2019 IL App (2d) 170085-U
No. 2-17-0085
Order Filed October 17, 2019
Modified Upon Denial of Rehearing November 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRENT GLEICHAUF, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 13-CF-72 Honorable John S. Lowry, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Bridges concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to sustain defendant's convictions. The State did not commit clear and obvious error during closing argument and, therefore, there was no plain error or ineffective assistance of counsel. Defendant's constitutional challenges to SORA are dismissed for lack of jurisdiction. Affirmed.

¶ 2 After a jury trial, defendant, Brett Gleichauf, was convicted of two counts of aggravated criminal sexual assault with a dangerous weapon (a belt) (720 ILCS 5/11-1.30(a)(1) (West 2012)) and one count of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2012)). The trial court denied defendant's motion for a new trial, and sentenced him to 16 years' imprisonment for

each aggravated-sexual-assault conviction, 2 years' imprisonment on the aggravated-unlawful-restraint conviction, and ordered that all sentences would run consecutively.

¶ 3 Defendant raises four overarching issues. The first concerns reversing his convictions, based on alleged inconsistencies and flaws in the victim's testimony. Next, defendant argues that the State committed plain error in this closely-balanced case where, in closing argument, it misstated the testimony given by its DNA expert and, further, that trial counsel and post-trial counsel were ineffective in failing to object to the misconduct and to preserve an objection in a posttrial motion. Third, defendant argues that the Sex Offender Registration Act (SORA) (730 ILCS 150/1 *et seq.* (West 2012)) and its restrictions violate substantive due process. Fourth, defendant argues that, where it fails to accord him an individualized assessment of whether he should be required to register, SORA violates his right to procedural due process. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Defendant, age 33, and victim M.K., age 29, initially met in August 2012, on an online dating website. After meeting in person, the relationship quickly escalated, with defendant often staying overnight at M.K.'s home. Shortly thereafter, however, in September 2012, the relationship turned rocky, with frequent arguments and accusations of cheating and other exhibitions of jealous behavior. They frequently broke up and reunited. Relevant here, the two broke up between Christmas and New Year's Eve 2012, but reconciled on Sunday, January 6, 2013. Specifically, defendant met M.K. at her church, they went to lunch, and they returned to her home. Defendant stayed the night, and the two had sex. On Monday, January 7, 2013, M.K. went to her full-time job at a bank, and defendant stayed at her home. They met back at her house and, that evening too, had vaginal and possibly oral sex.

¶ 6 A. January 8, 2013

¶ 7 i. M.K.'s Testimony

¶ 8 M.K. testified that the next day, on Tuesday, January 8, 2013, she went to work. Defendant also went to his first day at a new temp job. M.K. testified that she told defendant that she did not want him to stay over Tuesday night. At first, he was agreeable, but then defendant texted her throughout the day that he wanted to see her. Defendant said that he had hurt his foot at work, and he asked her to look at it that evening. (M.K. is not in the medical field, but she agreed to do so). After defendant arrived and she checked his foot, M.K. said that it looked fine and that defendant could leave, as she was going to make dinner and did not have enough for both of them. Defendant responded that she should go ahead and eat, and that he would just watch television. After eating, M.K. told defendant that he could leave, as she was going to watch a program that she had recorded. He said he would just watch it with her. M.K. was getting angry because defendant was not listening to her. After the program, M.K. said that she was ready to go to her room, and she asked defendant to leave. Defendant replied that he just wanted to stay until 10 p.m. and that he would lay down with her until then. Defendant joined M.K. on her bed, and they watched a television show. Around 9:15 p.m., defendant asked M.K. why she was being a "bitch" to him, and he started getting angry, yelling, and accusing her of being a prostitute and a "whore" and cheating on him. M.K. answered that she was not trying to be mean, but that she wanted to be alone and was upset because defendant would not leave. She told defendant that he had to go.

¶ 9 During this exchange, M.K. was lying on her back. Defendant climbed on top of her, straddling her with his legs and holding her down with his hands on her upper arms. He put her hands over her head, pulled off her pants, and took the belt out of his pants. The belt was in a single loop, and he put it around her neck, yanking it to tighten it. M.K. testified that she screamed,

pleaded with defendant, and kept fighting until she successfully removed the belt from her neck. Defendant then put the belt around her wrists, crossed over her head. Defendant pulled off his underwear and put his penis near her vagina, "trying to get it in." He was not erect, but kept trying to insert his penis, with only the tip of it going inside her body. M.K. told him to stop, said that he was hurting her, and tried to move herself out from under him, but could not. Defendant stopped trying to put his penis in her vagina and instead moved up to her face, inserting it into her mouth. His penis then grew erect, and he moved it back and forth until he ejaculated in her mouth while she was crying. The State asked M.K. whether defendant ejaculated "all over your mouth," and M.K. answered, "yeah." M.K. told defendant that she needed to spit out his semen, but he would not let her. At some point, her hands then became free. She tried to reach forward to grab defendant's penis to hurt him. He pushed her back and, with his right fist, punched the left side of M.K.'s face.

¶ 10 At that point, M.K. decided that fighting back was not helping and that she needed to "change her game plan." M.K. decided that the "only way I was gonna get out alive was if I became his friend." She told him everything was going to be okay, and was very reassuring to anything that defendant said. "He had said to me that he doesn't want to go to jail for the rest of his life over a girl. I told him he wouldn't, no one would know, and that we would get through this." According to M.K., at some point, defendant grabbed her hair and swung her up and down on the bed by her hair, hurting her head.

¶ 11 Defendant continued to restrain her. M.K. told defendant that she needed to get out of bed. Her stomach was in knots and was hurting, and she felt like she needed to go to the bathroom. Defendant would not let her get out of bed and said that she was not going anywhere. M.K. could no longer control her bowels. She defecated on herself and the bed linens.

¶ 12 Defendant was mad. He allowed her to shower, but followed her to the bathroom with his hand on her arm and holding a bamboo stick that M.K. kept by the side of her bed, between the bed and nightstand. M.K. explained that, because she lived alone, it gave her comfort to have the stick there as some protection. In the bathroom, M.K. looked at her face, and her eye was puffy and changing colors. After the shower, M.K. put on fresh underwear and a t-shirt. The bed was in chaos and smelled; defendant told M.K. to take off the soiled linens. She did so, and then put a comforter from her guest bedroom on her bed. At some point, a frozen bag of vegetables was obtained for her to put on top of her face. Defendant continued to follow her with the bamboo stick and held her arm as she was going from room to room. They got back in bed, and he continued to hold on to her. He "bear hugged" her the entire night (arms wrapped around the top part of her body and legs wrapped around her legs).

¶ 13 M.K. has strong feelings against smoking and never allowed defendant to smoke at her home or in her car. Instead, he smoked outside. Nevertheless, that evening, while in bed, he smoked in her bed and extinguished the ashes and cigarette butts in M.K.'s nightstand drawer.

¶ 14 M.K. awoke the next morning, and the clock reflected that it was 7:12 a.m. Defendant was still asleep, but holding on to her. She woke him and said that she needed to use the restroom. He again resisted, but she pleaded with him. Defendant accompanied M.K. to the bathroom, but then used the toilet himself. While washing her hands, M.K. realized that defendant was not holding on to her. She ran out of the bathroom, down the hall, out the front door, and across the yard to her neighbor's, Christine Clark's, house. It was "freezing" outside, and M.K. was wearing only underwear and a tank top. Her feet and legs were bare. She started banging on the door, and Clark's daughter answered it. M.K. said, "I did it. I got away. I got away." Clark comforted her, put her in a recliner with a blanket and jacket, and called the police. Looking out the window,

M.K. saw defendant's car stopped in the middle of the road; he quickly scraped his windshield and then got in the car and drove away.

¶ 15 Police officer Brian Woodford came to Clark's home and took a statement from M.K. An ambulance took M.K. to the hospital, where she was examined utilizing a "rape kit." When M.K. ultimately returned home, her cell phone, car keys and house keys were gone. She explained that, the previous evening, she let her dog out from the kitchen, and defendant took all of her keys and her phone, saying that she was not going to go anywhere. M.K. stated that this occurred after he sexually assaulted her.

¶ 16 Photographs in the record reflect M.K.'s injuries, her bedroom, the soiled linens, cigarette butts in a drawer, and defendant's looped belt, jacket, and a bamboo stick on the floor. M.K. denied that she and defendant ever engaged in bondage sexual practices.

¶ 17 On cross-examination, M.K. agreed that the only thing defendant tried to insert into her vagina was his penis. She did not recall telling a nurse at the hospital that he inserted a finger. She agreed that, on January 9, 2013, she gave a statement to Woodford that did not mention defendant taking her keys and cell phone, her telling defendant that things were not going to work out, being held in a "bear hug," or defendant saying that he did not want to go to prison for the rest of his life over a woman. M.K. explained, however, that her conversation with Woodford was fairly short, she was "frantic" at Clark's house when she spoke with him, and she did not give him a complete narrative with absolutely every detail that had occurred. Similarly, she was upset and in shock when transported to the hospital and throughout the rape-kit exam; she could not recall every detail about what happened in the hospital.

¶ 18 M.K. agreed that, prior to Sunday, January 6, 2013, she had tried to break up with defendant. That Sunday, she decided to try the relationship again. On the night of January 8,

2013, she testified that, "yes," she again said something to him about wanting to break up. Upon further questioning, she explained that she told him that night, while the altercation was taking place and he was straddling her and calling her names, but before he tried to choke her, that "it wasn't going to work out." Defense counsel, on re-cross-examination, confirmed with M.K. that it was during the argument on the bed that she told defendant that it was not going to work out, and then counsel established that this particular comment was not contained in her statement to Woodford. On further re-direct examination, the State directed M.K. to the hospital report where, in the report narrative, the nurses wrote that "[w]hile laying in bed, patient told assailant that their relationship was not going to work out because she was afraid of him." M.K. also confirmed that she told defendant on numerous occasions over the course of their relationship, but also more than once that particular night, that things were not going to work out.

¶ 19 ii. Defendant's Testimony

¶ 20 Defendant testified that, on Monday, January 7, 2013, he and M.K. engaged in bondage and restraint sexual practices, using his belt and a sex toy. He testified that they had oral sex that night, and that he ejaculated in M.K.'s mouth. The next day, he went to work and kept in contact with M.K. throughout the day, but she did not give him any indication that she did not want him to come over.

¶ 21 Accordingly, after work on January 8, 2013, defendant went to M.K.'s house. They discussed his injury and cuddled on the couch. Defendant received a text from another woman; M.K. became very quiet. After watching television, they headed towards M.K.'s bedroom, and M.K. said, "I want you in me right now." He took of his clothes, looped his belt and hung it on the closet doorknob. Defendant testified that he and M.K. had consensual vaginal sex and he ejaculated in her vagina. Further, he was asked, "*** on the 8th, when you were in the bedroom.

Did you, in fact, penetrate her with your penis? That's something you did, correct?" He replied, "Yes, I did." Defendant testified that M.K. "absolutely" consented, that he did not use force or threat of force, and they did not engage in oral sex that night.

¶ 22 M.K. used the restroom. When she returned, defendant was texting his friend Shawn about meeting that evening. M.K. got angry, accusing him of actually planning to meet the woman who had texted him earlier. Defendant said, "here we go again," and M.K. hit him. Defendant responded by striking her in the face, as hard as he could, with a closed fist. He then restrained M.K. to calm her down and to keep her from attacking him. Defendant pinned her to the bed with his body weight and held her arms and wrists with his hands. After 10 minutes, M.K. had a bowel movement on the bed, and defendant got off of her. While M.K. used the restroom, defendant took the sheets off the bed and put them in the closet. Later that evening, M.K. commented on her eye. Defendant felt "terrible," and said he would go to the police. M.K. told him not to worry and that she would not let anyone know. They fell asleep; he did not hold her in a "bear hug." Defendant testified that he did not follow or hold on to M.K. as she walked around the house, nor did he threaten her or carry around a bamboo stick. He testified that he smoked and extinguished the cigarette butts in the nightstand drawer because, after the fight, he was stressed out.

¶ 23 The next morning, defendant told M.K. that he was going to work. M.K. went to the bathroom. She said that she was going to let the dog out, but defendant heard the front door open. He became concerned that M.K. might have gone to a neighbor's house, and he changed his mind about wanting to talk to the police. Specifically, he testified that he thought, "I'm not sticking around here to talk to the cops." He quickly grabbed his clothes and, in his rush to exit the house, dropped his belt on the floor and left his jacket behind. Defendant did not go to work, as scheduled.

He instead drove to his brother's home in Milwaukee, Wisconsin, where, on January 11, 2013, he was located and arrested.

¶ 24 B. Neighbors' Testimony

¶ 25 Christine Clark testified that she is M.K.'s neighbor. On the morning of January 9, 2013, M.K. banged on her door around 7:30 a.m. M.K. was wearing only a tank top and underwear, and exclaimed, "I did it. I did it. I got away." M.K. appeared distraught, with bruising and swelling on the left side of her face. Clark let M.K. inside, and M.K. said, "He beat me and raped me and held me hostage." Clark called 911.

¶ 26 Eric Bergstrom, another neighbor, testified that he saw defendant run out of M.K.'s home on the morning of January 9, 2013. Defendant was not wearing a shirt when he ran out of the home; he put one on while running to his car. Defendant immediately drove away, but had to stop his car a couple of seconds later to scrape frost off of the windshield.

¶ 27 C. Police and Hospital Personnel

¶ 28 Deputy Woodford responded to Clark's 911 call. He observed M.K. crying, as well as swelling around her eye and on her neck. In a five-to-eight minute conversation, M.K. explained that she had tried to break up with defendant, but he forced her to the bedroom by grabbing her hair and pushing her. Defendant then pushed her onto the bed and took off her underwear.

¶ 29 An ambulance took M.K. to Swedish American Hospital. There, detective Jeff Ciaccio photographed M.K.'s injuries. According to Ciaccio, M.K. was "upset, crying, visibly shaking; very, very distraught." Nurses Ann Bastien and Tracy Digvonni examined M.K. Bastien took a narrative description of the events from M.K. The narrative included M.K.'s report that defendant tried to "get himself up" and, when erect, made her "suck him" and then it "went everywhere." Digvonni prepared a body chart to document M.K.'s injuries, which she explained looked worse

in person than they appeared in some of the photographic trial exhibits. Those documented injuries included bruising, swelling, redness, and tenderness near the left eye; redness, swelling, and tenderness on the left cheek; tenderness to the left side of the head; a six-centimeter linear pattern of redness on the left wrist; another linear red mark on the right wrist; redness and multiple areas of bruising on the right upper arm, consistent with arm gripping; a one-centimeter linear area of redness on the right, upper shoulder area; a two-and-a-half-centimeter linear area of redness beneath the shoulder; and a dark purple bruise to the "right side." Digvonni collected evidence for the sexual assault kit, including swabs from M.K.'s vagina, mouth, and a stain on her cheek that could have been semen. When administering a checklist in the kit, the nurses recorded M.K. as having responded "yes" to penetration by a penis and finger and to oral sex. She responded "no" to anal penetration or penetration by foreign object.

¶ 30 D. DNA Expert

¶ 31 Forensic scientist Blake Aper testified as a DNA expert. He analyzed the swabs collected by Digvonni. He testified that a color test performed on the vaginal swabs was negative for presence of semen, but he identified trace sperm cells on the vaginal swabs upon microscopic examination. Aper testified that the color test on the oral swabs also resulted in a negative result for the presence of semen, but, upon microscopic examination, he found one sperm cell. The DNA profile from the vaginal swab contained defendant's profile. The amount of male DNA on the oral swab was insufficient for DNA typing.

¶ 32 Aper agreed that semen can exist in a woman's body for two or three days. It is difficult to obtain a DNA profile from only one sperm found on an oral swab. Aper explained:

> "I'd say in the cases that I've worked where victims can say an oral assault occurred, it's very rare that we ever obtain enough male DNA to get any DNA types from

[an alleged oral assault]. The reasons being could be, you know, if she spits, does a mouth rinse or wash, takes a drink—that can all be rinsing away any potential evidence.

Even the time from the alleged assault to the time that she gets that evidence collected at the hospital can be a big difference [be]cause you can imagine, you know, your mouth is constantly cycling in a new—you know, new saliva all the time. So even if you don't take a drink, there's just so much saliva changing out through your mouth anyway, evidence can be getting rinsed away just through that."

¶ 33 E. Closing Argument

¶ 34 In its closing argument, the State argued that M.K. was more credible than defendant. Defense counsel argued the opposite and further asserted that the DNA evidence favored defendant's version of events. Defense counsel explained that the vaginal swabs allowed for a full DNA profile, which included defendant's profile. Therefore, he argued, the result could reasonably be interpreted as showing that, as defendant had reported, he and M.K. engaged in vaginal intercourse with ejaculation on January 8th. In contrast, counsel argued, although M.K. testified that defendant ejaculated in her mouth and that the ejaculate went "everywhere," the testing reflected no sperm, no semen, and only one spermatozoa that "could easily have been from oral sex the day before [*i.e.*, Monday, January 7]." That one spermatozoa was insufficient to allow for DNA testing. "There's physical evidence. It is a real tiebreaker which proves that [defendant] is telling the truth."

¶ 35 In its rebuttal argument, the State responded:

"But I want you to remember what Blake Aper told us about DNA. Remember, first of all, when the nurses were testifying, they said ideally you collect a rape kit within 72 hours of the sexual assault; but semen, DNA, can remain in bodily orifices for a number

of days. You recall that. But the mouth was unique. I think Mr. Aper said it was very rare to find even a single sperm cell even where there had been a claim of oral sexual assault with ejaculation.

And here's what we know for certain. That on Tuesday night, when [M.K.] got home from work, she ate dinner. Remember that? And this defendant's claim is they didn't have oral sex—fellatio—on Tuesday night. They had it Monday night. At least 24 hours before; right? Well, in that time period [M.K.] told you she eats breakfast at work. She went to work on Tuesday; she'd eaten breakfast. We don't know if she had lunch, but she certainly came home and had dinner.

Use your life experience and common sense. If there had been no oral sexual assault Tuesday night, isn't it just damned bad luck for this defendant's sperm to have shown up in her mouth?"

¶ 36 As previously mentioned, the jury convicted defendant of two counts of aggravated criminal sexual assault with a dangerous weapon and one count of aggravated unlawful restraint. Defendant's posttrial motions were denied, and the trial court sentenced him to 16 years' imprisonment for each aggravated-sexual-assault conviction, 2 years' imprisonment on the aggravated-unlawful-restraint conviction, and ordered that all sentences would run consecutively. In announcing its sentence, the trial court did not order defendant to register as sex offender pursuant to SORA, nor did the written sentencing order so specify. Defendant appeals.

¶ 37 II. ANALYSIS

¶ 38 A. Sufficiency of the Evidence

¶ 39 Defendant challenges the sufficiency of the evidence that contributed to only his convictions for aggravated criminal sexual assault. His arguments hinge on M.K.'s credibility. In

essence, defendant argues that, because M.K. repeatedly changed her accusations and her testimony was internally inconsistent, her testimony was inherently implausible, and the jury's finding was unreasonable. Specifically, defendant notes that M.K. was inconsistent regarding why he assaulted her, where and when the act began, what acts occurred, and how he kept her restrained. According to defendant, she presented three versions of the sexual assaults: (1) when first speaking to police, stating that she tried to breakup with defendant, but he forced her into the bedroom by grabbing her hair, pushing her onto the bed, and then taking off her underwear; (2) during the hospital examination, stating that she willingly went into the bedroom, but decided there that she needed to breakup with defendant, at which time he became abusive, tried to "get himself up," and made her "suck him;" and (3) at trial, denying that she tried to break up with defendant, saying she only asked him to leave for the night. In addition, defendant notes, at trial, M.K. claimed that defendant repeatedly penetrated her vagina with the tip of his penis. He claims her assertion is uncorroborated. Although he concedes that the hospital report also mentioned vaginal penetration, he suggests that the reliability of the report is at issue because the report also mentioned penetration by a finger, which M.K. has never claimed.

¶ 40 Defendant further notes that M.K. was also grossly inconsistent in her description of her wrist position when bound, first not remembering whether they were crossed, but then demonstrating at trial that her hands were above her head in a crossed fashion. In addition, he asserts that M.K was inconsistent in her description of how defendant was able to keep her restrained, given that she allegedly could not break free while he was busy trying to "get himself up," but then, after he ejaculated in her mouth and was making her swallow it, she was able to free herself. Further, he points out that the timing of events was inconsistent as to when she defecated, first saying it was after the sexual assaults and after he punched her and would not release her, but

later saying that, after the sexual assault, he let her go to the kitchen and let out the dog, and she defecated after that. Defendant contends that, in total, the inconsistencies render it impossible for a reasonable factfinder to accept any part of M.K.'s testimony. Further, he asserts that any evidence presented by the State as corroboration for M.K.'s testimony either contradicted her version of events or equally supported his own version (*e.g.*, the looped belt on the floor could have fallen off the door knob when he fled, the linear marks on M.K.'s wrists could have been from bondage activities on Monday night), thus establishing that the State did not meet its burden.

¶ 41 When a defendant challenges the sufficiency of the evidence that resulted in a conviction, our role is not to re-try the defendant. *People v. Collins*, 106 Ill. 2d 237, 237 (1985). Rather, viewing the evidence in the State's favor, we consider whether *any* rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.* We defer to the factfinder's assessment of witness credibility, as it is in a superior position to observe and weigh witness credibility and resolve conflicts in the testimony, and we will not overturn a conviction unless the evidence is so improbable or unsatisfactory that a reasonable doubt as to the defendant's guilt remains. See, *e.g.*, *People v. Richardson*, 234 Ill. 2d 233, 251 (2009); *People v. Schott*, 145 Ill. 2d 188, 203 (1991). Nevertheless, our deference to the factfinder does not extend to testimony that is so lacking in credibility that it is "improbable, unconvincing, and contrary to human experience." *People v. Vasquez*, 233 Ill. App. 3d 517, 527 (1992). A conviction based upon such testimony requires reversal. *Id.*

¶ 42 Here, M.K.'s testimony was not so improbable, unconvincing, or contrary to human experience that no rational trier of fact could have found her credible. Indeed, some of the alleged inconsistencies that defendant points to are not, if viewed in the light most favorable to the State, inconsistent in any meaningful way. For example, M.K.'s description of events during the hospital

examination, stating that she willingly went into the bedroom, but defendant became abusive, tried to "get himself up," and made her "suck him," is not inconsistent with her testimony at trial that she went to the bedroom when defendant would not leave, he penetrated her vagina with the tip of a flaccid penis, and that he forced her to perform oral sex. M.K.'s first report to Woodford was given when she was "frantic" and crying, her meeting with him lasted, at most, eight minutes, and she did not tell him every detail that occurred. The jury could have rationally believed that M.K.'s report to Woodford—that defendant forced her to the bedroom, pulled her hair, pushed her on the bed, and pulled off her underwear—represented an extremely truncated version of events that occurred throughout the evening, that the events happened later in the evening than Woodford understood when he wrote it down, and/or that the lack of detailed timeline was due to M.K.'s evident distress and shock. Moreover, the jury could have reasonably believed that, in her brief statement to Woodford, as she grappled with trauma, M.K. might have expressed distressing events as they came to mind, rather than with any focused intent to present a detailed timeline.

¶ 43 Defendant focuses on the alleged inconsistencies between M.K.'s statements that she told defendant that they needed to break up, which prompted the assaults, as opposed to her denial that she tried to break up with defendant, saying she only asked him to leave for the night. Again, viewed in a light favorable to the State, the jury could have believed these were two versions of the same sentiment; *i.e.*, defendant would not leave when asked to do so and M.K., as she became upset and defendant got mad at her, told defendant that it would not work out between them. Indeed, M.K. testified and was thoroughly cross-examined on whether and when she tried to break up with defendant. She consistently testified that she told defendant that their relationship was not going to work out. That testimony was corroborated by the hospital report narrative. Defendant notes, however, that M.K. told Woodford she tried to break up with defendant and *then* he attacked

her, whereas, at trial, she testified that she tried to break up with him during the events at issue. Again, the jury could have reasonably found that M.K.'s statement to Woodford was perfunctory and given while in a distressed state. Moreover, in either "version," M.K. recounts that she told defendant it would not work out prior to the sexual assault, *i.e.*, before he started choking her and before penetration.

¶ 44 We find similarly unavailing defendant's argument that M.K.'s testimony regarding how her wrists were bound or how she managed to free herself from defendant's restraint is unbelievable. M.K.'s testimony that she did not know exactly how he bound her wrists, but her demonstration of them being over her head in a crossed fashion, is not necessarily inconsistent and, in any event, was for the jury to assess. Further, it is not contrary to human experience that defendant's forceful efforts effecting restraint of M.K. while actively engaged in trying to "get himself up" might ultimately be relaxed after ejaculation. Similarly, that the timeline of minor events (such as when M.K. let the dog out, or when and how a bag of frozen vegetables was obtained) was unclear from M.K.'s testimony does not render her overall testimony on critical events so inherently unbelievable that the jury could not find defendant guilty beyond a reasonable doubt.

¶ 45 Defendant's reliance on *People v. Herman*, 407 Ill. App. 3d 688, 704-05 (2011), and *People v. Yeargan*, 229 Ill. App. 3d 219, 227 (1992), as reflecting convictions that were overturned based on inconsistencies and contradictions in the complainants' testimonies, is misplaced. Simply put, those facts reflected inconsistencies far more serious than those here. For example, in *Herman*, the complainant reported a changing timeline that included the relevant events happening when the defendant *could not have been with her*. *Herman*, 407 Ill. App. 3d at 705-06. In *Yeargan*, the complainant alleged an extremely violent attack, but there were no signs of physical abuse or

other evidence that should have existed as corroboration. *Yeargan*, 229 Ill. App. 3d at 221-22. Moreover, the court in *Yeargan* expressly acknowledged that its reversal was unusual (see *id.*), and its holding has been described as "rare and dramatic." *People v. Parker*, 2016 IL App (1st) 141597, ¶ 41.

¶ 46 Here, M.K.'s testimony alone was sufficient to support the jury's verdict (see *People v. Harris*, 2018 IL 121932, ¶ 27), but there was also sufficient undisputed evidence and corroboration that renders this case unlike *Yeargan* and *Parker*. There is no question that defendant was, in fact, with M.K. on the night in question. While there are some arguably unclear points or alleged inconsistencies concerning the order of events that night, the *undisputed* evidence reflects that a traumatic event occurred. At a minimum, it was undisputed at trial that defendant punched M.K. in her face, that M.K. defecated on her bed, that she fled her home in the morning and in freezing temperatures virtually unclothed, and that defendant, thereafter, rushed out of her home, leaving behind some of his belongings, skipping work at a new job, and driving across state lines to avoid the police. The jury viewed photographs of the soiled linens and M.K.'s injuries. The transcripts reflect that M.K.'s testimony was difficult for her, as she was prompted multiple times to "take a deep breath," asked if she needed "a minute" to pause, and was directed to tissues. The jury could have decided that defendant, while consistent in his description events, was not truthful, and that M.K., even if inconsistent on some points, was, overall, truthful. As such, the jury's decision to credit M.K.'s testimony that the events happened as she said and that they happened without her consent, was not unreasonable, in light of the evidence as a whole.

¶ 47 Defendant alternatively argues that we should nevertheless reverse the convictions based on vaginal penetration. Defendant argues that, even if it accepted her testimony concerning forced

oral sex, no rational trier of fact could believe M.K.'s testimony regarding vaginal penetration. He again notes inconsistencies in her various statements. We reject this argument, too.

¶ 48 Indeed, M.K. testified, and the hospital report corroborated, that defendant tried to "get himself up" and that the tip of his penis penetrated her vagina. Further, defendant conveniently ignores that the jury could have credited *his own* testimony that vaginal penetration occurred. Defendant testified that, on January 8, 2013, he and M.K. had consensual vaginal sex and that he ejaculated in her vagina. He continued by answering, "Yes, I did," when asked, " *** on the 8th, when you were in the bedroom. Did you, in fact, penetrate her with your penis? That's something you did, correct?" The jury could have reasonably found, based on defendant's testimony alone, that, at a minimum, he inserted his penis into M.K.'s vagina. At oral argument, defense counsel asserted that defendant does not dispute vaginal penetration, only M.K.'s description of that penetration as being nonconsensual. We do not, then, see how this is an alternative argument to the one we first resolved. In any event, again, the jury could have credited M.K.'s testimony that vaginal penetration occurred, that defendant was flaccid, and, moreover, that the penetration was nonconsensual. We will not substitute our judgment for that of the trier of fact on questions involving witness credibility. See, *e.g.*, *People v. Gray*, 2017 IL 120958, ¶ 35. For the foregoing reasons, we reject defendant's sufficiency arguments.

¶ 49 B. State's Closing Argument

¶ 50 Conceding that the issue was not raised below, defendant next asserts that the State committed reversible plain error when, in closing argument, it clearly and obviously misstated Aper's testimony regarding the results of the sexual-assault kit. Defendant argues that this case involved a credibility contest and that the evidence was closely balanced. The "tiebreaker" evidence, he contends, came from the sexual-assault kit. Defendant notes that Aper testified that,

because the mouth is constantly cycling new saliva and semen may be lost when it is spit out or the complainant rinses her mouth, it is difficult to obtain sufficient semen from an oral swab to develop a male DNA profile. However, he argues, the State mischaracterized that testimony in closing argument, incorrectly claiming that Aper said it was rare to find "even a single sperm cell" on an oral swab, making it especially compelling that "this defendant's sperm" was found on M.K.'s swab. According to defendant, these false statements were egregious and unfairly bolstered M.K.'s testimony because they suggested that he must have ejaculated in her mouth or there would not have been *any* sperm found. In contrast, defendant asserts, the result actually bolstered his own testimony that he did not force oral sex that night because, despite M.K.'s claim that he ejaculated all over her mouth and would not let her spit it out, no semen was found and only one trace spermatozoa was found on swabs collected from her mouth, cheek, and upper lip. Defendant finally argues that both trial and post-trial counsel were ineffective for failing to object to this misconduct and to properly preserve this issue. We reject defendant's arguments.

¶ 51 The plain-error doctrine permits review of unpreserved error where the error is clear or obvious and: (1) "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) "th[e] 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. Eppinger*, 2013 IL 114121, ¶ 18. We first determine whether error occurred.[1] *Id.* ¶ 19.

[1] In their briefs, defendant asserts that we determine *de novo* whether statements in closing argument warrant a new trial, while the State asserts that our review could be *de novo* or for an abuse of discretion. However, we need not decide which standard is proper, as we conclude that

¶ 52 Aper testified that it is difficult to obtain a DNA profile from only one sperm. Moreover, he testified that:

> "I'd say in the cases that I've worked where victims can say an oral assault occurred, it's *very rare that we ever obtain enough male DNA to get any DNA types from [an alleged oral assault]*. The reasons being could be, you know, if she spits, does a mouth rinse or wash, takes a drink—that can all be rinsing away any potential evidence.
>
> *Even the time from the alleged assault to the time that she gets that evidence collected at the hospital can be a big difference* [be]cause you can imagine, you know, your mouth is constantly cycling in a new—you know, new saliva all the time. So even if you don't take a drink, there's just so much saliva changing out through your mouth anyway, evidence can be getting rinsed away just through that." (Emphases added.)

¶ 53 Based on this, defense counsel argued to the jury that Aper's findings were the "tiebreaker," showing that defendant's version of events was credible and M.K.'s was not. He argued that, although M.K. testified that defendant ejaculated in her mouth and that the ejaculate went "everywhere," the testing reflected no sperm, no semen, and only one spermatozoa that "could easily have been from oral sex the day before [*i.e.*, Monday, January 7]." The State, in rebuttal, argued that defense counsel's conclusions were incorrect because "I think Mr. Aper said it was very rare to find even a single sperm cell even where there had been a claim of oral sexual assault with ejaculation." The State's comments reflect a reasonable inference from the testimony and not clear and obvious error.

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there was no error under either standard of review.

¶ 54 As defendant points out, Aper did not state that *no* sperm would exist for collection after an oral sexual assault, but merely that it is rare to collect *sufficient* sperm for DNA typing. Nevertheless, in our view, the State's overall argument rebutting defendant's interpretation of Aper's testimony was not clear and obvious error.[2] The State is afforded great latitude in closing argument. See, *e.g.*, *People v. Evans*, 209 Ill. 2d 194, 225 (2004) (the challenged statement must be considered in context of the argument as a whole, and counsel may comment upon defense characterizations of the evidence). Specifically, Aper's testimony reflects that, because the mouth constantly cycles new saliva and, consequently, evidence can be rinsed away, even the time between when an alleged oral assault occurs and when the victim is tested at the hospital can reduce the likelihood of recovering sufficient evidence to obtain male DNA. As such, the State's argument correctly rebutted defendant's implication that *more* semen would necessarily have been present for collection, if oral sex with ejaculation happened when M.K. said it did. To the contrary,

[2] We note, however, that the State's comment that "*defendant's* sperm" was found was clearly erroneous. Indeed, Aper's testimony was that there was insufficient evidence to perform a DNA profile and, therefore, there was no conclusive evidence that the sperm collected was actually defendant's. Nevertheless, although error, that comment was clearly harmless, given defendant's testimony that the two engaged in oral sex the night before and that defendant's identity is not at issue here. For that reason, defendant's reliance on *People v. Linsocott*, 142 Ill. 2d 22 (1991), and *People v. Giangrande*, 101 Ill. App. 3d 397, 403 (1981), as reflecting exaggerated DNA evidence is unpersuasive, as the closing comments concerning forensic evidence in those cases were prejudicial error because they implicated the defendants as the perpetrators, a disputed issue in those cases.

the State argued, Aper's testimony suggests that, even when an oral assault occurs and semen is "all over," it is not necessarily likely that enough evidence will be collected from the mouth to obtain a male DNA profile. Therefore, the State was rebutting defense counsel's argument that finding only one spermatozoa on the oral swabs suggested that oral sex did not even *occur* Tuesday evening, as M.K. reported. Further, the State's comments served to rebut defendant's additional suggestion that a single sperm could still be present from oral sex, as defendant claimed, two nights prior. The State's expressed skepticism, in light of Aper's testimony, that even a single sperm would likely remain in a victim's mouth two days after oral sex, was a reasonable inference based on the evidence and not clearly erroneous.

¶ 55 As there was no clear and obvious error, defendant's plain-error claim fails. See, *e.g.*, *People v. Sims*, 192 Ill. 2d 592, 628 (2000) ("[h]aving found no error, it follows that there can be no plain error ***. Accordingly, defendant's claim is procedurally defaulted"). Further, defendant's alternative, ineffective-assistance arguments, also necessarily fail. *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 47 (where there is no plain error, there can be no ineffective assistance of counsel).

¶ 56 C. SORA

¶ 57 We combine our analysis of defendant's final two arguments. Defendant dedicates almost 11 pages of argument to his assertion that SORA and its related restrictions violate substantive and procedural due process. Defendant asserts that the extensiveness of SORA's reach, coupled with its lifetime duration, infringe upon his fundamental liberty interest to be free from lifelong punishment and his right to privacy. He contends that SORA's restrictions are not narrowly tailored to achieve a compelling State interest, nor are they rationally related to the purpose of protecting the public from sex offenders. Finally, defendant argues that SORA's failure to afford

him an individualized assessment, prior to subjecting him to a lifetime of registration, violates due process guarantees under the federal and state constitutions. Defendant requests that we find SORA unconstitutional and remove his name from the registry. We strike defendant's arguments.

¶ 58 Specifically, defendant acknowledges that, in *People v. Bingham*, 2018 IL 122008, ¶¶ 17-26, our supreme court held that the appellate court lacks jurisdiction to consider challenges to the constitutionality of SORA raised for the first time on direct appeal of a criminal conviction. Specifically, in *Bingham*, the defendant directly appealed his conviction for theft, but, due to a prior attempted-criminal-sexual-assault conviction, the theft conviction triggered a requirement under SORA that he register as a sex offender. In his direct appeal, the defendant challenged the constitutionality of the registration requirement as applied to him, in part, on substantive due process grounds. The supreme court, citing Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967), noted that the scope of appellate review is defined by the trial court's judgment and the proceedings and orders related to it; specifically the appellate court may:

> " '(1) reverse, affirm, or modify the judgment or order from which the appeal is taken;
>
> (2) set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken;
>
> (3) reduce the degree of the offense of which the appellant was convicted;
>
> (4) reduce the punishment imposed by the trial court; or
>
> (5) order a new trial.' " *Bingham*, 2018 IL 122008, ¶ 16 (quoting Ill. S. Ct. R. 615(b) (eff. Jan. 1, 1967)).

¶ 59 The supreme court concluded that, because the requirement to register under SORA was not encompassed within the trial court's judgment of guilt on the theft conviction, or any other

court order in that proceeding, nor could the requirement that the defendant register be characterized as a "proceeding," the constitutional challenge asked the reviewing court to take action not available to it under Rule 615(b). *Bingham*, 2018 IL 122008, ¶ 17. The court continued that:

> "[A] reviewing court has no power on direct appeal of a criminal conviction to order that defendant be relieved of the obligation to register as a sex offender when there is neither an obligation to register imposed by the trial court nor an order or conviction that the defendant is appealing that is directly related to the obligation or the failure to register." *Id.* at ¶ 18.

¶ 60 Even if the registration requirement were considered a "punishment," the court noted, it would not be a punishment imposed by the trial court. *Id.* The court then specified that challenges to SORA's constitutionality may instead be pursued: (1) on direct appeal in a case finding a defendant guilty of violating a SORA requirement; or (2) by pursuing a constitutional claim in a civil suit. *Id.* at ¶ 21.

¶ 61 Accordingly, *Bingham* controls, as defendant here is directly appealing a criminal conviction, but the conviction does not concern his failure to comply with SORA requirements, and his obligation to register as a sex offender is not a requirement imposed upon him by the trial court. Defendant nevertheless asserts that this case is different than *Bingham*, because he is not raising an "as applied" challenge. However, the defendants in the following cases also raised claims that SORA is facially unconstitutional and the courts uniformly dismissed them for lack of jurisdiction: *People v. Wells*, 2019 IL App (1st) 163247, ¶¶ 45-52; *People v. Christian*, 2019 IL App (1st) 153155, ¶¶ 9-17; *People v. McArthur*, 2019 IL App (1st) 150626-B, ¶¶ 42-46; and *People v. Denis*, 2018 IL App (1st) 151892, ¶¶ 96-100. Defendant also tries to distinguish *Bingham* on

the basis that the sex offense at issue there was not the conviction being directly appealed, whereas, here, his requirement to register was triggered by the conviction on appeal. Therefore, he contends, the registration requirement is part of the judgment being appealed in this case. However, the four cases mentioned above all found *Bingham* controlling in exactly the same circumstances as here, *i.e.*, on direct appeal of the sex conviction triggering SORA. Thus, if *Bingham* was not, alone, sufficiently clear that we lack jurisdiction to consider defendant's claims here, cases post-*Bingham*, but issued prior to briefing was complete in this case, have made it abundantly clear.

¶ 62 Indeed, even if we had jurisdiction to consider defendant's substantive arguments, courts have uniformly rejected them as well, concluding that registration does not constitute "punishment," that SORA does not affect fundamental rights, that it is rationally related to a legitimate State interest of protecting the public from sex offenders, and that no additional procedures are necessary to comply with procedural due process. See, *e.g.*, *Wells*, 2019 IL App (1st) 163247, ¶ 52 n.2 (collecting cases). Interestingly, two of defendant's attorneys here, from the Office of the State Appellate Defender, First Judicial District, represented the defendant in *Bingham*, as well as the defendants in subsequent cases rejecting the same arguments raised here: Patricia Mysza, Deputy Defender (counsel of record in *Bingham*, *Wells*, *McArthur*, *Denis*, *Christian*, *People v. Rodriquez*, 2019 IL App (1st) 151938-B, and *People v. Lee*, 2018 IL App (1st) 152522), and James E. Chadd, State Appellate Defender (counsel of record in *Bingham*, *Wells*, and *McArthur*). We concede that the *Wells* decision was apparently released one day after defendant's reply brief was filed in this appeal, but counsel, who represented both Wells and defendant here, has not filed any motion to cite additional authority and, as noted, there was certainly plenty of authority *prior* to *Wells* reflecting that there was no good-faith legal basis to

raise these arguments. Nevertheless, other than *Bingham*, defendant's briefs fail to acknowledge the existence of *any* of the aforementioned cases.[3]

¶ 63 Relevant authority uniformly holds that there is *no jurisdiction* to consider SORA's constitutionality on direct appeal of this conviction and, in any event, the authority uniformly rejects defendant's substantive arguments with respect thereto. We remind the parties that, regardless of the merits of the constitutional arguments, *no argument* can bestow this court with jurisdiction where none exists. The parties should also remain mindful that this court possesses inherent authority to sanction frivolity, even in criminal appeals. See, *e.g.*, *Anders v. California*, 386 U.S. 738, 741-42 (1967); *Stull v. People*, 173 Ill. App. 512, 513-14 (1912). Accordingly, we dismiss defendant's constitutional claims.

¶ 64 III. CONCLUSION

¶ 65 For the reasons stated, the judgment of the circuit court of Winnebago County is affirmed.

¶ 66 Affirmed.

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[3] Actually, in his reply brief, defendant cites *Rodriguez* as a "see also" and as though it supports his position. He asks us to extend the holding in *Rodriguez*. However, the very parenthetical he provides shows that it does *not* support his position. Specifically, defendant states in the parenthetical that *Rodriguez* acknowledged *Bingham*, but found that the defendant "could raise his SORA challenges on direct appeal *because the trial court explicitly ordered him to register as a sex offender upon his conviction.*" (Emphasis added.) *Rodriguez* was a completely different posture than here, does not support defendant's claim that jurisdiction exists in this case, and, moreover, (as counsel must know), after finding it had jurisdiction, the court *rejected* the constitutional challenges to SORA. *Rodriguez*, 2019 IL App (1st) 151938-B, ¶ 37.