

NOTICE
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2019 IL App (5th) 170032-U

NO. 5-17-0032

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Clinton County.
)	
v.)	No. 15-CF-141
)	
DIEGO C. SALAZAR,)	Honorable
)	Stanley M. Brandmeyer,
Defendant-Appellant.)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Cates and Moore concurred in the judgment.

ORDER

- ¶ 1 *Held:* The judgment of the circuit court is affirmed where the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt; the defendant forfeited additional claims of error by failing to file a posttrial motion, and he forfeited plain-error review by failing to request it.
- ¶ 2 Following a bench trial, the defendant, Diego C. Salazar, was found guilty of two counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2014)) and sentenced to two concurrent terms of 10 years' imprisonment. On appeal, the defendant claims that (1) the evidence was insufficient to support the convictions and (2) the circuit court erred in admitting certain hearsay testimony at trial. For the reasons which follow, we affirm.

¶ 3

I. Background

¶ 4 On September 14, 2015, the defendant was charged by information with two counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2014))¹ for performing two separate acts of sexual penetration (*i.e.*, finger-to-vagina and mouth-to-vagina) on T.B. on or about August 14, 2015.² The defendant subsequently waived his right to a jury trial.

¶ 5

A. Dr. Deborah Treacy: Pretrial Videotaped Deposition

¶ 6 Prior to trial, the parties participated in a videotaped evidence deposition of Dr. Deborah Treacy, an emergency room physician. Dr. Treacy testified that she examined T.B. at St. Joseph's Hospital in August 2015 following complaints of a sexual assault. When the State questioned Dr. Treacy regarding T.B.'s statements, the defendant made a hearsay objection. The circuit court overruled the defendant's objection, finding T.B.'s statements admissible under the purpose of medical diagnosis or treatment exception to the hearsay rule (Ill. R. Evid. 803(4) (eff. Apr. 26, 2012)). The court admitted without objection a completed ISP "medical/forensic documentation form" containing T.B.'s account of the August 14, 2015, sexual assault.

¶ 7 Following the circuit court's ruling, Dr. Treacy testified about the statements T.B. made concerning the events that took place on August 14, 2015. Specifically, T.B.

¹The two counts contained in the information reference a violation of 720 ILCS 5/11-1.20(a)(1) (West 2014), which requires "force or threat of force" in the commission of the offense. The information, however, clearly indicated that the victim "was unable to give knowing consent," which is a violation of 720 ILCS 5/11-1.20(a)(2) (West 2014).

²The record contains conflicting testimony and references regarding the offense date. This discrepancy is not an issue on appeal. Therefore, we reference the date contained in the information in order to remain consistent.

informed Dr. Treacy that she woke up in an unfamiliar home and "found [the defendant] on top of her with his fingers in her vagina." Dr. Treacy's physical examination of T.B. did not reveal physical signs of trauma relating to a sexual assault. Dr. Treacy completed the ISP sexual assault evidence collection kit by collecting DNA swabs and subsequently tendered the samples to law enforcement.

¶ 8 B. Bench Trial

¶ 9 On November 29, 2016, the case proceeded to a bench trial. Without objection, Dr. Treacy's pretrial videotaped deposition and the accompanying transcript of proceedings were admitted into evidence. The State presented its witnesses.

¶ 10 1. Mark Taylor

¶ 11 Aviston Police Chief Mark Taylor testified to the following. Taylor's interview with T.B. elicited the following details. On August 14, 2015, T.B. drank alcohol and socialized with Zachary Engelmann, a previous boyfriend; Ciera Buffa, her cousin; and the defendant, who worked with Engelmann. T.B. and the defendant did not know each other before August 14, 2015.

¶ 12 In the early morning hours of August 14, 2015, T.B., Engelmann, and Buffa went to the defendant's home. Once there, all four of them watched television in the defendant's bed. At some point in the night, Buffa left the defendant's bed to sleep on the couch, while T.B., Engelmann, and the defendant stayed in the bed. T.B. and Engelmann slept parallel to each other, and the defendant slept at the foot of the bed. When T.B. woke up, her pants had been pulled down and the defendant was performing oral sex on her while simultaneously using his fingers to penetrate her vagina. T.B. instructed the

defendant to stop as she attempted to pull up her pants. T.B. then pretended to fall asleep until the defendant left the bedroom. At the conclusion of the interview, Taylor advised T.B. to undergo a sexual assault evidence collection procedure at St. Joseph's Hospital.

¶ 13

2. Elizabeth Terry

¶ 14 Elizabeth Terry testified to the following. Terry, an emergency room nurse at St. Joseph's Hospital, was present when Dr. Treacy performed T.B.'s physical examination and completed the ISP sexual assault evidence collection kit. During the procedure, which was invasive and took several hours, T.B. was tearful and appeared "a little shaken, a little scared, nervous of what we were going to do ***."

¶ 15

3. Buffa

¶ 16 Buffa testified to the following. On August 13, 2015, T.B., Engelmann, and the defendant came to Buffa's house to celebrate Buffa's birthday. Buffa did not know the defendant before August 13, 2015, and had asked T.B. and Engelmann not to leave her alone with him. According to Buffa, she was the only one in the group who was not intoxicated. The group drank alcohol and drove around Troy, Illinois, in Engelmann's car until they reached the defendant's house in the early morning hours of August 14, 2015. Once they arrived, Buffa slept on the couch. T.B. and Engelmann slept with the defendant in his bed.

¶ 17 After the defendant and Engelmann left for work between 5 a.m. and 6 a.m. on August 14, 2015, Buffa found T.B. in the bathroom. In response to the State's questioning regarding T.B.'s statements to her that morning, the defendant raised a hearsay objection. The circuit court initially sustained the defendant's objection. The State, however, argued

that T.B.'s statements qualified for admission as an excited utterance, an exception to the hearsay rule. In support, the State made the following offer of proof:

"Q. [THE STATE:] After you went back, found [T.B.] in the bathroom, she said something?

A. [BUFFA:] Yes. She asked me if they left, if [Engelmann] and [the defendant] left for work. And I actually—we went back out in the living room to check to see if they left. And then as soon as—you know, I looked out the window, I noticed that they were gone, she started bawling her eyes out and just—that's what happened.

Q. Okay. What happened next?

A. She was just—I was asking her what was wrong, you know, what happened. I didn't know. I had no idea why she was crying like that. And she just basically told me, you know, what happened that night."

After hearing the State's offer of proof, the court overruled the defendant's objection, concluding that the excited utterance exception to the hearsay rule applied to T.B.'s statements following the alleged sexual assault.

¶ 18 Next, Buffa provided a detailed account of her conversation with T.B. on August 14, 2015. Buffa explained that T.B. was hysterically crying, claiming that the defendant had raped her by performing oral sex on her while she was asleep. T.B. told Buffa that she "woke up to [the defendant's] face in [her] pussy." T.B. felt "disgusting" and wanted to go home to take a shower. Buffa was "stunned by the whole thing" and began "freaking out" after she spoke with T.B.

¶ 19 On cross-examination, Buffa acknowledged that the four of them had been drinking together for three or four hours. Buffa could not remember how T.B., Engelmann, and the defendant were positioned on the bed before she left the bedroom. Buffa did not witness the alleged sexual assault.

¶ 20

4. T.B.

¶ 21 T.B. testified to the following. T.B. and Engelmann had dated on and off through early 2015, and Buffa was her cousin. T.B. had never met the defendant before August 13, 2015. Shortly before midnight, August 13, 2015, T.B., Engelmann, and the defendant picked up Buffa at a house in Collinsville, Illinois, to "booze cruise" the back roads near Troy, Illinois. In the early morning hours of August 14, 2015, they arrived at the defendant's house and immediately "piled in [the defendant's] bed" to watch television. T.B. was intoxicated from two shots of Fireball and several beers. T.B. recalled falling asleep in the defendant's bed next to Engelmann, but she could not remember where the defendant or Buffa had slept.

¶ 22 T.B., a Type-1 diabetic, wore an insulin pump that attached to her body. T.B. remembered waking up to the alarm sounding on her insulin pump, at which point, she discovered the defendant "licking and putting his fingers inside" of her vagina. She immediately told the defendant "to get the fuck away." The defendant responded "sorry, sorry" and quickly left the room. T.B.'s underwear and skort had been pulled down and her jacket had been unzipped.

¶ 23 After Engelmann and the defendant left the house for work, T.B. cried in the bathroom while she told Buffa about the incident. After T.B. drove Buffa to her house, T.B. called her boyfriend, Christopher Tate. Tate was unable to meet T.B., so she called Tate's friend, Christian Vaughn. When Vaughn arrived at her house, T.B. was inconsolable. T.B. took a shower to remove the defendant's saliva from her body. T.B.

recalled that she did not contact the police until the next day, when she met with Taylor, who directed her to undergo a rape kit at St. Joseph's Hospital.

¶ 24 On cross-examination, T.B. admitted that she was intoxicated when she fell asleep in the defendant's bed, however, she could not recall if she was still intoxicated when she woke up to the defendant sexually assaulting her. T.B. acknowledged that Engelmann, who was sleeping next to her when the insulin pump alarm sounded, did not wake up, and that she did not wake Engelmann after the sexual assault. T.B. was unable to recall the exact position of her legs during the sexual assault or which hand the defendant had used in penetrating her vagina. She did recall telling the defendant to stop touching her. She also testified that she attempted to pull up her panties, tights, and skirt while in bed. T.B. was unsuccessful in doing so because her clothing was too tight. T.B. acknowledged that she did not wake up at any point in time when the defendant had pulled down her tight clothing. When Engelmann later questioned T.B. about her interaction with the defendant, she informed him that the defendant had raped her.

¶ 25 5. Engelmann

¶ 26 Engelmann testified to the following. Engelmann and T.B. had dated in high school and through January or February 2015. On August 14, 2015, Engelmann drove T.B., Buffa, and the defendant around in his car until they arrived at the defendant's house at approximately 4 a.m. Once they arrived, all four of them went into the defendant's bedroom to watch television. T.B. and Engelmann were parallel to each other on the defendant's bed with their heads near the headboard, and the defendant slept at the

foot of the bed. Buffa moved to the living room couch at some point. According to Engelmann, T.B. wore panties, a bra, and a shirt to bed.

¶ 27 At approximately 7 a.m. on August 14, 2015, the defendant aggressively shook and repeatedly shouted at Engelmann to wake up for work. When Engelmann woke up, he noticed that T.B.'s shirt was open, her breast was exposed, and her panties were near her head. Engelmann told T.B. he was leaving for work, but she did not wake up or respond. At work, the defendant told Engelmann that he had fingered T.B. and sucked on her breast. Although the defendant wanted to do more with T.B., he was unable to because the alarm on her insulin pump sounded. Based on this conversation, Engelmann believed the sexual acts were consensual, although he found it hard to believe. Later that morning, Engelmann had several missed calls and text messages from T.B. When Engelmann spoke with T.B., she was distraught because the defendant had raped her. After the State rested its case, the defendant made a motion for directed verdict, which the circuit court denied.

¶ 28 6. The Defendant

¶ 29 The defendant testified to the following. On August 14, 2015, he rode in Engelmann's car with Engelmann, Buffa, and T.B. Engelmann told the defendant that T.B. had performed oral sex on him while they were in the car. Between 3 a.m. and 4 a.m. on August 14, 2015, the group arrived at the defendant's home and watched television in the defendant's bed. Roughly 30 minutes later, T.B. undressed to only a thong and shirt for bed. Although the defendant offered the spare bedroom to T.B., she refused. T.B. fell asleep in the defendant's bed while the defendant slept at the foot of the

bed. The next morning, after he woke up to a coworker's call, the defendant noticed that T.B.'s breasts were exposed, and her insulin pump was beeping.

¶ 30 The defendant, however, denied telling Engelmann that he performed sexual acts on T.B. According to the defendant, Engelmann asked him if he had sex with T.B. The defendant responded in the negative. Immediately thereafter, the defendant asked Engelmann if he had sex with T.B., to which Engelmann replied, "I don't remember." At approximately 11 a.m. on August 14, 2015, the defendant heard Engelmann call the police. The defendant believed Engelmann, to garner favor, called the police because Engelmann had prior issues with police.

¶ 31 Following a brief recess, the circuit court found the defendant guilty beyond a reasonable doubt on two counts of criminal sexual assault. The court noted that after the sexual assault, T.B. had been hysterically crying, at which time, she made statements to Buffa that were consistent with a nonconsensual sexual encounter. Moreover, the court determined that Buffa and T.B. testified consistently about T.B.'s emotional state and desire to go home to shower after the sexual assault. The court also found the statements made between the defendant and Engelmann consistent with a nonconsensual sexual encounter. Specifically, Engelmann testified that the defendant had admitted to fingering T.B. and sucking on her breasts. Moreover, the defendant told Engelmann that he wanted to do more with T.B., but the alarm on her insulin pump sounded. The court determined that T.B.'s alarm would not have necessarily interrupted consensual sex. Instead, T.B.'s testimony, coupled with the defendant's statements, suggested an abrupt interruption to nonconsensual sexual acts.

¶ 32 Additionally, the circuit court considered T.B.'s statements to medical personnel. The court noted that the medical documentation entered without objection included T.B.'s statements that the defendant had sucked on her breasts, placed his fingers inside her vagina, and placed his mouth on her vagina. The court noted that, although T.B. had no physical signs of trauma to support the charges against the defendant, it had evaluated the various testimonies in light of the possibility for motive to misstate, lie, or cover up the truth. The court specifically stated that it had taken into account its assessment of the witnesses' demeanor and credibility in rendering the guilty verdict. In doing so, the court stated that T.B. and the defendant had never previously met each other, and there existed no evidence to show a motive on her part to conspire against the defendant. Also, the court discounted the defendant's suggestion that Engelmann had conspired against the defendant because Engelmann was in trouble with police. Instead, the court determined that the witness testimony, specifically Buffa and Engelmann, was consistent "but not redundant" regarding T.B.'s emotional state following the sexual assault. Thus, the court dispelled any suggestion that the witnesses had concocted a story against the defendant.

¶ 33 On January 10, 2017, the circuit court sentenced the defendant to two concurrent terms of 10 years' imprisonment. The defendant did not file a posttrial motion. The defendant filed a timely notice of appeal.

¶ 34 II. Analysis

¶ 35 On appeal, the defendant challenges the sufficiency of the evidence and contends that the circuit court, in finding the defendant guilty, considered improperly admitted testimony. Specifically, the defendant argues that certain details of T.B.'s testimony

diminished her credibility and the court erred in considering T.B.'s statements under the purpose of medical diagnosis or treatment (*i.e.*, to Dr. Treacy) and excited utterance (*i.e.*, to Buffa) exceptions to the hearsay rule.

¶ 36 "To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). In contrast, when a defendant challenges the sufficiency of the evidence, his or her claim may be raised for the first time on direct appeal. *Enoch*, 122 Ill. 2d at 190. Where the prosecution has failed to prove its case, "the only proper remedy is a judgment of acquittal" and remand for a new trial is not an option. *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). The standard of review in a challenge to the sufficiency of the evidence is 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 offense proven beyond a reasonable doubt. *People v. Hardman*, 2017 IL 121453, ¶ 37.

¶ 37 It is for the trial judge in a bench trial to determine the credibility of the witnesses, weigh and draw reasonable inferences from the evidence, and resolve any conflicts in the evidence. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). The trier of fact may believe part of a witness's testimony without believing all of it. *People v. Sanchez*, 105 Ill. App. 3d 488, 493 (1982). The testimony of a single witness, if positive and credible, is sufficient to sustain a conviction even if contradicted by a defendant. *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 62. A reviewing court will not substitute its own judgment for the trier of fact on issues regarding the weight of the evidence or the credibility of witnesses. *People*

v. Moore, 2016 IL App (1st) 133814, ¶ 54. We will not reverse a conviction unless "the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 38 Here, the defendant was charged with two counts of criminal sexual assault. A person commits criminal sexual assault by committing an act of sexual penetration when he "knows that the victim is unable to understand the nature of the act or is unable to give knowing consent." See 720 ILCS 5/11-1.20(a)(2) (West 2014). The defendant first argues that the evidence was insufficient to support the convictions. Specifically, he contends that the circuit court disregarded certain details of T.B.'s testimony that diminished her credibility and made her testimony highly improbable. In support, the defendant's argument is threefold. First, T.B. testified that she only woke up when her insulin pump alarm sounded, not when the defendant performed sexual acts on her. Second, T.B. was unable to answer basic questions, specifically, the position of her legs and the hand the defendant used to touch her. Third, T.B.'s testimony regarding her clothing at the time of the assault was contradicted by Engelmann and the defendant. In particular, T.B. had testified that she wore panties, tights, and a skirt to bed. However, Engelmann testified that she wore panties, a bra, and a shirt, and the defendant testified that T.B. wore only a thong and shirt to bed.

¶ 39 Contrary to the defendant's arguments on appeal, the record does not support a finding that the court disregarded weaknesses in T.B.'s testimony in rendering its verdict. Rather, the circuit court provided a thorough and detailed overview of the evidence by assessing the demeanor and credibility of the witnesses. The court considered T.B.'s

testimony that she did not wake up to the sexual assault until the alarm on her insulin pump sounded. T.B.'s account was corroborated by Engelmann's testimony that the defendant told him that he wanted to do more with T.B., but the alarm on her insulin pump sounded. The court determined that the alarm going off would not have necessarily interrupted consensual sex. Instead, T.B.'s testimony, coupled with the defendant's statements, suggests an abrupt interruption to nonconsensual sexual acts.

¶ 40 Additionally, the circuit court found the testimonies consistent, which the court believed dispelled any suggestion that the sexual assault allegation had been concocted by T.B., Engelmann, and Buffa. The record reflects that T.B. was admittedly intoxicated when she fell asleep and could not remember whether she was still intoxicated when she woke up several hours later. Likewise, in corroboration with T.B.'s testimony, Buffa testified that T.B. was hysterically crying in the bathroom after Engelmann and the defendant left for work on August 14, 2015. T.B.'s inability to recall the position of her legs or which hand the defendant had used was understandable, given the circumstances, and did not significantly impact her credibility before the court.

¶ 41 Lastly, despite disagreement on what T.B. was wearing when she fell asleep or the location of her panties following the sexual assault, the testimony was consistent that T.B. was partially undressed and her breasts were exposed in the morning. In viewing the evidence in the light most favorable to the prosecution, we do not find these inconsistencies so improbable, unsatisfactory, or inconclusive that they created reasonable doubt as to the defendant's guilt.

¶ 42 Moreover, although T.B. did not display physical signs of a sexual assault, the circuit court had evaluated the various testimonies in light of the possibility for motive to misstate, lie, or cover up the truth. In doing so, the court noted that T.B. and the defendant did not previously know each other, thus, there was no evidence presented to establish a motive to conspire against the defendant. The court also discounted the defendant's suggestion that Engelmann had conspired against the defendant because Engelmann had prior issues with police. Furthermore, the court took into consideration T.B.'s emotional demeanor after the sexual assault. In particular, T.B. had cried hysterically to Buffa after the incident, which Buffa testified had caused her to freak out. Buffa also testified that she was "stunned by the whole thing." Likewise, Engelmann saw T.B.'s breast exposed and her panties near her head when he left for work on August 14, 2015. According to Engelmann, he found it hard to believe that T.B. and the defendant would have consensual sex following his conversation with the defendant on August 14, 2015.

¶ 43 Based on the totality of the evidence, the circuit court was convinced beyond a reasonable doubt as to the defendant's guilt. After reviewing the evidence in the light most favorable to the prosecution, we conclude that the evidence was not so improbable, unsatisfactory, or inconclusive that it created reasonable doubt as to the defendant's guilt. In fact, regardless of the apparent discrepancies regarding certain details of the sexual assault, the record reflects that the court considered the flaws in the various testimonies, including inconsistencies, and judged the credibility of the whole. See *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004) ("it is for the fact finder to judge how flaws in

part of [a witness's] testimony affect the credibility of the whole"). Accordingly, the defendant's challenge to the sufficiency of the evidence fails.

¶ 44 Next, the defendant argues the circuit court erred in admitting T.B.'s statements under the purpose of medical diagnosis and treatment (*i.e.*, to Dr. Treacy) and excited utterance (*i.e.*, to Buffa) exceptions to the hearsay rule. As mentioned above, a defendant must both object to an error at trial and raise it in a posttrial motion to preserve an issue for review. *Enoch*, 122 Ill. 2d at 186. Here, the defendant failed to preserve these two evidentiary objections through a properly filed posttrial motion. Consequently, the defendant must establish plain error for review of these claims. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967).

¶ 45 Codified in Illinois Supreme Court Rule 615 (eff. Jan. 1, 1967), the plain-error rule bypasses normal forfeiture principles and allows for review of unpreserved error in limited circumstances. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). It provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded' unless the appellant demonstrates plain error." *People v. Leach*, 2012 IL 111534, ¶ 60 (quoting Ill. S. Ct. R. 615 (eff. Jan. 1, 1967)). Specifically, the plain-error rule may be invoked where a clear and obvious error occurred "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Herron*, 215 Ill. 2d at 187. Additionally, when a defendant fails to present an argument to satisfy the plain-error doctrine, he forfeits review. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010). Here, the

defendant did not address forfeiture or argue that the evidentiary issues should be reviewed for plain error. As such, these issues are forfeited.

¶ 46

III. Conclusion

¶ 47 For the foregoing reasons, the judgment of the circuit court of Clinton County is hereby affirmed.

¶ 48 Affirmed.