2017 IL App (2d) 150695-U
No. 2-15-0695
Order filed November 14, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ARMANDO VEGA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 14-CF-87 Honorable T. Clint Hull, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed first-prong plain error in the State's closing argument: the argument was error, as the State effectively argued that defendant had admitted sexual contact, when the evidence showed that he had repeatedly denied it; the error was reversible, as the jury's questions indicated that the argument might have influenced the verdicts; and the plain-error rule applied, as the evidence was not overwhelming.

¶ 2 Defendant, Armando Vega, appeals from his convictions of four counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)) and four counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2014)). He contends that the prosecution during its closing argument seriously misstated the evidence, effectively stating

that defendant had denied that his conduct amounted to "rape," when he had in fact denied all sexual contact with C.S., the alleged victim. He concedes that he failed to preserve the error, but argues that the misstatement amounted to first-prong plain error. We agree; we therefore vacate the convictions and remand the matter for a new trial.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by indictment with four counts of predatory criminal sexual assault of a child, all charged as "sexual penetration *** hand in *** sex organ," and four counts of aggravated criminal sexual abuse, all charged as "sexual conduct *** hand on *** breast." All eight counts alleged sexual conduct by defendant with a victim who was less than 13 years old. The State alleged that the offenses occurred between February 28, 2007, and February 27, 2011.

¶ 5 Defendant had a jury trial. The State had six witnesses: (1) Selma Griffin (Selma), the older sister of C.S.'s father, Juan Santana (Juan); (2) C.S. herself; (3) Griselda Santana (Griselda), C.S.'s grandmother and defendant's girlfriend at the time of the charged offenses; (4) Juan; (5) Sangita Rangala, M.D. (Rangala), an emergency-medicine physician with additional training in child sexual abuse, who examined C.S., and (6) Timothy Martin (Martin), an investigator with the Kane County Children's Advocacy Center, who interviewed defendant. Defendant was the sole defense witness.

¶ 6 Selma testified that, in the years at issue, C.S. had generally lived with her, but had usually spent every other weekend at Griselda's house. On those weekends, Griselda, defendant, or both of them together would pick C.S. up at her school in Sleepy Hollow. When C.S. was a third-grader, she started being extremely reluctant to go. At some time in 2009 or 2010, Selma received information from Juan such that she would no longer allow C.S. to be alone with defendant. When Selma conveyed the decision to C.S., C.S. was tense, but never explained her

reluctance to go to Griselda's house. In 2013, Selma learned that C.S. was injuring herself. Selma took her to "Alexian Brothers mental health clinic." After that, someone from "Kane County DCFS" came to interview Selma. This was when Selma learned in detail what had happened to C.S. However, in 2008, C.S. had talked a bit about what defendant had done to her, but Selma "didn't recognize it as that."

¶ 7 C.S.'s testimony followed Selma's. As an elementary-schooler and middle-schooler, she had lived with Selma and had gone to school in Huntley, Elgin, Marengo, and Sleepy Hollow. She went to third grade in Sleepy Hollow, and, at that age, she would sleep over at Griselda's house in Carpentersville "[a]lmost every night" when she "had school." Because defendant had turned a room that had been her bedroom into an office, she slept on a couch in Griselda's living room. She usually slept in shorts and a T-shirt. Sometimes when she was in the living room, defendant would touch her, placing his hands on her breasts and in her vagina. He would touch her breasts "in circular rotations"; when he touched her vagina, "[h]e would put his hand in [her]." When he touched her vagina, she felt "disgusted and ashamed." When his hand went into her vagina, his hand felt "[d]isgusting." The assaults would end when defendant walked away to Griselda's bedroom or the bathroom. The assaults usually happened at night, and usually when she was on the couch. There had been more than three instances where "this" happened on the couch; there had been "only a few times" that defendant did not touch her vagina. More than one instance had taken place when she was in a living-room chair. One incident of his touching her breasts took place during the day while Griselda was at the store. Defendant came up behind her, started rubbing her shoulders, and said that she should put baby oil on herself. He then touched her breasts. Asked if anything else happened that time, she said, "Not that I can recall."

Defendant generally did not talk to her during the assaults, but sometimes he made shushing noises.

¶ 8 C.S. did not tell Griselda what happened right away: "When it first happened, I didn't quite understand what was going on. I didn't really understand the situation until its full extent." Juan "found out from others" what had happened. She went to Alexian Brothers because she "was suffering from self-harm and depression." She told the staff what had happened, "because [she] want[ed] a full recovery." The assaults happened when she was 8 to 11 years old. She was now living in Griselda's house. Asked how this made her feel, she said, "It's devastating. Some nights I can't even be in my room," because "it brings back too many memories."

¶ 9 On cross-examination, C.S. said that she had had a bedroom at Griselda's house at one time, but after she "moved out," defendant had turned the second bedroom in the house into an office. She had since moved back into that room, and it was her bedroom at the time of trial.

¶ 10 Griselda testified that she had lived in Carpentersville for more than 20 years and that she worked in a factory. She had been dating defendant for about 10 years, "on and off," and, during the relationship, he would stay at her house almost every weekend. That relationship ended in 2014. Griselda's house had two bedrooms, but when defendant stayed with her, he would share her bedroom. C.S. had a bedroom, but she sometimes fell asleep on the living-room couch. C.S.'s bedroom had never been used as an office. Griselda sometimes went shopping by herself when both defendant and C.S. were at the house. This was usually in the morning when both defendant and C.S. were asleep.

¶ 11 Juan testified that he had asked Selma for help raising C.S. However, while C.S. was in elementary school, she would sometimes sleep over at Griselda's house. While she was there, she would sleep either on the living-room couch or in a spare bedroom that also had a desk in it.

This time overlapped with the time in which defendant was dating Griselda. In June 2010, an aunt of C.S.'s other than Selma relayed information to C.S. that led Juan to ask C.S. what "rape" meant. C.S. started crying and turned red. She told him that "defendant would at times come up from behind her and grab her inappropriately." He could not remember the specifics of what she said, but he believed that she had mentioned that it happened when she was lying on the couch.

¶ 12 Juan was angry and told all of his siblings what he had learned. He also told C.S. that, if she found herself alone in the house with defendant, she should lock herself in her room. He thought that Griselda was "in love with that dude," and he wanted to "save her feelings"; this was why he did not contact the police. He did not tell Griselda what he had learned, but he did confront defendant; he told defendant that he was "going to break his fucking neck." Defendant's response was to "ramble[] off a lot of gibberish." Griselda continued to date defendant after this, but Juan thought that C.S. had not had any unsupervised contact with defendant after he spoke to his siblings and C.S.

¶ 13 In 2013, Juan learned that C.S. was harming herself and had been taken to Alexian Brothers hospital. He then learned more details of what defendant had done to her. He believed that Griselda had stopped dating defendant in the middle of 2013. He agreed that he had been convicted of forgery in 2006 and, in 2008, misdemeanor attempted obstruction of justice.

¶ 14 On cross-examination, Juan said that, during the 2010 conversation, C.S. told him that defendant had "raped" her. When he asked her what she meant, she said that she "had been sleeping on [the] couch, *** and that [defendant] touched her [while she was at Juan's] mom's house."

¶ 15 Rangala testified as an expert witness on sexual-abuse diagnosis. She said that, along with her ordinary training in emergency medicine, which included treating child victims of

sexual abuse, she had received specialized in-depth training on such victims. According to the research she relied on, 98% to 99% of children who have been sexually abused show no physical indications of abuse; if the examinations can be done within 24 to 72 hours of the abuse, the likelihood of an abnormal examination rises, but even with prompt examination, 75% to 80% have normal examinations. This is partly because the kinds of injuries children suffer in sexual abuse often heal very rapidly and partly because many kinds of abuse do not cause physical injury. Normal results occur even in children for whom video-recorded evidence of penetration exists and in those who have become pregnant. Rangala examined C.S. and found no physical indications of abuse. However, C.S.'s psychiatric symptoms—extreme anxiety and self-cutting—were of a type common in child victims of sexual abuse, and especially those who keep their abuse secret.

¶ 16 Martin testified that he interviewed defendant on September 24, 2013. He told Martin that Griselda was his girlfriend. He knew C.S. as the daughter of Griselda's son Juan who would come on weekends to Griselda's house in Carpentersville. C.S. would sleep in her room or the living room. Martin asked defendant directly about the accusations:

"[Assistant State's Attorney] Q. Did you ask him about the allegations [C.S.] made?

[Martin] A. Yes.

Q. What was his reply?

A. He said in my own personal opinion, I didn't touch the girl.

Q. Did he say anything after that?

A. He said maybe [C.S.] was dreaming or fantasizing about him touching her, but he didn't do it."

¶ 17 On cross-examination, defense counsel asked whether the particular denial Martin had mentioned was defendant's only denial of contact with C.S.:

> "[Defense counsel] Q. And during that hour-long conversation, [defendant] continuously denied touching [C.S.]; is that correct?
>
> [Martin] A. He denied touching her.
>
> MS. SCHMIDT [Assistant State's Attorney]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> THE WITNESS: He denied touching her."

The State rested after declining to ask Martin any redirect questions.

¶ 18 Defendant's testimony was the final evidence. He said that he had met Griselda at work; they had been dating for about nine years as of the trial. He knew C.S. as Griselda's granddaughter. He had spent some nights at Griselda's house; C.S. also stayed there some of those nights. Defense counsel asked him what his relationship with C.S. was like. He responded:

> "At the beginning, I didn't know [C.S.] that well. But our relationship start [*sic*] growing up because I knew her and to me she seemed like a confused girl. She had issue [*sic*] in her life and I was like a best friend to her."

Defense counsel asked him in what way they were like best friends. He responded:

> "Well, she told about her dreams, like, career goals, dreams. She told me about the things she wanted."

He sometimes picked C.S. up at her school in his car, and he sometimes took her to school even when he did not sleep at Griselda's house. When both he and C.S. were at Griselda's house, she sometimes slept in the living room and sometimes slept in the spare bedroom. He thought that she slept in the living room because she liked to be near the television and computer. He had not

converted the spare bedroom into an office, but he had removed a bathroom with leaky plumbing and made the space into a walk-in closet. He had never put his hands into C.S.'s vagina or onto her breasts.

¶ 19 In its closing argument, the State emphasized the oddness of defendant's saying that, in his "own personal opinion," he did not touch C.S., and the implausibility of some of his testimony:

> "So that leads us to *** look at the defendant's statement as far as what you heard from Timothy Martin. In my own personal opinion, I didn't touch the girl. And he also stated that maybe [C.S.] was dreaming or fantasizing about him touching her. An eight to 11-year-old girl being fantasized about being digitally penetrated and touched by this man over here. That sounds absolutely ridiculous, Ladies and Gentlemen.
>
> And let's talk about personal opinion. Who uses those words[?] Who uses in my own personal opinion[?] Circumstantially, by that statement, you can infer he doesn't believe based on when you look at that legal definition that digital penetration, he doesn't believe he had sexual relations with that girl. He doesn't believe he had sexual relations based on the conduct in and of itself. Because it is mine, he's thinking, well, I didn't have sex with her. I didn't do this or that. He doesn't believe he had sexual relations with [C.S.]"

¶ 20 Defense counsel responded by arguing that C.S. was a mentally ill child who had made up a story to get Juan to pay attention to her:

> "[Defendant] did not sexually assault [C.S.] He did not sexually abuse [C.S.] [C.S.] is a very confused young lady. She was a confused girl. She has a lot of mental health problems as young girls do.

*** She wanted attention from her family.

And so, how did she go about getting it[?] She told her father [defendant] raped me. Juan Santana testified that he talked to his daughter in 2010 and he asked her what does rape mean. And she started to cry and she said [defendant] touched me.

She didn't say, he touched my breast. She didn't say, he touched my vagina. She didn't say, he put his hand inside my vagina. Maybe she didn't know those words, but she didn't say he touched me here. She didn't say he touched me here. She didn't point to any part of her body. She didn't say this happened more than once, more than twice, every time I go to grandma's. What she said was [defendant] touched me.

***

These are people who knew [C.S.] best. It is pretty obvious they did not believe what she was saying. You can use your own personal experience, your own common sense, what you know about parents and their children.

***

You have to remember that [C.S.] said I was raped. And when they questioned her about it, she said, [defendant] touched me, and that was all she said. So, obviously, being touched isn't rape. No one is alleging that. So she was confused about that."

¶ 21 After noting that C.S.'s testimony suggested that she was confused about where she had slept while she was in school and was confused about defendant having turned her bedroom into an office, defendant argued that the reason that she was confused was that she was lying:

"And Ladies and Gentlemen, the reason why she was confused about so many things is because it is hard to keep a story straight when that's all it is, is just a story."

¶ 22 The main issue in this appeal arises from the prosecution's rebuttal argument. It initially responded to the claim that C.S. was lying:

> "Ladies and Gentlemen, if you don't believe [C.S.], you believe she's lying. You can't have it both ways. If you don't believe her testimony, then you believe she's lying."

However, it quickly switched to arguing that defendant was the person with a motive to lie and that his denial of guilt was actually inculpatory, starting by arguing that his referring to C.S. as "the girl" was telling:

> "And defendant in this case *** is presumed innocent but not presumed to be telling you the truth. *** And I want to touch on statements he made to Investigator Martin.
>
> He states, in my personal opinion, I did not touch the girl. He doesn't say, I didn't do anything. He says, in his own personal opinion, I didn't touch the girl. And he says the girl. And I want you to remember that he says the girl.
>
> *** He distances himself from her. *** Well, he testified from that witness stand that they were best friends, but he's going to refer to her as the girl."

After suggesting that defendant had never been a friend or father figure to C.S., it made the remarks that are at issue in this appeal:

> "[Moreover] when [defendant] says in his personal opinion, I want you to consider that because in his head, he doesn't think he raped her. He doesn't think that's rape.
>
> MS. ARCHULETA [Defense counsel]: Objection. There is no evidence that he was asked about rape.

THE COURT: Okay. *** The objection is going to be overruled. However, any evidence and argument that is not based upon the evidence that has been received should be disregarded.

You can continue.

MS. SCHMIDT [Assistant State's Attorney]: He doesn't think when he put his hand inside her vagina and assaulted her that that was rape.

And then, he finally says, well, maybe she was dreaming or fantasizing. What child is going to fantasize about her grandmother's boyfriend? What child is going to do that? It doesn't make any sense. The defendant is clearly protecting himself.

* * *

We don't have to prove why the defendant did this. We don't have to prove his motive. Nobody knows why people do these crimes, but they happen. The defendant counted on [C.S.], a child, to not know what he was doing was actually rape. He counted on her being silent."

¶ 23 The jury started deliberating, but sent four questions to the court:

"What verbiage was used by the investigator to the defendant if he touched her private areas, IE [*sic*], in my personal opinion.

Number two: Is English the first or second language for the defendant?

Third: Why was the original examiner not called in as a witness? And then, in a parenthesis, Alexian Brothers.

*** [N]umber four: If we the jury all believe [C.S.'s] testimony is true, is that enough for a guilty verdict?"

The court sent the jury the response that it had received all of the evidence.

¶ 24 The jury next returned incomplete and contradictory verdict forms. The court received four forms finding defendant guilty of aggravated criminal sexual abuse, with the corresponding not-guilty forms unsigned. For the predatory-criminal-sexual-assault charges, however, it received two completely signed guilty-verdict forms that were accompanied by two partially signed not-guilty forms. The court retained the guilty-verdict forms for aggravated criminal sexual abuse, but sent the jury new verdict forms for all counts of predatory criminal sexual assault. The jury then rendered guilty verdicts on all of those counts as well.

¶ 25 Defendant filed a motion for judgment notwithstanding the verdict, which, as amended, raised eight issues, none of which is relevant to the issue on appeal. The court denied the motion.

¶ 26 At sentencing, the parties agreed that defendant had spent 429 days in custody for which he was entitled to credit. The court sentenced defendant to an aggregate of 37 years' imprisonment, ordering that he receive credit for the 429 days served. Defendant filed a motion for reconsideration of his sentence, the court denied it, and defendant timely appealed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, defendant admits that he did not raise the prosecution's rebuttal remarks concerning his beliefs about rape in his posttrial motion and concedes that he thus forfeited that claim (see *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007)). However, he asks that we review the claim as first-prong plain error—that is, he contends that clear reversible error occurred and that the evidence was closely balanced. He argues that the State's "comment *** wrongly suggest[ed] that he had not denied touching C.S. and had instead admitted to conduct that constituted rape, but just refused to give it that label." He also contends that the prosecution's use of the term "rape" served no purpose but to inflame the jury. Alternatively, he asks us to "correct the mittimus" to show that he is to receive 429 days of presentencing incarceration credit.

¶ 29 The State argues that the prosecution's remarks did not misrepresent the evidence, that "[t]he prosecutor's use of 'rape' was a fair comment on the acts the defendant denied, which the young victim referred to as rape," and that, in any event, the court's warning to the jury that it should disregard any argument inconsistent with the evidence was sufficient to cure any prejudice. It also argues that "the generic term of 'rape' "—as opposed to the statutory titles of the charged sex offenses—was a fair description of "what the defendant did to C.S.," and thus was not error. Finally, it denies that the evidence was closely balanced. We note that neither party has suggested which convictions are most securely supported by the evidence.

¶ 30 We agree that first-prong plain error occurred here. The State's rebuttal clearly had great potential to make the jury think that defendant had denied "raping" C.S. rather than having denied "touching" her. Furthermore, the evidence was extremely closely balanced as to some counts at least. We thus vacate the convictions and remand the cause for a new trial.

¶ 31 The plain-error doctrine serves as " 'a narrow and limited exception' " to the general forfeiture rule. *People v. Szabo*, 113 Ill. 2d 83, 94 (1986) (quoting *People v. Pastorino*, 91 Ill. 2d 178, 188 (1982)). Illinois's plain-error doctrine is set out in *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005), and clarified in *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). *Piatkowski* explains:

> "We now reiterate that the 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 [(first-prong plain 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 [(second-prong plain error)]." (Emphases added.) *Piatkowski*, 225 Ill. 2d at 565.

¶ 32 To find plain error, we first must find reversible error. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008) ("Absent reversible error, there can be no plain error."). Moreover, that reversible error must be clear or obvious. See *People v. Burton*, 2012 IL App (2d) 110769, ¶ 15 (we must determine whether the error is such that it would require reversal of the defendant's convictions before we reach the issue of whether the evidence was closely balanced). Only upon finding clear or obvious reversible error do we apply the two-prong plain error analysis as such. See *Burton*, 2012 IL App (2d) 110769, ¶ 15. We thus first explain why the argument was improper and then why it was clearly reversible error.

¶ 33 Substantively, whether argument is improper "depends, in each case, on the nature and extent of the statements and whether they are probative of [the] defendant's guilt." *People v. Blue*, 189 Ill. 2d 99, 132 (2000).

> "Courts allow prosecutors great latitude in making closing arguments. [Citation.] In closing, the State may comment on the evidence and all inferences reasonably yielded by the evidence. [Citation.] However, argument that serves no purpose but to inflame the jury constitutes error. [Citations.] Closing arguments must be viewed in their entirety and the allegedly erroneous argument must be viewed contextually." *Blue*, 189 Ill. 2d at 127-28.

Further, the prosecution must not argue facts that are not based on the evidence before the jury. *People v. Kliner*, 185 Ill. 2d 81, 151 (1998).

¶ 34 Defendant contends that the prosecution incorrectly stated that he had denied "raping" C.S., when it could properly argue only that he had denied "touching" C.S. He argues that the

comments turned his repeated denials into something that amounted to an admission of sexual conduct that he merely refused to concede was "rape." We agree. The State could be correct when it argues that the prosecution was trying to draw an inference about defendant's state of mind from his remark that, in his "personal opinion," he did not "touch" C.S. If that was its intent, it failed. The prosecution did not quote defendant's full denial. Instead, it joined his "in my own personal opinion" qualification of his denial that he "touch[ed]" C.S., to his supposed opinion about "rape": "[W]hen [defendant] says in his personal opinion, I want you to consider that because in his head, he doesn't think he raped her. He doesn't think that's rape." The implication that defendant had said, "In my personal opinion, I didn't rape the girl," is unavoidable. Whereas defendant repeatedly denied that he "touched" C.S., the prosecution suggested that defendant essentially *admitted* that he touched her, denying only that he should be criminally liable for doing so. This argument misled the jury about the facts and was thus error.

¶ 35 The State suggests that the prosecution's closing arguments, considered in their entirety, could not have made the jury think that defendant denied only "rape." We disagree. Indeed, we think that the entire argument tended to confuse the jury about defendant's denials. Certainly, the prosecution mentioned the wording that Martin described defendant using—"I didn't touch [her]"—in the first part of the closing statement and earlier in the rebuttal. However, the earlier comments focused so tightly on the phrase "my own personal opinion" that the phrase "didn't touch [her]" could scarcely have made an impression. By contrast, in its final comment, the word "rape" was central. Furthermore, if we accept the State's encouragement to look more broadly at the prosecution's closing arguments, we conclude that their overall effect was misleading. The remarks as a whole gave the impression that defendant denied the offenses *only* while including the odd qualifier, "in my own personal opinion." We note that the jury expressed concern and

uncertainty about defendant's exact words at the interview: "What verbiage was used by the investigator to the defendant if he touched her private areas, IE [*sic*], in my personal opinion[?]" The prosecution's remark earlier in rebuttal fostered that kind of confusion: "[Defendant] states, in my personal opinion, I did not touch the girl. *He doesn't say, I didn't do anything.*" (Emphasis added.) But the record shows that Martin conceded that defendant had denied the offenses throughout the interview, presumably with only one of the denials being prefaced by "in my own personal opinion." The prosecution's arguments effectively buried that fact. Thus, when we consider the rebuttal remarks in the broader context that the State invites, our concern that the remarks confused the jury only increases.

¶ 36 Not only were the "rape" remarks error, they were clear reversible error. In *Wheeler*, the supreme court described three conditions under which improper argument becomes reversible error: (1) "if the improper remarks constituted a material factor in a defendant's conviction"; (2) "[i]f the jury could have reached a contrary verdict had the improper remarks not been made"; and (3) if "the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction." *Wheeler*, 226 Ill. 2d at 123. As the jury's note makes clear, the second condition applies here. Given the context of the prosecution's statements and the close balance of the evidence, a mistaken impression that defendant's denial was really a partial admission could have been the deciding factor in at least some of the guilty verdicts.

¶ 37 The evidence of defendant's guilt was far from overwhelming. Indeed, it strongly suggested that C.S.'s memories were not reliable as to specifics. No one else remembered that she always had to sleep in the living room because her bedroom had been made into an office; the other witnesses suggested that, at most, the bedroom had a desk in it. No one else thought that, during the relevant period, she had spent "almost every night" at Griselda's house; the other

witnesses put her visits at something like every other weekend. Given these apparent major errors in C.S.'s recollection, real uncertainty could exist about the number and nature of the assaults.

¶ 38 Moreover, the remarks' context increased the likelihood that they confused the jury. First, the comments were in the prosecution's rebuttal, so defendant could not correct them. Second, defense counsel's objection was weak. Its phrasing—"There is no evidence that he was asked about rape"—did not remind the jury that defendant had denied "touch[ing]" C.S. or that he had repeated his denial—presumably in other terms—throughout the interview. Third, the argument was not merely in passing. It continued after the objection, and the following comments—that defendant counted on C.S. not recognizing the contact as "rape"—harkened back to the supposed admission. Fourth, neither party had otherwise focused attention on defendant's statements to Martin, so Martin's actual testimony of defendant's denials would have been unlikely to be prominent in the jury's recollection. Fifth, the court *overruled* the objection, thus allowing the jury to conclude that the court had given its imprimatur to the prosecution's line of argument.

¶ 39 Concerning our fifth point, the State argues that any error was necessarily cured by the court's instructing the jury that the arguments were not evidence. Cases such as *People v. Rush*, 294 Ill. App. 3d 334, 341 (1998) (which the State cites for that proposition), contain boilerplate to that effect. In *Rush* itself, the jury could have heard that instruction only as part of the general instructions, as defense counsel did not object to the State's argument (*Rush*, 294 Ill. App. 3d at 340). Thus, if we take *Rush* at face value, improper argument is never reversible error unless the court also fails to give standard general instructions. That is obviously not a universal rule. The real question is whether the court's specific instruction upon overruling defense counsel's objection cured any prejudice. It did not. The usual rule is that prejudice from an argument that

misstates the evidence is cured by the court's *sustaining* the objection. See, *e.g.*, *People v. Williams*, 85 Ill. App. 3d 850, 858 (1980) (the prosecutor's false suggestion that a search had occurred was cured by the court's sustaining the defense objection to the argument). If the court overrules the objection, it is likely to increase the prejudice by allowing the jury to infer that the prosecution stated the facts correctly. Adding a reminder that argument is not evidence after overruling an objection cannot fully correct the impression that the court vindicated the prosecution.

¶ 40 The presence of reversible error is clear. The weaknesses in the evidence combine with the seriousness of the error to make it clear that, had defendant preserved the error, the convictions could not have stood. Further, our analysis so far makes clear why the error was first-prong plain error—clear or obvious error occurring when the evidence was closely balanced. Beyond that, the jury's questions suggested that it perceived the evidence as closely balanced and that its verdicts might have turned on how it understood defendant's comments. Its question about defendant's first language strongly implied that it was weighing the interpretive nuances of his statements. It would not have concerned itself with those nuances if it had found the evidence to be overwhelming. Moreover, although the jury might have wondered whether defendant grasped the connotations of stating that C.S. might have been fantasizing or dreaming about the events she described, the most salient interpretive issue was surely that of why defendant prefaced his denial to Martin with the phrase "in my own personal opinion." Thus, the jury was likely concerned with the exact phrasing of his denials. Further, if the jury was struggling with how much it should rely on C.S.'s testimony—as its question concerning that testimony's sufficiency suggests—it was likely searching for evidence to corroborate that testimony, something that an incriminating statement from defendant would provide. It thus

seems highly likely that the comments at issue here misled the jury about a piece of evidence that proved indispensible to the convictions.

¶ 41 The same considerations that require us to conclude that the jury could have reached a contrary verdict had the improper remarks not been made also require us to conclude that the evidence was closely balanced. The case turned on the reliability of C.S.'s testimony, and her recollection was almost certainly unreliable on matters to which others could testify. Nothing in the evidence corroborated the specifics of her description of what defendant did to her. However, a jury influenced by the prosecution's misleading comments would have found some corroboration in the inculpatory "denial" that the prosecutors invented for him. The fairness of defendant's trial was compromised, and we therefore must vacate his convictions.

¶ 42 Defendant claims in the alternative that we should amend the sentencing order to reflect defendant's day-for-day sentencing credit. Defendant asserts that "none of the written sentencing orders in this case reflect [the proper] credit." But we agree with the State that the order already gives defendant the 429 days' credit that he seeks. The sentencing order states that defendant is to receive the credit for counts II, III, IV, and V. However, as we are vacating defendant's convictions, we offer this guidance only should the point arise on remand.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we vacate defendant's convictions and remand the matter for a new trial.

¶ 45 Vacated and remanded.