2018 IL App (5th) 150176-U

NO. 5-15-0176

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 14-CF-350
	)	
DAVID OLSON,	)	Honorable
	)	John Speroni,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Where the State did not file a notice of its intent to use out of court statements of the victim as required by section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2012)), and the trial court did not hold a hearing on the reliability of these out of court statements as required by the same section of the Code, and where the defendant established that the evidence was closely balanced as required for a plain error appeal, we reverse the convictions, vacate the sentences, and remand for a new trial.

¶ 2 Defendant, David Olson, appeals from his conviction on two counts of predatory criminal sexual assault of a child. Defendant received two consecutive 20-year sentences to be served in the Department of Corrections with 3 years to life of mandatory supervised release on each conviction upon discharge. The victim, V.S., was a female

child who was between the ages of seven and nine on the dates of the alleged crimes, and the defendant was V.S.'s "godparent." In his direct appeal, he asks this court to reverse his convictions and vacate his sentence.

¶ 3 FACTS

¶ 4 Defendant timely filed this direct appeal. This court has jurisdiction pursuant to Illinois Supreme Court Rules 603 and 606, as well as article VI, section 6, of the Illinois Constitution. Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013); Ill. Const. 1970, art. VI, § 6.

¶ 5 In July 2014, the State charged defendant with three counts of predatory criminal sexual assault of a child in violation of section 11-1.40(a)(1) of the Criminal Code of 2012 (two counts of penetration of victim's sex organ with fingers with the first occurrence on July 12, 2014, and the second occurrence between 2012 and 2014; and one count of placement of tongue on victim's sex organ). 720 ILCS 5/11-1.40(a)(1) (West Supp. 2013). In response to defendant's request for a bill of particulars, the State confirmed that the first digital penetration count took place at defendant's house on Lighthouse Road, on July 12, 2014; the second digital penetration count took place at the same house on an unspecified date in 2014; and the oral contact count took place at defendant's house on Poor Farm Road on an unspecified date in 2013.

¶ 6 In pretrial discovery, the State disclosed numerous statements and memos of interviews conducted with the victim, V.S. Specifically, there was a videotaped interview of V.S. by the Williamson County Children's Advocacy Center (CAC) on July 30, 2014, investigative memoranda by Detective Karl Gusentine of the Williamson County Sheriff's Department, statements of V.S.'s mother, Amanda, and reports prepared

by Dr. Kathy Swafford of the Children's Medical Resource, who examined and interviewed V.S.

¶ 7 Before the first trial date, defendant filed a motion *in limine* asking the trial court to bar the State from introducing evidence of defendant's prior misdemeanor conviction for sexual exploitation of a child. The court granted the motion. Prior to the second trial date, the trial court heard a second defense motion *in limine* in which the defendant sought to bar Dr. Kathy Swafford from testifying that recent research revealed that in 94 to 98% of child sexual abuse victims, physical evidence of sexual abuse was not detected. The court granted the motion, directing Dr. Swafford to only testify to her examination of V.S., as well as her own personal medical experience.

¶ 8 *Voir Dire*

¶ 9 At *voir dire*, the State stressed to the venire panels that it was unrealistic to expect the State to produce physical evidence of guilt, and that the jury would only hear witness testimony. One particular male juror expressed concern with the nature of the case in that he might give the victim's testimony more weight because of her age, but then he stated that he hoped that he would be able to keep an open mind throughout the trial. Another juror had been part of that venire panel when the male juror expressed his concerns.

¶ 10 Opening Statements

¶ 11 In its opening statement, the State advised the jury that it would hear testimony from Dr. Swafford, from V.S., and from V.S.'s mother, Amanda, and that this testimony would demonstrate defendant's guilt. In defense counsel's opening statement, the attorney stressed the closeness of the families of defendant and V.S. and urged the jury to

consider the context of V.S.'s accusation. V.S. had been accused of touching her cousin in a sexual manner and that led V.S.'s mother to confront her about these actions. V.S. accused defendant of touching her at the end of the talk with her mother. Defense counsel also pointed out that each time V.S. retold the story, she added more elaborate detail. Finally, the defense informed the jury that there was no physical evidence to corroborate V.S.'s claims.

¶ 12 Evidence Presented by the State

¶ 13 Amanda testified that V.S. was her daughter. Amanda's best friend was Jennifer C. Jennifer C. was engaged to marry the defendant. Amanda viewed Jennifer C.'s entire family as her own extended family and had an arrangement with that family to care for her children if anything ever happened to her. Jennifer C., the defendant, and her extended family lived together initially on a plot of land on Old Frankfort Road in Johnston City, then on one plot of land with several buildings on Lighthouse Road in Johnston City. At one point in time in between the Old Frankfort and Lighthouse Road addresses, defendant and Jennifer C. lived by themselves in a house on Poor Farm Road in Johnston City. Amanda testified that V.S. had stayed with the defendant and Jennifer C. at all three properties over the years, and that she had never noticed any problems when her daughter returned home from these visits. At times, V.S. "invited" herself over to the defendant's house. V.S. never avoided the defendant or indicated that she was in any way afraid. V.S. was described as tech-savvy and had her own Facebook page.

¶ 14 In mid-July 2014 after Amanda married a man named Rodney, Rodney's sister notified Amanda that V.S., then nine years old, had engaged in sexual contact with her

daughter. That information led Amanda and Rodney to confront V.S. Amanda testified that this conversation with V.S. lasted approximately 90 minutes. Amanda asked V.S. if there was anything she had done that she felt bad about doing. Amanda then told V.S. what she had been told by Rodney's sister. She told V.S. that she wanted to hear what happened from her. During this talk, V.S. initially denied touching this other child, but after repeated reassurances during questioning that she would not be in trouble, V.S. admitted that she had done so. Amanda testified that she could tell when V.S. was being untruthful. If V.S. was lying, she would not look directly at Amanda; would smile and laugh; and would make excessive mouth movements.

¶ 15 After V.S. admitted to engaging in sexual contact with this other child, Amanda continued on with the conversation. V.S. asked Amanda if she could tell her "anything" and she would not be in trouble, and Amanda reassured her she could do so. Amanda told V.S. that she could not help and protect her if she did not know what was happening. V.S. then offered: "There has been somebody that touched me, mom." V.S. then told Amanda that she had been touched by David Olson. Amanda stated that she did not want to believe that the defendant had touched V.S., but that he must have done so because she knew that V.S. was not lying.

¶ 16 Rodney was not present in the room when V.S. told Amanda that David Olson had touched her. Amanda had V.S. repeat this claim to Rodney. Later that same day, Amanda talked to Rodney's sister. V.S. repeated her claim to Rodney's sister. Amanda and Rodney's sister then took V.S. over to the Lighthouse Road property where defendant, Jennifer C., and her family lived so that V.S. could confront the family.

Amanda asked that the defendant leave the house. V.S. then stated the allegations and the family asked her questions. Later that same week, Amanda took V.S. to her mother's house and had V.S. repeat the allegations to her family.

¶ 17 After one week had passed, Amanda contacted the police to tell them about V.S.'s allegations. Amanda testified that she waited that week to report the matter because she had known the defendant for 10 years and was fearful of losing her friendship with Jennifer C. and her family. Additionally, Jennifer C.'s family had made unspecified requests, presumably to not involve the police. V.S. made a statement to the police, and eventually was examined and interviewed at the CAC.

¶ 18 Dr. Kathy Swafford is a board-certified child abuse pediatric physician who performs exams for children who may have been victims of abuse and/or neglect. Dr. Swafford conducted her interview and examination of V.S. on August 13, 2014. Dr. Swafford testified that V.S. told her about multiple incidents of abuse followed by discomfort during urination. V.S. informed Dr. Swafford that she had been told that she would be in trouble if she reported these incidents. Finally, V.S. told Dr. Swafford that she had participated in looking at and appearing in pornographic photos.

¶ 19 Upon examination, Dr. Swafford found no physical evidence to support V.S.'s allegations. Specifically, she detected no physical evidence of penetration and determined that V.S.'s hymen was intact. Blood and urine samples were taken and the resulting tests were negative. Dr. Swafford testified that lack of physical evidence in suspected child sexual abuse cases was normal and to be expected. Defense counsel objected to this testimony, and the trial ucourt sustained the objection. Dr. Swafford then

testified that in her own personal experience, she had found no physical evidence in other children who were alleged victims of sexual abuse.

¶ 20 V.S. testified that she was then 10 years old. She stated that she had spent virtually every weekend at the defendant and Jennifer C.'s house. During the talk with her mother, her mother asked her the question, "has anybody ever touched you?" V.S. testified that initially she said no, because defendant had told her she would be in trouble if she told anyone about their "little game." After she told her mother "no," her mother asked her again and stated that she did not need to be afraid. Then, V.S. told her mother that defendant had touched her.

¶ 21 V.S. testified that the touching began when she was seven years old. She explained that defendant would lick her "pee-pee" with his tongue and touch her with his fingers.

¶ 22 The last day that he touched her was the day before her mom and Rodney's wedding (July 12, 2014). She testified that she was sitting on the couch with defendant and he pulled the covers up over them. Then, the defendant began putting his hands down her pants, but before his hands reached her "pee-pee," she "slapped" his hands away. She also detailed two incidents that occurred at the defendant's current home (Lighthouse Road). The first incident occurred in the shed when the defendant put his fingers up her "pee-pee." The second incident occurred in an office in a building on the property when defendant touched her "pee-pee" but stopped when another family member opened the door to the office.

¶ 23 V.S. also testified about an incident at the first house (Old Frankfort Road) in defendant's bedroom when he put "stuff" on her "pee-pee" that burned and he told her it would make it easier for him to put his "private place" in her "private place," but she did not let him do that.

¶ 24 V.S. stated that one time at the second home (Poor Farm Road), she woke up and had been moved from a couch in the bedroom to the bed. She recounted that the defendant was hovering above her and that he tried to put his "private place" in her "private place," but she kicked him, got out of the bed, and put on her clothing.

¶ 25 V.S. testified that she did not want to always go to defendant and Jennifer C.'s house, but that her mother made her go. On cross-examination, she admitted that the statement that she was forced to go to the defendant's house was not entirely truthful. She also acknowledged sending Facebook messages to the defendant, where she initiated general conversation and also had asked to spend the night at defendant's house.

¶ 26 V.S. testified that defendant used to ask if he could take a photograph of her private parts, and that she told him no. She claimed to have found a photo of her private parts on his phone, and assumed that he took it when she was sleeping in the nude. V.S. testified that she deleted the photo.

¶ 27 V.S. testified that she told Leah Brown of the CAC about the incident when defendant took her into the shed at the third home (Lighthouse Road).

¶ 28 Detective Karl Gusentine testified that he interviewed several members of Amanda's and Jennifer C.'s families. He also watched V.S.'s interview with Leah Brown, a counselor at the CAC. He testified that he heard V.S. tell Leah Brown about

the photo of her genitals, and about certain abuse allegations. Detective Gusentine asked Jennifer C. to provide them with the cell phone used by defendant, but she refused. The police did not seek a search warrant for the defendant's phone, did not seek cellular data from the phone company, and did not seek information potentially stored in any sort of cloud-based system. Detective Gusentine reviewed V.S.'s Facebook messages, and found that she had communicated with the defendant several times, including a message in June 2014 in which she asked defendant for permission to spend the night at their house. The police did not seek a search warrant to do a forensic search of defendant's Facebook account or computer in general. Other than V.S.'s Facebook messages with defendant, Detective Gusentine confirmed that no physical evidence was collected.

¶ 29 At the close of the State's case, the defense filed a motion for a directed verdict on all counts. The trial court granted the motion as to the first of the two touching counts in light of V.S.'s testimony that although defendant was attempting to touch her private parts on July 12, 2014, he did not actually do so.

¶ 30 Evidence Presented by the Defense

¶ 31 Rachel C. is Jennifer C.'s sister. She testified that V.S. wanted to be around the defendant and that during the time frame of the charge in count I (July 12, 2014), she did not recall defendant being alone with V.S. She testified that V.S. had never exhibited any fear around defendant. Rachel testified that at times, V.S. would call someone at the familial house and ask if she could spend the night, and they always allowed her to do so. She also testified that V.S. was not always truthful, and made up stories about incidents at school.

¶ 32 Defendant informed the court that he was not going to testify in his own defense.

¶ 33 The parties agreed to have the judge read a stipulated statement to the jury which was inconsistent with V.S.'s claim that she told Leah Brown of the CAC about the incident in the shed. The stipulation stated that in this interview, V.S. "did not disclose any incident with David Olson occurring in a shed outside of the auction house (one of the buildings on the family property)."

¶ 34 Evidence Presented by the State in Rebuttal

¶ 35 Joshua Melton is Rachel C.'s fiancé. The State called him as a rebuttal witness to testify to an incident he observed in October 2013 between the defendant and V.S. Joshua and defendant were sitting next to each other, and V.S. and Amanda were sitting across from them. Defendant attempted to grab V.S.'s arm to give her a hug. V.S. pulled away and said "no." Joshua saw no other interaction of this type between defendant and V.S.

¶ 36 Defendant's renewed motion for a directed verdict on the remaining two counts was denied.

¶ 37 Closing Arguments

¶ 38 The State began its closing argument by reminding the jurors that Amanda believed that her daughter was being truthful. In addition, the State argued that V.S.'s memories were detailed and thus credible, and that V.S. disclosed the allegations against defendant to others prior to trial. In response, the defense argued that there was no physical evidence to corroborate V.S.'s claims; that V.S. could have been motivated to lie because she had been discovered to be engaged in sexual contact with her step-cousin;

that each time V.S. repeated her story, she added more elaborate details; and that none of the family members had noticed anything unusual prior to the initial allegation other than the instance of V.S. resisting a hug from the defendant. In rebuttal argument, the State reiterated that Amanda believed V.S. was truthful, that V.S. was credible because her memories were detailed, and that V.S. had repeatedly disclosed the allegations.

¶ 39 Jury Instructions, Deliberation, and Verdict

¶ 40 The jury was not instructed about prior inconsistent statements even though the trial court read to it the stipulation intended to impeach V.S. During deliberations, the jurors sent out a note asking to see the transcript and DVD from Leah Brown's interview. The trial court declined the request. The jury returned verdicts of guilty on counts II and III.

¶ 41 Sentencing

¶ 42 The trial court denied defendant's motion for a new trial. The trial court sentenced defendant to two consecutive terms of 20 years in the Illinois Department of Corrections, to be followed by mandatory supervised release for 3 years to life on each conviction.

¶ 43 Defendant appeals.

¶ 44 LAW AND ANALYSIS

¶ 45 In his direct appeal, defendant raises four issues: that the State failed to give notice that it would use V.S.'s out of court statements as substantive evidence, and the trial court allowed the statements into evidence without first holding a reliability hearing; that the State usurped the jurors' roles as fact-finders by calling V.S.'s mother to testify that V.S. was credible and arguing that the jurors should defer to the mother's assessment; that the

State indoctrinated the jury during *voir dire* primarily on the lack of physical evidence; and that the evidence in this case was closely balanced and the errors that occurred threatened to tip the scales of justice.

¶ 46 Out of Court Statements

¶ 47 Section 115-10 of the Code of Criminal Procedure of 1963 (Code) allows certain hearsay exceptions in a prosecution for predatory criminal sexual assault perpetrated on a child under the age of 13, or upon a person suffering an intellectual disability, a cognitive impairment, or a developmental disability. 725 ILCS 5/115-10 (West 2012). The hearsay evidence exception that is allowed is victim testimony in the form of an out of court statement that the victim complained of the act to another person; and testimony in the form of an out of court statement in which the victim describes any complaint of the act which is an element of the offense against the victim. *Id.* § 115-10(a)(1), (2). If the State wants to use victim statements, it must provide notice of its intent to do so complete with a recitation of the specific information included in the statement. *Id.* § 115-10(d). The court may admit these hearsay exceptions only if the court holds a hearing outside of the presence of the jury and makes a finding that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability" and that the child under the age of 13 either testifies at the proceeding or is unavailable to testify and there is corroborative evidence of the act which is the subject of the statement. *Id.* § 115-10(b)(1), (2). "It is error in a jury trial to admit into evidence, pursuant to section 115-10, testimony about a child's out of court statement without such a hearing." *People v. Mitchell*, 155 Ill. 2d 344, 352, 614 N.E.2d 1213, 1216 (1993).

¶ 48 The appellate court case *People v. Smith*, 221 Ill. App. 3d 605, 582 N.E.2d 317 (1991), is helpful to understanding the legislature's rationale for section 115-10 of the Code. Prosecution of cases that involve sexual abuse of children presents specific challenges of proof. *Id.* at 607. The court noted that "[t]he most obvious difficulty is the fact that usually the only witness to the crime is a young child who may not be able to testify adequately about what occurred." *Id.* (citing *People v. Rocha*, 191 Ill. App. 3d 529, 547 N.E.2d 1335 (1989)). In addition the children's complaints do tend to "become more credible, reliable and understandable when supported by corroborative testimony from adults." *Id.* (citing *People v. Branch*, 158 Ill. App. 3d 338, 511 N.E.2d 872 (1987)). The court explained that the legislature enacted section 115-10 of the Code to allow the introduction of out of court statements of children who have been sexually abused. *Id.* The statute was written to provide protections to insure that only credible evidence is introduced. *Id.* The out of court statement must have a "particularized guarantee of trustworthiness." *Id.* (citing *People v. Coleman*, 205 Ill. App. 3d 567, 563 N.E.2d 1010 (1990)). The statutory phrase "sufficient safeguards of reliability" must be comparable "with a finding that the circumstances of the statement render the declarant particularly worthy of belief." *Id.* (citing *Coleman*, 205 Ill. App. 3d at 584). The *Smith* court concluded that in order to insure that the defendant receives a fair trial, the trial court must first examine the substantive hearsay evidence before the evidence is submitted to the jury. *Id.*

¶ 49 Defendant cites to the supreme court case *People v. Mitchell* in support of his claim that the State should have filed a notice of intent and the trial court should have

held a hearing pursuant to section 115-10 of the Code. In *Mitchell*, the defendant was convicted of two counts of aggravated criminal sexual assault—sexual penetration by insertion of a finger in the vagina of the minor victim. *Mitchell*, 155 Ill. 2d at 346-47. At trial, the victim testified that the defendant did not touch her private areas, but also testified that she had been truthful in providing several statements to law enforcement and to her mother where she said that he did touch her private areas. *Id.* at 347. On cross-examination, the victim first said that the defendant did not touch her private areas, but then said that he had done so "a little." *Id.* at 348. On re-cross-examination, she reverted again to her position that the defendant had not touched her. *Id.* As the trial testimony continued, the State produced various witnesses to confirm that the victim admitted that defendant had touched her private areas. *Id.* at 348-50. The appellate court had concluded that the trial court committed error by not conducting a hearing pursuant to section 115-10 of the Code, especially because the victim's testimony was inconsistent and contradictory. *Id.* at 350. On appeal to the supreme court, the State took the position that the reliability of the victim's statements was "thoroughly examined" by the testimony of the law enforcement officials, and that the testimony about the victim's out of court statements was merely cumulative in light of the defendant's confession and the testimony of other individuals. *Id.* at 351. The supreme court cited *People v. Smith* and commented upon the unique prosecutorial challenge of child sexual abuse cases and the concern that repeated out of court statements provided through corroborating adults tended to increase the credibility of the victims' testimony. *Id.* (citing *Smith*, 221 Ill. App. 3d at 607). Ultimately, the supreme court concluded that despite the defendant's

confession, the error amounted to plain error on multiple bases: that the trial court did not hold a section 115-10(b) hearing before allowing the jury to hear out of court statements; that the victim's inconsistent testimony was substantially bolstered by the testimony of the witness; and that the trial court did not provide the jury with the mandatory instruction pursuant to section 115-10(c) of the Code. *Id.* at 352-55.

¶ 50 In this case, the State argues that admission of these out of court statements was harmless because the statements contained no substantive evidence, and thus by definition, the statements could not be construed as "hearsay." In other words, the witnesses simply confirmed, without specific detail, that V.S. had told them the identical claims. We agree with the State's argument that nonsubstantive out of court statements could be admissible without a hearing. However, section 115-10(a) of the Code only contemplates the admission of hearsay, *i.e.*, the admission of substantive evidence, if the "time, content, and circumstances of the statement provide sufficient safeguards of reliability." 725 ILCS 5/115-10(a), (b)(1) (West 2012).

¶ 51 Accordingly, we review the out of court statements admitted in this case to determine if these statements contained substantive information. Amanda, V.S's mother, testified with little detail other than that the defendant "touched V.S." Through Amanda's testimony, however, the jury learned that V.S. repeated this story to Amanda's husband Rodney, Rodney's sister, Amanda's mother, and Jennifer C.'s entire family. Although the "touching" testimony is not terribly specific, the allegation is substantive as it goes beyond a statement that "V.S. told me what happened." Dr. Kathy Swafford testified that V.S. told her about the sexual incidents; about painful urination after these

sexual incidents; about photos defendant took of V.S. when she was nude; about defendant showing V.S. pornographic images; and that defendant told V.S. that she would be in trouble if she told anyone what she and defendant had done. In addition, Detective Gusentine testified that he heard V.S. tell the counselor Leah Brown of the CAC about the photo of her genitals, and about certain specific abuse allegations. We conclude that many of the out of court statements were substantive in nature, and thus constituted impermissible hearsay.

¶ 52 Having determined that the repeated statements contained hearsay, we review the trial court's procedure in this case. Here, there is no question that the State did not file a notice of its intent to use V.S.'s out of court repeated statements. Similarly, there is no question that the court did not hold a hearing to determine if "the time, content, and circumstances of the statement provide sufficient safeguards of reliability." However, the trial court did instruct the jury as follows:

> "You have before you evidence that statements were made concerning the offenses charged in this case. It is for you to determine whether the statements were made, and, if so, what weight should be given to the statements. In making that determination, you should consider the age and maturity of the witness, the nature of the statements, and the circumstances under which the statements were made."

This instruction appears to follow the language required by section 115-10(c), and must be given to the jury if a statement is admitted pursuant to the section. 725 ILCS 5/115-10(c) (West 2012). We find that merely instructing the jury, without holding the hearing, does not correct the error. The instruction presupposes that the trial court has held the

hearing and determined that the time, content, and circumstances of the out of court statement are sufficiently reliable.

¶ 53 Plain Error

¶ 54 Although we find that the State and the trial court erred in its handling of the out of court statements during trial, the defendant failed to preserve the issue for review. The defendant did not object each time the statements were offered and also did not raise the issue in a posttrial motion. Therefore, the defendant forfeited the issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1129-30 (1988). Defendant asks us to consider the issue as plain error. "The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010). The plain error rule may be used if the evidence was closely balanced or the error was so great that the defendant did not receive a fair trial. *People v. Hindson*, 301 Ill. App. 3d 466, 474-74, 703 N.E.2d 956, 962-63 (1998) (citing *People v. Petitt*, 245 Ill. App. 3d 132, 139, 613 N.E.2d 1358, 1365 (1993)); *Thompson*, 238 Ill. 2d at 613 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410 (2007)). In plain error review, the defendant bears the burden of persuasion. *Thompson*, 238 Ill. 2d at 613 (citing *People v. McLaurin*, 235 Ill. 2d 478, 495, 922 N.E.2d 344, 355 (2009)).

¶ 55 Defendant argues that the evidence in this case was closely balanced. When evidence in a case is closely balanced, we must " 'err on the side of fairness, so as not to convict an innocent person.' " *Piatkowski*, 225 Ill. 2d at 566 (quoting *People v. Herron*, 215 Ill. 2d 167, 193, 830 N.E.2d 467, 483 (2005)). Defendant has the burden to establish

prejudicial error and to establish that the State's evidence of his guilt was closely balanced. *Id.*

¶ 56 The determination of whether evidence in a criminal case is "closely balanced" is fact-based. The reviewing court must decide if the evidence was so closely balanced that the error "severely threatened to tip the scales of justice." *People v. Sebby*, 2017 IL 119445, ¶ 51, 89 N.E.3d 675 (citing *Herron*, 215 Ill. 2d at 187). The court must consider and evaluate the totality of the evidence presented "and conduct a qualitative, commonsense assessment of it within the context of the case." *Id.* ¶ 53 (citing *People v. Belknap*, 2014 IL 117094, ¶¶ 52-53, 23 N.E.3d 325). Accordingly, a reviewing court must assess all evidence on the elements of the charged offense as well as all evidence regarding witness credibility. *Id.*

¶ 57 In this case, defendant claims that the evidence was closely balanced because there was no confession, no physical evidence, and no corroborating eyewitness accounts. Furthermore, the allegations were not contemporaneous with the alleged assault. In addition, the jury seemed to struggle with some aspect of the victim's testimony or with V.S.'s additional renditions of the allegations to family members, Dr. Swafford, and Detective Gusentine because the jury asked to watch her taped interview with Leah Brown of the CAC, and to review the transcript.

¶ 58 We begin our analysis by reviewing the two predatory criminal sexual assault charges of which defendant was convicted. The State alleged that defendant penetrated V.S.'s sex organs with his fingers and also used his tongue on her sex organs sometime

between 2012 and 2014. We consider the two charges together in this analysis because of the interwoven nature of V.S.'s testimony.

¶ 59 To prove these charges, the State had to prove that defendant committed that act between 2012 and 2014 and that when the offense was committed, defendant was over 17 years of age and the victim was under 13 years of age. There is no question that the State established the ages of defendant and V.S. Therefore, we review the evidence of the two distinct charges against the defendant.

¶ 60 In this case, the victim testified that defendant proposed a game in which he would touch her private areas and lick her "pee-pee." She testified that the game began when she was about seven years old. Other than V.S.'s testimony that defendant unsuccessfully attempted to touch her private area on July 12, 2014 (the trial court directed a verdict for defendant on this specific charge), she had no sense of dates.

¶ 61 V.S. testified that at the first house (Old Frankfort Road), defendant put some product on her "pee-pee" that burned, but he did not touch her. V.S. testified that he did touch her vagina "at different times" at this house. V.S. testified that she was "about seven" when defendant lived in that house.

¶ 62 V.S. testified that at the second house (Poor Farm Road), there was an incident in which she woke up in defendant's bed and he was "hovering" over her and wanted to put his private area in her private area, but she successfully thwarted his efforts. V.S. testified that she did not remember anything else that happened in that house.

¶ 63 V.S. testified that at the third house (Lighthouse Road), one event occurred in a shed on that property. In that occurrence, V.S. testified that defendant digitally

penetrated her "pee-pee." V.S. also testified to a second incident at an office in a building on the Lighthouse Road property where defendant touched her "pee-pee" with his hand; however, V.S. did not testify that she was digitally penetrated.

¶ 64 Regarding defendant using his tongue on her "pee-pee," V.S. testified that this happened "almost at every single house." When pressed for a specific incident, V.S. testified to an incident at the third house (Lighthouse Road) when defendant pulled down her panties and started "licking" her. She did not testify about oral contact at the Poor Farm Road house.

¶ 65 Overall, there was a lack of testimony about the dates when defendant, Jennifer C., and her family lived at the first and the third plots of land. Similarly, we do not have specific dates on when defendant and Jennifer C. lived by themselves at the Poor Farm Road house. Amanda, V.S.'s mother, testified about the three locations, but similarly provided no timeline. The timeline is important because of the nature of V.S.'s testimony, which was connected to the individual houses as opposed to the dates.

¶ 66 There was also a lack of specificity of the dates of the offenses with which defendant was charged. The indictments were general in that defendant was alleged to have committed both offenses sometime between 2012 and 2014. The bill of particulars narrowed the focus. The digital penetration was alleged to have occurred in 2014 at the Lighthouse Road (the third) property, while the oral contact was alleged to have occurred in 2013 at the Poor Farm Road (the second) property. As stated earlier in this order, V.S. did not testify to a specific oral incident at the Poor Farm Road property. In this case, the evidence to support the charge was basically absent with the exception of V.S.'s

testimony that the defendant licked her "pee-pee" "almost at every single house." The evidence of the oral contact charge offered at trial differed from the bill of particulars designed to put focus on the charge and its defense. Although during *voir dire* the jury was instructed to the specific dates of the alleged charges, the jury instructions on the two charges contained no dates.

¶ 67 Defendant did not confess and did not testify. No one witnessed the alleged acts or saw anything that would raise questions about defendant's actions. V.S. did not contemporaneously tell someone what had happened. Only when V.S was discovered engaged in some sexual contact with another child, and after her mother asked her specifically if someone had touched her, did V.S. offer the defendant's name as a person who had done this to her.

¶ 68 We also note that during deliberations, the jurors asked to see the recorded interview and the transcript of the interview of V.S. The court denied the request. While we would be hesitant to find that the jury's request definitively meant that the individual members were struggling with the "closely-balanced nature of the evidence," it certainly speaks to a need for confirmation or clarification of some aspect of V.S.'s testimony.

¶ 69 V.S.'s claims were partly corroborated by what she told family members, Dr. Swafford, and what Detective Gusentine observed her tell Leah Brown of the CAC. Even though the victim's testimony at trial was partly supported by this other evidence, we have concluded that allowing those confirmations was erroneous because the State had not provided advance knowledge that it planned to use these out of court statements and the trial court neglected to hold a hearing on the admissibility of those statements.

Therefore, we cannot find that these other accounts serve to bolster V.S.'s claim. See, *e.g*, *People v. Boling*, 2014 IL App (4th) 120634, ¶ 131, 8 N.E.3d 65 (finding that the evidence was closely balanced and declining to add weight to the victim's claims simply because the victim repeated the claims to four other witnesses).

¶ 70 We find that the evidence in this case was closely balanced. When the guilt or innocence of a defendant comes down to a credibility contest, no error should be allowed to intervene. *People v. Emerson*, 97 Ill. 2d 487, 502, 455 N.E.2d 41, 47 (1983). Although the factual evidence was predominantly based upon V.S.'s testimony and out of court versions of that same account provided to family members, Dr. Swafford, and Detective Gusentine, the State had the burden of proving defendant's guilt beyond a reasonable doubt. With no physical evidence and no eyewitnesses, V.S.'s allegations were only corroborated by the repeated hearsay statements that the trial court had not previously examined and found to be reliable. 725 ILCS 5/115-10(b)(1), (2) (West 2012). As this court stated in *People v. Hudson*, "corroboration by repetition 'preys on the human failing of placing belief in that which is most often repeated.' " *People v. Hudson*, 86 Ill. App. 3d 335, 340, 408 N.E.2d 325, 329 (1980) (quoting *People v. Sanders*, 59 Ill. App. 3d 650, 654, 375 N.E.2d 921, 924 (1978)).

¶ 71 Retrial

¶ 72 Although we hold that the evidence in this case was closely balanced and reverse the defendant's convictions and sentences, after thorough review of the record on appeal, we conclude that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt. As a result, "prosecution of the defendant on remand will not violate

principles prohibiting double jeopardy." *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 42, 37 N.E.3d 347. Furthermore, we make no conclusion about defendant's guilt or innocence that would be binding on retrial. *Id.*

¶ 73 Other Issues on Appeal

¶ 74 Because we determine that defendant's convictions and sentence must be reversed, we do not address the remainder of the issues defendant raises on appeal, as we are reluctant to issue what could be construed as advisory opinions. See *Kaemmerer v. St. Clair County Electoral Board*, 333 Ill. App. 3d 956, 961, 776 N.E.2d 900, 904 (2002).

¶ 75 CONCLUSION

¶ 76 For the foregoing reasons, we reverse the defendant's convictions, vacate the corresponding sentences, and remand for a new trial.

¶ 77 Convictions reversed; sentences vacated; cause remanded.