2017 IL App (1st) 143964-U

No. 1-14-3964

Third Division
March 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ZALE HODDENBACH, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 11 CR 19045 Honorable Nicholas Ford, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court did not commit reversible error where it did not hold an acknowledgment hearing regarding witness's prior inconsistent statements or where it allowed other witnesses to testify regarding the statements. The court's decision to send the jury transcripts of two State witnesses' testimony where a transcript of defendant's testimony was unavailable was not an abuse of discretion. The court's clarifying question to a witness and comments regarding defense counsel did not indicate an impermissible bias against defendant. Evidence at trial was sufficient to prove beyond a reasonable doubt that defendant held a position of trust, authority, or supervision over the victim.

¶ 2 Following a jury trial, defendant was convicted of two counts of criminal sexual assault and three counts of aggravated criminal sexual abuse and sentenced to an aggregate term of

40 years' incarceration. On appeal, defendant contends that (1) the trial court erred in its handling and admission of out of court statements of defendant's daughter under the acknowledged prior inconsistent statement exception; (2) the trial court erroneously granted the deliberating jury's request to review transcripts of two State witnesses' testimony where the similarly requested transcript for defendant's testimony was unavailable; (3) the trial court showed an impermissible bias against defendant by questioning a witness and discrediting defense counsel through various comments; and (4) the trial court erred in denying defendant's motion for a directed verdict. We affirm.

¶ 3 I. BACKGROUND

¶ 4 At defendant's trial, J.V. testified that she was born on October 27, 1994. She first saw defendant during talks he gave at her junior high school about the harms of drugs and gangs. At the time, J.V. was in the seventh grade. The next year, when J.V. was 14 years old, she joined the Boys and Girls Club. She joined the club's track team, which defendant coached. Defendant had an office at the club, and J.V. would visit him in his office. She approached defendant in his office in 2010, while she was 15 years old, and asked for help in finding a job. Defendant gave her a list of jobs, but also suggested that she "could either pose for pictures in lingerie or take pictures of couples having sex." J.V. told him that she did not want to do either of those things. She tried some of the jobs on the list defendant gave her, but none of them "worked out."

¶ 5 In the fall of 2010, defendant texted J.V.'s cell phone, and she "ended up" agreeing to photograph defendant having sex. Defendant, who was still a counselor at the Boys and Girls Club, picked her up in his car and told her that if the woman involved asked, J.V. should answer that she was 18 years old because otherwise he "could get in trouble." Defendant

drove to a blue house where they met a 25-year-old Hispanic woman. The woman was about 130 pounds and had short, black, curly hair. They entered the living room of the house and defendant gave J.V. a camera. Defendant and the woman disrobed and engaged in oral sex while J.V. took pictures. Defendant and the woman then proceeded to have vaginal intercourse for approximately an hour as J.V. continued taking pictures. She took "around 30 or more" pictures**.** Afterwards, the woman began to touch J.V.'s "breasts and vagina" underneath her clothes, causing J.V. to become "scared." J.V. remained quiet because she was frightened of defendant, who started to take pictures. Eventually, defendant drove J.V. home and paid her $200.

¶ 6 Defendant continued to text J.V. in the following months. Sometime between March and April 2011, defendant texted J.V. that he was going to pick her up after school. He arrived at her school and brought her to his home. He had her retrieve a bag containing a camera and lotion from the trunk of his car and they entered his house. He took J.V. into his basement laundry room and put lotion on her hand. He had her place her hand on his penis. J.V. protested, but defendant told her to "stop acting like a little child." He also threatened to post online the pictures he had taken of her being touched by the other woman. He had threatened to do so previously and J.V. feared that if she refused to do as he asked, he would post the pictures. J.V. "strok[ed]" defendant's penis for 30 minutes until defendant ejaculated into a trash can. Defendant then asked J.V. to perform oral sex, but she refused. Defendant told her to "stop acting like a little kid." When she would not do as he asked, defendant got "really mad" and took her home. He again threatened to post the photographs.

¶ 7 One month later, defendant texted J.V. "that we're going to do the photo shoot again with a couple." J.V. told him "okay" because he was "always threatening" her with the

photographs. He picked her up in front of the Boys and Girls Club and drove her to a "Sybaris" hotel in Chicago. Defendant got a room and they both went inside. J.V. described the hotel room in detail for the jury, identifying its layout and furniture. Once inside the room, defendant had J.V. put on two dresses that he had bought for her and began to take pictures by the room's pool and bed. Eventually, defendant started touching J.V.'s breast, her vagina, and "everywhere." Although he initially touched her over her clothing, he subsequently began to touch her under her clothes. When J.V. complained, he told her to "stop acting like a little girl" and to "be a woman." Defendant placed baby oil on J.V.'s body, including her vagina, and had sex with her.

¶ 8 A few weeks later, defendant picked J.V. up at her home and brought her back to the hotel. In a different room, which J.V. also detailed for the jury, defendant took pictures of her while she was naked and told her that he was going to "beat this pussy up." Defendant "forced himself on" J.V. She told him to stop and tried to push him away, but was unsuccessful. Defendant inserted his penis into J.V.'s vagina and eventually ejaculated on her. Later, defendant penetrated J.V.'s vagina with a "vibrator thing." Following the hotel room, defendant gave J.V. money for a tattoo. He also took her to a store and bought her shoes.

¶ 9 Defendant again texted J.V. a few months later. Picking her up from her home, defendant brought J.V. to a different house. Once inside, defendant began touching J.V. on her breasts and vagina. He then took off his pants and told J.V. to "give him oral." When J.V. protested, he told her to stop "acting like a little girl." He then took pictures of J.V. with her mouth on his penis. Subsequently, defendant took off J.V.'s pants and placed his penis in J.V.'s anus.

¶ 10 In August 2011, defendant brought J.V. to a "Lover's Lane" store, gave her $100, and told her to pick out clothes while he waited in the car. J.V. purchased several pieces of lingerie. Defendant then brought J.V. to a Motel 6 room where he made her put on the lingerie. He then had oral and vaginal intercourse with J.V. Afterwards, defendant called someone and gave directions to the motel. He told J.V. that his friend would be coming. When she asked him why, defendant told her to "shut up" and that she was "his bitch." Shortly thereafter, a 25- or 30-year-old African-American man arrived. The man was about five feet and seven or eight inches tall. He touched J.V.'s vagina and then had sex with her while defendant stayed in the bathroom. Before leaving, the man asked if J.V. was all right and asked how old she was. When J.V. told the man that she was 17 years old, he apologized and left. Defendant drove her home.

¶ 11 Beginning with the initial incident in the house with the woman, defendant had consistently asked J.V. to send him pictures of herself and she did, fearing he would post the pictures of her with the woman. However, following the incident in the motel, she "couldn't stand it anymore." When defendant again asked for photographs a few days later, J.V. told him she wanted to stop. He threatened her with the pictures and J.V. sent him additional photographs of herself. She then told a friend, and later an employee at her high school, what had occurred.

¶ 12 Sebastian Sieczkowski testified that he was a technology coordinator at J.V.'s high school. In September 2011, he saw J.V. in a school hallway and she seemed "really distraught." Sieczkowski stopped her and asked what was wrong. J.V. said she had to go and Sieczkowski told her that she could call him over the weekend, if needed. That Saturday, J.V.

texted Sieczkowski numerous times and relayed information that distressed him. On Monday morning he spoke with school police officials.

¶ 13 James Browne, a Chicago police detective, was assigned to investigate J.V.'s allegations. Browne visited the Sybaris hotel room and collected registration cards regarding defendant's check-ins. Browne also brought J.V. to the house listed on the registration of defendant's vehicle and J.V. identified it as one of the houses defendant brought her to. J.V. also provided a receipt from Lover's Lane, the purchased lingerie, and a pair of shoes to the detective.

¶ 14 John Stephan, the director of the Boys and Girls Club, testified that he managed the facility and supervised the club's staff while defendant was employed there. Defendant was employed as the club's "Street Smarts Coordinator" and had an office at the club. He dealt with applications for membership from students and would often meet with children in his office. Defendant was also the leader of the running club of which J.V. was a member. Stephan testified that J.V.'s membership with the Boys and Girls Club expired in 2010, but sometimes expired members would still use the club facility.

¶ 15 An employee from a Sybaris hotel testified that defendant had reservation cards at the hotel for April 10, 2011, and June 27, 2011. On both dates defendant checked into the room shortly after noon and checked out about four hours later. An employee for the motel that J.V. identified in her testimony testified that defendant had checked into the motel on August 25, 2011.

¶ 16 The State also offered testimony regarding two other acts by defendant. The first involved O.L., another former member of the Boys and Girls Club. O.L. testified that she was 15 years old in 2010, a member of the club, and a member of the club's track team. She

often saw defendant at the club, and met with him in his office several times a week. One day following summer school, O.L. called defendant and asked if he would give her a ride home. Defendant replied that she would have to tell him that she "was his little bitch." O.L. refused and defendant did not pick her up. Following the phone call, defendant would not speak to O.L. at the club for several weeks. Subsequently O.L. went to defendant's office for help finding a job. He told her that she could get a job recording him "having sex or girls giving him blow jobs." He showed her pictures on his phone of girls from 16 to 18 years old with their mouths touching his penis. Defendant told O.L. that she "could learn some things from them." He then asked her if she wanted to see his penis. She told him no, but he proceeded to pull down his pants. He asked her if she wanted to touch his penis. When she said no, he grabbed her hand and placed it on his penis. He "made" her "rub" his penis for a few seconds before asking her to show him her breast. O.L. did so.

¶ 17 The State also called E.H., defendant's daughter, to question her on statements she made to a school counselor and police officer when she was 17 years old. Defendant objected, arguing that the statements were hearsay. In a sidebar, the trial court ruled that the State was permitted to question E.H. regarding the statements, and if she acknowledged making them then the State would be permitted to call the counselor and police officer to testify regarding the statements. Back before the jury, the State asked E.H. if she had spoken to her school counselor in 2005. E.H. testified that she spoke with Bonnie Salvo, a high school counselor, and a detective assigned to the school, Laural Panico. She denied making statements to either individual that defendant had made her "perform oral sex" on him before allowing her to go out with her friends. Following the direct examination, the trial court stated, "Cross." Defense counsel then proceeded to question E.H. On cross-examination, E.H. testified that

Salvo had asked her about sexual acts and asked "does your father make you give him blow jobs?" Defense counsel asked if E.H. answered the questions and E.H. answered that she was angry with her father, "[s]o at that point, yes, I said, uh-huh, because I thought that if I said something like that I would be able to—." The trial court then interjected and the following colloquy occurred:

"THE COURT: When you said, uh-huh, then, I know what you meant, were you saying you said yes?

THE WITNESS: Uh-huh. Yes.

THE COURT: Answer the question.

THE WITNESS: It's yes.

THE COURT: Okay. Thank you."

Following E.H.'s testimony, the trial court stated that E.H. had acknowledged making the statements during cross-examination and ruled that both Salvo and Panico were permitted to testify.

¶ 18 Salvo testified that she was a social worker in E.H.'s high school in 2005, when E.H. approached her. E.H. "seemed upset" and looked like she "had been crying." E.H. told Salvo that defendant had made her do things of a sexual nature and that she "had to perform *** a blow job" before she was allowed to leave the house. Salvo then invited Panico, the school detective, to speak with E.H. Panico testified that when she asked why E.H. was crying, the teenager replied that her father had "her [] perform sexual acts." E.H. used the term "blow job" and told them that defendant "had asked [her] to perform oral sex in exchange for going out with her friends." Panico made a report and E.H. gave a handwritten statement. However, the statement was eventually destroyed after charges were not pursued.

¶ 19 Defendant testified that in February 2011, he was having lunch at a McDonald's when J.V. approached him. He did not know her, but stopped to talk with her because she addressed him by his nickname. She said she needed to talk with him because she was having some problems. Defendant told her that he could not speak at the moment, but gave her his private cell phone number. J.V. subsequently called him and told him that she was "having a crises [sic] in her life and she needed help." Defendant told her that he could meet with her later that day. When they met, J.V. told defendant that her parents had taken her child away from her and that she needed help getting him back. She showed defendant pictures of a baby and told him that she needed a job. Defendant told her that he would reach out to people to try and help her. He went to two agencies that work with high risk situations seeking a job for J.V. He believed her to be an adult because she had stated she was 19 years old in a text message.

¶ 20 Defendant also spoke with a social worker to find options for J.V. He had the social worker call J.V. to discuss options for getting her child back. After the phone conversation, defendant went to J.V.'s home and advised her to confront her family. J.V. would not confront her parents and insisted that she just needed help obtaining a job. Defendant then made a list of possible job opportunities and gave it to J.V. He took J.V. to several restaurants to apply for a job and saw her identification card which indicated that she was 18 years old.

¶ 21 After meeting J.V., defendant began to frequently text with her, between 20 and 30 times a day. In February, J.V. texted that she had "an idea about opening up a business and making money" because the jobs defendant had suggested were not working out. She sent him a photograph of herself and "two other females" in lingerie and stated that she wanted to open

a cleaning service. She began to send him "a battery" of photographs of herself in lingerie. Defendant testified that on February 20, 2011, J.V. sent him a photograph of her having sex with a man. She asked him sexually explicit questions and asked him to send her pictures of himself. The "texts became real intimate and extremely personal" and J.V. attempted to set a date "to hook up" with defendant. Defendant responded that he had to "sit and talk" with her and share something.

¶ 22 Defendant later met with J.V. in a car several houses away from her home. Defendant explained to J.V. that he had an injury that precluded him from sexual activity. Something heavy had fallen on "his midsection" and he was no longer "able to get an erection." A few days later, J.V. texted defendant that "she had an idea" and that defendant should watch her engage in sex. She later texted him that he could watch her have sex with another woman, but he would need to pay them both $500. Defendant agreed. He picked J.V. up at her home and drove to another house where J.V. introduced him to another woman. Defendant testified that J.V. and the woman went into a bedroom and he followed five minutes later. When he entered, the two individuals were naked and engaging in sexual activity. He watched them but did not participate. The other woman then approached defendant and removed his pants. The woman and defendant touched each other. Afterwards, defendant paid both individuals $500 and drove J.V. home.

¶ 23 J.V. and defendant began to text and meet more frequently. J.V. frequently asked for money and defendant gave it to her. He also "bought her whatever she asked for," including giving her money for a tattoo though he did not go with her to get it.

¶ 24 Defendant also testified that he complained to J.V. that the interaction he had watched between her and the other woman was "fake sex" and J.V. suggested she "hook something up

with a guy." They agreed to meet at a Sybaris hotel room where J.V. would have intercourse with a man. Defendant registered for the room, but J.V. and the man asked him to go purchase alcohol. When he returned, they would not allow him into the room. After 25 minutes, the door opened and the man left and defendant became upset. J.V. asked for $500, but defendant only gave her $300 and drove her home.

¶ 25 The two continued to text and defendant continued to give J.V. money. He purchased a used car for her and frequently checked on the car in her driveway. In July 2011, J.V. suggested that they return to the hotel and have defendant watch as she had sex with another woman. Defendant agreed and checked into a room. J.V. never showed up and later texted that the other woman had stood her up. He drove to J.V.'s home and saw that her car was "missing." The two began to have "real heated conversations" and J.V. promised to make it up to him. However, defendant later found sent text messages from J.V.'s phone in which she disparaged him and they continued to argue.

¶ 26 Sometime later, J.V. texted defendant that she had found a man "willing to do something." In late August, defendant asked J.V. if she wanted to shop at Lover's Lane and she said yes. He gave her money, but waited outside. He then took J.V. to a motel, deciding not to return to the Sybaris because he was angry about J.V.'s text messages. When they arrived at the motel, J.V. called a man to tell him that they were at the motel and not the Sybaris. Shortly thereafter, the man arrived and had sex with J.V. while defendant watched from the bathroom. Afterwards the man left. Defendant did not have sex with J.V. As he drove her home they argued. He told her he wouldn't give her anymore money and she threatened to speak with his wife. Defendant responded that he would post the pictures J.V. had sent him.

¶ 27 On cross-examination, defendant admitted having sent J.V. texts asking for explicit pictures. He admitted sending her numerous texts referring to her as his "bitch." He also admitted to texting her following the motel room, stating "Just giving you a heads up. Me and my guy will be working that again soon. I'll let you know when" and "Hurts, but not as much as it's going to hurt when we hit it, and I know I run this."

¶ 28 Defendant also presented the testimony of several witnesses. His wife, Sylvia Hoddenbach, testified that he had injured his penis in 2007 and that it could no longer become erect. She admitted that she had a two-year-old child with defendant who was conceived through sexual intercourse well-after 2007. Defendant's doctor, an expert in urology, testified that he treated defendant for an injury to his penis in 2007. Defendant's injury restricted blood flow and defendant reported that he was unable to "get an erection the way he did before the injury." The doctor admitted on cross-examination that the injury limited, but did not eliminate defendant's blood flow. He also admitted that he did not see defendant between 2008 and 2011, that defendant had the ability to ejaculate as evidenced by his child, and that defendant had come to him in 2011 for an elective vasectomy.

¶ 29 Christina Rosario testified on behalf of defendant and stated that she met J.V. on a social networking site where J.V. listed her name as "Demon" and her age as 18 years old. Rosario would smoke marijuana with J.V. and was present when J.V. sent defendant pictures of herself in lingerie. She also testified that J.V. had stated that she was trying to get money from defendant by pretending she had a baby.

¶ 30 Ijael Garcia, J.V.'s former boyfriend, testified that J.V. proposed a plan to take defendant's money and cars in the summer of 2011. Garcia admitted that he never told anyone about this interaction and that he and J.V. were not on good terms.

¶ 31 Defendant also presented the testimony of Chicago police detective Charles Hollendoller, who testified that he had examined J.V.'s phone and found a text she sent indicating that she smoked marijuana. Two witnesses testified that J.V. had spoken with them regarding potential jobs, one of whom stated that J.V. had indicated she was 18 years old.

¶ 32 Following closing arguments, the jury sent several questions to the trial court, including a request for transcripts of J.V.'s, O.L.'s, and defendant's testimony. Due to the timing of the witnesses' testimony, transcripts were only available for J.V. and O.L. Over defendant's objection, the transcripts for J.V.'s and O.L.'s testimony were sent back to the jury along with an instruction that defendant's testimony was unavailable due to timing.

¶ 33 The jury found defendant guilty of two counts of criminal sexual assault and three counts of aggravated criminal sexual abuse. The jury found defendant not guilty of child pornography and five other counts of criminal sexual assault. The trial court sentenced defendant to an aggregate sentence of 40 years' incarceration.

¶ 34 II. ANALYSIS

¶ 35 A. E.H.'s Out of Court Statements Accusing Her Father

¶ 36 Defendant first contends that the trial court erred in admitting E.H.'s prior inconsistent statement accusing him. He argues that the trial court failed to hold a required "acknowledgment hearing" outside of the presence of the jury, failed to *sua sponte* strike E.H.'s testimony following the direct examination by the State, and erred in permitting the State to present a different version of the out of court statement through two other witnesses.

¶ 37 We review a trial court's evidentiary ruling for an abuse of discretion. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009). Hearsay statements, out of court statements produced for the truth of the matter asserted, are generally inadmissible unless they fall into one of many

exceptions. *People v. Tenney*, 205 Ill. 2d 411, 432-33 (2002). E.H.'s statements were admitted under section 115-10.1 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-10.1 (West 2012)). The section sets forth, in relevant part:

> "In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement—
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> ***
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
>
> ***
>
> (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding."

¶ 38 A party must lay a proper foundation before introducing prior inconsistent statements into evidence. *People v. Hallbeck*, 227 Ill. App. 3d 59, 62 (1992). Part of that foundation requires asking the witness whether he or she made the inconsistent statement. *People v. Bradford*, 106 Ill. 2d 492, 500-01 (1985). The witness must be directed to the time, place, and circumstances of the statement and its substance, so that the witness can have an opportunity to explain the inconsistency. *Id.* Before extrinsic evidence of impeaching statements may be introduced, the minimum foundation requires either (1) the witness be confronted with the

contents of the statement, or (2) the witness must deny the statements were ever made. *People v. McIntosh*, 70 Ill. App. 3d 188, 194 (1979).

¶ 39 Defendant does not appear to argue that E.H.'s acknowledgment that she had indicated to Salvo and Panico that he had made her perform oral sex was in and of itself inadmissible hearsay. We note in passing that it was not. The statement was clearly inconsistent with E.H.'s testimony that her father had not forced her to engage in any such acts, it involved occurrences of which she had personal knowledge, E.H. was fully cross-examined on the matter, and during that cross-examination she acknowledged that she had answered "yes" to Salvo's questions on the matter. Clearly, each element of the statutory hearsay exception was met. See 725 ILCS 5/115-10.1 (West 2012).

¶ 40 Rather than challenging the admissibility of the statements, defendant argues that the trial court used an improper procedure in admitting the statements, relying heavily on *People v. Brothers*, 2015 IL App (4th) 130644. In *Brothers*, the State presented a witness who testified that she remembered having a conversation with police officers, but she did not remember what she had said to them. *Id.* ¶ 87. The State then called one of the police officers and began to question him regarding the prior witness's earlier statements and the trial court allowed the testimony under subsection 115-10.1(c)(2)(B) of the Code. *Id.* ¶ 88. The appellate court's Fourth District reversed and held that the statements were inadmissible hearsay because the witness had only acknowledged that she had spoken with officers and did not acknowledge the contents of any statement. *Id.* ¶ 90. During its analysis, the court also noted that "a better practice" for trial courts to follow was to hold an "acknowledgment hearing" outside of the presence of the jury to avoid any prejudice from the jury hearing statements that are ultimately deemed inadmissible. *Id.* ¶ 74. The court explained that without a hearing at which

the proper foundation is established, "if the witness does not acknowledge making the statement after being confronted with it, the statement is inadmissible as substantive evidence. In this scenario, the jury has nonetheless heard the potentially damaging contents of the statement, and depending upon its prejudicial effect, reversible error may have occurred." *Id.* ¶ 72.

¶ 41 We agree that the best practice for a trial court faced with an admissibility determination under subsection 115-10.1(c)(2)(B) of the Code is to hold a hearing outside the presence of the jury to ensure that the proper foundation can be presented. However, despite defendant's contention otherwise, reversible error does not occur merely in the absence of such a hearing. Reversible error occurs as a result of the jury hearing overly prejudicial hearsay statements that are not acknowledged and, therefore, are ultimately inadmissible. See *id.* ¶ 72. In the present case, unlike in *Brothers*, E.H. acknowledged making the inconsistent statement and the foundation necessary for its admission was established. Thus, although the trial court's decision to forego a hearing outside of the presence of the jury risked exposing the jury to prejudicial hearsay, that risk never materialized. Accordingly, no reversible error occurred due to the lack of an acknowledgment hearing.

¶ 42 Defendant also argues that the trial court erred where it failed to rule on the admissibility of E.H.'s statements immediately following the State's direct examination and failed to immediately strike her testimony. He asserts that the trial court directed him to conduct a cross-examination and that he had no choice but to proceed. Defendant provides no legal citation to support his contention that the trial court had a *sua sponte* obligation to strike E.H.'s testimony. Moreover, it is well-settled law that a party cannot complain of an error it induced or invited. *People v. Feldmann*, 314 Ill. App. 3d 787, 797 (2000). Here, despite

defendant's assertion, the trial court did not "direct" him to cross-examine. Instead, it is clear from the record that the trial court merely noted that defendant had the opportunity to do so. Defendant made the strategic choice to cross-examine E.H., rather than moving to strike the testimony. The trial court also did not force defendant to ask E.H. questions which provided evidence necessary for the statement's admission. Defendant cannot now complain that the trial court did not intervene to stop him from exercising his constitutional right to cross-examine.

¶ 43 Finally, defendant argues that the trial court erred in allowing other live witnesses to testify regarding E.H.'s statements because they disagreed on the specific wording of E.H.'s statements. Defendant again cites *Brothers*, in which the Fourth District stated "a witness's prior inconsistent statements should not be admitted under subsection (c)(2)(B) through the testimony of another live witness" because it would be cumulative to the witness's acknowledgment itself. *Brothers*, 2015 IL App (4th) 130644, ¶ 82. Although we note that such a prohibition is not readily apparent from the statute (see 725 ILCS 5/115-10.1(c)(2)(B) (West 2012)), we need not determine whether the testimony of the social worker and the police officer was admissible. The admission of hearsay evidence is harmless error where there is no reasonable probability that the jury would have acquitted defendant absent the hearsay testimony. *People v. Shorty*, 408 Ill. App. 3d 504, 512 (2011). This is particularly true where the challenged evidence is merely cumulative of other, admissible evidence. See *People v. Yancy*, 368 Ill. App. 3d 381, 385, 858 (2005).

¶ 44 Defendant argues that the testimony in question was highly prejudicial because it alerted the jury to a claim that the defendant had criminally abused his adolescent daughter. However, the statements testified to by both Salvo and Panico were cumulative of the

admissible testimony given by E.H. Salvo and Panico did not provide direct evidence that E.H. had been abused by her father; rather they merely reiterated a fact already before the jury, that E.H. had stated such abuse occurred. It is true that the two witnesses testified that E.H. told them that her father had made her engage in sexual activity whereas E.H. testified that she answered "yes" when she was asked if that had happened. Yet the substantive truth of those differently worded statements remained the same. E.H. indicated that her father had sexually abused her. The primary prejudicial effect of that fact was already before the jury through E.H.'s admissible testimony.

¶ 45 Moreover, we disagree that there is a reasonable probability that the jury would have acquitted defendant absent Salvo's and Panico's testimony due to the overwhelming evidence presented against defendant. J.V. testified at length and in great detail in front of the jury, describing the abuses defendant committed against her. She provided detailed precise descriptions of the people and places involved. Many portions of her testimony were corroborated by receipts and other witnesses like the hotel receptionist. Additionally, O.L testified to interactions with defendant that in many ways mirrored J.V.'s account. When this evidence is taken into account along with E.H.'s properly admitted admission, we cannot say that there is a reasonable possibility that the verdict would have been different if Salvo and Panico's testimony was excluded. Accordingly, we find any error in allowing Salvo and Panico to testify would have been harmless.

¶ 46 B. Transcripts Sent to the Jury

¶ 47 Defendant also contends that the trial court erred in sending the transcripts of E.H.'s and J.V.'s testimony to the deliberating jury because a transcript of his own testimony was not available to be sent back. He argues that giving the jury only two of the three transcripts

requested was unfair as it strengthened the testimony of the State's witnesses through repetition, "armed" any jury members arguing for conviction against any jury members considering acquittal, and gave an incomplete view of the trial.

¶ 48 The decision whether to provide a deliberating jury with transcripts of witness testimony " 'rests within the sound discretion of the trial court.' " *People v. McLaurin*, 235 Ill. 2d 478, 491 (2009) (quoting *People v. Kliner*, 185 Ill. 2d 81, 163 (1998)). As such, we review the trial court's decision to send back two of the three requested transcripts for an abuse of discretion. *Kliner*, 185 Ill. 2d at 163. An abuse of discretion occurs where the court's decision is "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. McDonald*, 2016 IL 118882, ¶ 32.

¶ 49 Transcripts of testimony may be made available to the jury if the jury makes such a request and if the trial court, in its discretion, believes that the transcripts will be helpful to jurors. *People v. Modrowski*, 296 Ill. App. 3d 735, 747 (1998). A trial court exercises its discretion when it denies a jury's request for transcripts for the reason that they are unavailable. See *People v. Shaw*, 258 Ill. App. 3d 119, 122 (1994) (finding that the trial court exercised its discretion where it declined the jury's request for transcripts because they were unavailable). A trial court also does not abuse its discretion in providing only some of the transcripts requested by a deliberating jury. See *People v. Creque*, 214 Ill. App. 3d 587, 596 (1991) (citing *People v. Reyes*, 108 Ill. App. 3d 911, 919-20 (1982) and *People v. Reynolds*, 57 Ill. App. 3d 593, 598 (1978)). The court may "permit[] review of only prosecution witnesses [citation], or allow[] review of direct examination without the related cross-examination [citation]." *Id.*

¶ 50 Although *Creque* was decided 25 years ago, defendant has offered no subsequent precedent that either overrules or challenges the reasoning in that case. Further, this court's own research has not revealed any such cases. Accordingly, we rely on *Creque* as instructive. In that case, the jury requested transcripts for the entirety of the testimony presented at trial, but the trial court informed it that transcripts were unavailable. *Id.* at 596. The jury later repeated its request and the trial court determined that the jury wished to review the direct examination of a detective and the full testimony of two other State witnesses. *Id.* However, only the transcript of the detective's direct examination was available, and the trial court allowed it to be sent to the jurors. *Id.* at 597. On appeal, the defendant argued that the jury's consideration of only the detective's direct examination placed undue emphasis on that testimony and deprived him of a fair trial. *Id.* On review, this court ruled that the trial court had not abused its discretion noting that the jury had the opportunity to hear and judge the detective's cross-examination during the trial and that the other transcripts were unavailable. *Id.*

¶ 51 In the present case, the jury was able to hear and weigh the testimony of defendant, J.V., and E.H. during trial. Moreover, unlike in *Creque*, the jury was given transcripts of both the direct examinations and the extensive cross-examinations of the two State witnesses, so that both the State's account and defendant's impeachments of those witnesses were available for the jury. As a transcript of defendant's testimony was unavailable, the trial court could reasonably have determined that to grant the jury's request for such a transcript would have impermissibly impeded the progress of the trial. See *id.* Accordingly, we cannot say that the trial court abused its discretion in allowing the jury to review the transcripts of J.V.'s and E.H.'s testimony despite the unavailability of a transcript of defendant's testimony.

¶ 52 C. Judicial Bias

¶ 53 Defendant also contends that he was deprived of a fair and neutral trial judge, pointing to numerous instances throughout the record in which he claims the trial court impermissibly showed bias in favor of the State. The State responds that that defendant forfeited this right by failing to contemporaneously object to the trial court's actions, but correctly asserts that claims of a biased judge are reviewable despite forfeiture under the second prong of the plain error analysis. See *People v. Thompson*, 238 Ill. 2d 598, 609 (2010) (listing trial before a biased judge as structural error). The State argues that the record reveals that the trial court was a fair and impartial arbiter.

¶ 54 A fair trial is a fundamental right in all criminal prosecutions and a denial of that right is a denial of the procedural due process guaranteed under both the United States (U.S. Const, amend. XIV) and Illinois (Ill. Const. 1970, art. I, § 2) Constitutions. *People v. Taylor*, 357 Ill. App. 3d 642, 647 (2005). A defendant is fundamentally entitled "to an unbiased, open-minded trier of fact." *People v. Eckert*, 194 Ill. App. 3d 667, 673 (1990). As such, a judge should refrain from injecting commentary into proceedings reflecting a bias for or against either party. *People v. Sims*, 192 Ill. 2d 592, 636 (2000). We view any claim of judicial bias in context of the entire record and evaluate the trial court's reactions in regards to the circumstances presented by the individual case before it. *People v. Urdiales*, 225 Ill. 2d 354, 426 (2007). We presume that a trial judge was impartial, and it is defendant's burden to prove otherwise. *People v. Faria*, 402 Ill. App. 3d 475, 482 (2010).

¶ 55 Defendant first argues that the trial court indicated bias by interrupting his cross-examination of E.H. and questioning her himself. It is well within a trial court's discretion "to question a witness 'to elicit the truth or to bring enlightenment on material issues which seem

obscure.' " *People v. Smith*, 299 Ill. App. 3d 1056, 1062 (1998) (quoting *People v. Wesley*, 18 Ill. 2d 138, 154-55 (1959). However, in doing so, the trial court must act in a fair and impartial manner. *Id.* A trial judge crosses "the line of judicial propriety" when he or she takes on the role of prosecutor. *Taylor*, 357 Ill. App. 3d at 648. Thus, the trial judge may not question a witness in a fashion akin to a cross-examination. See *People v. Jackson*, 409 Ill. App. 3d 631, 648 (2011).

¶ 56 In context, it is clear that the singular question asked by the trial court was not tantamount to a cross-examination as defendant claims. In answering a material question, E.H. used the non-verbal response "uh-huh." The trial court then noted that it understood the meaning of "uh-huh," but sought to clarify asking E.H. if her potentially ambiguous non-verbal response meant "yes." When E.H. again stated "uh-huh," the trial court told her to "[a]nswer the question" and E.H. responded with a verbal "Yes." From this brief interchange, defendant infers that it is "inescapable; the judge interrupted the witness and questioned her himself in an effort to rescue the State and avoid a mistrial." We disagree. The much more reasonable conclusion is that the trial court, cognizant of the need for an accurate and unambiguous trial record, merely sought to clarify E.H.'s ambiguous response. It did not abuse its discretion in doing so.

¶ 57 Defendant also argues that the trial court discredited defense counsel in front of the jury. He points to several, separate instances in which he alleges that the trial court unjustly criticized defense counsel before the jury.

¶ 58 First, during defense counsel's cross-examination of E.H., counsel asked her, "Do you think you're being called to kind of slander your father?" E.H. answered affirmatively. The State immediately objected and the trial court sustained the objection. It then instructed the

jury, "Folks, that's just the kind of evidence, a question and an answer that are absolutely inadmissible and only posited with one purpose. That's to inflame the sympathy or bias or prejudice on your part. And that's one of the reasons I'm going to admonish you now to disregard the question and the answer, because it was inappropriate. So does everybody understand they couldn't consider any of it in any way?"

¶ 59 Second, during defendant's case in chief as defense counsel was examining the Chicago detective who examined J.V.'s phone, the following interaction occurred:

"[COUNSEL]: I'll direct your attention to line 728 of your forensic report and ask you whether there's an outgoing text?

[WITNESS]: Yes.

[COUNSEL]: So, outgoing would mean that [J.V.] sent that text out?

THE COURT: Please don't lead the witness and don't misstate the evidence when you do so, which would be that the number admittedly called to another number. You would agree with that, wouldn't you [counsel]?

[COUNSEL]: Yes, Judge."

¶ 60 Finally, defendant points to several interchanges during defense counsel's closing argument. Multiple times, the State objected and argued that defense counsel was misstating the evidence. In response, the trial court instructed the jury that it was "mere argument" and "I just want to make sure that you understand as you listen to these arguments that they're not evidence. Evidence is what you heard from the witness stand. Keep your focus on that." The trial court repeated the phrase "mere argument" for several objections. Also during closing argument defense counsel stated to the jury, "I guarantee you, [defendant] would never do anything there in the Boys and Girls Club." The State objected and the trial court sustained,

stating, "Your guarantee is irrelevant, [defense counsel]." Later, defense counsel stated, "I mean, again, I don't think [J.V.] looked that young when she was testifying." The State again objected, and the trial court stated, "Your opinion is absolutely irrelevant, [defense counsel]. Completely."

¶ 61 A trial judge should refrain from injecting commentary into proceedings reflecting a bias for or against either party. *People v. Sims*, 192 Ill. 2d 592, 636 (2000). However, a judge's display of "displeasure or irritation with an attorney's behavior is not necessarily evidence of judicial bias against the defendant or his counsel." *Id.* Even where comments are improper, reversal is only required where the comments were "a material factor in the conviction or were such that an effect on the jury's verdict was the probable result." *People v. Burrows*, 148 Ill. 2d 196, 250 (1992).

¶ 62 It is important to note initially that defendant has not challenged any of the evidentiary rulings the court made underlying the allegedly objectionable comments. Defense counsel's question regarding whether the State sought to "slander" defendant was clearly irrelevant (Ill. R. Evid. 402 (eff. Jan. 1, 2011)), speculative (Ill. R. Evid. 602 (eff. Jan. 1, 2011)), and argumentative (see Ill. R. Evid. 611 (eff. Jan. 1, 2011)). When questioning the detective, defense counsel did offer a leading question (Ill. R. Evid. 611 (eff. Jan. 1, 2011)) and arguably misstated the detective's testimony. The detective testified that a message was sent from J.V.'s phone, however he had no knowledge of who had actually sent the message from that phone. Defense counsel's closing arguments did contain improper personal guarantees and opinions. See *People v. Pope*, 284 Ill. App. 3d 695, 706 (1996). We also note that defendant does not argue that any of the trial court's allegedly improper comments and instructions misstated the law to the jury. Rather, it appears defendant's sole contention is

that the trial court's substantively valid instructions to the jury, prompted by defense counsel's own arguably objectionable conduct, was too strongly worded. Having reviewed the entire record, including the context of each of the challenged comments, we cannot say that the trial court's comments were improper or evidenced a bias against defendant. Moreover, there is no indication that the comments were a material factor in defendant's conviction.

¶ 63 D. Sufficiency of the State's Evidence

¶ 64 Defendant finally contends that the trial court erred in denying defendant's motion for a directed verdict on several charges because the State failed to prove him guilty of each count beyond a reasonable doubt. The convictions challenged by defendant are Count 2 criminal sexual assault, Count 10 criminal sexual assault, Count 13 aggravated criminal sexual abuse, and Count 20 aggravated criminal sexual abuse. The indictment for each count alleged the following element[1]: defendant "HELD A POSITION OF TRUST, AUTHORITY, OR SUPERVISION IN RELATION TO [J.V.], TO WIT: BOYS AND GIRLS CLUB COUNSELOR." He argues that the State did not prove that defendant had "a position of trust" over J.V. because the indictments alleged that defendant was a "Boys and Girls Club Counselor" while testimony showed that his title was actually "coordinator." He also argues that he did not hold a position of trust in relation to J.V. because her membership at the Boys and Girls Club had expired by 2011.

¶ 65 Due process requires the State to prove each element of a criminal offense beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (citing *In re Winship*, 397 U.S. 358, 364 (1970)). When reviewing the sufficiency of evidence, a reviewing court

[1] Defendant solely challenges the sufficiency of proof for this element for each count. Accordingly we confine our analysis to this element.

must decide "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); See also *Cunningham*, 212 Ill. 2d at 278. A reviewing court will not overturn a guilty verdict unless the evidence is "so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 66 Multiple witnesses testified that defendant was employed by the Boys and Girls Club. Multiple witnesses also testified that he would go to schools for the club to talk about gang violence and other subjects and that he led the club's track team. Both O.L. and J.V. testified that defendant was a "counselor." J.V. further testified that she first met defendant while he spoke at her school on behalf of the club. She then knew him as her track coach through the club. According to J.V., defendant's inappropriate contact with her began when she approached defendant in his office in the Boys and Girls Club and asked for help finding a job. Although defendant argues that J.V. couldn't have been in a position under defendant because her membership expired, this argument is countered by the club director's testimony that children with expired memberships were still permitted to use the club. Clearly, when taking all the evidence in the light most favorable to the prosecution, the jury could rationally find beyond a reasonable doubt that defendant held a position of trust and authority over J.V.

¶ 67 Although defendant attempts to cast his argument in the light of the sufficiency of the evidence, in reality it is an argument that the proof at trial was at fatal variance from the indictments. He argues that the indictments used the term "counselor" but the club's director testified that defendant's actual title was "coordinator." This purely semantic argument is unavailing. To constitute a fatal variance, "a variance between the allegations in a criminal

complaint and the proof at trial must be material and be of such character as may mislead the defendant in making his or her defense, or expose the defendant to double jeopardy." *People v. Maggette*, 195 Ill. 2d 336, 351 (2001). An indictment must state the name of the accused; set forth the name, date and place of the offense; cite the statutory provision the defendant allegedly violated; and set forth in the statutory language of the nature and elements of the charged offense. *People v. Collins*, 214 Ill. 2d 206, 219 (2005). Where an indictment charges all of the essential elements of a crime, matters that are unnecessarily added may be regarded as surplusage. *Id.*

¶ 68 Our supreme court's opinion in *Collins* is instructive. There, the indictment charged the defendant with recklessly discharging a firearm and thus endangering the safety of a particular police officer, but the proof at trial showed that others, not that police officer, were so endangered. *Id.* The supreme court held that the proof at trial did not fatally vary from the indictment because "[t]he specific identity of the victim is not an essential element of the offense of reckless discharge of a firearm." *Id.* at 220.

¶ 69 Here, the charges correctly identified the element of the crimes: that defendant "held a position of trust, authority, or supervision in relation to" J.V. The specific title held by defendant is not an essential element of the crimes charged and was therefore surplusage. Moreover, we cannot find that defendant was prejudiced by the allegation that he was a "counselor" at the Boys and Girls Club rather than a "coordinator," as he was put on notice of the charge with sufficient detail to permit him to mount a defense to the charges. See *People v. Espinoza*, 2015 IL 118218, ¶ 38 (due process requires that charging instrument adequately notify defendant of offense charged with sufficient specificity to enable proper defense).

Accordingly, we find that the trial court erred in denying defendant's motion for a directed verdict on Counts 2, 10, 13, and 20.

¶ 70 III. CONCLUSION

¶ 71 For the foregoing reasons, we find that the trial court did not commit reversible error in its handling of prior inconsistent statements by defendant's daughter, or in its decision to send the transcripts of two State witnesses' testimony to the deliberating jury where a transcript of defendant's testimony was unavailable. The trial court's question and comments did not indicate it was biased against defendant and the State presented evidence to prove defendant was in a position of trust or authority over J.V. beyond a reasonable doubt. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 72 Affirmed.