2019 IL App (2d) 160868-U
No. 2-16-0868
Order filed May 2, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Kendall County. |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | No. 06-CF-218 |
| | ) | |
| ROBERT SCHAG, | ) | Honorable |
| | ) | Timothy J. McCann, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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

**ORDER**

¶ 1 *Held*: The evidence of the victim's inability to give knowing consent was not closely balanced; therefore, the trial court properly denied defendant's postconviction petition.

¶ 2 Defendant, Robert Schag, was convicted of two sexual crimes: (1) the criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2004)) of T.S., a mentally disabled adult who was unable to knowingly consent; and (2) the indecent solicitation of an adult (720 ILCS 5/11-6.5(a)(1)(I) (West 2004)) in which defendant solicited T.S. to engage in oral sex with defendant's mentally disabled son, R.S. Defendant's convictions and sentences were affirmed on direct appeal. *People v. Schag*, No. 2-08-0787 (2010) (unpublished order under Illinois Supreme Court Rule

23) (*Schag I*). Defendant thereafter filed a postconviction petition alleging, pertinently, that his appellate counsel was ineffective for failing to argue that the circuit court's failure to properly admonish the jury regarding the *Zehr* principles enumerated in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012)[1] amounted to plain error. After advancing to a third-stage evidentiary hearing, defendant's petition was denied, prompting the instant appeal. On appeal, defendant limits his challenge to the conviction for criminal sexual assault. Defendant argues that the evidence was closely balanced on the issue of whether T.S. was unable to knowingly consent and, because defendant is proceeding under the closely balanced prong of plain-error analysis, the failure to properly apprise the jury of the *Zehr* principles resulted in reversible error necessitating a new trial on the charge of criminal sexual assault. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We generally summarize the facts of record and focus particularly on those germane to defendant's appeal. Before the trial in this matter, the court held a section 115-10 hearing (725 ILCS 5/115-10 (West 2006)) to determine whether statements made by T.S. and R.S. would be admissible at trial. At the hearing, T.S.'s father testified that, at the age of three, T.S. had been diagnosed with disabilities and had, throughout her educational career, been placed into learning disabled classes. Detective Joe Jasnosz of the Kendall County sheriff's department testified that he interviewed T.S. in connection with this case, and, due to T.S.'s mental capacity, he had difficulty in interviewing her. Jasnosz was able to satisfy himself that T.S. was able to independently and accurately recall the incident, but otherwise had difficulty keeping T.S. on track and focused.

[1] So called due to their initial explication in *People v. Zehr*, 103 Ill. 2d 472 (1984).

¶ 5 As to the incident itself, the outline is simple. T.S. worked at a local Jewel grocery store as a bagger and restocker. Defendant had relatives who also worked at the same Jewel. It was unclear who concocted the scheme, but T.S. was invited to a party at R.S.'s grandmother's house. The catch was, in exchange for the opportunity to smoke cannabis, T.S. would have to provide sexual favors for the other attendees. T.S. agreed, and on the date of the offenses, defendant, defendant's nephew Ryan, and R.S. picked up T.S. and drove her to the grandmother's house for the party. Once there, T.S. smoked cannabis and performed sexual acts with defendant, Ryan, Paul, and Jesse. At some point, T.S. was instructed to perform oral sex on R.S., and she complied. According to the State, defendant witnessed the act, flashed a "thumbs up" sign, and may have bragged to the others that his boy received oral sex. Defendant, by contrast, maintained that he was not present and walked in on the episode between T.S. and R.S. and, rather than giving a "thumbs up" sign, gestured the baseball umpire's "out" sign with his thumb to indicate his decision to expel T.S. from the house.

¶ 6 During the trial, defendant tried to impeach T.S. with a guilty plea she entered in an earlier case. The circumstances of T.S.'s guilty plea were more extensively covered during T.S.'s rebuttal testimony.

¶ 7 Regarding the issue of T.S.'s mental capacity, T.S. was the subject of a recorded interview with Jasnosz, and part of the recording of the interview was played for the jury. T.S.'s statements in the recording were substantially similar to those she made during her testimony. T.S. testified at the trial to the outline of the offense given above. Of note in her trial testimony is her embarrassment about the incident and her reluctance over having to recount the incident to the court and jury. Additionally, we note that, in describing the sexual encounters with the various partygoers, T.S. invariably described them as lasting "for a few seconds" regardless of

whether she was describing an oral-sex encounter or sexual intercourse. In her recorded statement with Jasnosz, but not during her trial testimony, T.S. recounted that she accepted sexual intercourse with some of the partygoers, refused others, and, with at least one, decided to stop after sexual intercourse had been initiated. T.S. also testified that she was not physically struck or yelled at during the course of the party.

¶ 8 T.S. testified in rebuttal that she did not know the meaning of several words and phrases used by the trial court in T.S.'s criminal case, specifically, "voluntary," "appeal," "deported," and "motion to vacate," and she did not know how to file a motion to vacate. On cross-examination during her rebuttal testimony, T.S. agreed that her parents were with her at the guilty plea hearing. As an example of her testimony on cross-examination, T.S. was confused by defense counsel's questioning:

> "Q [Defense Counsel] And when the judge said you are doing this, and this means pleading guilty, the judge said you are doing this voluntarily, is that correct, and you said uh, huh, yes?
>
> [State]: Objection, improper impeachment.
>
> [Defense Counsel]: I'm not trying to impeach her.
>
> THE COURT: Overruled.
>
> BY [Defense Counsel]:
>
> Q Correct. Judge Wegner said you're doing this voluntarily, and you said yes.
>
> A [T.S.] Doing what voluntarily?
>
> Q Entering the plea of guilty, ma'am.
>
> A No. Or wait, did I?

THE COURT: I can't answer for you.

BY [Defense Counsel]:

Q Ma'am, this is what the transcript says. The judge said to you, you are doing this voluntarily, is that correct? And you said uh-huh, yes.

Do you recall doing that?

A Was I caught doing that?

THE COURT: No, do you recall, do you remember saying that?

THE WITNESS: Saying?

[Defense Counsel]: May I withdraw the question, Judge?"

Notwithstanding T.S.'s evident confusion and difficulty, T.S. eventually admitted during cross-examination that, at the time of that proceeding, she "understood what was going on" during her guilty plea.

¶ 9 Defendant's recorded statement to Jasnosz was also played for the jury. In addition to describing the events of the incident, defendant made several comments about T.S. Specifically, defendant told Jasnosz that T.S. was "slow minded" and "messed up" during the party. Defendant also told Jasnosz that he believed that T.S. was not "too bright upstairs" and did not possess a "full deck." Finally, defendant told Jasnosz that, in his experiences with T.S., she had been extremely gullible and would do whatever defendant told her to do.

¶ 10 Dr. David Leader, a psychiatrist with the Dreyer Medical Clinic, testified that, from July 1997 until May 2003, he treated T.S., primarily managing her medications. Leader noted that T.S. had an IQ of 72, which is low-average and approaching what is deemed to be mental retardation. Leader noted that an IQ of 72 had a 5-point margin of error, meaning that T.S.'s IQ was in a range between 67 and 77, so the fact that T.S.'s IQ number was not below 70 still was

best deemed to be on the borderline with mental retardation. Leader explained that the impact of a low IQ would be on the person's ability to understand abstract concepts, such as truth, justice, or love. Leader testified that T.S. had experienced a decline in her IQ over time, and he attributed it to the fact that her peers continued to advance mentally while T.S. did not, so her IQ declined. Leader testified that a person with a low IQ could be trained to perform tasks to a high degree of proficiency, but could have difficulty in changing those tasks without a large amount of retraining.

¶ 11 Leader testified that T.S. was impulsive, made snap decisions, and did not always listen to everything she had been told. T.S. generally acted in furtherance of her agenda, even to the point of disputing Leader's feedback about her behaviors and trying to recast those behaviors after the fact so as to avoid the difficult aspects of Leader's feedback. Specifically, T.S. wanted to be "cool," which included behaviors such as getting tattoos, smoking cigarettes and cannabis, and engaging in sex. T.S. did not consider the consequences of her "cool" behaviors and, in any event, was not adept at considering and assessing any consequences very well. Leader had discussed the consequences of sexual behaviors with T.S., but he was convinced that T.S. just did not "get it." For example, T.S. had asked male students at school to expose themselves to her, but she was surprised and affronted when her school peers believed that she had engaged in sex (when, at that time, she had not). Leader also noted that T.S. was easily manipulated, giving the example that, from time to time, T.S. would be convinced by her coworkers purchase things for them even though she could not afford the purchases.

¶ 12 Leader testified that, when he began T.S.'s treatment, she was having social difficulties within her community at school and was unsuccessful in making contacts with persons outside of her family. By the end of her treatment with Leader, T.S. had made some strides in functioning

within her community and making contacts with other people. Nevertheless, Leader testified that, in his opinion, T.S. was "absolutely not" able to live independently and function on her own. It was Leader who recommended that a guardian be appointed.

¶ 13 Leader testified on cross-examination that T.S. was able to make decisions, and that she was aware of what she wanted. For example, T.S. could pick between wearing one item of clothing versus another. Defendant asked Leader if T.S. could consent to or refuse to engage in sexual activities. Leader stated that T.S. would hold an opinion, but, due to her legal incompetence, would be unable to give or withhold consent. When defendant attempted several times to approach the issue of T.S.'s capacity to consent to sexual activities, Leader consistently avoided defendant's attempts and recharacterized the questioning to emphasize the distinction between making a choice and giving knowing consent by understanding the ramifications and consequences of the choice. Thus, Leader eventually conceded that T.S. had the capacity to make decisions or choices, but emphasized she did not have a grasp about the ramifications of her choices.

¶ 14 Leader also testified on cross-examination about cognitive testing results for T.S. He noted that, for the Allen Cognitive Level Screen assessment, T.S. had scored 4.5 out of 6. Leader explained that, while it represented a mild to moderate functional deficit, such a score would cause an elderly adult with dementia to be placed in a nursing home. Leader explained during redirect testimony that the Allen Cognitive Level testing provided objective evidence to support his opinion that T.S. was not capable of living and functioning independently. Leader also observed that, for the length of his treatment of T.S., his constant opinion was that T.S. could not live independently, although he did not believe that she belonged in a nursing home.

¶ 15 Dr. K. Ali testified that she is the psychiatrist who took over T.S.'s care in 2003 and

continued through the date of trial. Ali's primary therapeutic purpose in T.S.'s care was the monitoring of T.S.'s medications. Ali testified that she would see T.S. once every two months with each visit lasting about 10 or 15 minutes. Apart from a formal diagnosis of schizoaffective disorder, bipolar type, along with impulsivity, and with social judgment deficit, Ali described her observations of T.S. Ali testified that T.S.'s mental functioning was on the borderline between normal intelligence and mental retardation. Ali also noted that T.S. did not act age appropriate (approximately 28 or 29 years at the time of trial). Ali did not specify what age T.S. seemed to act, however.

¶ 16 Following the presentation of evidence, defendant was convicted of both counts. Defendant's posttrial motion was denied. In ruling on the posttrial motion, the trial court concluded that T.S.'s testimony at trial and her recorded interview made it clear that she was unable to give knowing consent. The trial court illustrated its conclusions with a reference to the fact that, during closing arguments and apparently feeling attacked by the State's remarks, T.S. stood up and loudly proclaimed that she was "done with this fucking shit," and walked out of the courtroom "as a child would when attacked verbally." The trial court also specifically observed that T.S. possessed the intellect and intelligence of an elementary-school-aged individual and that T.S.'s faculties were further eroded by the cannabis she received on the night of the incident. Defendant was thereafter sentenced to consecutive terms of imprisonment of 25 years for the solicitation conviction and 10 years for the sexual assault conviction.

¶ 17 Defendant appealed, raising seven issues. We affirmed on all issues. *Schag I*, slip op. at 66. Defendant contended that the evidence was insufficient to find him guilty of criminal sexual assault because the evidence adduced did not demonstrate that T.S. could not knowingly consent to sexual activities and there was no evidence to show that defendant knew that T.S. was unable

to knowingly consent to engage in sexual activities with defendant. We concluded that the evidence regarding T.S.'s inability to knowingly consent was indeed sufficient. *Schag I*, slip op. at 29. In fact, we stated that, "[a]s we noted above, the evidence established overwhelmingly that T.S. was unable to give her knowing consent to engaging in sexual conduct with defendant." *Id.*, slip op. at 33. Likewise, we noted that the evidence of the indecent solicitation charge was also overwhelming, as defendant has conceded. *Id.*, slip op. at 31-32.

¶ 18 Following his direct appeal, on March 21, 2011, defendant filed a *pro se* postconviction petition. Through inaction, the petition was advanced to the second stage and postconviction counsel was appointed to represent defendant. On January 14, 2014, defendant, through counsel, filed an amended postconviction petition which adopted defendant's claims from his *pro se* postconviction petition. The amended petition also added five more claims including the claim that appellate counsel was ineffective for failing to argue that the trial court's violation of Rule 431(b) resulted in reversible error.

¶ 19 On March 14, 2014, the State moved to dismiss the amended petition. The State argued that a violation of Rule 431(b) was not *per se* reversible error and did not amount to structural error. The State concluded that the allegation demonstrated neither deficient performance by appellate counsel nor prejudice. Interestingly, despite alluding to plain-error analysis with the structural-error argument, the State did not address whether the evidence of defendant's guilt was close. On April 24, 2014, defendant responded, arguing that the violation of Rule 431(b) deprived him of a fair trial and challenged the integrity of the judicial process. On September 19, 2014, the trial court ruled that the claim of ineffectiveness of appellate counsel should be explored in a third-stage hearing on defendant's amended postconviction petition.

¶ 20 The evidentiary hearing finally proceeded on May 16, 2016. Defendant's appellate

counsel testified that, in his opinion, he raised the seven strongest arguments in defendant's direct appeal. Appellate counsel noted that the trial court did not fully comply with Rule 431(b) and the State stipulated that the trial court had not asked the prospective jurors if they accepted the *Zehr* principles. Appellate counsel also acknowledged that he could have included the 431(b) violation, but explained that, to his understanding, the trial court's violation of Rule 431(b) would be subject to a harmless-error analysis and did not warrant an automatic reversal.

¶ 21 The parties submitted written closing arguments. Defendant argued that appellate counsel should have raised the Rule 431(b) violation as a matter of plain error, contending that the evidence was closely balanced. The State opposed the argument, contending both that defendant could not demonstrate prejudice, that the Rule 431(b) error was not cognizable as a structural error under the plain-error rubric, and that the evidence was not closely balanced.

¶ 22 On September 12, 2016, the trial court denied defendant's amended postconviction petition. The trial court ruled, pertinently:

> "Regarding the claim that [defendant's] appellate counsel was ineffective for failing to raise the issue that the trial court failed to ask each potential juror, individually or as a group, whether each juror understood and accepted the *Zehr* principles, in violation of Supreme Court Rule 431(b), the transcript of the proceedings indicates that the trial judge asked the potential jurors whether they understood the principles, but did not specifically ask if the jurors accepted said principles.
>
> Supreme Court Rule 431(b), [*sic*] mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each

prospective juror on their understanding and acceptance of those principles. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010).

Therefore, because the trial judge did not follow the dictates of Rule 431(b) it is clear that the trial judge violated the rule.

However, the inquiry does not end here. Not all violations of Supreme Court Rules require reversal of a criminal conviction. Automatic reversal is required only when an error is deemed "structural." Structural errors are systemic, serving to "erode the integrity of the judicial process and undermine the fairness of the defendant's trial." An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence. [*Id.*] at 608-09.

A trial court's violation of Supreme Court Rule 431(b) in this case does not fall within the very limited category of structural errors and, thus, does not require automatic reversal of defendant's conviction. *Id.* at 611.

A violation of Supreme Court Rule 431(b) would entitle the Defendant to a reversal of his conviction if it is established that he had a biased or otherwise unfair jury. No proof of such circumstances exists here.

Accordingly, [defendant] has failed to sustain his burden of proof as to this issue."

¶ 23 On September 28, 2016, defendant filed a motion to reconsider. Defendant argued that the trial court improperly applied plain-error analysis because it only considered the second prong, structural error, and did not consider the first prong, whether the evidence was closely balanced. During the hearing on the motion to reconsider, the court asked defendant's counsel, "did I make a finding that the evidence was closely balanced?" Counsel replied, "No," and the

trial court stated: "I did not. I did not intend to make that finding." The trial court denied the motion to reconsider. Defendant timely appeals.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant argues that the trial court erred in denying his amended postconviction petition on the Rule 431(b) issue. Centrally, defendant argues that the evidence regarding whether T.S. was unable to knowingly consent was closely balanced rendering the Rule 431(b) violation prejudicial and necessitating a new trial on the sexual assault charge.[2] Before we reach defendant's central issue, we review the procedures and standards necessary for full understanding.

¶ 26 A. Postconviction Procedures

¶ 27 A proceeding on a postconviction petition has up to three stages. 725 ILCS 5/122-2.1(a) (West 2010). In the first stage, the trial court reviews the petition within 90 days of its filing to determine whether it is frivolous or is patently without merit. *People v. Guerrero*, 2018 IL App (2d) 160920, ¶ 40. At the first stage, the petitioner is required to present only the gist of a constitutional claim. *Id.* If the petition survives the trial court's first-stage review (or is not reviewed within 90 days) it advances to the second stage. *Id.* At the second stage, an indigent petitioner is entitled to the appointment of counsel, the petition may be amended, and the State may answer the petition or move to dismiss it. *Id.* In second-stage proceedings, the petitioner must make a substantial showing of a constitutional violation, meaning that the well-pleaded allegations of the petition (taken as true unless affirmatively rebutted by the record) show that

[2] Defendant concedes that evidence was overwhelming on the indecent solicitation charge and confines his arguments only to the charge of sexual assault.

the petitioner would be entitled to relief if proved true. *Id.* If the petition advances to the third stage, the trial court conducts an evidentiary hearing and enters any appropriate orders regarding the conviction or sentence. *Id.*

¶ 28 B. Ineffective Assistance Standards

¶ 29 Defendant's postconviction claim is based on a claim that his appellate counsel was ineffective for failing to argue that the trial court violated Rule 431(b) on direct appeal in *Schag I*. A claim of ineffectiveness of counsel is governed by the familiar *Strickland* standard. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that, as a result of the deficient performance, the defendant was prejudiced. *Id.* This standard applies equally to claims against trial counsel or appellate counsel. *Id.* at 497. To prevail on a claim of ineffectiveness of appellate counsel, the defendant must show that appellate counsel's performance was deficient (meaning that it was objectively unreasonable under the prevailing professional norms) and that, as a result of appellate counsel's unprofessional errors, the defendant was prejudiced, meaning that there is a reasonable probability that the appeal would have been successful. *Id.* at 496-97. The defendant must prove both deficient performance and prejudice, so this means that an ineffectiveness claim may be resolved on either ground alone. *People v. Viramontes*, 2016 IL App (1st) 160984, ¶ 45.

¶ 30 In this case, defendant contends that appellate counsel was ineffective for failing to raise the issue of the Rule 431(b) violation. Thus, to prevail on the ineffective assistance claim, defendant must show that it was objectively unreasonable not to raise the Rule 431(b) violation on direct appeal and that, had the violation been raised, it would have succeeded on appeal.

¶ 31 C. Merits

¶ 32 Our analysis of the merits is complicated by the fact that, at trial, defendant's trial counsel did not object to the trial court's conduct of *voir dire* on the *Zehr* principles codified in Rule 431(b). Defendant acknowledges that his trial counsel's failure to object results in the forfeiture of the issue for purposes of appeal. Defendant avoids the issue of forfeiture by arguing that his appellate attorney could have argued that the Rule 431(b) issue was nevertheless cognizable on direct appeal under the doctrine of plain error.

¶ 33 Under the doctrine of plain error, codified in Illinois Supreme Court Rule 615 (eff. Jan. 1, 1967), an otherwise unpreserved error may be noticed in two circumstances:

> "(1) when 'a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error,' or (2) when '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.' " *People v. Sebby*, 2017 IL 119445, ¶ 48.

Analysis under the plain error doctrine proceeds in two steps. The first step is to determine whether there was an error. *Id.* ¶ 49. The second step depends upon which prong of the doctrine the defendant invokes. *Id.* ¶ 50. Under the first prong (the closely balanced prong), the reviewing court must decide whether the evidence was closely balanced. *Id.* ¶ 51. If the defendant is able to show that the evidence was closely balanced, then the error has been shown to be actually prejudicial. *Id.* Under the second prong (the structural error prong), the reviewing court must decide whether the defendant has shown that the error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *Id.* ¶ 50. If the defendant is able to show a structural error, then the error is presumed to be prejudicial because

of the importance of the right involved. *Id.* (quoting *People v. Herron*, 215 Ill. 2d 167, 187 (2005)).

¶ 34 With the foregoing standards in mind, we turn to the substance of defendant's contention regarding the trial court's Rule 431(b) violation. Rule 431(b) provides:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 35 Defendant argues that the record shows that the trial court asked the prospective jurors, en masse, whether each understood that defendant was presumed innocent; that, before defendant could be convicted, the State must prove him guilty beyond a reasonable doubt; that defendant did not have to present any evidence on his own behalf; and that, if defendant did not testify, the jurors could not hold it against him. However, the trial court did not ask each juror whether they accepted each of the principles. The State concedes that the jury was asked if they understood the principles but not if they accepted the principles. Thus, under the first step of the plain error analysis, defendant has shown the existence of a clear or obvious error in the trial court.

¶ 36 Turning to the second step, defendant does not argue that the Rule 431(b) violation amounted to a structural error. Indeed, we note that a Rule 431(b) violation is not cognizable under the structural error prong of plain error analysis, at least without evidence that the violation produced a biased jury. *Sebby*, 2017 IL 119445, ¶ 52. Defendant points to no evidence that the jury was biased and the trial court held that there was no evidence of bias in denying defendant relief pursuant to defendant's amended postconviction petition. Thus, we accept defendant's implied concession that the structural error aspect of plain error analysis is not applicable to this case.

¶ 37 Defendant instead limits his argument to the closely balanced prong. Defendant argues that, as to the element of whether T.S. was unable to give knowing consent, the evidence at trial was closely balanced. *Sebby* instructs that, in determining whether the evidence at trial was closely balanced, the "reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Id.* ¶ 53. To accomplish this evaluation, the reviewing court assesses the evidence on the elements of the charged offense along with any evidence regarding the credibility of the witness or witnesses. *Id.* We therefore focus on the element of consent following a brief explanation of the offense under consideration.

¶ 38 A defendant commits the offense of criminal sexual assault if he or she "commits an act of sexual penetration and the [defendant] knew that the victim was unable to understand the nature of the act or was unable to give knowing consent." 720 ILCS 5/12-13(a)(2) (West 2004). While the statute defines the offense in two ways, the jury was instructed only with the element of "unable to give knowing consent." Neither consent nor the phrase, "unable to give knowing consent" was defined for the jury. The jury requested a definition of the phrase, "unable to give

knowing consent," but the trial court, *ex parte*, refused to provide an answer and instructed the jury to keep deliberating. We held that the trial court's non-answer was erroneous (*Schag I*, slip op. at 49-50), but concluded no prejudice accrued, both because there was nothing in the record indicating prejudice (*id.*, slip op. at 51) and because appellate counsel failed to sufficiently argue that defendant was prejudiced by the error (*id.*, slip op. at 52). Thus, for our purposes, the key issue is whether the evidence was closely balanced on the issue of whether T.S. was unable to give knowing consent to defendant.

¶ 39 Defendant argues that, at the third-stage evidentiary hearing on the amended postconviction petition, no evidence was presented on the issue of the closeness of the evidence of whether T.S. was unable to knowingly consent. Defendant contends that the trial court did not expressly state in its judgment that the evidence on this issue was not closely balanced, urging us to overlook the trial court's statement during defendant's motion to reconsider that it did not intend to make the finding that the evidence was closely balanced because had it so intended, "it easily could have said, 'I find that the evidence was not closely balanced.' " Thus, defendant urges that we follow *Sebby* and consider the totality of the evidence while remaining sensitive to the context in which it was adduced.

¶ 40 When we do so, we conclude that the evidence on the issue of whether T.S. was unable to knowingly consent was not closely balanced and, indeed, was closer to the "overwhelming" end of the spectrum. First, we note that T.S.'s live testimony and the portions of the recording of her interview with Jasnosz were before the jury. We note that Jasnosz testified that, in the interview, he had difficulty in keeping T.S. focused on his inquiries to such an extent that he had to formulate questions to determine whether T.S. had sufficient capacity to independently recall and relate the events that occurred in the incident. T.S.'s own testimony before the jury revealed that

she was confused and had apparently limited capacity to understand even relatively simple questioning, such as that pertaining to her guilty plea in a previous offense. See *supra*, ¶ 8.

¶ 41 Leader flatly testified that T.S. could not function on her own and live independently. He testified that T.S. wanted to engage in what she considered to be "cool" behaviors, such as sexual activity, but she did not understand the implications or consequences. Her diminished capacity led to T.S. being easily manipulated. Leader specifically testified that, due to her incapacity, T.S. could not give her consent. Ali's testimony was less detailed than Leader's about T.S.'s capacity to form consent, but her testimony agreed with Leader's regarding T.S.'s mental abilities along with the opinion that she did not act in an age-appropriate manner.

¶ 42 Finally, defendant's statements about T.S. from his recorded interview with Jasnosz were also before the jury. Defendant believed that T.S. was "slow minded," not "too bright upstairs," and did not possess a "full deck." Defendant also related that he was able to take advantage of T.S.'s diminished mental capacity and manipulate T.S. into doing whatever he wanted her to do.

¶ 43 We also note that, in *Schag I*, we stated that "the evidence established overwhelmingly that T.S. was unable to give her knowing consent to engaging in sexual conduct with defendant." *Schag I*, slip op. at 33. This comment referenced our analysis of the sufficiency of the evidence regarding the sexual assault conviction (*id.*, slip op. at 20-29), and the comment was made during our discussion of the prejudicial effect of certain prosecutorial statements during closing argument in the context of an ineffective assistance claim arising out of trial counsel's failure to object to the prosecutor's statements (*id.*, slip op. at 32-34). Thus, in *Schag I*, we recognized that the evidence concerning whether T.S. was unable to knowingly consent was not at all close.

¶ 44 We further note that, in our consideration of the sufficiency of the evidence of the sexual assault conviction here, we have focused on the issue of T.S.'s inability to knowingly consent.

Reviewing the analysis in that portion of *Schag I* and considering the development of the law regarding the issue of a victim's inability to knowingly consent, we believe that the legal context of this issue continues to support our determination here (and our determination in *Schag I*) that the evidence adduced on this issue is not close. In general, a victim's young age alone is insufficient to support a determination that the victim was unable to give knowing consent. *People v. Lloyd*, 2013 IL 113510, ¶ 44. In our case, the parallel could be argued that the fact that T.S. had a low or borderline IQ (rendering her mentally equivalent to a victim of young age), standing alone, would be an insufficient basis from which to conclude that T.S. was unable to knowingly consent. Indeed, defendant does argue that, because T.S.'s IQ was not below the demarcation line of mental retardation, she was able to knowingly consent. However, much more evidence than T.S.'s low IQ was provided. The evidence showed that T.S.'s parents were plenary guardians for her, implying that T.S. could not function or live independently; T.S.'s treating psychiatrists testified that she could not function independently and did not understand consequences, especially of sexual conduct; T.S.'s own testimony and recorded statement revealed her obvious (even in a cold record) limitations; defendant professed to be aware of her mental limitations and manipulability. With all of this evidence along with evidence of the objectively low IQ measurement, *Lloyd* would not apply.

¶ 45 Further, in *Schag I*, we reasoned that, while T.S. was not as profoundly limited as in other cases, *e.g.*, *People v. Whitten*, 269 Ill. App. 3d 1037 (1995) (victim was developmentally disabled with an IQ of 54); *People v. Fisher*, 281 Ill. App. 3d 395 (1996) (victim was unconscious from alcohol consumption), there was more than ample evidence showing her inability to consent. Specifically, defendant exhibited awareness that, during the incident, T.S. was "slow minded" as well as "messed up" from consumption of cannabis. Defendant also knew

that T.S. was not "too bright" and believed she did not possess a "full deck." Defendant was also confident in his ability to manipulate T.S., stating that she did whatever he told her to do. Moreover, T.S.'s physicians and father testified about her limitations and T.S. herself placed those limitations on full display in front of the jury. In the specific legal context of the element of consent, "the evidence established overwhelmingly that T.S. was unable to give her knowing consent to engaging in sexual conduct with defendant." *Schag I*, slip op. at 33.

¶ 46 Accordingly, considering the totality of the evidence adduced on the issue of whether T.S. was able to knowingly consent, we hold that the evidence was not close. As a result, defendant's plain error argument fails.

¶ 47 D. Defendant's Specific Contentions

¶ 48 We now turn to defendant's specific contentions. Defendant relies on three cases to provide the underpinning authority for his contention that the evidence presented on the issue of whether T.S. was unable to knowingly consent was closely balanced: *Sebby*, 2017 IL 119445; *People v. Anderson*, 2018 IL App (1st) 150931; and *People v. Richardson*, 2013 IL App (1st) 111788. We have extensively relied on and followed *Sebby*'s presentation of the relevant controlling principles above. Despite this, *Sebby* is factually distinguishable. In *Sebby*, the defendant was charged with resisting a police officer. *Sebby*, 2017 IL 119445, ¶ 54. The evidence presented about the incident by both the State and the defendant was plausible and consistent, and the defendant's evidence plausibly explained some of the observations made by the police officers. *Id.* ¶ 61. For example, the police believed that defendant flailed around when told he was under arrest; defendant testified he threw up his arms and did not resist; likewise, when defendant was on the ground, police testified he was squirming and resisting; defendant and his witnesses testified he did not resist and only tried to alleviate the discomfort of

being shirtless on a gravel driveway when he was on the ground. *Id.* ¶¶ 55-60. Thus, in that case, there were two competing versions of the event that were plausible and consistent. Here, by contrast, there was no second version of the event. Further, on the narrow issue of T.S.'s inability to consent, the evidence was largely consistent. Defendant suggests that Leader's testimony that T.S. was able to make choices means that she could give knowing consent. The problem with this suggestion is that the example given in testimony was the choice between different colored dresses; the testimony was consistent that T.S. did not understand (did not "get it" in Leader's words) the consequences of engaging in sexual activity—T.S. only thought such behavior would make her "cool." Thus, there was no controversy about her ability to knowingly consent and this serves to factually distinguish the circumstances in this case from those in *Sebby*.

¶ 49 *Anderson* is likewise factually distinguishable. In that case, the plain error analysis focused on the defendant's intent to promote or facilitate a codefendant's criminal actions in shooting up a car of supposed gang rivals and killing the driver. *Anderson*, 2018 IL App (1st) 150931, ¶¶ 1-2. The court held that the evidence on the defendant's intent was closely balanced because the credibility of the only witness to place a gun with the defendant was strongly attacked and called into question, that witness's testimony was contradicted by other testimony, and the evidence that the defendant made a threat was misrepresented to the jury. *Id.* ¶¶ 30-34. Here, there were no credibility issues with the witnesses testifying about T.S.'s mental capacity; likewise there was no conflicting evidence regarding T.S.'s ability to knowingly consent. Defendant contends that T.S.'s ability to knowingly consent was demonstrated by her guilty plea to an offense occurring before the incident in this case. Defendant reasons that she was able to knowingly and voluntarily plead guilty, otherwise there could have been no plea. We note that

T.S.'s parents, who at the time of the guilty plea were also her plenary guardians, were also present and advising T.S. This undercuts defendant's point because, even though T.S. entered the plea, she was still under the guardianship of her parents and, had they not concurred, the plea likely would not have occurred. Thus, the guilty plea does not establish T.S.'s ability to independently knowingly consent. Moreover, during the guilty plea proceedings, T.S.'s parents were present (and presumably advising her) while, during the party, T.S.'s parents were not present and were not advising her; indeed, T.S. kept the party secret from her parents until she could no longer maintain secrecy. Thus, even if the guilty plea sheds light on T.S.'s ability to consent in general, the circumstances are so different from those present at the time leading up to the party and at the party, the two events cannot be reasonably compared. Defendant's contention, therefore, is ill taken and *Anderson* remains factually distinct from the circumstances of this case.

¶ 50 Finally, defendant relies on *Richardson* for the proposition that a plain error analysis may properly focus on an element of an offense even where the defendant has admitted other elements. *Richardson*, 2013 IL App (1st) 111788, ¶¶ 22-33. We agree with this general point and, in fact, defendant's appeal in this case is predicated on focusing on the element of inability to knowingly consent despite the concession as to the existence of the other elements of the offense of sexual assault. Factually, the defendant in *Richardson* signed a statement that may not have accurately depicted her mental state regarding whether she intended to harm the child (the defendant admitted that, when she pulled the child from the car, his foot was twisted and the child eventually was diagnosed with a spiral fracture near his ankle), and the treating physician testified that, while he believed the injury resulted from abuse, another doctor at another hospital told him it was possible for the child to have experienced the injury without abuse as a child that

age could move with enough force to cause the same injury. *Id.* ¶¶ 28-30. Here, Leader testified that, while T.S. had the capacity to discriminate and choose between two options, she did not have the ability to consent or to apprehend abstract concepts like love and justice. Leader's testimony, unlike the physician's testimony in *Richardson*, was not self-contradictory. Thus, *Richardson*, too, is distinguishable.

¶ 51 Defendant insists that the evidence demonstrated that T.S. was not intellectually disabled. Defendant points to Leader's testimony that she was capable of making choices and to T.S.'s interview with Jasnosz in which that she knew what sex was and knew what was going on at the party, and that she even agreed to have sexual intercourse with defendant, but during the act, asked him to stop, and defendant stopped. We disagree. The evidence also demonstrated that T.S. was under the plenary guardianship of her parents because she was unable to function independently. Leader unequivocally stated his opinion that T.S. was unable to knowingly consent, especially in sexual matters. He explained that she was able to make choices, but she did not understand the consequences of those choices. Ali and Leader both testified that T.S.'s intellectual functioning was very low to borderline mentally retarded and that her discourse and behavior was not age appropriate. Leader testified that, in an older person exhibiting dementia, T.S.'s level of functioning would require institutionalization. Jasnosz testified that he had difficulty in his interview because of her low mental abilities and had difficulty in keeping T.S. focused. T.S. in her own testimony became confused and was manifestly unable to follow a straightforward line of questioning during cross-examination. Far from showing that T.S. was not intellectually disabled, the evidence strongly established and exhibited T.S.'s intellectual disability and supported the central issue that T.S. could not knowingly consent. We reject defendant's contention.

¶ 52 Defendant argues that the jury question requesting clarification on the issue of inability to give knowing consent suggests that the evidence was closely balanced. This argument conflates two distinct and incompatible ideas. First, closeness of the evidence presents a factual and evidentiary question. This sort of question is quite distinct from the legal concept of inability to give knowing consent. The fact that members of the jury may have been confused about a legal instruction or a legal definition has literally no bearing on whether, as a matter of facts adduced at trial, the evidence bearing on T.S.'s ability to knowingly consent was closely balanced. This view is reinforced by the jury's actual question: the jury informed the trial court that it "need[ed] clarification on the charge of criminal sexual assault" asked the trial court to "[p]lease expand or clarify of [*sic*] 'unable to give knowing consent to the Act [of sexual penetration].' "[3] Requesting clarification of a legal concept does not implicate the closeness of the evidence adduced related to that concept.

¶ 53 Relatedly, defendant points out in a footnote that, in *Schag I*, we held that the trial court's *ex parte* response to the jury's questions was erroneous. *Schag I*, slip op. at 50. We resolved the issue by concluding both that evidence of prejudice to defendant accruing from the erroneous response was lacking (*id.*, slip op. at 51-52) and that, alternatively, appellate counsel's failure to sufficiently argue that defendant was prejudiced resulted in forfeiture (*id.*, slip op. at 52). Defendant omits our consideration of the factual record to determine if there were anything supporting a finding of prejudice and instead concludes only that we held the issue to be forfeited. From this, defendant concludes that, "[g]iven the closely-balanced [*sic*] nature of the

[3] The question referred to the propositions instruction for the charge of criminal sexual assault.

evidence on the issue of knowing consent discussed herein, it is apparent that defendant was prejudiced by the [trial] court's erroneous *ex parte* response." To our mind, this suggests that defendant is suggesting that appellate counsel was also ineffective for failing to argue the issue of prejudice arising from the trial court's erroneous *ex parte* response to the jury's questions. The three-sentence footnote, leaving aside its inaccuracy in capturing our actual holding, is inadequate to actually raise the issue for our consideration. Also, in addition to the unfleshed-out nature of the argument, no pertinent authority supporting the contention is presented, thereby running afoul of Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017). Finally, to the extent that *Schag I* is all the pertinent authority required to present the argument, defendant erroneously interpreted what we actually held and *Schag I* does not support defendant's point. For the closely balanced evidence to provide the requisite prejudice, we would have had to be engaging in plain error review of the jury-questions issue, and we specifically held that the error had been properly preserved. *Schag I*, slip op. at 49.

¶ 54 In a further attempt to carry his jury-question point, defendant points out that the behavior of the jury is a factor to be considered when reviewing the totality of the circumstances of the entire case. See *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 37 (while the fact of a jury question does not indicate either an impasse among the jury or that the jury believed it to be a close case, the jury's behavior is a legitimate factor to consider amongst the totality of the circumstances). Defendant concludes that the jury's questions support defendant's view that the evidence was close. We disagree. We have carefully reviewed the evidence bearing upon the issue, including evidence omitted by defendant from his briefing on appeal, such as defendant's own statements acknowledging T.S.'s intellectual disabilities and manipulability. While the suite of jury questions is a factor to consider, even so, the questions themselves do not

necessarily suggest that the jury believed that the evidence was close. Based on all of the foregoing, we reject defendant's contention.

¶ 55 Defendant finally argues that, while we held that the evidence was sufficient to convict defendant beyond a reasonable doubt of the offense of criminal sexual assault in *Schag I*, here we are not considering the sufficiency of close evidence but the closeness of sufficient evidence. *Sebby*, 2017 IL 119445, ¶ 60. We agree. We do not agree, however, that the evidence on the issue of whether T.S. was unable to knowingly consent was close. Indeed, as early as our sufficiency-of-the-evidence consideration in *Schag I*, we noted that "the evidence established overwhelmingly that T.S. was unable to give her knowing consent to engaging in sexual conduct with defendant." *Schag I*, slip op. at 33. We maintain that opinion here, where the question is solely focused on the evidence of whether T.S. was unable to give her knowing consent to the various sexual acts with defendant for purposes of the charge of criminal sexual assault: the evidence is not closely balanced. Accordingly, defendant's argument under the first, closely balanced, prong of plain error review fails, and we affirm the trial court's judgment denying defendant's amended postconviction petition following the third-stage evidentiary hearing.

¶ 56 III. CONCLUSION

¶ 57 For the foregoing reasons, we affirm the judgment of the circuit court of Kendall County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 58 Affirmed.