there can be no plain error. *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 64. Here, we conclude there was no error.

¶ 43 Our review of the propriety of jury instructions consists of determining "whether the jury was fairly, fully, and comprehensively informed as to the relevant principles, considering the instructions in their entirety." *People v. Watson*, 342 Ill. App. 3d 1089, 1097 (2003), citing *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 100 (1995). In making this determination, we must view all of the instructions together as a whole and not in isolation from one another. See *People v. Ward*, 187 Ill. 2d 249, 265 (1999) ("Jury instructions are not to be read in isolation; they are to be construed as a whole."); *People v. Housby*, 84 Ill. 2d 415, 433-34 (1981) ("When examining instructions in a case, no single instruction is to be judged in artificial isolation. It must be viewed in the context of the entire charge.").

¶ 44 The defendant contends that the type of sexual penetration alleged in each count needed to be specifically included in the issues instructions because it is an essential element of the offense. This contention, however, has already been soundly refuted by a number of existing cases. First, the type of sexual penetration alleged in charges of criminal sexual assault (predatory, aggravated, or otherwise) has been repeatedly found not to be an element of the offense. See, *e.g.*, *People v. Harper*, 251 Ill. App. 3d 801, 806-07 ("In a case involving sexual penetration, the specific type of penetration is not an element of the offense."); *People v. Webster*, 175 Ill. App. 3d 119, 131 (1988) (where the trial court did not tell the jury that it had to

find the defendant performed the acts of penetration charged, "the jury was adequately apprised of the elements of the offense of aggravated criminal sexual assault, since the State need not prove the type of sexual penetration as an element of the offense"); *People v. Tanner*, 142 Ill. App. 3d 165, 169 (1986) ("We find that the type of penetration that constitutes the sexual assault is not an essential element of the offense.").

¶ 45 Second, in cases where defendants have sought reversal of their convictions on the basis that the trial court failed to include the specific type of penetration alleged in the charging instrument, their arguments have been rejected by the courts. See *People v. Giles*, 261 Ill. App. 3d 833, 845-46 (1994); *People v. Smith*, 209 Ill. App. 3d 1043, 1056-57 (1991). For instance, in *Giles*, the defendant was charged with two counts of aggravated criminal sexual assault, one based on placing an object in the victim's vagina and the other on placing his penis against the victim's vagina. *Giles*, 261 Ill. App. 3d at 835-36. The jury was given a single, general issues instruction for aggravated criminal sexual assault and a single instruction defining "sexual penetration." *Id.* at 846. According to the defendant, "[b]y receiving only one issues instruction, *** the jury was not informed that it was required to find beyond a reasonable doubt that he committed each particular act for both counts or that it had to unanimously find two specific, separate sexual acts." *Id.* at 845.

¶ 46 The Fourth District rejected this claimed error. In addition to noting that the defendant was not entitled to separate issues instructions differentiating the two separate alleged sexual acts because the type of penetration is not an element of the offense, the Fourth District also relied on the fact that the concluding instruction informed the jury of the two types of penetration alleged and the verdict forms allowed the jury to find the defendant guilty or not guilty of each of the alleged acts. *Id.* at 846; see also *Smith*, 209 Ill. App. 3d at 1056 (concluding that the trial court

did not err in giving a single issues instruction where the defendant was charged with three distinct acts of aggravated criminal sexual assault, because the trial court otherwise informed the jury of the different ways the defendant was alleged to have committed the offense and provided the jury with verdict forms as to each of the different acts).

¶ 47 As in *Giles* and *Smith*, we conclude that, to the extent that it was required to instruct the jury as to the alleged acts of sexual penetration, the trial court adequately did so. First, although the issues instructions (instructions 15 and 16) did not specifically list the type of penetration as an element of the offense, each instruction identified which count it applied to by specifying the alleged penetration in the introductory paragraph. This alone indicated to the jury that the charges against the defendant were based on two separate sexual acts. In addition, however, at the end of instructing the jury, the trial court informed the jury that the defendant was charged with two separate counts of predatory criminal sexual assault—one based on contact between the defendant's penis and A.C.'s anus, and one based on contact between the defendant's penis and A.C.'s vagina—and provided the jury with its verdict options as to each count. Finally, the jury was given six different verdict forms, each of which specified whether it pertained to the penis-anus contact or the penis-vagina contact. Based on this, we cannot say that there was any failure on the part of the trial court in instructing the jury. See *Giles*, 261 Ill. App. 3d at 845-46; *Smith*, 209 Ill. App. 3d at 1056-57.

¶ 48 We note that the defendant also argues that the "misleading nature of the instructions" was exacerbated by the trial court's use of IPI 2.01Q and 26.01Q instead of IPI 2.01R and 26.01R when instructing the jury about the lesser included offense of aggravated criminal sexual abuse. According to the defendant, the use of 2.01Q and 26.01Q "further blurred the lines between the two counts of predatory criminal sexual assault, making them essentially

interchangeable." Given that we have already concluded the issue instructions were not misleading or blurry in the first place, we do not agree that the use of 2.01Q or 26.01Q could have exacerbated the problem.

¶ 49 Nevertheless, several points regarding this argument are worth noting. First, the defendant fails to explain how the use of 2.01Q and 26.01Q made the two counts "essentially interchangeable," especially when the trial court read two separate 26.01Q instructions, one specifically for the penis-anus contact and one specifically for the penis-vagina contact. See *People v. Agnew-Downs*, 404 Ill. App. 3d 218, 231 (2010) (argument forfeited where the defendant failed to develop it and support it with legal authority).

¶ 50 Second, IPI 2.01R and 26.01R are no more specific than their Q-series counterparts, so we fail to see how the use of the R-series would have remedied the alleged interchangeability of the alleged sexual acts.

¶ 51 Finally, the defendant is simply incorrect in his contention that 2.01Q and 26.01Q were the improper instructions to use because, unlike 2.01R and 26.01R, they did not apply where there were multiple greater offenses and lesser included offenses. In the committee comments for 2.01Q and 26.01Q, it states, "This instruction should be used whenever the jury is to be instructed on *one or more* charges which include a lesser offense." (Emphasis added.) In contrast, the committee comments for 2.01R and 26.01R state that they are to be used when "(1) the jury is to be instructed on one or more charges which include a lesser offense *and* (2) the jury is also to be instructed on some other charge or charges." (Emphasis added.) In the present case, the jury was instructed on two counts of predatory criminal sexual assault—one based on penis-anus contact and one based on penis-vagina contact. The jury was also instructed on the lesser-included offense of aggravated criminal sexual abuse as to both penis-anus contact and penis-

vagina contact. The jury was not instructed on any other charges. Accordingly, the proper instructions to use were 2.01Q and 26.01Q, which apply when the jury is to be instructed on "one or more charges which include a lesser offense." Instructions 2.01R and 26.01R did not apply, because the jury was not instructed on "some other charge or charges" besides the charges that included lesser offenses.

¶ 52 Prosecutorial Misconduct

¶ 53 Finally, the defendant argues that he was denied a fair trial where the State engaged in prosecutorial misconduct during closing arguments. More specifically, the defendant contends that the State urged the jury to consider evidence that had been stricken by the trial court, argued that the defendant had admitted anal penetration when he had not, and misstated the law regarding the jury's role in determining the voluntariness of the defendant's statement to police. We conclude that none of these constitute reversible error.

¶ 54 Generally, prosecutors are given wide latitude in making closing arguments and may comment on the evidence and any fair and reasonable inferences to be drawn from the evidence. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). More specifically, a prosecutor "may speak unfavorably of the accused, comment on the evidence presented and make reasonable inferences therefrom, even if those inferences are unfavorable to the defendant." *Watson*, 342 Ill. App. 3d at 1092. Where the alleged improper remarks are not a material factor in the defendant's conviction or where they do not result in substantial prejudice to the defendant, we will not reverse the defendant's conviction. *People v. Lyles*, 106 Ill. 2d 373, 391 (1985); *People v. Sims*, 285 Ill. App. 3d 598, 605 (1996); *People v. Witted*, 79 Ill. App. 3d 156, 165 (1979). Unless we can say that the jury would have reached a contrary verdict absent the improper remarks, we will not award the defendant a new trial. *Witted*, 79 Ill. App. 3d at 165. In assessing the propriety of

the State's closing arguments, we consider the argument as a whole and do not focus on isolated comments or remarks. *Runge,* 234 Ill. 2d at 142. We must also consider "the content of the language used, its relation to the evidence, and the effect of the argument on the rights of the accused to a fair and impartial trial." *Witted,* 79 Ill. App. 3d at 165. Comments, even if improper, are not reversible if they are brief and isolated within lengthy closing arguments. *Runge,* 234 Ill. 2d at 142.

¶ 55 The defendant first argues that the State improperly argued evidence that the trial court had previously stricken, namely, testimony from Gloria that she did not call the police to report A.C.'s allegations because Yajaira, the defendant's biological daughter, stated that she did not want to be without her father and that she wanted her family together. The defendant objected to this testimony on the basis that it was hearsay, and the trial court sustained the objection and struck Gloria's testimony regarding Yajaira's statements. Later, during redirect of Gloria, the State again asked her why she did not call the police, Gloria began to recount what Yajaira told her. The defendant again objected to the hearsay statements, and the trial court sustained those objections. Although the trial court was clear that it would not allow any evidence of what Yajaira said to Gloria, the State was able to elicit that the reason Gloria did not contact the police was "[b]ecause of Yajaira."

¶ 56 During its rebuttal argument, the State argued:

> "Gloria *** did not protect [A.C.]. There is no question. I think Gloria probably knows that herself. But Gloria *** heard what [A.C.] had to say, and she didn't call the police like she should have. She confronted the defendant, and he never slept in that bed again. She let him stay in the house, but she took safeguards to make sure that [A.C.] wasn't alone with him. So it's not that she didn't call the police because she didn't

> believe her daughter. She was in an impossible position where she had her young child, his biological daughter, not wanting to be without a father."

The defendant objected to this argument, and the trial court overruled it.

¶ 57 The defendant argues that the trial court committed reversible error in overruling his objection, because the State's argument in this respect relied on evidence that was excluded from evidence. We disagree. First, we believe that even without considering Yajaira's hearsay statement to Gloria, it was reasonable to infer from the evidence that Gloria did not call the police because Yajaira did not want to be without her father. Specifically, the evidence was that the only child in the home that was the biological child of the defendant was Yajaira, and Gloria testified that the reason she did not call the police was "[b]ecause of Yajaira." Given this, and the common sense notion that children generally do not want to be without their parents, it was reasonable to infer that Gloria did not call the police because Yajaira did not want to be without her father.

¶ 58 Moreover, even assuming error in this argument, we fail to see any substantial prejudice to the defendant by this comment. The State mentioned it once as part of a larger discussion of A.C.'s lack of immediate outcry, and the State did not harp on the issue or bring it up repeatedly. More importantly, Gloria's reason for failing to immediately go to the police has no bearing on the elements of the crimes charged; it does not make it any more or less likely that the defendant committed the charged offenses. Thus, we cannot say that the jury's verdict would have been different had the trial court sustained the defendant's objection to the State's rebuttal argument in this respect.

¶ 59 The defendant next argues that the State misstated the evidence regarding the defendant's statement to the police when it argued in rebuttal that the defendant admitted to anal penetration. The portion of argument to which the defendant refers, and its surrounding context, is as follows:

"[MS. STEVENS:] If his penis made any contact however slight with her anus, that is penetration. You don't have to know how far it went into her anus. It could rub the outside of her anus. You heard the testimony that her legs were spread and that he was rubbing it and it went in and out. It doesn't have to hurt. She doesn't have to feel pain. That's not the law. Sexual contact however slight.

You know that she—it did hurt because she told you, but we don't have to prove that. So when he's rubbing and he admits in his statement that he placed it between her cheeks, it's touching her anus. He admits to the penetration—

MS. NELSON: Objection.

MS. STEVENS: --element.

THE COURT: Basis?

MS. NELSON: Misstates the evidence.

THE COURT: Overruled. Counsel may argue reasonable inferences. It's up to the jurors to determine whether it was penetration or not.

MS. STEVENS: He admits in this statement to penetrating her anus. And again, he didn't put in here about the vagina, but he did it. He's right there. He did it to her vagina. He did it to her anus, and he did it over and over and over again."

¶ 60 According to the defendant, this argument misstated the evidence, because the defendant never admitted to touching his penis to A.C.'s anus; rather, he admitted only to placing his penis between A.C.'s buttcheeks. The defendant also argues that this argument gave the jury the

impression that the defendant's statement to the police was more incriminating than it actually was. Lastly, the defendant contends that the trial court exacerbated the prejudice to the defendant by stating that the State was entitled to argue reasonable inferences, suggesting that the State was, in fact, making a reasonable inference.

¶ 61 Again, we conclude that the State's argument in this respect was simply arguing the reasonable inferences from the evidence. As discussed above, given the size disparity between the defendant and A.C. around the time of the offenses, it is reasonable to infer that when the defendant admitted to placing his adult-sized penis in between the child-sized butt cheeks of A.C., he was also necessarily admitting contact with A.C.'s anus, *i.e.*, sexual penetration in this context. This inference distinguishes the present case from *People v. Jackson*, 2012 IL App (1st) 102035, on which the defendant relies. In that case, the prosecutor argued during rebuttal that the defendant told police that he found a gun in his car, yet there was no evidence that the defendant had given any statement to the police, much less one admitting knowledge of a firearm in his vehicle. *Id.* at ¶¶ 18-19. Here, in contrast, the defendant did make a statement to police and it was reasonable to infer from the defendant's admissions in that statement that his penis made contact with A.C.'s anus.

¶ 62 As for the trial court's statement that the State could argue reasonable inferences, we do not believe that it validated the reasonableness of the State's inferences any more than it validated the defendant's when the State objected during his closing. We find this to be especially true where the trial court went on to say that it was the jury's task to determine whether penetration occurred, making clear that the State's opinion on the issue was second to the jury's determination. Moreover, the jury was specifically instructed by the trial court, "Neither by these instructions nor by any ruling or remark which I have made do I mean to

indicate any opinion as to the facts or as to what your verdict should be." We think that any improper validation of the State's argument by the trial court's comment was ameliorated by this instruction. See *People v. Herndon*, 2015 IL App (1st) 123375, ¶ 36 (errors in closing arguments may be cured where the trial court gives the jury proper instruction on the law to be applied or informing the jury that arguments are not evidence).

¶ 63 The defendant's last contention of prosecutorial misconduct is that the State misstated the law by urging the jury to disregard the instruction regarding the jury's role in determining the voluntariness of the defendant's statement to the police. The instruction at issue read:

> "You have before you evidence that the defendant made statements relating to the offense charged in the indictment. It is for you to determine whether the defendant made the statements, and, if so, what weight should be given to the statements. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made."

The State's rebuttal argument that the defendant contends was improper was as follows:

> "Counsel talked a lot about the defendant's handwritten statement. Let's be very clear. The evidence that you have in this case is what you heard from the witness stand. It's what Detective Castaneda told you, that it was a voluntary statement and it was his words. It's what Officer Reyes told you from the witness stand, that this was a voluntary statement and these were his words. It's what ASA Rusch told you from the witness stand.
>
> You can't speculate that this isn't voluntary. The evidence comes from—"

Following the defendant's objection on the basis that the State's argument misstated the law, the trial court held a sidebar, during which the following was discussed:

"THE COURT: State, did you see what you said? Do you want to look at the words? It says you can't speculate.

MS. STEVENS: But you can't speculate.

MS. NELSON: Judge, they are absolutely entitled to reasonable inference from the evidence, that it was involuntary—

MS. STEVENS: I didn't say that they aren't allowed to speculate about evidence, that they don't have—they can draw reasonable inferences.

MS. NELSON: I would say that telling them they can't speculate is tantamount to telling them they can't draw reasonable inferences, which they can.

THE COURT: I would like you to rephrase that.

MS. STEVENS: I can say it like that, you can't speculate?

THE COURT: Yes, please do.

MS. STEVENS: Sure.

After the sidebar, the State continued:

"MS. STEVENS: You can't speculate. You can look at the evidence and draw reasonable inferences from that evidence and apply it to the law in this case.

The evidence in this case, you'll get an instruction that says, the evidence which you should consider consists only of the testimony of the witnesses, the exhibits, and the stipulations the Court has received. That is what you have taken an oath to follow, and the evidence is that this defendant made this statement, that these are his words."

¶ 64 According to the defendant, "The State had just finished telling the jury that the evidence was what it had 'heard from the witness stand' about how the statement was a 'voluntary statement.' [Citation.] This leaves the jury with the impression that all they can consider about

the voluntariness is what the witnesses who testified told them about its voluntariness." The defendant also argues that because the State's rephrased statement came directly after the sidebar, it carried with it the implication that the trial court had approved of the statement.

¶ 65 We disagree with both contentions. First, the defendant objected to the State's use of the word speculate in connection with the determination of voluntariness on the basis that it suggested that the jury couldn't draw reasonable inferences from the evidence about the voluntariness of the defendant's statement. Following the sidebar, the State corrected that impression by specifically stating that although the jury could not speculate (*i.e.*, make determinations not based on the evidence), they were free to draw reasonable inferences about the evidence. The remainder of the State's argument on the voluntariness of the defendant's statement was no more than arguing the evidence that supported the State's position—a direct response to the defendant's argument that the evidence supported his position that his statement was involuntary. See *Watson*, 342 Ill. App. 3d at 1092 ("Where the complained-of comments are part of a prosecutor's rebuttal argument, the statements will not be deemed improper if they were invited by defense counsel's closing argument."). We see nothing in the State's argument that misstated or misrepresented the law or evidence; although the jury was confined to considering only that which was presented as evidence, they were informed that they could draw their own reasonable inferences. The State simply argued that it was its position that the most reasonable inference was that the defendant's statement was voluntary.

¶ 66 As for the contention that the rephrasing of the State's argument immediately following the sidebar suggested that the trial court approved of the State's position, we find no basis for concluding that the jury would have drawn such a conclusion. The sidebar was held outside the hearing of the jury. The jurors had no idea what portion of the State's argument the defendant

found objectionable, nor were they privy to the trial court's ruling or the reasoning for the ruling. Accordingly, we cannot say that the defendant was prejudiced by the State's argument on this issue.

¶ 67 Moreover, with respect to all of the defendant's contentions of prosecutorial misconduct, we note that the trial court specifically instructed the jury that "[n]either opening states nor closing statements are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded." Where the trial court instructs the jury that closing arguments are not evidence and that any statements not based on evidence presented at trial should be disregarded, such instruction is considered to cure potential errors in closing arguments, because the jury is presumed to follow the trial court's instructions. *People v. Barney*, 111 Ill. App. 3d 669, 677-78 (1982).

¶ 68 In sum, we do not believe that any of the alleged improper arguments by the State were material factors in the defendant's conviction, whether taken individually or together.

¶ 69 CONCLUSION

¶ 70 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 71 Affirmed.