2019 IL App (3d) 150114-U

Order filed August 16, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0114 Circuit No. 12-CF-2312
JAMES ROBINSON JR.,	)	
Defendant-Appellant.	)	Honorable David Carlson, Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held*: (1) The State presented sufficient evidence to support defendant's convictions for predatory criminal sexual assault. (2) No confrontation clause violation is implicated where defendant had the opportunity to cross-examine his accuser. (3) Defendant's cumulative plain-error argument is rejected where the evidence is not closely balanced. (4) Defendant's sentence is not excessive.

¶ 2 Defendant, James Robinson Jr., appeals from his convictions and sentences for three counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40 (West 2012)), and one count of aggravated criminal sexual abuse (*id.* § 11-1.60(d)). He argues that (1) the State failed

to prove him guilty beyond a reasonable doubt of predatory criminal sexual assault, (2) his accuser's testimony failed to allow for cross-examination in violation of the confrontation clause, (3) the cumulative effect of multiple trial errors denied him a fair trial, and (4) the trial court abused its discretion in sentencing defendant because it failed to consider his rehabilitative potential. We affirm.

¶ 3 FACTS

¶ 4 I. Pretrial Proceedings

¶ 5 A. The State's Charges

¶ 6 In October 2012, the State charged defendant by criminal indictment with three counts of predatory criminal sexual assault of a child (counts I, II, and III) (*id.* § 11-1.40) and one count of aggravated criminal sexual abuse (count IV) (*id.* § 11-1.60(d)). The charges alleged that defendant, who was over 17 years of age, knowingly committed an act of sexual penetration with S.T., who was under the age of 13 years, by (1) placing his penis upon her vagina (count I) (2) placing his penis upon her anus (count II), and placing his mouth on her vagina (count III). Count IV alleged that defendant knowingly committed an act of sexual conduct with S.T. by placing his mouth upon her breast for the purpose of his sexual gratification.

¶ 7 B. The State's Pretrial Motions

¶ 8 In March 2013, the State filed a series of motions. The first motion sought a pretrial ruling on the admissibility of certain hearsay statements that S.T. made to her mother, law enforcement personnel, and an interviewer with the Child Advocacy Center pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2012)). The second motion sought a pretrial ruling on the admissibility of certain statements that S.T. made to her treating physicians in the course of receiving medical treatment pursuant to section

115-13 of the Code (*id.* § 115-13). The third motion sought a pretrial determination regarding the admissibility of the proof of other crimes pursuant to section 115-7.3 of the Code (*id.* § 115-7.3). In particular, the State wanted to introduce the testimony of another individual who claimed that defendant inserted his penis into her vagina when she was 13 and he was 21 years old. The trial court conducted a hearing on these motions over the course of several days in April 2013.

¶ 9 During the section 115-10 hearing, the State presented the following evidence. S.T.'s mother, Salina, testified that she and defendant were married for the last two years but dated off and on since 1999. They had a one-year-old child together and were expecting another child. Although they were married, defendant did not live with her but "had access" to her house. On the evening of July 24, 2012, S.T. came into her room and told her "daddy tried to rape me." S.T. called defendant "daddy." Salina believed this happened on July 20, 2012, because she just started working nights. S.T. told her they were at defendant's mother's house when he called her downstairs into his bedroom, pushed her on the bed, and got on top of her. When defendant got off her, S.T. walked around the bed and he then pushed her onto the ottoman and tried to kiss her. Defendant then took S.T. and her baby sister back to Salina's house. Defendant called S.T. into Salina's bedroom and "he started kissing on her," "kissing on her chest." Salina continued, "He was kissing on her chest, then she said he licked on her private. She asked him why was he doing that to her because daddies don't do that to their daughters, and he told her, well, some do, and he made her get in the shower." S.T. also told her that prior to taking a shower, defendant "kept just trying to put it in her, but he couldn't. That's when he reached over and got some Vaseline, tried, and she was asking him to stop, and at that time, you know, he told her to get in the shower." At some point, defendant ripped S.T.'s bra and S.T. threw it away.

¶ 10 Salina further testified that after the incident, but before S.T. told her of the incident, defendant told her he planned to take S.T. bra shopping because "she was complaining about her bras" and to get her ears pierced a second time.

¶ 11 After S.T. told her what happened, Salina took her to the hospital where she heard S.T. relay the same account of the incident to her treating physicians and nurses, as well as a Joliet police officer. The doctor examined S.T. and found no injuries. Salina did not immediately make an appointment for S.T. to be interviewed at the Will County Advocacy Center because she just got a new job and did not know her availability. Salina's mother finally made the appointment for her and took S.T. to the interview.

¶ 12 On cross-examination, Salina testified that she and defendant were having marital problems prior to the incident and that they were contemplating divorce because defendant continued to be unfaithful. In July 2012, she and defendant, along with S.T. and her baby sister, went to defendant's family reunion. Defendant left the reunion with another woman, but she stated it did not make her mad and that "It ain't nothing new."

¶ 13 S.T.'s grandmother, Brenda, testified that S.T. lived with her from the end of July 2012 through August 2012. In late July, she received a phone call from her ex-husband who told her defendant "raped" S.T. After picking S.T. up from school, Brenda asked if someone hurt her. S.T. started crying and told her, "My mama told me, don't tell nobody, I am going to get in trouble." S.T. then told her "he really hurt me, he hurt me." Days later, S.T. told Brenda that defendant ripped her clothes off. Before Brenda learned of the incident, she noticed S.T. was having trouble sleeping. One night S.T. told Brenda she could not sleep because someone was at the window. The next night she asked to have the closet light left on. On cross-examination,

Brenda testified S.T. may have been having trouble sleeping because her mother was not there. Brenda never liked defendant and thought he was a "bum."

¶ 14 Joliet police officer Kent Liebermann testified that he spoke to S.T. at the hospital at 11 p.m. on July 24, 2012. S.T. told him she was at home with defendant and her younger sister while her mother was at work. Her stepfather called her into his bedroom, pushed her onto the bed, and told her to take off her clothes. When S.T. declined to do so, defendant took off her clothes and ripped her bra. Defendant then got on top of her and began licking her private parts with his tongue. Defendant then "began to put his private parts in her private parts, which I clarified with her, by what she meant by private parts was her vagina and his penis, and she said yes." Defendant held her down and stayed on top of her "until he was done." Defendant then told her he would kill her, her mom, and her baby sister if she told. He then gave her a bar of soap and told her to take a shower.

¶ 15 Jaclyn Lundquist, a forensic interviewer with the Will County Child Advocacy Center, testified that she interviewed S.T. on September 11, 2012. The trial court admitted a copy of the recorded interview into evidence and it was played in open court. The following interactions are seen on the video. Upon being asked if she knew why she was there, S.T. stated it was because her stepdad, who she calls "dad," molested her. This happened on one occasion at Salina's house while Salina was at work. S.T. described the incident as follows. Defendant called her into Salina's room and told her to take off her clothes. She said no, so he ripped her pants and shirt. He then took off her underwear and ripped her bra. He then took his clothes off. She told defendant to stop, that "dads don't do this." He told her "some of them do." Defendant laid down on top of her and kissed her neck and lips, pinning her arms at her side. He then licked her "private part." He tried to stick his penis in her private and in her butt. Defendant put Vaseline on

his penis which was "sticking up." She cried but defendant told her to "stop crying." He was not able to put his penis inside her. Afterward, defendant told her to take a shower. He told her if she told Salina about what happened, he would kill her, Salina, and her baby sister. Defendant told S.T. he was sorry and left to pick up Salina. S.T. told Salina what happened "the next day after [defendant] wasn't there."

¶ 16 Dr. Anthony Murino, an emergency room physician, testified that he treated S.T. at the hospital. According to his medical records, S.T. stated her stepdad "kiss[ed] her on her neck and touch[ed] her private areas," and then "had sexual intercourse with the patient." Afterward, he "made her shower and threatened to kill the patient, the mom, and little sister if she told anyone." Although S.T. reported bleeding and pain following the incident, Murino did not observe any injuries to her arms or vagina. Although his examination was "normal," it did not mean that an assault did not happen.

¶ 17 Joliet police detective Tizoc Landeros testified that he attempted to contact Salina several times by telephone. When he finally spoke to her, he informed her that she needed to make an appointment for S.T. to participate in a victim sensitive interview.

¶ 18 Defendant's 10-year-old daughter, J.R., testified that sometime prior to July 2012, she and S.T. went to the "Haunted Trails." At that time, S.T. told her that she did not like defendant and her mom made her call him "dad." S.T. said defendant treated her mom wrong and "they were always fighting over the car."

¶ 19 Sue Cattaneo, a retired investigator for the Department of Children and Family Services (DCFS), testified that she contacted Salina numerous times to schedule a visit with her and the children. Salina had no knowledge that defendant had been arrested or accused of sexual assault in the past.

¶ 20 At the conclusion of the section 115-10 hearing, the court ruled that all statements made by S.T. could be admitted except for the statements made to the police while at the hospital. Following additional hearings, the court granted the State's motions to admit (1) statements that S.T. made to her treating physicians in the course of receiving medical treatment and (2) evidence to show proof of other crimes.

¶ 21 C. Defense's Motions *in Limine*

¶ 22 In November 2013, defense counsel filed three motions *in limine* to bar the State from (1) introducing evidence of defendant's prior convictions, (2) introducing evidence that the victim in defendant's 2000 aggravated-sexual-abuse case became pregnant and had an abortion, and (3) calling certain witnesses to testify because the State failed to tender discovery as to those witnesses in a timely manner. Following separate hearings on the defense motions, the trial court (1) ruled that information related to defendant's 2000 conviction for aggravated sexual abuse would be allowed as propensity evidence based on the similarities between the two cases[1], (2) denied the motion to exclude evidence of the abortion, (3) barred the State's expert on proper vaginal examination of children from testifying based on insufficient discovery, and (4) ruled that due to its highly prejudicial nature, defendant's 2005 conviction for unlawful delivery of a controlled substance could not come in unless defendant later opened the door by testifying he had not been in legal trouble since his conviction in 2000.[2]

¶ 23 D. Recantation of S.T. and the Defense's Motion to Reopen Proofs

¶ 24 On September 30, 2014, defense counsel informed the trial court that S.T. recanted her accusations against defendant the day before. As a result of S.T.'s recantation, the defense filed a

[1] Specifically, the trial court ruled that transcripts of the now-deceased victim in defendant's 2000 aggravated sexual abuse case could be read into the record as part of the State's case-in-chief.

[2] Most of the pretrial motions were heard and decided by Judge Robert P. Livas. On September 30, 2014, Judge David Carlson became the presiding judge following Judge Livas's retirement.

motion to reopen proofs from the section 115-10 hearing on October 1, 2014. Specifically, counsel sought an order precluding the State from using S.T.'s outcry statements or, in the alternative, to reopen proofs regarding the admission of such statements. Following a hearing, the court denied the motion. In support of its decision, the court cited *People v. Monroe*, 366 Ill. App. 3d 1080 (2006), for the proposition that "once a statement is found to be reliable, it is admissible and it does not become inadmissible because the declarant fails to corroborate."

¶ 25 II. Defendant's Trial

¶ 26 Defendant's 11-day jury trial commenced on October 1, 2014, during which the following evidence was presented.

¶ 27 A. The State's Case

¶ 28 1. Detective Landeros's Testimony

¶ 29 Detective Tizoc Landeros investigated the allegations made by S.T. in this case. After several attempts to contact S.T.'s mother, he assisted her in scheduling a victim sensitive interview. Landeros observed S.T.'s victim sensitive interview conducted at the Will County Children's Advocacy Center from behind a one-way mirror in a room equipped with a video monitor and audio speakers. S.T. appeared upbeat when she first arrived, but her voice got softer and she began to cry as she described the incident. During the interview, S.T. drew on anatomically correct diagrams of a nude male and female, coloring around the "genital, penis area" on the picture of the nude male and around the "nipple," "vaginal area" and "between the buttocks" on the picture of the nude female. These diagrams were admitted into evidence over defendant's objections.

¶ 30 Following the interview, Landeros obtained an arrest warrant for defendant. Upon serving the warrant, defendant refused to come to the door. After obtaining consent to enter the home, he found defendant in a crawl space underneath the stairwell.

¶ 31 2. S.T.'s Testimony

¶ 32 Twelve-year-old S.T. knew defendant since she was a baby and called him "dad." Although he never lived with her, he visited often and stayed overnight. On July 20, 2012, S.T. and her four-month-old sister were at defendant and Mary's house as their mother just started a new job. At some point, defendant took her and her sister back to their house.

¶ 33 S.T. did not recall defendant asking her to get him $20 nor did she tell her mother that he did. She did not recall going to the Child Advocacy Center or to the hospital, speaking to a nurse at the hospital, telling her grandma that defendant hurt her, or talking to Officer Lieberman while at the hospital. S.T. stated, "I blocked it from my head, so I'm not going to remember it." When asked why she did not want to remember, she replied, "Because I'm trying to move on from this. I want to do what I want to do because I don't want to remember this at all. I'm not going to talk about it any more. Like I told my mom, I stop [*sic*] talking about it until everybody stop [*sic*] talking about it. Because I don't want to bring it back up."

¶ 34 S.T. eventually recalled some things about her interview with Jackie Lundquist at the Child Advocacy Center, but not others. Specifically, she remembered talking about books she liked to read and her baby sister, but she did not recall anything she told Jackie regarding the reason she was there because she "blocked it out." However, S.T. later acknowledged that she told Jackie defendant molested her.

¶ 35 S.T. identified the anatomically correct male and female diagrams in evidence and agreed that she marked the "private part" on the male diagram and the "private parts" on the female

diagram with a crayon. S.T. colored the "butt" area of the female diagram "Because that's where I was touched at." She colored the area between the female's thighs, which she called a "vijayjay." When asked, "Did [defendant] touch you there in between your thighs," she responded, "Yeah." Finally, she agreed that she colored the "top part" of the female diagram, which she had no other name for, because she was also touched there.

¶ 36 On cross-examination, S.T. testified that defendant did not do any "bad things" like trying to kiss her or touching her "personal area." Defendant "wasn't the one that touched [her]." It was actually some "guy named Sam" from "the neighborhood." S.T. only said defendant touched her because she "didn't like the way he was treating [her] mama."

¶ 37 The State then published the video and audiotaped copy of S.T.'s interview at the Child Advocacy Center. Following the publication of the interview, S.T. testified that "What [she] said [in the video] was true, but it wasn't [defendant] that did it." Instead, it was a guy named Sam. She did not know Sam's last name and guessed him to be between 13 and 15 years old. S.T. explained that Sam knocked on the door after defendant "went out somewhere." Sam then "busted in" and ripped off her clothes, threw her back on the bed, licked her breast and her private, and "tried to stick his private in [hers]." She told Sam that "daddies don't do this" because "he had said that he had a child." Sam threatened to kill her family if she told anyone. S.T. told Salina about Sam in September. S.T. recalled meeting with the prosecutors and telling them defendant did not commit the offenses she had alleged. She told them this because it was the truth, not because she did not want to testify.

¶ 38 S.T. learned that her mother was pregnant with her little brother approximately six months after defendant was charged in this case and that defendant was the father. Defendant was also her baby sister's father. She agreed that her mother would talk to defendant on the

telephone and visit him so that he could see his children. S.T. would go with her mother to some of these visits, but she would wait in the car while they visited. Finally, S.T. recalled overhearing a conversation between defendant and her mother about S.T. getting her ears pierced. When asked if that conversation took place "right after [defendant] did this to you," S.T. respondent, "Oh, my gosh, yes."

¶ 39 On recross-examination, S.T. denied that she made up Sam. She stated she lied when she accused defendant of touching her. She also denied that her mother told her what to say.

¶ 40 3. Salina's Testimony

¶ 41 Salina testified consistently with her testimony at the section 115-10 hearing. Salina agreed that Sue from DCFS called to do a child well-being check and told her to schedule the victim sensitive interview. Salina told Sue that S.T. "didn't want to talk to nobody about it." Salina did not have physical contact with defendant following S.T.'s allegations; however, she began to have physical contact with him again in late August 2012 and conceived their son shortly thereafter. Their son was born on June 2, 2013.

¶ 42 On June 15, 2013, Salina wrote a letter to the State's Attorney indicating that S.T. did not want to take the stand in the event of a trial and that she would not force her to do so. In November 2013, Salina wrote a letter to defendant, which stated "some part of me hated you for hurting [S.T.], but some times [*sic*] I get mad she told me!" It was important to Salina that defendant remained in his children's lives.

¶ 43 Salina knew of a boy named Sam from the neighborhood. She described him as being 14 or 15 years old and African-American. On September 29, 2014—just days before the trial was to begin—S.T. told Salina that Sam was responsible for the assault, not defendant. Salina did not tell anyone in the State's Attorney's office of S.T.'s disclosure.

¶ 44 4. Dr. Murino's Testimony

¶ 45 Dr. Anthony Murino testified consistently with his testimony at the section 115-10 hearing. He examined S.T., then 10 years old, at Silver Cross Hospital on July 24, 2012. S.T. told him that three days prior, while alone with her stepdad and baby sister, her stepdad started kissing her on her neck, touched her private areas, and had sexual intercourse with her. Afterward, defendant made her shower and threatened to kill S.T., Salina, and her baby sister if she told. S.T. reported she had some pain and bleeding after the assault. Murino generally used the phrase "sexual intercourse" to describe "penis in vaginal intercourse."

¶ 46 Murino conducted a "head to toe exam" of S.T. Specifically, he looked over her body for injuries, bruises, abrasions, or anything out of the ordinary. He also conducted an internal speculum vaginal exam. At the time of the exam, he did not see any signs of injury internally or externally. It was possible that any injuries S.T. suffered had already healed by the time of the exam.

¶ 47 5. Tracy Fredwell's Testimony

¶ 48 Tracy Fredwell, a nurse at Silver Cross Hospital, treated S.T. in the emergency room on the evening of July 24, 2012. S.T. told her that a few days before, on a Friday, her stepdad kissed her neck, "attempted to put his private part in her, and that he had licked her on top and her private parts." S.T. pointed to her breasts when she said defendant licked her "on top." Fredwell asked S.T. why she did not tell Salina sooner; S.T. responded that defendant threatened to kill her, Salina, and her baby sister. S.T. also told her that she experienced some pain and bleeding afterward. Fredwell was present during Dr. Murino's examination and heard S.T. tell Murino her stepdad "tried to put his private part in her private part, that he had licked her on her neck and her upper body."

¶ 49 6. Officer Liebermann's Testimony

¶ 50 Police officer Kent Liebermann testified consistent with his testimony at the section 115-10 hearing.

¶ 51 7. Jaclyn Lundquist's Testimony

¶ 52 Jaclyn Lundquist interviewed S.T. at the Center on September 11, 2012. She recognized the anatomically correct drawings, which had earlier been admitted into evidence, as the same drawings used during the interview. According to Lundquist, the purple coloring on the female diagram represented areas where defendant licked S.T. and the blue coloring represented areas where defendant's penis touched S.T. The breasts on the female diagram were colored purple to represent where defendant licked S.T. The purple and blue coloring on the vaginal area represented where defendant licked S.T. and where his penis touched her. The blue coloring on the "butt region" of the diagram represented another place where defendant's penis touched S.T. The diagrams were published to the jury.

¶ 53 8. Assistant State's Attorney Kathryn Tinich's Testimony

¶ 54 Assistant State's Attorney Kathryn Tinich and another assistant State's Attorney were preparing S.T. for her testimony on September 29, 2014. They asked S.T. if she wanted to see the video of her victim sensitive interview. Initially, S.T. wanted to see it and started to follow them to the library; however, Salina then asked S.T., "do you really want to do this." At that point, S.T. said she did not and sat back down. She would not make eye contact with them, but would occasionally look up at Salina. They asked S.T. if she remembered what happened, but S.T. said she did not want to remember and put her head down. Eventually, S.T. told them that "he didn't do it." They asked S.T. whether she said that because she did not want to testify or

because he really did not do it. She told them that she did not want to testify. They informed defense counsel of S.T.'s recantation.

¶ 55 9. Testimony related to Defendant's 2000 Aggravated-Criminal-Sexual-Abuse Case

¶ 56 Nancy Hodges, a certified court reporter who transcribed defendant's 2000 aggravated-criminal-sexual-abuse trial, testified by reading T.R.'s testimony from the transcript. Thirteen-year-old T.R. and then 21-year-old defendant had a sexual relationship which resulted in a pregnancy. When T.R. told defendant of the pregnancy, he told her he "would take care of it." T.R. later decided to have an abortion; she told defendant she had an abortion two weeks after the fact.

¶ 57 T.R.'s mother testified that T.R. told her the baby was defendant's. T.R. passed away in in a car accident in 2011.

¶ 58 10. Brenda's Testimony

¶ 59 Brenda testified consistent with her testimony at the section 115-10 hearing. She also stated that she observed that Salina and S.T's relationship became distant after S.T.'s initial allegations. Brenda questioned Salina as to why she had not returned Detective Landeros's phone calls and why she had not went to the police station to sign the paperwork so they could proceed with the victim sensitive interview. Within a few days, S.T.'s mother signed the necessary paperwork and scheduled the interview.

¶ 60 B. The Defense's Case

¶ 61 1. Defendant's Testimony

¶ 62 Defendant testified on his own behalf. In 1999, he and T.R., whom he believed to be 17 or 18 years old at the time, had a sexual relationship.

¶ 63 Defendant and Salina were married for approximately four years; they have two children together. He has known S.T. since she was a baby.

¶ 64 In July 2012, he lived at his mother's house. Following his marriage to Salina in 2010, he continued to cheat on her. The two of them argued and fought a lot. In addition to Salina, defendant slept with several other women between January and June 2012. He filed for divorce from Salina in May 2012 but never followed through with it.

¶ 65 Defendant agreed it was possible he watched S.T. around July 20, 2012, at his Salina's house because he "watched 'em a lot." He categorically denied assaulting S.T. at any time.

¶ 66 Defendant further testified that he hid when the police came to his house because he had a pending warrant for failing to appear for two traffic tickets. He did not want to go to jail. "In [his] neighborhood when the police come around, don't mean nothing good."

¶ 67 Outside the presence of the jury, the State then argued that defendant's testimony opened the door to his 2005 drug conviction. Following arguments from both sides, the trial court agreed with the State and ruled that the conviction could come in for impeachment purposes. The State then impeached defendant with his prior conviction.

¶ 68 2. Mary Robinson's Testimony

¶ 69 Defendant's mother, Mary Robinson, often babysat her grandchildren and step-grandchildren in the summer of 2012. Defendant helped her out with the children "a little bit," but they were basically with her. Mary did not recall a time where S.T. asked her for $20. Mary also stated she did not allow the children to go downstairs to defendant's room. She did not recall S.T. ever going into defendant's room. She never heard S.T. yelling from defendant's room and she "would have been down those stairs" if she had heard screaming.

¶ 70 3. Lakisa Tucker

¶ 71 Lakisa Tucker had an "up and down" relationship with defendant for 21 years. They had two children together. She did not get along with Salina.

¶ 72 4. S.T.'s Testimony

¶ 73 When S.T. "was about 11 or 10," she told her stepsister that she did not like defendant because she "didn't like the way he was treating [her mom]."

¶ 74 C. The Verdict

¶ 75 Following closing arguments, the jury found defendant guilty of all counts.

¶ 76 III. Posttrial Proceedings

¶ 77 Defendant filed a motion for judgment notwithstanding the verdict, or in the alternative, a motion for a new trial which the trial court denied.

¶ 78 Defendant's sentencing hearing took place on February 10, 2015. During the hearing, S.T. and Salina testified on behalf of defendant. Defendant also made a statement maintaining his innocence. Ultimately, the trial court sentenced defendant to consecutive prison sentences of 33 years on counts I, II and III, and 6 years on count IV. Defendant filed a motion to reconsider his sentence which was denied in February 2015.

¶ 79 This appeal followed.

¶ 80 ANALYSIS

¶ 81 On appeal, defendant argues that (1) the State failed to prove him guilty beyond a reasonable doubt of predatory criminal sexual assault, (2) his accuser's testimony failed to allow for cross-examination in violation of the confrontation clause, (3) the cumulative effect of multiple trial errors denied him a fair trial, and (4) the trial court abused its discretion in sentencing defendant because it failed to consider his rehabilitative potential.

¶ 82 I. Sufficiency of the Evidence

¶ 83 Defendant first asserts that the State failed to prove him guilty beyond a reasonable doubt of predatory criminal sexual assault where the only evidence presented in support of the offense "was uncorroborated out-of-court statements from a biased complainant who later recanted her story."

¶ 84 To prove predatory criminal sexual assault, the State was required to show that defendant (1) was 17 years of age or older when he (2) committed an act of sexual penetration with (3) the victim who was under the age of 13. 720 ILCS 5/11-1.40(a)(1) (West 2012). "Sexual penetration" is defined as "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person *** into the sex organ or anus of another person." *Id.* § 11-0.1.

¶ 85 When reviewing the sufficiency of the evidence, "we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *People v. Collins*, 214 Ill. 2d 206, 217 (2005). "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *Sutherland*, 223 Ill. 2d at 242. Thus, we must "carefully examine the evidence while bearing in mind that the trier of fact is in the best position to judge the credibility of witnesses, and due consideration must be

given to the fact that the fact finder saw and heard the witnesses." *People v. Herman*, 407 Ill. App. 3d 688, 704 (2011).

¶ 86 Here, defendant essentially argues that S.T.'s pretrial allegations are so incredible that no rational trier of fact could believe them. In support, he focuses on (1) S.T.'s retraction of her allegations against him, (2) alleged inconsistencies in her account of what happened and where it happened, and (3) her supposed motive to fabricate the allegations against him.

¶ 87 Initially, we note that the State cites *People v. Morgan*, 212 Ill. 2d 148, 155 (2004), and *People v. Steidl*, 177 Ill. 2d 239, 260 (1997), for the proposition that recantations are generally regarded as inherently unreliable and will warrant a new trial only in extraordinary circumstances. While we agree with this general proposition, the recantations in *Morgan* and *Steidl* concerned the State's key witnesses recanting their incriminating trial testimony following the respective defendants' convictions. This is not what happened here.

¶ 88 In this case, S.T. retracted her initial allegations that defendant assaulted her prior to trial. In fact, at defendant's trial, S.T. testified that defendant was not the person responsible for her assault. Specifically, she stated that defendant did not do any "bad things" like trying to kiss her or touching her "personal area"; that defendant "wasn't the one that touched [her]"; that a "guy named Sam" from the neighborhood assaulted her; and that she only accused defendant because she "didn't like the way he was treating [her] mama." Unlike in *Steidl* or *Morgan*, the jury had the opportunity to consider S.T.'s "recantation" and weigh its significance against the other evidence presented prior to reaching its verdict.

¶ 89 S.T.'s pretrial retraction notwithstanding, the record shows that just days after the assault, S.T. told her mother that defendant took or ripped her clothes off, made her lie on the bed, laid on top of her, kissed her neck and chest, licked her private, and then "tried to put it in her but it

didn't go in" even after he applied Vaseline. Immediately after disclosing the assault to her mother, S.T. reiterated the facts of the assault to hospital staff and to a police officer. Although defendant would have us believe that S.T. "told medical staff and the police that he put his private *into* her privates," the record belies this contention. While Dr. Murino testified S.T. told him defendant had "sexual intercourse" with her, Nurse Fredwell—who was present during that conversation— stated S.T. actually told Murino that defendant "tried to put his private part in her private part, that he had licked her on her neck and her upper body." In addition, prior to seeing Murino, S.T. disclosed to Fredwell that defendant "attempted to put his private part in her, and that he had licked her on top and her private parts." Finally, S.T. told Officer Liebermann that defendant licked her privates with his tongue and then "began to put his private parts in her private parts." Further, S.T.'s mother, Salina, wrote defendant a letter in November 2013 in which she stated she hated him for hurting S.T. but sometimes got mad that S.T. told her what happened.

¶ 90 Defendant next asserts that S.T.'s story contains "major inconsisten[ies]" regarding where the attack occurred. In particular, he points out that S.T. told her mother and grandmother the attack started at Mary Robinson's house, yet, during both the trial and her victim sensitive interview, S.T. claimed that the only incident happened at her mother's house. We note, however, that "a complainant's testimony need not be unimpeached, uncontradicted, crystal clear, or perfect in order to sustain a conviction for sexual abuse." *People v. Soler*, 228 Ill. App. 3d 183, 200 (1992). "Where minor inconsistencies or discrepancies exist in a complainant's testimony but do not detract from the reasonableness of her story as a whole, the complainant's testimony may be found to be adequate to support a conviction for sexual abuse." *Id.* In this case, we cannot find that the inconsistencies in S.T.'s accounts of the assault detract from the

reasonableness of her story as a whole. Up until her pretrial retraction, S.T. consistently stated that while at her mother's house, defendant licked her chest area and her "private parts" and attempted to put his "private part" into her "private part" and into her "butt."

¶ 91 Further, the jury observed S.T.'s demeanor throughout her victim sensitive interview, a copy of which was published to the jury. During that interview, S.T. clearly stated that defendant assaulted her and, for all fundamental purposes, gave the same account of the assault which she had given to her mother, the police, medical personnel, and her grandmother. She also corroborated her account of the assault by marking the body parts involved on anatomically correct diagrams, which were admitted into evidence.

¶ 92 Based on the evidence presented in this case, it was not unreasonable for the jury to find S.T.'s trial testimony that Sam assaulted her instead of defendant incredible, especially considering she had a motive to recant. In particular, the record indicates that Salina interfered in this case from the very beginning. Initially, she dodged several of Detective Landeros's attempts to contact her in order to schedule S.T.'s victim sensitive interview. Then, just one month after the assault, Salina continued an intimate relationship with defendant resulting in the June 2013 birth of S.T.'s little brother. That same month, Salina informed the State's Attorney's office that S.T. did not want to testify at trial and she would not force her to do so. In November 2013, Salina told defendant in a letter that she "hated [him] for hurting [S.T.]" but sometimes "[got] mad [S.T.] told her" in the first place. Then, two days before defendant's trial, as S.T. was about to watch the video of her victim sensitive interview, Salina stopped her by asking, "Do you really want to do this." Following Salina's interruption, S.T. changed her mind about watching the video and thereafter refused to make eye contact with the prosecutors, telling them she did not want to remember and eventually that "he didn't do it." At trial, S.T. initially testified she could

not recall the incident because she "blocked it from [her] head," was "trying to move on," "d[id not] want to bring it back up" and was "not going to remember it." However, despite her initial failure to recall the incident, S.T. responded "Oh, my gosh, yes" when asked whether the conversation between her mother and defendant regarding getting S.T.'s ear pierced took place "right after [defendant] did this to you."

¶ 93 Based on the above, we find the evidence sufficient to support defendant's conviction for predatory criminal sexual assault.

¶ 94 II. Right to Confrontation

¶ 95 Defendant next argues that his sixth amendment right to confrontation was violated. Specifically, he asserts that "S.T.'s testimony failed to allow for cross-examination within the meaning of the confrontation clause such that the admission of [her] out-of-court accusations violated [his] sixth amendment right to confront his accuser where S.T's trial testimony failed to establish the elements of two of the four counts with which [he] was charged."

¶ 96 Defendant concedes that he failed to preserve the issue for appeal as he neither objected at trial nor included it in posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an error for appellate review, a defendant must raise the issue at trial and in a posttrial motion). Forfeiture notwithstanding, he contends this court may review the issue under both prongs of the plain-error doctrine. We first consider whether an error occurred. *People v. Eppinger*, 2013 IL 114121, ¶ 19. Only if we find that an error occurred will we then consider whether the error amounts to plain error. *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010). We review *de novo* the ultimate question of whether a forfeited error is reviewable as plain error. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010).

¶ 97 Here, defendant takes issue with the trial court's decision to allow a copy of S.T.'s victim sensitive interview to be published to the jury pursuant to section 115-10 of the Code (725 ILCS 5/115-10 (West 2012)), which allows, in pertinent part, certain out-of-court statements to be admitted as evidence as an exception to the hearsay rule so long as the statement provides sufficient safeguards of reliability and the witness also testifies at trial. In particular, defendant takes issue with statements S.T. made during the interview which formed the basis for two of the charges against him, *i.e.*, that defendant placed his mouth upon her vagina (count III) and placed his mouth upon her breast (count IV). Essentially, defendant claims S.T. was unavailable for cross-examination within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004), because she did not testify at trial regarding the allegations in counts III and IV.

¶ 98 The confrontation clause of the sixth amendment to the United States Constitution (U.S. Const., amend. VI), made applicable to the states through the fourteenth amendment (*Pointer v. Texas*, 380 U.S. 400, 407-08 (1965)), guarantees the right of an accused in a criminal prosecution to "be confronted with the witnesses against him (U.S. Const. amend. VI)." (Internal quotation marks omitted.) *People v. Hood*, 2016 IL 118581, ¶ 19. Under the confrontation clause, a criminal defendant has the right to "physically *** face those who testify against him, and the right to conduct cross-examination." *Id.* (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987)).

¶ 99 The Illinois Supreme Court, relying on several United States Supreme Court decisions, has held, in pertinent part, that "[t]he confrontation clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *People v. Flores*, 128 Ill. 2d 66, 88 (1989) (citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)); *United States v. Owens*, 484 U.S. 554 (1988);

California v. Green, 399 U.S. 149, 158 (1970); see also *People v. Redd*, 135 Ill. 2d 252, 310 (1990) ("As long as the [hearsay] declarant is actually testifying as a witness and is subject to full and effective cross-examination, then the confrontation clause is not violated by admitting the out-of-court statement of the declarant.").

¶ 100 The appellate court recently considered and rejected essentially the same claim as that raised by defendant here. For example, in *People v. Dabney*, 2017 IL App (3d) 140915, ¶ 14, the defendant argued that his constitutional rights under the confrontation clause were violated when the trial court admitted the victim's videotaped statement into evidence. Specifically, the defendant claimed the victim did not appear for cross-examination as to two of the charges against him and that the only evidence supporting those charges came from the victim's video-recorded forensic interview. *Id.* ¶¶ 9, 10. In rejecting the defendant's claim, this court noted, "the key inquiry in determining whether the declarant is available for cross-examination is whether the declarant was present for cross-examination and answered all of the questions asked of him or her by defense counsel." *Id.* ¶ 19. Because the victim testified at the defendant's trial and answered all questions asked of her during cross-examination, we found no confrontation clause violation. *Id.* ¶ 20.

¶ 101 Similarly, in *People v. Bryant*, 391 Ill. App. 3d 1072 (2009), the defendant argued that his confrontation clause rights were violated where the only evidence introduced to support the elements of one of the charged offenses came from hearsay statements the victim made to two witnesses. *Id.* at 1079-80. Thus, the defendant asserted the victim "was unavailable as a witness" and "not subject to cross-examination" as to that charge. *Id.* at 1080. The Fourth District rejected the defendant's claim, noting that "[t]he key inquiry is whether she was present for cross-examination and answered questions asked of her by defense counsel." *Id.* at 1083. The court

found that "[d]espite [the victim's] apparent unwillingness or inability to testify on direct examination about defendant's making her put her mouth on his private part, this record demonstrates that [she] 'appeared' for cross-examination at trial within the meaning of *Crawford* and the confrontation clause." *Id.*

¶ 102 Here, like the victims in *Dabney* and *Bryant*, S.T. appeared for trial and was subject to cross-examination. The record shows that she answered all questions posed to her by defense counsel. Thus, the trial court committed no error in allowing the interview to be published to the jury. Based on the facts of this case, the confrontation clause is not implicated and defendant's right to confrontation was not violated.

¶ 103 III. Cumulative Error

¶ 104 Defendant next argues that the cumulative effect of multiple trial errors denied him a fair trial. In particular, he contends the trial court erred by (1) admitting evidence of his 2005 drug conviction, (2) failing to reopen proofs following S.T.'s recantation, and (3) allowing the jury to hear evidence pertaining to an unrelated pregnancy and subsequent abortion. In addition, he maintains the Assistant State's Attorney made inflammatory remarks during closing argument.

¶ 105 Defendant acknowledges that, with the exception of the issue pertaining to his 2005 drug conviction, he failed to preserve his contentions of error for appeal. See *Enoch*, 122 Ill. 2d at 186 (to preserve an error for appellate review, a defendant must raise the issue at trial and in a posttrial motion). Forfeiture notwithstanding, defendant contends that this court may review the forfeited errors for cumulative error under the plain-error doctrine.

¶ 106 "The plain-error doctrine permits a reviewing court to by-pass normal rules of forfeiture and consider '[p]lain errors or defects affecting substantial rights *** although they were not brought to the attention of the trial court.' " *People v. Eppinger*, 2013 IL 114121, ¶ 18 (quoting

Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). "Plain-error review is appropriate under either of 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.' " *Id.* (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 107 Here, defendant asserts the alleged errors are reviewable for cumulative error under the first prong of the plain-error doctrine because the evidence was closely balanced. Notably, defendant does not argue that the alleged errors were so serious that they affected the fairness of his trial and challenged the integrity of the judicial process under the second prong of the plain-error doctrine. Thus, defendant bears the burden of persuasion that the alleged errors were plain errors and that the evidence was so closely balanced that the errors alone threatened to tip the scales of justice against him. See *Johnson*, 238 Ill. 2d at 484. We review *de novo* the ultimate question of whether a forfeited error is reviewable as plain error. *Id.*

¶ 108 Typically, a plain-error analysis begins with the determination of whether a clear or obvious error occurred. *People v. Sargent*, 239 Ill. 2d at 189. However, under the closely-balanced prong, defendant "must show *both* that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." (Emphasis added.) *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Thus, where the evidence against a defendant is not closely balanced, it is unnecessary to conduct a primary inquiry as to whether error occurred. See, *e.g.*, *People v. White*, 2011 IL 109689, ¶ 3 (refusing to consider whether error occurred where the evidence was not closely balanced); *People v. Davis*,

233 Ill. 2d 244, 273-75 (2009) (assuming, *arguendo*, error occurred, the defendant could not establish plain error where the evidence was not closely balanced).

¶ 109 Assuming, *arguendo*, that a cumulative-error challenge is cognizable under the first prong of the plain-error doctrine, based on our "commonsense assessment" of the evidence in the context of the specific facts in this case, we find the evidence is not so closely balanced that it warrants a preliminary inquiry as to whether the errors alleged by defendant are indeed clear and obvious errors. See *People v. Adams*, 2012 IL 111168, ¶ 22 (quoting *People v. White*, 2011 IL 109689, ¶ 139) ("In determining whether the closely balanced prong has been met, we must make a 'commonsense assessment' of the evidence [citation] within the context of the circumstances of the individual case.").

¶ 110 Here, the record shows that in the days, weeks and months that followed the incident, S.T. consistently accused defendant of sexually assaulting her. S.T.'s initial outcry statements to her mother, identifying defendant as her attacker, were corroborated by statements she later made to her grandmother, Officer Liebermann, Dr. Murino, Nurse Fredwell, and forensic interviewer Lundquist. Although S.T. later retracted her accusations against defendant, she did so only on the eve of defendant's trial and after she had a motive to do so. Notably, Salina continued to have an intimate relationship with defendant after S.T.'s assault that resulted in the birth of S.T.'s baby brother. Although Salina "hated" defendant for what he did to S.T., she also got mad that S.T. told her in the first place; it was important to Salina that defendant remain in his children's lives. Further, while S.T. testified defendant "wasn't the one that touched [her]," she contradicted herself on at least two occasions. First, she acknowledged that defendant touched her "between [her] thighs" when testifying about the reasons she colored the area between "vijayjay" on the anatomically correct diagram. Next, when asked whether the

discussion between defendant and her mother about getting S.T.'s ears pierced took place "right after [defendant] did this to you," she responded, "Oh, my gosh, yes." Thus, when viewed in the context of the specific facts of this case, we find the evidence was not closely balanced. S.T. clearly had a motive to retract her allegations and she contradicted herself during defendant's trial. Moreover, the evidence is overwhelming that Salina coached S.T. to forget about the assault and "move on." Because the evidence is not closely balanced, there can be no plain error under the first prong of the plain-error doctrine.

¶ 111 IV. Excessive Sentence

¶ 112 Finally, defendant challenges his sentences which total 105 years in prison. Specifically, he argues that the trial court abused its discretion by failing to properly consider his rehabilitative potential.

¶ 113 Pursuant to the Illinois Constitution, "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The trial court must balance the retributive and rehabilitative purposes of punishment and carefully consider all aggravating and mitigating factors. *People v. Daly*, 2014 IL App (4th) 140624, ¶ 26. "A reasoned sentence must be based on the particular circumstances of each case." *Id.* "Because of the trial court's opportunity to assess a defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age, deference is afforded its sentencing judgment." *Id.* We review a trial court's sentencing decision for an abuse of discretion. *Id.* An abuse of discretion exists when a trial court's decision is arbitrary, fanciful, unreasonable, or where no reasonable person would take the trial court's view. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001).

¶ 114 Here, defendant was subject to a sentencing range of 6 to 60 years for each count of predatory criminal sexual assault and 6 to 30 years for aggravated criminal sexual abuse, all of which were mandatory consecutive. Prior to imposing sentence, the trial court noted it had considered all evidence presented at trial and at the sentencing hearing, including S.T.'s victim impact statement, defendant's oral and written statements in allocution, character-witness testimony presented by defendant, the presentence investigation report, the arguments of the parties, and all statutory factors in mitigation and aggravation. The court then sentenced defendant to mandatory consecutive sentences of 33 years in prison for each count of predatory criminal sexual assault and 6 years in prison for aggravated sexual abuse.

¶ 115 Defendant maintains the trial court's finding that he could not be rehabilitated was an abuse of discretion. We disagree. Here, the record shows defendant had a lengthy criminal history ranging from Class B misdemeanors to Class X felonies. Specifically, his criminal history includes a juvenile adjudication for misdemeanor battery, two Class 2 felony convictions, one Class X felony conviction, and 14 misdemeanors convictions. Notably, this was the second time defendant had been convicted of a sex offense involving a child under the age of 13 and in 2000, his probation on the prior aggravated criminal sexual abuse case involving T.R. was revoked and he was sentenced to four years in prison. It is clear that defendant has a propensity to commit serious sex crimes against children—one of whom he enjoyed a father/daughter relationship with. Evidence of defendant's potential for rehabilitation—if there is any—is not entitled to great weight than the seriousness of the offense. Based on our review of the record, the trial court's decision was not an abuse of discretion.

¶ 116 CONCLUSION

¶ 117 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 118 Affirmed.

¶ 119 JUSTICE McDADE, dissenting:

¶ 120 The majority has affirmed the convictions of the defendant, James Robinson, Jr., on three counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse, all stemming from a single recanted claim of "sexual assault", and the combined sentence of 105 years in the Illinois Department of Corrections. For the reasons that follow, I would find that defendant's convictions in this case must be vacated or at the least he should have a new trial. I therefore respectfully dissent from the majority's judgment.

¶ 121 The charges against Robinson arose from the allegation of his 10-year-old stepdaughter, S.T., of a single incident of claimed sexual assault. I have no dispute with the factual background as set out in the majority decision. Clearly there are several extremely troubling factual aspects in this case, including: S.T.'s persistent recantations of her claim, one of which occurred under oath during defendant's trial; Salina's seeming reluctance to schedule the victim sensitive interview, her expressed ambivalence about S.T.'s claim itself and S.T.'s pressing forward with it, and her continued relationship with Robinson; and the resulting concern that Salina may have intentionally or inadvertently influenced S.T. to recant.

¶ 122 My dissent, however, is grounded in legal differences with the analysis by which the majority has reached its decision on two important issues raised by Robinson. The first is his confrontation clause challenge and the second is the trial court's decision to admit evidence of his 2005 drug conviction. Although defendant has not raised it, I, in dissent, would also find the admission of the 2000 sexual assault conviction was improper in that it does not show propensity and any probative value it might possibly have had is simply overwhelmed by its prejudicial

impact. Also, although not specifically addressed, I believe my analysis also demonstrates that the State loses on defendant's challenge to the sufficiency of the evidence against him.

¶ 123 In considering the constitutional challenge, Robinson has conceded that he failed to preserve this issue for review but asserts that it is entitled to plain-error review under the first prong—that the evidence is closely balanced such that *any* error, no matter how serious, was likely to tip the scales against him. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The majority has found that because S.T. appeared at trial and answered questions, no error occurred. The majority has also found in conjunction with its cumulative error analysis that the evidence in the case was not closely balanced. I respectfully disagree with both conclusions.

¶ 124 Turning first to the question of whether there was a clear error in the trial, I would find that there were three.

¶ 125 First, specific to the confrontation clause claim, I would find there was a problem different from that identified by defendant. Robinson stands accused through a victim sensitive statement that has been unequivocally repudiated *as to him* by its maker. Cross-examination of S.T. would neither implicate nor satisfy the confrontation clause; her sworn testimony that Robinson did not assault her was fully consistent with his identical defense. She was not a witness against him and was, in the most real sense, no longer his accuser. While the examining doctor opined that any injuries that might have been inflicted as a result of a sexual assault could have healed in the three days between the claimed assault and his examination, he in fact, found no physical evidence of an assault. Indeed there is no direct physical evidence either that a crime was actually committed or that, if any such offense was committed, this defendant was the perpetrator. Everything to which the remaining State's witnesses testified was wholly derivative of and dependent on S.T.'s retracted allegations. Moreover, any victim sensitive evidence,

previously imputed against defendant, is equally imputable against the newly accused "guy named Sam." In the face of S.T.'s recantation, Robinson has no accuser but the State and its representative, the State's Attorney, was not available for cross-examination. I would find that this is a violation of Robinson's sixth amendment constitutional right to be confronted by his accuser (*supra* ¶ 98) and therefore error.

¶ 126 The second error I would find is the trial court's decision allowing the State to present, as impeachment, evidence of defendant's 2005 conviction for unlawful delivery of an illegal substance. The court initially, and properly, granted defendant's motion *in limine* to bar the State's use of this prior conviction as evidence in this case, but ruled the evidence could come in if defendant opened the door by testifying that he had not been in legal trouble since an earlier 2000 conviction. While testifying in his own defense, defendant, in response to a question about why he was hiding in the closet when the police came to the house, acknowledged that there was a pending warrant for his failure to appear for two traffic tickets and he did not want to go to jail. Specifically he said, "In [his] neighborhood when the police come around, don't mean nothing good." See *supra*, ¶ 66. The State argued that this testimony had "opened the door" and, for reasons I find unfathomable, the trial court agreed. Even though there is no reasonable way in which this statement can be construed to be a denial of involvement in legal trouble since 2000, the 2005 conviction was erroneously used by the State to impeach Robinson.

¶ 127 I would find a third error in the trial court's allowance of the State's use of defendant's 2000 conviction of aggravated criminal sexual assault as evidence of propensity because I see no nexus between that conviction and the allegations in this case. Defendant was accused in the instant case of a single incident of sexual assault of his 10-year-old stepdaughter. The 2000 conviction was apparently based on the then 21-year-old defendant's maintenance of a sexual

relationship with a girl he thought was 17 or 18 but who proved to be 13 years old. As a result of that relationship, she became pregnant and had an abortion. During the 14 years between that conviction and his trial for the alleged, but later recanted, sexual assault of S.T., all of the evidence is that defendant engaged in relationships with other women that were sufficiently numerous that his wife would no longer live in the same house with him. The court allowed not only the conviction itself into evidence but also the facts of the pregnancy and abortion. Whatever probative value that prior conviction involving a relationship might have had relative to S.T.'s retracted claim of sexual assault was necessarily overwhelmed by its prejudicial impact. Its admission was error.

¶ 128 Having found error, I consider next whether the evidence was closely balanced. It is clear to me that it was. First, it is difficult to imagine any evidence more closely balanced than the person charged with criminal activity and the putative victim of that crime both testifying, under oath, that the defendant did not commit it. In this case, the accusing fingers are being pointed at Robinson by the victim sensitive statement, which had been repudiated by S.T. and by its proponents. The majority has concluded that S.T.'s retraction need not be burdened with the usual negative presumption against recantations because the jurors were aware of it and had the opportunity to factor it into their deliberations. (*supra* Paragraph 88) I agree with that conclusion.

¶ 129 Second, there was significant evidence about the tenuous nature of Salina and defendant's marriage, the fact that they lived in different houses, and the reasons for the marital discord—reasons that S.T. also assigned for lying when she accused Robinson of "sexually assaulting" her. He was unfaithful; he maintained relationships with multiple other women. There was no evidence that those other relationships were with children rather than adults.

¶ 130 Third, S.T., did not say the assault never happened; indeed she said it did—just not at the hands of defendant. Thus, a jury could find, all of the details she provided—the pictures, the descriptions, the marked body parts on anatomically-correct diagrams, the feelings—to be accurate and her testimony to be credible, and they would still not implicate Robinson.

¶ 131 For these reasons, I would find (1) that at the time of his trial defendant was no longer actually or credibly accused of a crime, (2) that his sixth amendment right to confront his accuser was therefore violated, (3) that he was not appropriately or fairly tried for the foregoing reasons and for the additional reason that evidence of prior convictions was improperly used against him, and (4) that he was not proven guilty of the crime of sexual assault or sexual abuse or any crime beyond a reasonable doubt. I believe defendant's convictions must be vacated.