

2017 IL App (2d) 150242-U
No. 2-15-0242
Order entered June 29, 2017

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 14-CF-1235
)	
JOSE R. LECHUGA,)	Honorable
)	Clint Hull,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* Although some testimony was inconsistent regarding events that occurred after the offense, the State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of aggravated sexual abuse; the State proved beyond a reasonable doubt that defendant touched the victim for the purpose of sexual gratification because the jury could have reasonably inferred the element, where the evidence established that defendant touched the victim’s breast and leg and he told the victim it was “all a dream” and to “not tell anyone”; and the prosecutor’s improper comment during closing argument regarding defendant’s postarrest silence was harmless error. Trial court affirmed.

¶ 2 Defendant, Jose R. Lechuga, was convicted of two counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2014)) after a jury trial and was sentenced to 48

months' probation. Defendant argues that the State failed to prove him guilty beyond a reasonable doubt because there were inconsistencies in the witnesses' testimony and there was insufficient evidence that defendant touched the victim for the purpose of defendant's sexual gratification. Defendant also argues that the trial court erred by denying his motion for a mistrial where, during closing argument, the prosecutor commented on defendant's post-arrest silence. We affirm.

¶ 3

I. BACKGROUND

¶ 4 In October 2014, the State charged defendant with three counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2014)). Specifically, the State alleged that, between July 11 and 12, 2014, defendant, a person over the age of 17, knowingly committed an act of sexual conduct with S.C. (the victim), who was under 13 years of age when the acts were committed, in that defendant touched S.C. for the purpose of the sexual arousal of defendant or S.C. (1) "on or about the breast" (count I), (2) "on or about the vagina" (count II), and (3) "on or about the body" (count III).

¶ 5 The following evidence was presented by the State at defendant's January 2015 jury trial.

¶ 6 S.C. testified that she was born on March 31, 2002, and lived in Wisconsin with her mother, Marta V., and her older brother. On July 11, 2014, S.C. and her mother were visiting S.C.'s aunt Maria, to celebrate her birthday. Maria lived in Aurora with her daughters, Jocelyn, Jacqueline, and Jashlyn. After going to a party at Marta's aunts' house, at about 9 p.m. a relative drove S.C., Jacqueline, and Jocelyn back to Maria's house. Jashlyn did not sleep at home that night. At about 9 p.m., Marta left the party to go to Maria's work. When the girls arrived "home," they went to the bedroom. At approximately midnight, the girls decided that Jocelyn would sleep in the single bed, and Jacqueline and S.C. would sleep in the bunk beds, Jacqueline in the bottom bed and S.C. in the top bed. S.C. played on her phone for about ten minutes and fell

asleep at about 12:15 a.m. The door to the room was open because it was hot and the air conditioning was on. S.C. wore shorts, underwear, a T-shirt, and a bra. She was partly covered by a blanket.

¶ 7 S.C. identified defendant in court as her “uncle.” She testified that, after she fell asleep, “I got woken up by my uncle touching me.” When she woke up, light was coming into the bedroom from the bathroom that was next to the bedroom. S.C. explained, “Someone was touching me on my [left] leg near to my private part, vagina, and something—another hand on my [left] breast” at the same time. When the hand was on S.C.’s leg, “[i]t was moving up and down, but it was on my private part.” The hand went underneath S.C.’s shorts and the hand touched her underwear. The other hand was on “on top of [S.C.’s] breast, on top of [her] tank top [and bra].” When S.C. woke up, she felt someone touching her but did not see anybody. S.C. “stayed awake for a little bit.” Then, defendant, who had been kneeling down, stood up, and S.C. said, “Don’t touch me anymore,” and she told defendant to get away. Defendant told S.C., “Shhh, and not to say anything and this was a dream.” Then defendant left the bedroom.

¶ 8 S.C. got up, woke up Jacqueline and Jocelyn, and told them what happened. S.C. explained that neither she nor her mother had good phone service, so she used the Wi-Fi connection on Jocelyn’s phone to connect to her phone and tried to contact her mother using Facebook. When she “couldn’t message her [mother],” S.C. sent messages to her Aunt Maria’s phone via Facebook messenger. Using pictures of Maria’s phone that were admitted into evidence, S.C. testified about the conversation she had with Maria at about 2:30 a.m. in Spanish, via Facebook messenger. She testified regarding the contents of the messages in English.

¶ 9 S.C. testified that, in her first message, she told her Aunt Maria that defendant touched her. Maria replied, “What happened?” Then Maria asked if S.C. had told her mother. S.C. replied, “I was sleeping and that he started to touch me and that—and I told him to stop.” Maria replied,

“What did he say?” S.C. replied, “He told me that—not to anybody.” Maria asked S.C. where defendant touched her, and S.C. replied, “my private part and *** my chest.” Maria asked where defendant was, and S.C. replied that he was sleeping in the next room. She asked Maria to tell her mother because she could not reach her on Facebook. Then, using Jocelyn’s phone, S.C. spoke to her mother on Maria’s phone. S.C. told her mother what happened, and her mother told her to stay in the bedroom with Jacqueline and Jocelyn. Maria and S.C.’s mother came home with police officers. Later that morning, S.C. went to the Child Advocacy Center and spoke with investigator Tim Martin.

¶ 10 During cross-examination, S.C. testified as follows. S.C. was a heavy sleeper. While she was asleep, she “felt touching on my [her] leg and private part.” When S.C. woke up, the touching stopped, and she saw some hands moving away from her body. Eventually, defendant came up to the top bunk and S.C. saw defendant’s face. Defendant leaned toward S.C. and tried to put his left hand on S.C.’s leg again; she told him, “Don’t touch me anymore” and “Get away.” S.C. told investigator Martin that, while she was asleep, she felt rubbing on her leg and that she thought it was in a sexual manner because defendant touched her “private part and he was rubbing it.” At some point, defendant pushed S.C.’s head onto the pillow and said “Go to sleep, this is just a dream, don’t say anything, [and] shhh.” Defendant then asked her if she wanted a kiss goodnight. S.C. replied, “No.” S.C. did not see defendant kiss Jacqueline or Jocelyn. After S.C. went into Jacqueline’s bottom bunk bed and told her what happened, defendant came into the room again. Defendant did not say anything, but S.C. thought that defendant kissed Jacqueline goodnight.

¶ 11 Marta V., S.C.’s mother, testified as follows. At the time of the trial, S.C. was twelve years old. She identified defendant as her sister Maria’s former husband and the father of Jacqueline, Jocelyn, and Jashlyn. Marta corroborated S.C.’s testimony that, on the night of the

incident, Marta and S.C. were visiting Maria in Aurora because the following day was Maria's birthday. Marta, S.C., Maria, and her daughters went to a relative's party on July 11, 2014, and, between 9:30 and 10:30 p.m., Marta went to work with Maria "so [Maria] could finish sooner." At approximately 2 a.m., Maria showed Marta some messages from S.C. on Maria's phone. In response to those messages, Marta called S.C. on Maria's phone and told S.C. "to be calm and that [she] was on her way." On the way to Maria's house, Marta called the Aurora police. When Marta arrived at Maria's house, three police cars were there, and police officers were at the door. The police officers went inside the house with Maria. The police officers went into defendant's bedroom and arrested him. S.C. was crying, and Marta hugged her

¶ 12 Marta asked S.C. to explain what happened. In response, S.C. told her the following. S.C. was sleeping on the upper bunk, she began to feel somebody touching her legs, and she woke up. Defendant "already had his hand on [S.C.'s] vagina. And she told him to stop. And he told her, 'Shhh. Don't say anything. This is a dream.' And [S.C.] told him to stop. And he didn't do it. He touched her breast." S.C. started to cry, and "later, when [defendant] stood up, he kissed [Jacqueline]. And he kissed [Jocelyn]. And he went to the bathroom." A few hours later, Marta took S.C. to the Child Advocacy Center.

¶ 13 Martin testified that he was a police officer and a criminal investigator for the Kane County State's Attorney's Office, assigned to the Kane County Child Advocacy Center. He had held this position for 12 years. Martin was proficient in English and Spanish. Martin interviewed S.C. at the Child Advocacy Center on July 12, 2014. The interview was video recorded in Spanish and later transcribed into English. Pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2014)), the trial court admitted in evidence the transcript and original video recording of the interview. The trial court also admitted an anatomical drawing of a female of approximately S.C.'s age that S.C. referred to during the interview

¶ 14 According to the transcript of the interview, S.C. told Martin the following. Earlier that day, at about 3 a.m.:

“I felt someone touching me on my leg and about to touch me on my private part. And then I felt someone try to touch my breasts. *** And then that’s when I woke up and then I saw, I didn’t see nobody at first because I, it was my uncle but then I didn’t see him because he was crouching down so I couldn’t see him.”

S.C. explained that defendant was “rubbing [her] left leg in a sexual way [and] trying to touch [her] private part.” S.C. thought it “wasn’t happening and I thought like I got a realistic dream or something *** you know how sometimes you have dreams and you don’t know if it’s real or no[?]” Defendant touched her vagina under her shorts, but over her underwear. Defendant was “grabbing” her left breast over her shirt. S.C. told Martin that the person who touched her was her Aunt Maria’s husband. S.C. said, “when I was sleeping I felt someone touching me. That woke me up.” S.C. also said that, after she felt someone touching her:

“I didn’t see nobody there, I just stay [*sic*] there for a couple of minutes like awake and then I see my uncle there. And then he’s trying to touch me again and then I did, I like said, ‘Get away from me—I don’t want you touching me anymore.’ Cause I couldn’t believe that it was him cause I thought he wouldn’t do that. *** And then he kept touching me and then I told him to get to get away from me that I didn’t want him to be near like near me, and then and then I started I was about to cry because I was like scared. *** [H]e like tapped me on the head so I could put me head on the pillow, *** he like pushed it softly so I could like my head would be on the pillow.*** [W]hen he was doing that he told me, ‘Don’t tell anyone; this is a dream.’”

¶ 15 S.C. explained to Martin that she slept on the top bunk, Jacqueline slept on the bottom bunk bed, and Jocelyn slept on a single bed, all in the same room. S.C. told Martin that, after defendant

left the bedroom, she told Jacqueline what happened, started to cry, and went into Jacqueline's bed. Jocelyn woke up, and S.C. told Jocelyn what happened.

¶ 16 Jacqueline R. testified as follows. Jacqueline essentially repeated S.C.'s testimony regarding the events leading up to bedtime. Normally, Jacqueline, the oldest sister, slept in the bottom bunk, Jashlyn, the youngest sister, slept in the top bunk, and Jocelyn, the middle sister in age, slept in the single bed. But on July 11, 2014, Jashlyn slept at a cousin's house, Jacqueline slept in the top bunk, S.C. slept in the bottom bunk, and Jocelyn slept in the single bed. At some point, a loud noise woke up Jacqueline. The noise was "like something had hit the bed." Jacqueline felt the bed move. Jacqueline woke up and opened her eyes, rolled over from facing the wall, and saw defendant. S.C. said, "Don't touch me" or "Get away from me." The tone of S.C.'s voice was "like crying." Then, defendant, who was facing the bunk bed, said, "Don't tell anyone." Defendant left the room. After about five minutes, S.C. started crying, called to Jacqueline in a whispering voice, and told Jacqueline that defendant had touched her.

¶ 17 Jacqueline also testified that, at some point, defendant came back into the room and gave her and Jocelyn a kiss goodnight. After defendant left the bedroom, S.C. started crying and climbed down into Jacqueline's bunk bed. At some point, S.C. moved to Jocelyn's bed and texted Jacqueline's mother. Jacqueline testified that the bedroom lights were off, but a nearby bathroom light was on.

¶ 18 Jocelyn testified as follows. Jocelyn woke up to S.C. crying; S.C. was in the top bunk when Jocelyn heard her cry. S.C. told Jocelyn that defendant had touched her "[i]n the boobs and her private part and thighs." Jocelyn did not see defendant in the room, but she felt him kiss her goodnight before she heard S.C. cry.

¶ 19 Defendant testified that, at the time of the incident, he lived with his wife, Maria, and his three daughters, Jocelyn, Jacqueline, and Jashlyn. On the night of the incident, at about 10 or

11p.m., he was watching television on the couch trying to fall asleep. Jocelyn, Jacqueline, and S.C. were eating pizza in the kitchen. He laid down and told Jocelyn to make sure they turned off the lights before they went to bed. Defendant did not see the girls go into the bedroom. He fell asleep on the couch between 11 and 11:30 p.m.

¶ 20 Defendant woke up between 12 and 1 a.m., turned on the bathroom light, and went into the bedroom to give Jocelyn and Jacqueline a kiss. Defendant thought that Jashlyn was in the top bunk because that is where she normally slept. To give S.C. a kiss, defendant touched her shoulder with his right hand and, grabbed her other shoulder with his left hand “a little bit firmly.” S.C. woke up and defendant realized that S.C. was “the other girl.” Defendant was surprised and scared and that S.C. was scared too, so defendant said, “[d]on’t worry. I was only touching you in order to give you a kiss.” Then defendant said, “shhh. Relax. Go to sleep.” When defendant told S.C. he was going to give her a kiss, she replied, “no, no,” so defendant left the room and went into his bedroom to go to sleep.

¶ 21 Defendant was worried about S.C. because she was visiting so he went back into the girls’ room. He told S.C., “[d]on’t worry. Go back to sleep. Relax.” Defendant then rubbed S.C.’s shoulder and grabbed her head to put it down on the pillow. Defendant testified that he “went up close to [S.C.] and was going to give her a kiss. And her reaction was that she was going to give [him] a kiss. So then it was like she regretted it. And she drew back. And she said, ‘no, no, go away.’” He gave Jacqueline “another kiss” and then went back to his bedroom.

¶ 22 Later that morning, when police officers arrived in defendant’s bedroom, he did not know why they were there. The police officers told him to get up and that he was under arrest. At the police station, he told an investigator that he had touched S.C.’s shoulder but that he had not touched her leg, vagina, or breasts. Defendant touched S.C.’s shoulders, head, and hair, but he

did so “without knowing it” because he does so when his daughter is there. Defendant did not grab S.C. to hurt her and he did not do anything wrong to S.C.

¶ 23 The jury found defendant guilty of two counts of aggravated criminal sexual abuse (touching S.C.’s breast and body, counts I and III, respectively). On February 26, 2015, the trial court sentenced defendant to concurrent 48-month terms of imprisonment on each count, with 180 days in jail and credit for time served.

¶ 24 Defendant filed a notice of appeal on March 10, 2015.

¶ 25 **II. ANALYSIS**

¶ 26 Defendant argues that the State failed to prove him guilty beyond a reasonable doubt of aggravated criminal sexual abuse because of “material inconsistencies between witnesses.”

¶ 27 When reviewing the sufficiency of the evidence, this court will not retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, we must consider “ ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” (Emphasis in original.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under this standard, a reviewing court must draw all reasonable inferences from the record in favor of the State. *Davison*, 233 Ill. 2d at 43. It is the trier of fact’s duty to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *Evans*, 209 Ill. 2d at 211. We will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant’s guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 28 To prove defendant guilty of aggravated criminal sexual abuse, the State had to prove that: (1) defendant was 17 years old or older’; (2) the victim was under 13 years old; and (3) defendant committed an act of sexual conduct with the victim. See 720 ILCS 5/11-1.60(c)(1)(i)

(West 2014)). Sexual conduct is defined as “any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age *** for the purpose of sexual gratification or arousal of the victim or the accused.” 720 ILCS 5/11-0.1 (West 2014)). Here, it is undisputed that defendant was over the age of 17 and the victim was under the age of 13 when the offenses occurred.

¶ 29 Defendant argues that it was unreasonable for the jury to credit S.C.’s testimony that he touched her because she testified, and told Martin, that defendant touched her while she was asleep and, when she woke up, she did not see anybody.

¶ 30 Here, there was sufficient evidence that defendant touched S.C. S.C. testified and told Martin that, while she was sleeping, she woke up when defendant touched her leg, vagina, and breast. S.C. testified that, while she was being touched, she “stayed awake for a little bit,” did not see anyone because defendant was crouching down on the lower bunk bed, and, when defendant got up, she saw him and said, “Don’t touch me anymore.” S.C. testified that defendant told her, “Shhh, [and] not to say anything [and] this was just a dream” and then defendant left the bedroom. S.C.’s testimony is corroborated, in part, by defendant’s testimony and the statement he made to Martin. Defendant testified that S.C. told him, “no, no, Go away,” and that he told her, “Shhh” and “[d]on’t worry. Go back to sleep.” Further, S.C.’s testimony withstood rigorous cross-examination. Therefore, defendant has failed to demonstrate that it was unreasonable for the jury to credit S.C.’s testimony that defendant touched her.

¶ 31 Defendant also argues that it was unreasonable for the jury to credit S.C.’s testimony because of differences between the victim’s testimony and that of Jacqueline, Jocelyn, and Marta. Defendant notes that S.C. testified that she got into Jacqueline’s bed before defendant entered the room a second time, while Jacqueline testified that S.C. got into her bed after

defendant left the room the second time; Jacqueline also testified that she woke up when she heard a noise like something hitting the bed, and then testified that she woke up because S.C. whispered “get away from me.” Defendant further points out that S.C. testified that she climbed down to Jacqueline’s bed and, while she was crying, Jocelyn woke up. On the other hand, Jocelyn testified that, when she woke up, S.C. was still on the top bunk and was crying. Finally, defendant notes that, contrary to S.C.’s testimony, S.C. told Marta that defendant touched her breast only after he touched her vagina.

¶ 32 Defendant fails to explain how the minor inconsistencies render the evidence so improbable or unsatisfactory that it created a reasonable doubt of defendant’s guilt. See *Collins*, 106 Ill. 2d at 261. Further, defendant fails to recognize that Jacqueline, Jocelyn, and Marta corroborated S.C.’s testimony that defendant was in the bedroom and that he touched her. Jacqueline testified that she woke up when she felt the bed move; she saw defendant; S.C. said “Don’t touch me” or “Get away from me”; defendant said, “Don’t tell anyone”; and S.C. told Jacqueline that defendant touched her. Jocelyn testified that S.C. told her that defendant had touched her “[i]n the boobs and her private part and thighs.” Marta testified that she called the police after receiving a phone call from S.C.; when she arrived at Maria’s, the police were there; S.C. told Marta that defendant touched her legs, vagina, and breast, and defendant told S.C. “This is a dream.” Because defendant fails to establish how the alleged inconsistencies create a reasonable doubt regarding defendant’s guilt, reversal is not warranted.

¶ 33 Next, defendant points out numerous inconsistencies between his testimony and S.C.’s testimony, and notes that several key points in his testimony are consistent with that of Jacqueline and Jocelyn’s testimony. Defendant argues that the jury should have accepted his “more reasonable explanation [that he] was in a sleepy haze, went to kiss his girls goodnight and touched [S.C.] in some way, thinking it was Jashlyn. [S.C.], in a moment of fear, misconstrued

the innocuous touching, [and] Jacqueline and Jocelyn woke up, heard [S.C.'s] version of the events and adopted that version as their own.”

¶ 34 This argument relates to S.C.'s credibility and is best reserved for the trier of fact. The jury was not required to accept defendant's explanation and elevate it to the status of reasonable doubt. *People v. Siguenza-Brito*, 213, 224-25, 229 (2009). It could believe as much or as little of any witness testimony as it saw fit. *People v. Villareal*, 198 Ill. 2d 209, 231 (2001). Here, the jury credited S.C.'s testimony over that of defendant, and nothing in the record convinces us that its finding was unreasonable. The positive and credible testimony of a single witness is sufficient to support a criminal conviction. *People v. Smith*, 185 Ill. 2d 532, 541 (1999); see also *People v. Calusinski*, 314 Ill. App. 3d 955, 960 (2000) (finding six-year-old victim's testimony sufficient to convict the defendant, particularly where it was corroborated by her later statements to her mother).

¶ 35 Next, defendant argues that the State failed to prove beyond a reasonable doubt that defendant touched S.C.'s breast or body for the purpose of sexual gratification.

¶ 36 To prove the offense of aggravated criminal sexual abuse, the State must prove, *inter alia*, that the accused committed an act of sexual penetration or sexual conduct with the victim. 720 ILCS 5/11-1.60(d) (West 2014). Sexual conduct is defined, in part, as the intentional or knowing touching or fondling by the accused of the sex organs, breast, or any part of the body of a child under 13 years of age, either directly or through clothing, for the purpose of the sexual gratification or arousal of the accused. 720 ILCS 5/11-0.1 (West 2014). Sexual gratification or arousal, however, is not defined by statute. *In re Davontay A.*, 2013 IL App (2d) 120347, ¶ 17. The intent to sexually gratify or arouse has no restrictive meaning and can be inferred solely by the nature of the act. *People v. Burton*, 399 Ill. App. 3d 809, 813 (2010).

¶ 37 Here, defendant's conduct clearly allowed the inference that his touching of S.C. was done for his sexual arousal or gratification. The evidence showed that, while S.C. was sleeping, defendant put his hand on her breast and leg. S.C. woke up when she felt defendant move his hand up her leg under her shorts toward her vagina. The fact that defendant told S.C. "Shhh, [and] not to say anything [and] this was just a dream" underscores that defendant's actions were for the purpose of his own sexual gratification and arousal. If defendant's actions were arguably innocent, as he testified, he would not have been crouched down, hiding from S.C., and when S.C. saw him defendant would not have told S.C. not to tell anyone. Taking the record in the light most favorable to the prosecution, a rational finder of fact could find beyond a reasonable doubt that defendant acted for the purpose of sexual gratification when he touched S.C.

¶ 38 Next, defendant contends that the trial court erred by denying his motion for a mistrial due to the prosecutor's improper comment during closing argument, allowing the jury to infer defendant's guilt based on his post arrest silence.

¶ 39 During closing argument, the prosecutor stated:

"The first thing I would like to caution you is take into account the credibility of the witnesses and any bias or motive that they have in testifying. ***

* * *

So in passing, does it make any sense that the Defendant wouldn't ask the Aurora police officer why he was being handcuffed or why—"

¶ 40 Defense counsel objected and moved for a mistrial. The trial court overruled the objection and denied defense counsel's motion for a mistrial. After argument and before instructing the jury, the court the trial court stated:

"I believe that when I overruled the objection, I made a mistake. I am going to sustain the objection. I am not going to grant your motion for a mistrial.

I am just going to indicate that the Jury is to disregard that State's argument that the Defendant didn't ask what he was being arrested for."

Defense counsel declined the trial court's offer of a curative instruction, stating the he did not want to "revisit that particular argument in front of the jury."

¶ 41 The State argues that any error was harmless.

¶ 42 Defendant contends that the State impermissibly commented on his post arrest silence, in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). "There the Supreme Court held that since a defendant's silence after being informed of his right to remain silent is 'insolubly ambiguous,' and in light of the implied assurance given in the *Miranda* warnings that silence will carry no penalty, 'it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.'" *People v. Bock*, 242 Ill. App. 3d 1056, 1072 (1993), quoting *Doyle*, 426 U.S. at 617-18. The Illinois supreme court held that it is error for a prosecutor to comment on a defendant's post arrest silence. See *People v. Herrett*, 137 Ill. 2d 195, 214 (1990). But not every *Doyle* violation warrants reversal; rather, such violations are subject to a harmless error analysis. *People v. Hart*, 214 Ill. 2d 490, 517 (2005). In determining whether a *Doyle* violation is harmless beyond a reasonable doubt, a reviewing court considers the following factors: (1) the party eliciting the testimony about defendant's silence at issue; (2) the intensity and frequency of the references to the defendant's silence; (3) the use that the prosecution made of defendant's silence; (4) the trial court's opportunity to grant a mistrial motion or to give a curative jury instruction; and (5) the quantum of other evidence proving the defendant's guilt. *Id* at 517-18 (citing *People v. Dameron*, 196 Ill. 2d 156, 164 (2001)).

¶ 43 In the present case, the five factors favor a finding that any alleged *Doyle* violation was harmless error. During closing argument, the prosecutor asked, "does it make any sense that the Defendant wouldn't ask the Aurora police officer why he was being handcuffed?" The State

did not elicit testimony giving rise to this rhetorical remark, the intensity and frequency was limited to one remark, and no further reference was made by the prosecution during argument. Further, the trial court subsequently sustained defendant's objection and offered to give a curative instruction, which defendant refused. Finally, contrary to defendant's contention, the evidence was not closely balanced; rather, there was substantial evidence presented at trial to prove defendant's guilt. Based on our consideration of these factors, we conclude that the alleged *Doyle* violation amounted to harmless error.

¶ 44

III. CONCLUSION

¶ 45 The judgment of the circuit court of Kane County is affirmed.

¶ 46 Affirmed.