2014 IL App (1st) 120658-U

No. 1-12-0658

Fifth Division
March 28, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	No. 10 CR 8247
	)	
PHILLIP TODD,	)	The Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.
	)	

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction was affirmed where: (1) the State proved that defendant was the victim's father beyond a reasonable doubt; (2) the State proved direct contact between defendant's hand and the victim's vagina beyond a reasonable doubt and there was no possibility of a non-unanimous verdict on this point; and (3) the State's closing argument was not improper.

¶ 2 After a jury trial, defendant Phillip Todd was convicted of aggravated criminal sexual abuse for his conduct towards 15-year-old T.T. and was sentenced to 15 years in the Illinois Department of Corrections. On appeal, defendant argues: (1) that the State failed to prove

that defendant was T.T.'s father, a necessary element of the offense of aggravated criminal sexual abuse; (2) that the State failed to obtain a unanimous conviction of the charged offense; and (3) that the State's comments during closing argument constituted misconduct and thereby denied defendant a fair trial. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 I. Pretrial Proceedings

¶ 5 On May 6, 2010, defendant was indicted for aggravated criminal sexual abuse for "intentionally or knowingly touch[ing] his hand to [T.T.'s] vagina over clothing for the purpose of sexual gratification or arousal of Phillip Todd or [T.T.]" when T.T. was under 18 years old and defendant was T.T.'s father.[1] On December 15, 2011, the day that the parties came before the trial court for trial, the State indicated that it would be amending the indictment under which it was proceeding to remove the words "[o]ver clothing." The trial court clarified that the State would be proceeding on "touching skin to skin then," and the State agreed. The court noted that "[t]hat would be harder to prove for the State then. Skin to skin versus touching over the clothing. Would actually be harder for the State."

¶ 6 The next day, December 16, 2011, the trial court considered defendant's motions *in limine*, including a motion to bar "[p]ersonal opinions regarding the defendant or the crime that he is charged with." The trial court stated: "personal opinions, no one can enforce their opinion about the case of Todd. The juror's opinion is the only one that counts in this case."

[1] The copy of the indictment contained in the record on appeal has the "over clothing" language blacked out. However, there is no dispute that the indictment originally contained this language.

¶ 7 II. Trial

¶ 8 The State presented three witnesses at trial: T.T., the victim; T.T.'s mother, Felicia Heard; and defendant's girlfriend at the time of the incident, Nicole Ransom. The defense presented one witness, Detective Linda Paraday; and two stipulations.

¶ 9 A. -- T.T.

¶ 10 T.T., the victim, testified that she was 17 years old at the time of the trial and lived with Felicia Heard, her mother; T.T. was 15 years old at the time of the incident at issue. T.T. testified that defendant was her biological father and that, prior to April 2010, they had a "good relationship," visiting twice a month. T.T. testified that she attended an alternative high school as well as cosmetology school.

¶ 11 T.T. testified that, on April 10, 2010, she saw defendant at Chuck E. Cheese, at a party for her sister M.T.'s first birthday. Defendant was also M.T.'s biological father, and M.T.'s mother was Nicole Ransom. After M.T.'s birthday party, T.T. returned to Ransom's home, because T.T. had agreed to spend the night and babysit M.T.; K.H., Ransom's other daughter; and K.H.'s friends.

¶ 12 Defendant and Ransom left Ransom's home at approximately 8 or 9 p.m., and T.T. bathed M.T., then put her to bed in Ransom's bedroom. T.T. then went to bed with M.T. T.T. had been wearing jeans and a fitted t-shirt for the birthday party, and removed her jeans to go to bed; the jeans were placed on the side of the bed, and T.T. went to bed wearing her t-shirt and underwear.

¶ 13 At approximately 3 a.m. on April 11, 2010, Ransom returned to the home, waking T.T. by ringing the doorbell. After T.T. opened the door for Ransom, T.T. went back to bed and fell back asleep. At approximately 5 a.m., the doorbell rang again when defendant returned

home. When T.T. opened the door for defendant, she noticed that he was under the influence of alcohol, which she concluded by "the way he was talking to me" and because he smelled of alcohol. T.T. again returned to bed with M.T.

¶ 14 Approximately 10 minutes later, defendant entered Ransom's bedroom, where T.T. was sleeping with M.T. Defendant was wearing a long-sleeved button-up shirt and black dress pants, which he removed; defendant was then wearing a white tank top and boxer shorts. Defendant climbed into bed with T.T. and M.T.; M.T. was in the middle of the bed, with T.T. and defendant on either side of her. T.T. fell back asleep.

¶ 15 T.T. was awakened at approximately 8 a.m. when M.T. began crying, and placed her at the edge of the bed. Ransom entered the room and removed M.T., taking her into the room where Ransom had been sleeping. Once T.T. and defendant were alone in the bed, defendant "scooted [T.T.] closer to him," to the point where their bodies were touching. T.T. was laying on her side, and defendant was laying on his side, behind T.T. Defendant asked T.T. if she was having sex, and rubbed her belly under her shirt with his hand, asking if she was going to have her bellybutton pierced before she turned 16. T.T. testified that defendant was whispering and, when he whispered, T.T. could smell alcohol on his breath.

¶ 16 At the time that defendant was rubbing her belly, T.T. had a cell phone in the bed with her, and T.T. sent a text message to her "god sister" Ashley "[b]ecause [she] was scared." The text message stated, "Tell my momma to please come and get me because my daddy is coming on to me." Defendant then moved his hand, placing it inside T.T.'s underwear and touching her vagina with his hand. When defendant touched her vagina, T.T. told him that she needed to use the bathroom so that she could get away. Defendant "start[ed] squeezing

harder saying pee right here, pee right here." T.T. stood up, grabbed her pants, and ran to the bathroom.

¶ 17 When T.T. was in the bathroom, she called home, but there was no answer, so she called her mother's friend, followed by her grandmother. Her grandmother answered the phone, and the grandmother was able to reach T.T.'s mother. While T.T. was in the bathroom, defendant knocked on the door and asked to use her cell phone. T.T. told him that she was using the bathroom and, a few minutes later, defendant again knocked on the door and said he needed to use the bathroom.

¶ 18 When T.T. was able to speak with her mother, T.T. asked her mother to come and get her. T.T. stayed on the phone until her mother arrived, but, while on the phone, T.T. left Ransom's home and began walking to a nearby store. When T.T. left, defendant followed her; defendant asked her who she was speaking to on the phone, and T.T. lied and told him she was speaking to her godmother. Defendant asked T.T. if she was angry with him, and T.T. "told him yes, because don't no father do that to their daughter." Defendant then told T.T., "[d]on't tell [her] momma."

¶ 19 T.T. met her mother outside the store, where she was waiting with a police officer and a marked police vehicle. T.T. began running toward her mother, and defendant followed her; T.T. ran to the police vehicle and entered it. T.T. heard defendant tell her mother and the police officer that "[h]e didn't do anything."

¶ 20 On cross-examination, T.T. testified that she had spoken to a number of police officers, detectives, and prosecutors, including speaking with Detective Linda Paraday on the day of the incident. T.T. denied telling Paraday that defendant was facing her at the time of the incident and denied telling Paraday that defendant touched her outside her underwear. T.T.

testified that she stated that defendant touched her under her underwear the day before trial "and when it first began."

¶ 21 B. Nicole Ransom

¶ 22 Nicole Ransom testified that she and defendant met in November 2005, and moved in together on January 29, 2010. They lived together with Ransom's two daughters, K.H. and M.T.; K.H. was 12, and M.T. was two. Defendant was M.T.'s biological father; T.T. was defendant's oldest daughter.

¶ 23 On April 10, 2010, Ransom threw a party at Chuck E. Cheese to celebrate M.T.'s first birthday, which T.T. attended. After the party, T.T. returned to Ransom's home with Ransom and defendant. That night, Ransom and defendant left Ransom's home and T.T. stayed to babysit M.T., K.H., and three girls K.H.'s age. Ransom returned home at approximately 3 a.m. on the morning of April 11; T.T. opened the door to let Ransom in after Ransom rang the doorbell and called her cell phone. Ransom observed M.T. sleeping in Ransom's room, and T.T. joined M.T. while Ransom slept on the couch downstairs. Ransom was awakened at "[a]round 5:00 something" when defendant returned home. Ransom observed defendant go upstairs, where there were two bedrooms and a bathroom, and then fell back asleep on the couch.

¶ 24 Ransom awakened later that morning and went upstairs because M.T. was crying. When Ransom entered the bedroom, she observed T.T., M.T., and defendant in the bed, with M.T. in the middle. Ransom removed M.T. and took her downstairs to feed her. Ransom passed the bedroom again 5 to 10 minutes later and observed T.T. and defendant in the bed, laying side by side facing the wall; they were closer together than they had been when M.T. was in

the bed, but there was still "a little gap" between them. Ransom went to the second bedroom and fell back asleep; she did not observe either T.T. or defendant leaving the home.

¶ 25 Ransom testified that she was no longer in a relationship with defendant "[b]ecause of what happened to [T.T.]"

¶ 26 C. Felicia Heard

¶ 27 Felicia Heard testified that she was T.T.'s mother and that defendant was T.T.'s biological father. Defendant was not named on T.T.'s birth certificate because both Heard and defendant were minors at the time; she later testified that they were both 15 years old when T.T. was born. Heard and defendant ended their romantic relationship when T.T. was approximately a year old.

¶ 28 Heard testified that defendant and T.T. had a "good" relationship, with T.T. visiting defendant once a week. Heard testified that, in April 2010, defendant was living with Ransom, with whom Heard had a "perfect" relationship.

¶ 29 On April 10, 2010, T.T. went to her father's home for a birthday party and planned to spend the night there. At approximately 10 a.m. on April 11, 2010, Heard was in bed asleep when she received a phone call. Her sister woke her and was holding two telephones; Heard's mother was on one phone and T.T. was on the other. Heard first spoke to her mother, but could hear T.T. crying on the other phone. When Heard heard T.T. crying, Heard stopped speaking with her mother and spoke to T.T. instead.

¶ 30 Heard told T.T. to "get out of there as fast as you can, I'm on my way," referring to defendant's home. Heard immediately drove to defendant's home, accompanied by Heard's sister and cousin. Heard remained on the phone with T.T. while she drove, and heard T.T. tell

defendant "don't no daddy do that to their kid"; in response, defendant told T.T., "Don't tell your mother."

¶ 31 When Heard was near defendant's home, she observed several police vehicles and attempted to flag them down; the first, an unmarked vehicle, did not stop, but the second, a marked vehicle driven by a female police officer, stopped. Heard and the police officer parked their vehicles in a store parking lot and began talking. While they were talking, Heard observed T.T. running toward her, followed by defendant. T.T. ran into the backseat of the police vehicle, crying. Once defendant reached Heard and the police officer, he stated, "I didn't do it"; neither Heard nor the police officer had said anything to defendant prior to his statement.

¶ 32 On cross-examination, Heard testified that defendant owed Heard child support, but denied going to court to attempt to obtain child support.

¶ 33 D. Detective Linda Paraday

¶ 34 Detective Linda Paraday testified on behalf of the defense that she was the lead detective in T.T.'s case, and interviewed both T.T. and Heard. Paraday interviewed T.T. on April 11, 2010, and took notes in the form of a general progress report. During the interview, T.T. informed Paraday that she and defendant were laying in the same bed; Paraday denied that T.T. informed her that T.T. and defendant were facing each other. The defense then asked Paraday to review her general progress report and Paraday testified that she included the statement "Victim on side. Offender on side facing victim." However, Paraday testified that "[u]nfortunately, my recollection is different."

¶ 35 Paraday also testified that her general progress report did not indicate that T.T. told Paraday that defendant pulled her closer to him, and Paraday did not recall such a

conversation. T.T. also informed Paraday that defendant returned home at 3:58 a.m., which T.T. remembered because she recalled seeing the time on her cell phone. T.T. never told Paraday that defendant had touched her underneath her underwear.

¶ 36 E. Stipulations

¶ 37 On December 19, 2011, the parties stipulated that T.T. and Heard met with Assistant State's Attorney (ASA) Stephanie Miller twice in person and at least twice over the phone, including an in-person meeting on December 15, 2011. They further stipulated that the December 15, 2011, meeting was the first time that either T.T. or Heard stated that defendant had said " 'I didn't do anything' " upon first approaching the responding police officers on April 11, 2011. The parties also stipulated that the December 15, 2011, meeting with ASA Miller was the first time that T.T. stated that defendant had directly touched her vagina with his hand.

¶ 38 F. Jury Instructions

¶ 39 When discussing jury instructions, the parties considered the instruction defining "sexual conduct." The instruction proposed by the State included a statement that the contact could be "either directly or through clothing." The State wished to keep the phrase, despite the fact that the indictment had been amended to strike the phrase "through clothing" and therefore only charged direct contact. Defense counsel, on the other hand, stated: "I think that this definition is most appropriate where it mirrors the language in the charging document the jury has heard." The trial court also indicated that leaving in the language "through clothing" could lead the jury to "speculate about the over the clothing part." The parties then engaged in the following colloquy:

"STATE: Your Honor, can we resolve this issue by *** simply striking the phrase in parentheses either directly or through clothing, striking those five words.

THE COURT: Let me see how that works then.

The term sexual conduct means any intentional or knowing touching or fondling by the accused of the sex organ of the victim for the purpose of sexual gratification or arousal of the victim or the accused, but leaving out the words either directly or through clothing. Does that satisfy the defense?

DEFENSE: I think that is a reasonable resolution, Your Honor.

THE COURT: Then the State cannot argue that it might have been over the clothing. The State chose to proceed in the fashion they chose to proceed, which kind of took me back a notch when I heard it, but that's the State's way of trying the case, I suppose.

So you'll change 11.65D. It will merely read as follows, the term sexual conduct means any intentional or knowing touching or fondling by the accused of the sex organ of the victim for the purpose of sexual gratification or arousal of the victim or the accused. So leave out the words either directly or through clothing.

So we'll get that one corrected then. That was 14, with the correction of leaving out those five words, either directly or through clothing, those five words will come out. It will be changed to reflect that then.

Then I assume there is no objection then, [defense counsel]?

DEFENSE: No, Your Honor."

¶ 40 G. Closing Arguments

¶ 41 During closing argument, the prosecutor discussed any motivation for T.T. to lie:

> "And you look at this girl, ladies and gentlemen, she's 15 years old when this comes about. There is evidence that she went to an alternative school. This girl is not very sophisticated. And that's not a knock to [T.T.] She's 15 years old. She went through a very stressful situation. Do you think she'd be able to concoct a story like this?
>
> This girl, you saw her when she was questioned by the defense attorney in this case. If he used rather large words, the questions had to be rephrased two, maybe three times. This is a girl that's going to concoct a story and keep it alive for almost two years? To put a case on her father, for no reason that we know of? That there was no evidence that came to light to show why she would do this to herself, to her family, to her own father? Knowing that when she got up there on the stand, knowing the day she told police officers that it would be the end of her relationship with this man? Does that make any sense at all that she would make this up? It doesn't.
>
> What makes sense is what she told you on the stand that happened that day. The way he touched her. The way he whispered in her ear. It makes sense because it's the truth."

Later, the prosecutor noted:

"And let's not forget that after this all occurred, he chases her into the bathroom. Let me in. Can I use your phone? Because he knows she's in there now with the phone. Consciousness of guilt. He doesn't want her telling anybody what just happened. Why would he? Sick and disgusting."

¶ 42 During its closing argument, the defense noted:

"Now, even two little things. Because it's each and every element, well, do we really truly have proof that she's his daughter? Just a rhetorical question. But if we're proving each and every element, it is something to think about."

Defense counsel further argued:

"She lied. She lied to your face. She said he touched me. She acted irrational. A lie told a thousand times is still a lie. But it wasn't told a thousand times. She couldn't even keep it straight.

To say over versus under, to not get that right is incredible. To change that is unbelievable and unforgivable. The positioning of how this actually happened, whether you're looking at someone or not. That right there is incredible, is reasonable doubt. It's remarkable. And to add and contract and change portions of a story, a story that wasn't very good to begin with."

¶ 43 In rebuttal, the prosecutor stated:

"There is nothing inconsistent about [T.T.'s] account of the defendant's hand to her vagina. Much has been made about over her

> clothing, under her clothing. Make no mistake, hand to vagina is a crime. Make no mistake about that."

The prosecutor further argued:

> "And if you are to believe that she made this entire thing up and that she would have done a better job at it and made a better story of it, think about what she would have had to have done to make all this happen. She had to lie. She had to get her mother to lie. She had to get a seasoned police detective to come in and lie. And she had to get Nicole Ransom, who she's not related to and doesn't really have a relationship with other than they interacted because of the defendant, she had to coordinate all of these people to concoct this story so she could pin this crime on her father for absolutely no reason. You know that's not true because that's unbelievable."

¶ 44 III. Verdict, Sentencing, and Posttrial Proceedings

¶ 45 The jury found defendant guilty of aggravated criminal sexual abuse and the trial court entered judgment on the jury's verdict. On January 13, 2012, defendant filed a posttrial motion for a new trial and, on February 15, 2012, defendant filed an amended posttrial motion for a new trial.

¶ 46 On February 17, 2012, the trial court denied both of defendant's motions for a new trial and, after considering evidence in aggravation and mitigation, sentenced defendant to 15 years in the Illinois Department of Corrections. Defendant filed a motion to reconsider his sentence, which was denied. This appeal follows.

¶ 47 ANALYSIS

¶ 48 On appeal, defendant argues: (1) that the State failed to prove that defendant was T.T.'s father, a necessary element of the offense of aggravated criminal sexual abuse; (2) that the State failed to obtain a unanimous conviction of the charged offense; and (3) that the State's comments during closing argument constituted misconduct and thereby denied defendant a fair trial. We consider each argument in turn.

¶ 49 I. Proof That Defendant Was T.T.'s Father

¶ 50 Defendant first challenges the sufficiency of the evidence, arguing that the State did not establish an essential element of the crime since it did not prove that defendant is a family member of the minor victim. As a result, defendant argues that we should reduce defendant's conviction to a battery.

¶ 51 When a defendant challenges the sufficiency of the evidence, the standard of review is " 'whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " [Emphasis omitted.] *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Under this standard, the reviewing court does not retry the defendant, and the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence." *People v. Ross*, 229 Ill. 2d 255, 272 (2008). While great deference is given to the findings of the jury, a criminal conviction cannot be upheld if the evidence is so improbable or unsatisfactory as to give rise to a reasonable doubt regarding an essential element of the offense that the defendant has

been found guilty of committing. *People v. Rowell*, 229 Ill. 2d 82, 98 (2008); *People v. Adair*, 406 Ill. App. 3d 133, 137 (2010); *People v. Clinton*, 397 Ill. App. 3d 215, 222 (2009).

¶ 52 When presented with a challenge to the sufficiency of the evidence, it is this court's function to carefully examine the evidence, giving due consideration to the fact that the court and jury observed and heard the testimony of the witnesses. *People v. Sykes*, 341 Ill. App. 3d 950, 982 (2003). It is the unique responsibility of the jury to weigh the evidence, assess the credibility of the witnesses and to resolve any conflicts in the testimony. *People v. Mejia*, 247 Ill. App. 3d 55, 62 (1993). In fulfilling its duty as the trier of fact, the jury is free to believe as much or as little as it pleases of a witness' testimony. *People v. Beasley*, 54 Ill. App. 3d 109, 114 (1977). Circumstantial evidence that proves the elements of the crime charged beyond a reasonable doubt is sufficient to sustain a criminal conviction. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). "Circumstantial evidence is 'proof of facts and circumstances from which the trier of fact may infer other connected facts which reasonably and usually follow according to common experience.' " *People v. McPeak*, 399 Ill. App. 3d 799, 801 (2010) (quoting *People v. Stokes*, 95 Ill. App. 3d 62, 68 (1981)). When assessing circumstantial evidence, "the trier of fact is not required to disregard inferences which flow normally from the evidence and to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *Hall*, 194 Ill. 2d at 332 (citing *People v. McDonald*, 168 Ill. 2d 420, 447 (1995)).

¶ 53 In the case at bar, defendant was convicted of aggravated criminal sexual abuse. The Illinois Criminal Code of 1961 (the Criminal Code) states, "A person commits aggravated criminal sexual abuse if that person commits an act of sexual conduct with a victim who is under 18 years of age and the person is a family member." 720 ILCS 5/12-16(b) (West

2008); *People v. Ostrowski*, 394 Ill. App. 3d 82, 91 (2009). The statute defines a "family member" as "a parent, grandparent, or child, whether by whole blood, half-blood[,] or adoption and includes a step-grandparent, step-parent, or step-child." 720 ILCS 5/12-12(c) (West 2008); *People v. Stull*, 2014 IL App (4th) 120704, ¶ 59. "Family member also means, where the victim is a child under 18 years of age, an accused who has resided in the household with such child continuously for at least six months." 720 ILCS 5/12-12(c) (West 2008).

¶ 54 The State's evidence was sufficient to establish that defendant was a family member of T.T. beyond a reasonable doubt, since three witnesses testified at trial that defendant was her father. First, Felicia Heard testified that she was T.T.'s mother and defendant was T.T.'s father. Heard also testified that defendant's name did not appear on T.T.'s birth certificate because both she and defendant were only 15 years old when T.T. was born. Second, T.T. testified that, although she lived with her mother, defendant was her biological father, and that, prior to the crime, she had a good relationship with him and visited him twice a month. T.T. also testified that M.T. was defendant's daughter and T.T.'s half sister. Third, Nicole Ransom testified that she was defendant's live-in girlfriend of five years and mother of his child M.T., and that defendant was also T.T.'s father. Since three witnesses – the victim, the victim's mother, and defendant's girlfriend – all testified that defendant was T.T.'s father, we cannot say that the evidence at trial was so unreasonable, improbable, or unsatisfactory as to give rise to a reasonable doubt that defendant was a family member of T.T.

¶ 55 Defendant argues that T.T. and Ransom's testimony was insufficient to sustain the conviction because neither had personal knowledge that defendant was T.T.'s father. Ill. R. Evid. 602 (eff. Jan. 1, 2011) ("A witness may not testify to a matter unless evidence is

introduced sufficient to support a finding that the witness has personal knowledge of the matter."). However, both T.T. and Ransom testified that they had a close relationship with defendant, and as a result their testimony that they knew defendant to be T.T.'s father is not outside the scope of personal knowledge pursuant to Rule 602.

¶ 56 Defendant next argues that Heard's testimony alone was insufficient to convict defendant because her testimony would have been insufficient to prove that defendant was T.T.'s father in a civil proceeding. In support, defendant cites the Illinois Parentage Act of 1984 (the Parentage Act), which states that paternity may be considered a rebuttable presumption when the parents: (1) are married prior to the child's birth; (2) are married after the child's birth and the father's name appears on the child's birth certificate; or (3) sign an acknowledgement of paternity. 750 ILCS 45/5(a)(1-4) (West 2012). Defendant argues that, since defendant never married Heard and defendant's name does not appear on T.T.'s birth certificate, defendant would have certain rights in a civil paternity proceeding, such as the right to request DNA testing. 750 ILCS 41/11 (West 2012). Defendant concludes that the State failed to show that he was T.T.'s father since the evidence did not amount to a rebuttable presumption of paternity, and that "[n]either speculation nor suspicion is an acceptable substitute for proof" of paternity. *Adams v. Kite*, 48 Ill. App. 3d 828, 832 (1977).

¶ 57 However, the Parentage Act concerns paternity actions in a civil court, and defendant has provided no authority that states that either a rebuttable presumption of paternity or the Parentage Act applies to criminal proceedings such as the case at bar. Under criminal law, the burden is on the State to prove defendant guilty of each element of the charged crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 315. Here, the State proved beyond a

reasonable doubt that defendant is T.T.'s father since three witnesses testified to that fact at trial.

¶ 58 Lastly, defendant argues that the State's burden to prove that he was a family member of the victim is analogous to the State's burden to prove the existence of a prior conviction in prosecuting a defendant on a charge of unlawful use of a weapon by a felon. Defendant cites *People v. Gober*, 146 Ill. App. 3d 499, 502 (1986), which states that, for the purposes of an unlawful use of a weapon by a felon charge, "a prior conviction can be proved only by the record or an authenticated copy *** showing the caption, return of indictment in open court by the grand jury, the indictment and arraignment of the defendant, paneling of the jury, and the final judgment of the court." Defendant argues that the instant case is similar to the case at bar because paternity of a non-marital child requires a legal judgment following a civil proceeding and the State did not present a certified copy of a prior judgment of paternity. In support, defendant cites *Miller v. Albright*, 523 U.S. 420, 437 (1998) ("Congress could fairly conclude that despite recent scientific advances, it still remains preferable to require some formal legal act to establish paternity, coupled with a clear-and-convincing evidence standard to deter fraud."), and the Illinois Probate Act of 1975 (755 ILCS 5/2-2(h) (West 2010) ("If during his lifetime the decedent was adjudged to be the father of a child born out of wedlock by a court of competent jurisdiction, an authenticated copy of the judgment is sufficient proof of the paternity; but in all other cases paternity must be proved by clear and convincing evidence.")). Since there was no evidence of a prior paternity action, defendant argues that the State failed to prove that he was T.T.'s father.

¶ 59 Defendant's analogy to *Grober* is not persuasive because in order to convict a defendant of unlawful use of a weapon by a felon, there must be a prior felony conviction resulting

from a court proceeding. *Gober*, 146 Ill. App. 3d at 502. In the instant case, the Criminal Code does not contemplate that the State must prove the family member element of an aggravated sexual abuse charge with proof of a prior civil paternity proceeding. Moreover, *Miller* concerns proof of paternity related to establishing U.S. citizenship and the Probate Act concerns civil inheritance actions, and defendant has provided no authority that either *Miller* or the Probate Act applies to criminal prosecutions. As stated, the State sufficiently proved that defendant was a family member of T.T. beyond a reasonable doubt since three witnesses testified at trial that he was her father.

¶ 60 Additionally, we note that defendant concedes in his reply brief that Heard, as T.T.'s mother, was in the best position to know who T.T.'s father is, yet states that "the law requires more." However, the testimony of a single witness is sufficient to convict, as long as the witness' testimony is credible and proves the elements of the crime beyond a reasonable doubt. *People v. Heard*, 53 Ill. App. 3d 1042, 1047 (1977). Here, Heard testified that she was T.T.'s mother and defendant was T.T.'s father, and she provided a reasonable explanation for why defendant's name did not appear on T.T.'s birth certificate. We cannot say that Heard's testimony was so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. Moreover, Heard's testimony was corroborated by T.T. and Ransom, both of whom testified that defendant is T.T.'s father. As a result, the State sufficiently proved defendant guilty of aggravated sexual abuse, and we affirm defendant's conviction and sentence.

¶ 61 II. Possibility of Non-Unanimous Verdict

¶ 62 Defendant next argues that the State failed to prove that defendant had touched T.T.'s vagina directly and not through her underwear. Defendant further argues that the jury

instruction concerning sexual conduct was insufficient to clarify that direct contact was required and that, given the jury instruction and the State's encouragement during closing argument to convict on either basis, the possibility of a non-unanimous verdict exists.

¶ 63 A. Sufficiency of the Evidence

¶ 64 We first consider whether the State satisfied its burden of proving direct contact with T.T.'s vagina. As noted, to prove that defendant committed aggravated criminal sexual abuse, the State was required to prove that defendant "commit[ted] an act of sexual conduct with a victim who was under 18 years of age when the act was committed and [that] the accused was a family member." 720 ILCS 5/12-16(b) (West 2008). To prove "sexual conduct" for the purposes of the statute, the State was required to prove that defendant "intentional[ly] or knowing[ly] touch[ed] or fondl[ed]" "the sex organs, anus or breast" of T.T., "either directly or through clothing," "for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/12-12(e) (West 2008). The indictment in the case at bar initially charged defendant with touching T.T.'s vagina over clothing; however, the State amended the indictment immediately prior to trial to remove the phrase "over clothing." Accordingly, the State was required to prove direct contact between defendant and T.T.'s vagina.

¶ 65 Again, when reviewing the sufficiency of the evidence in a criminal case, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541 (1999). "[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). A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to each witness' testimony. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009); *People v. Ross*, 229 Ill. 2d 255, 272 (2008). Instead, "it is our duty to 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) (citing *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004), and *People v. Smith*, 185 Ill. 2d 532, 541 (1999)).

¶ 66 In the case at bar, a rational trier of fact could have found beyond a reasonable doubt that defendant directly touched T.T.'s vagina. "The testimony of a single witness, if it is positive and the witness [is] credible, is sufficient to convict." *People v. Smith*, 185 Ill. 2d 532, 542 (1999). Here, T.T. testified that defendant placed his hand inside her underwear and touched her vagina, and a rational trier of fact could have found such testimony credible.

¶ 67 Defendant does not dispute that the testimony of a single witness is sufficient to support a conviction, but argues that T.T.'s testimony was not credible. Defendant points to the fact that the first time T.T. informed anyone that defendant directly touched her vagina was the day before trial, arguing that the timing of T.T.'s outcry severely undermined T.T.'s credibility, and also points to the fact that there was no corroborating evidence of direct contact. We do not find this argument persuasive.

¶ 68 The jury heard the testimony of all of the witnesses and the stipulations between the parties. Thus, they heard that T.T. never informed Detective Paraday that defendant had touched her under her underwear and also heard that the December 15, 2011, meeting with

ASA Miller was the first time that T.T. stated that defendant directly touched her vagina with his hand. However, the jury nevertheless found T.T.'s testimony credible, and we will not substitute our judgment for the jury's.

¶ 69 We also note that, while there may have been no corroborating evidence of the direct contact, there was corroborating evidence of other aspects of T.T.'s recounting of the events. For instance, Ransom testified that she passed by the bedroom in which T.T. and defendant were sleeping and observed them in bed, closer together than they had been when M.T. was in the bed. Similarly, Heard testified that T.T. called her and they remained on the phone until they were able to meet in the store parking lot; Heard also testified that she heard T.T. tell defendant "don't no daddy do that to their kid," and in response, defendant told T.T., "Don't tell your mother." Thus, while the jury heard testimony casting doubt on T.T.'s version of events, they also heard testimony supporting it. Accordingly, a rational trier of fact could have chosen to accept T.T.'s testimony that defendant directly touched her vagina, which is sufficient to support defendant's conviction.

¶ 70 Moreover, we find unpersuasive defendant's claim that the State "invited the jury to convict Todd if it believed he touched TT over her underwear." This argument is based on the State's statement during closing argument that "[m]uch has been made about over her clothing, under her clothing. Make no mistake, hand to vagina is a crime. Make no mistake about that." We cannot find that this statement invited the jury to convict on an uncharged offense.

¶ 71 As the State notes, its comment occurred in the context of the narrowed definition of "sexual conduct" applicable to the case at bar. The jury was instructed that "sexual conduct" required the "touching or fondling" of T.T.'s "sex organ." The jury was never instructed, and

thus would have no reason to know, that the Criminal Code also considers contact through clothing to be a crime. The State never indicated to the jury that contact through clothing was a crime, but stated that "hand to vagina is a crime" --- a statement that is accurate. Furthermore, the statement that "[m]uch has been made about over her clothing, under her clothing" was directly responsive to the defense's closing argument, which focused on that purported inconsistency to attack T.T.'s credibility. The State argued that T.T. testified truthfully, and did not argue that even if T.T.'s testimony was incredible, the jury could convict because either form of touching was sufficient. Thus, we cannot find that the jury was encouraged to convict on an uncharged offense and affirm defendant's conviction.

¶ 72 B. Jury Instruction

¶ 73 Defendant also argues that the State impermissibly sought to obtain a conviction based on touching either under or over clothing through the use of an insufficient jury instruction. The question of whether jury instructions accurately conveyed the applicable law is reviewed *de novo*. *People v. Parker*, 223 Ill. 2d 494, 501 (2006). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 74 When discussing jury instructions, the parties considered the instruction defining "sexual conduct." The instruction proposed by the State included a statement that the contact could be "either directly or through clothing." The State wished to keep the phrase, despite the fact that the indictment had been amended to strike the phrase "through clothing" and therefore only charged direct contact. The defense, on the other hand, stated: "I think that this definition is most appropriate where it mirrors the language in the charging document the jury has heard." The trial court also indicated that leaving in the language "through clothing"

could lead the jury to "speculate about the over the clothing part." The parties then engaged in the following colloquy:

> "STATE: Your Honor, can we resolve this issue by *** simply striking the phrase in parentheses either directly or through clothing, striking those five words.
>
> THE COURT: Let me see how that works then.
>
> The term sexual conduct means any intentional or knowing touching or fondling by the accused of the sex organ of the victim for the purpose of sexual gratification or arousal of the victim or the accused, but leaving out the words either directly or through clothing. Does that satisfy the defense?
>
> DEFENSE: I think that is a reasonable resolution, Your Honor.
>
> THE COURT: Then the State cannot argue that it might have been over the clothing. The State chose to proceed in the fashion they chose to proceed, which kind of took me back a notch when I heard it, but that's the State's way of trying the case, I suppose.
>
> So you'll change 11.65D. It will merely read as follows, the term sexual conduct means any intentional or knowing touching or fondling by the accused of the sex organ of the victim for the purpose of sexual gratification or arousal of the victim or the accused. So leave out the words either directly or through clothing.

> So we'll get that one corrected then. That was 14, with the correction of leaving out those five words, either directly or through clothing, those five words will come out. It will be changed to reflect that then.
>
> Then I assume there is no objection then, [defense counsel]?
>
> DEFENSE: No, Your Honor."

¶ 75 We agree with the State that the defense may not challenge the jury instruction given in the case at bar because it affirmatively acquiesced to its use. "Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003). "[A] defendant's invitation or agreement to the procedure later challenged on appeal 'goes beyond mere waiver' " and has been referred to as an issue of estoppel. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (quoting *People v. Villareal*, 198 Ill. 2d 209, 227 (2001)).

¶ 76 Here, the defense objected to the use of the State's proposed jury instruction, stating that the instruction should mirror the charging instrument. When the State proposed removing the phrase "either directly or through clothing," defense counsel called it a "reasonable resolution" and stated that there was no objection to the modified instruction. Defendant cannot now argue that the instruction was insufficient where defense counsel affirmatively acquiesced in the use of the instruction. See *People v. Curry*, 2013 IL App (4th) 120724, ¶ 88 ("defense counsel affirmatively acquiesced to the court's instruction [in response to a jury note], and under the invited error doctrine, defendant cannot object to the instruction on appeal").

¶ 77 Defendant acknowledges that "[i]f Todd's argument relied solely upon the jury instruction, the State's estoppel argument could have some merit." However, defendant

argues that the jury instruction combined with the State's argument during closing that "[m]ake no mistake, hand to vagina is a crime" operated to urge conviction for an uncharged offense and led to the possibility of a verdict that was not unanimous. We do not find this argument persuasive.

¶ 78 As noted in the previous section, the State's comment during closing did not urge conviction on an uncharged offense, and the use of the jury instruction does not change that result. The jury instruction does not indicate that touching over clothing is a permissible basis for conviction but instead mirrored the charging instrument. Thus, we cannot find that the jury was encouraged to convict on either basis and affirm the trial court.

¶ 79 III. Closing Arguments

¶ 80 Finally, defendant claims that he was denied a fair trial based on several comments made by the State in closing argument.

¶ 81 A. Standard of Review

¶ 82 It is not clear whether this issue is reviewed *de novo* or for abuse of discretion. We have previously made this same observation in several cases, including *People v. Land*, 2011 IL App (1st) 101048, ¶¶ 149-51, *People v. Phillips*, 392 Ill. App. 3d 243, 274-75 (2009), and *People v. Johnson*, 385 Ill. App. 3d 585, 603 (2008). The Second District Appellate Court has agreed with our observation that the standard of review for closing remarks is an unsettled issue. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 26; *People v. Robinson*, 391 Ill. App. 3d 822, 839-40 (2009).

¶ 83 The confusion stems from an apparent conflict between two supreme court cases: *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), and *People v. Blue*, 189 Ill. 2d 99, 128, 132 (2000). In *Wheeler*, our supreme court held that "[w]hether statements made by a prosecutor at closing

argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*." *Wheeler*, 226 Ill. 2d at 121. However, the supreme court in *Wheeler* cited with approval *Blue*, in which the supreme court had previously applied an abuse of discretion standard. *Wheeler*, 226 Ill. 2d at 121. In *Blue* and numerous other cases, our supreme court had held that the substance and style of closing arguments is within the trial court's discretion and will not be reversed absent an abuse of discretion. *Blue*, 189 Ill. 2d at 128, 132; *People v. Caffey*, 205 Ill. 2d 52, 128 (2001); *People v. Emerson*, 189 Ill. 2d 436, 488 (2000); *People v. Williams*, 192 Ill. 2d 548, 583 (2000); *People v. Armstrong*, 183 Ill. 2d 130, 145 (1998); *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Our supreme court had reasoned that "[b]ecause the trial court is in a better position than a reviewing court to determine the prejudicial effect of any remarks, the scope of closing argument is within the trial court's discretion." *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). Following *Blue* and other supreme court cases like it, this court had consistently applied an abuse of discretion standard. *People v. Tolliver*, 347 Ill. App. 3d 203, 224 (2004); *People v. Abadia*, 328 Ill. App. 3d 669, 678 (2001).

¶ 84 Since *Wheeler*, appellate courts have been divided regarding the appropriate standard of review. The second and third divisions of the First District have applied an abuse of discretion standard, while the Third and Fourth Districts and the fifth division of the First District have applied a *de novo* standard of review. Compare *People v. Love*, 377 Ill. App. 3d 306, 313 (1st Dist. 2d Div. 2007), and *People v. Averett*, 381 Ill. App. 3d 1001, 1007 (1st Dist. 3d Div. 2008), with *People v. McCoy*, 378 Ill. App. 3d 954, 964 (3d Dist. 2008), *People v. Palmer*, 382 Ill. App. 3d 1151, 1160 (4th Dist. 2008), and *People v. Ramos*, 396 Ill. App. 3d 869, 874 (1st Dist. 5th Div. 2009).

¶ 85 However, we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this case would be the same under either standard. This is the same approach that we took in both *Phillips* and *Johnson*, and was the same approach taken by the Second District in its *Robinson* and *Burman* opinions. *Phillips*, 392 Ill. App. 3d at 275; *Johnson*, 385 Ill. App. 3d at 603; *Robinson*, 391 Ill. App. 3d at 840; *Burman*, 2013 IL App (2d) 110807, ¶ 26.

¶ 86 Our analysis is also shaped by defendant's failure to preserve this issue for review. Illinois law is clear that both an objection and a written posttrial motion raising an issue are necessary to preserve an error for appellate review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("*Both* a trial objection *and* a written [posttrial] motion raising the issue are required for alleged errors that could have been raised during trial." (Emphases in original.)). Here, defense counsel neither objected to any of the comments at issue, nor were they included in defendant's posttrial motion. Accordingly, we review their propriety under plain-error review.

¶ 87 "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) 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) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In a plain-error analysis, "it is the defendant who bears the burden of persuasion." *People v. Woods*, 214 Ill. 2d 455, 471 (2005). However, in order to find plain

error, we must first find that the trial court committed some error. *Piatkowski*, 225 Ill. 2d at 565 ("the first step is to determine whether error occurred").

¶ 88 B. Opinions About Defendant

¶ 89 Defendant first argues that the State improperly expressed an opinion of defendant or his defense in violation of the motion *in limine* granted by the trial court. Defendant claims that the State called Ransom as a witness "for the purpose of introducing her opinion that Todd committed the offense and that she left him because she was so repulsed by his behavior." Defendant further claims that the State elaborated on this sentiment during closing argument and referred to defendant as "sick and disgusting."

¶ 90 First, we cannot find that the trial court abused its discretion in permitting Ransom to testify. See *People v. Morgan*, 197 Ill. 2d 404, 455 (2001) (it is within the trial court's discretion to decide whether evidence is relevant and admissible, and such a decision will not be reversed absent an abuse of discretion). Contrary to defendant's claim, Ransom was not called as a witness to express an opinion that defendant committed the offense. Instead, Ransom was called as a witness to corroborate T.T.'s testimony about the evening in question. She testified about the party at Chuck E. Cheese, about T.T. babysitting and spending the night, about taking M.T. from the bedroom when she began crying, and about observing defendant and T.T. laying close together in bed shortly after M.T. was taken from the room. At the end of her testimony, she explained that she and defendant were no longer in a relationship and why, information that is relevant in demonstrating any bias. She did not express an opinion "that Todd committed the offense and that she left him because she was so repulsed by his behavior," as defendant claims. Thus, we find no error here.

¶ 91 Additionally, we cannot find error in the State's use of the phrase "sick and disgusting." The State's closing argument will lead to reversal only if the prosecutor's improper remarks created "substantial prejudice." *Wheeler*, 226 Ill. 2d at 123, *People v. Johnson*, 208 Ill. 2d 53, 64 (2003); *People v. Easley*, 148 Ill. 2d 281, 332 (1992) ("The remarks by the prosecutor, while improper, do not amount to substantial prejudice."). Substantial prejudice occurs "if the improper remarks constituted a material factor in a defendant's conviction." *Wheeler*, 226 Ill. 2d at 123 (citing *People v. Linscott*, 142 Ill. 2d 22, 28 (1991)).

¶ 92 When reviewing claims of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney, in order to place the remarks in context. *Wheeler*, 226 Ill. 2d at 122; *Johnson*, 208 Ill. 2d at 113; *People v. Tolliver*, 347 Ill. App. 3d 203, 224 (2004). Prosecutors are afforded a great deal of latitude in closing argument. *Wheeler*, 226 Ill. 2d at 123; *Blue*, 189 Ill. 2d at 127. They may comment on the evidence and draw reasonable inferences therefrom, as well as dwelling on the " 'evil results of crime' " and urging the " 'fearless administration of the law.' " *People v. Liner*, 356 Ill. App. 3d 284, 295-96, 297 (2005) (quoting *People v. Harris*, 129 Ill. 2d 123, 159 (1989)). However, a prosecutor may not make an argument that serves no purpose but to inflame the jury. *Blue*, 189 Ill. 2d at 128 (citing *People v. Tiller*, 94 Ill. 2d 303, 321 (1982)).

¶ 93 In its closing argument, the State noted:

> "And let's not forget that after this all occurred, he chases her into the bathroom. Let me in. Can I use your phone? Because he knows she's in there now with the phone. Consciousness of guilt. He doesn't want her telling anybody what just happened. Why would he? Sick and disgusting."

Defendant claims that the use of the phrase "[s]ick and disgusting" was an attempt to inflame the passions of the jury. We do not find this argument persuasive.

¶ 94 We agree with the State that the prosecutor was not calling *defendant* "[s]ick and disgusting," but instead was referring to "what just happened." "[C]ommenting unfavorably on the evils of crime do[es] not constitute error." *Blue*, 189 Ill. 2d at 129 (citing *People v. Hope*, 116 Ill. 2d 265, 277-78 (1986)). Here, defendant was on trial for touching the vagina of his 15-year-old daughter. It was permissible for the State to comment on the nature of that crime. Accordingly, we find no error.

¶ 95 C. Vouching for Credibility of Witness

¶ 96 Defendant next argues that the State improperly vouched for the credibility of T.T. by telling the jury that T.T.'s account "[m]akes sense because it's the truth" and that "[t]here is nothing inconsistent about [T.T.'s] account of the defendant's hand to her vagina." Defendant further argues that the latter statement was a misstatement of the evidence.

¶ 97 "While it is improper for the State to place the integrity of the State's Attorney's office behind the credibility of a witness, the State may discuss the witnesses and their credibility and is entitled to assume the truth of the State's evidence." *People v. Pryor*, 170 Ill. App. 3d 262, 273 (1988) (citing *People v. Redman*, 141 Ill. App. 3d 691, 702 (1986)). Here, despite defendant's contention to the contrary, the State was not expressing a personal belief but merely commenting on the evidence when stating that T.T.'s account "[m]akes sense because it's the truth." In fact, the State was specifically explaining why she was credible when it made that comment:

> "And you look at this girl, ladies and gentlemen, she's 15 years old when this comes about. There is evidence that she went to an alternative

> school. This girl is not very sophisticated. And that's not a knock to [T.T.] She's 15 years old. She went through a very stressful situation. Do you think she'd be able to concoct a story like this?
>
> This girl, you saw her when she was questioned by the defense attorney in this case. If he used rather large words, the questions had to be rephrased two, maybe three times. This is a girl that's going to concoct a story and keep it alive for almost two years? To put a case on her father, for no reason that we know of? That there was no evidence that came to light to show why she would do this to herself, to her family, to her own father? Knowing that when she got up there on the stand, knowing the day she told police officers that it would be the end of her relationship with this man? Does that make any sense at all that she would make this up? It doesn't.
>
> What makes sense is what she told you on the stand that happened that day. The way he touched her. The way he whispered in her ear. It makes sense because it's the truth."

We cannot find that the prosecutor's statement was improper and, thus, find no error.

¶ 98 Similarly, we find no error in the prosecutor's statement that "[t]here is nothing inconsistent about [T.T.'s] account of the defendant's hand to her vagina." The prosecutor's comment was in response to the defense's closing argument, which focused heavily on the credibility of T.T. Additionally, we note that, despite defendant's argument to the contrary, the prosecutor's comment did not misstate the evidence. T.T. testified that defendant touched his hand to her vagina. She also denied telling Detective Paraday that defendant had touched

her outside her underwear and testified that she had stated that defendant touched her under her underwear the day before trial "and when it first began." While there was evidence presented contradicting T.T.'s testimony, T.T.'s account of the incident did not change. Thus, the prosecutor's statement did not misstate the evidence.

¶ 99 Moreover, even if the prosecutor's statement was improper, it would not constitute reversible error because it did not result in substantial prejudice. See *Wheeler*, 226 Ill. 2d at 123. The jury heard all of the testimony, including the testimony of Detective Paraday and the stipulations between the parties. Thus, they would have been able to determine whether there were contradictions in T.T.'s testimony in light of this other evidence. Additionally, the trial court cautioned the jury that closing arguments were not evidence and that any statement not based on the evidence should be disregarded. Accordingly, we cannot find that the prosecutor's statement that "[t]here is nothing inconsistent about [T.T.'s] account of the defendant's hand to her vagina" constituted a material factor in defendant's conviction. See *Wheeler*, 226 Ill. 2d at 123 (substantial prejudice occurs "if the improper remarks constituted a material factor in a defendant's conviction").

¶ 100 D. Implication of Orchestrating a "Big Lie"

¶ 101 The final comments challenged by defendant are statements that defendant argues "summarized the theory of defense as an absurd conspiracy designed to convict him for no reason." Defendant challenges the following comments, made during the State's rebuttal:

> "And if you are to believe that she made this entire thing up and that she would have done a better job at it and made a better story of it, think about what she would have had to have done to make all this happen. She had to lie. She had to get her mother to lie. She had to get a seasoned

> police detective to come in and lie. And she had to get Nicole Ransom, who she's not related to and doesn't really have a relationship with other than they interacted because of the defendant, she had to coordinate all of these people to concoct this story so she could pin this crime on her father for absolutely no reason. You know that's not true because that's unbelievable."

Defendant claims that "the State essentially told the jury that to pull this off, TT had to orchestrate a big lie and recruit law enforcement and the mother of Todd's child to participate in that lie, all to convict Todd for no reason. This comment did not reflect the law and distorted the burden of proof." We do not agree with defendant's characterization of the above comments.

¶ 102 First, the argument in defendant's brief that "only TT had to lie. The other witnesses merely acted on TT's lie" is factually untrue. Ransom, defendant's girlfriend at the time, testified that she personally observed defendant and T.T. laying in the same bed, close together. Heard, T.T.'s mother, testified that she and T.T. spoke on the phone and remained on the phone until Heard was able to meet T.T. in the store parking lot with a police officer; Heard also specifically testified that, while on the phone, she heard T.T. tell defendant "don't no daddy do that to their kid" and defendant respond "[d]on't tell your mother." The testimony of these two witnesses was based on their personal observations and not merely "act[ing] on TT's lie."

¶ 103 Next, while it is true that "[i]t is generally improper for a prosecutor to argue that in order to believe the defendant or to acquit the defendant the jury must believe that the State's witnesses are lying" (*People v. Miller*, 302 Ill. App. 3d 487, 497 (1998)), that is not what

occurred here. The State made the challenged comments in rebuttal, after the defense's closing argument was focused on discrediting T.T. As an example of the type of argument made by the defense, the defense began its closing argument with the following comment:

> "Ladies and gentlemen, she lied. She lied to your face. She lied. This is a 15 year old girl who made a bad decision. And how do you know that? How do you know that she lied? Well, the story changed. There are ridiculous facts we're left to deal with, and there is absent [*sic*] of proof. Changed facts, ridiculous facts, absent proofs. C-r-a-p. That's what we are left with."

In response to the defense's argument, the State made its comments, designed to emphasize the different witnesses corroborating parts of T.T.'s account in order to demonstrate that her testimony was credible. This type of comment is similar to the comments at issue in *People v. Coleman*, 158 Ill. 2d 319, 346-47 (1994), in which our supreme court determined that the comments did not distort the law or the burden of proof.

¶ 104 In *Coleman*, our supreme court considered the prosecutor's statement that " 'in order to believe the Defendant you must believe that all the civilian witnesses, all the police, all the experts, lied.' " *Coleman*, 158 Ill. 2d at 345. The supreme court noted that this statement did not misstate the law because it did not say that in order to *acquit* the defendant, the jury must believe that the witnesses were lying but only said that to *believe* the defendant, the jury must believe that the witnesses were lying; the court noted that "the jury could disbelieve defendant but still conclude that the State had not met its burden of proof." *Coleman*, 158 Ill. 2d at 346. The supreme court further noted that the statement did not shift the burden of proof to defendant because "[t]he State's comment did not inform the jury that defendant had

a burden of proof. Instead, the comment was a direct response to defense counsel's closing argument that many of the State's key witnesses had lied. Defense counsel had argued to the jury that [five witnesses] and a police officer had lied." *Coleman*, 158 Ill. 2d at 346-47.[2]

¶ 105 Similarly, in the case at bar, the State's comments did not indicate that to acquit defendant, the jury needed to believe that the State's witnesses were lying, and so did not misstate the law. Additionally, like in *Coleman*, the State's comments were a direct response to defense counsel's closing argument that T.T. had lied and did not inform the jury that defendant had a burden of proof. Accordingly, we find no error in the State's comments.

¶ 106 We find defendant's reliance on *People v. Miller*, 302 Ill. App. 3d 487 (1998), to be unpersuasive. There, the court considered the prosecutor's statement that " '[t]o believe that [the defendant] did not commit this murder *** you have to think that his own daughter and that his-the grandmother [*sic*] of his own daughter, *** they all got together and they are making things up, they are adding things, they are lying, trying to put a case on [the defendant] and let the real killer go free.' " (Emphases omitted.) *Miller*, 302 Ill. App. 3d at 496. The court determined that, "in effect, the prosecutor informed the jurors that in order to reach a not guilty verdict they would have to find that all the State's witnesses had lied," which was error. *Miller*, 302 Ill. App. 3d at 498. The court noted that the statement was particularly misleading since none of the witnesses had seen the shooting at issue and the defendant had argued that the witnesses were mistaken. *Miller*, 302 Ill. App. 3d at 498.

¶ 107 Here, by contrast, the State never said, or even implied, that in order to acquit defendant, the jury needed to believe that the State's witnesses were lying. Instead, the State said that *in order to believe that T.T. was lying*, the jury needed to believe that other witnesses were also

[2] The *Coleman* court did find error, in that the defendant's testimony did not contradict *all* of the State's witnesses as the State had argued, which it found was an improper comment on the evidence, but the court also found that the statement did not result in substantial prejudice. *Coleman*, 158 Ill. 2d at 347.

lying. Additionally, as noted, defense counsel specifically argued that T.T. was lying, not that she was mistaken, unlike in *Miller*. Accordingly, we do not find *Miller* persuasive and continue to find no error.

¶ 108 E. Cumulative Error

¶ 109 Defendant also argues that, even if each comment in isolation does not constitute reversible error, the cumulative impact of the statements requires reversal. We do not find this argument persuasive. "Where the alleged errors do not amount to reversible error on any individual issue, there generally is no cumulative error." *People v. Moore*, 358 Ill. App. 3d 683, 695 (2005) (citing *People v. Foster*, 322 Ill. App. 3d 780, 791 (2000)). Here, we cannot find that the cumulative impact of the State's closing argument requires reversal and, accordingly, affirm defendant's conviction.

¶ 110 F. Ineffective Assistance of Counsel

¶ 111 Finally, defendant argues that his trial counsel was ineffective for failing to object to the State's closing argument, thereby waiving the issue on appeal. The Illinois Supreme Court has held that, to determine whether a defendant was denied his or her right to effective assistance of counsel, an appellate court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, a defendant must prove both (1) his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness; and (2) absent these errors, there was a reasonable probability that his trial would have resulted in a different outcome. *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94).

¶ 112 Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing professional norms." *Colon,* 225 Ill. 2d at 135; *People v. Evans,* 209 Ill. 2d 194, 220 (2004). Under the second prong, the defendant must show that, "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon,* 225 Ill. 2d at 135; *Evans,* 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans,* 209 Ill. 2d at 220; *Colon,* 225 Ill. 2d at 135. In other words, the defendant was prejudiced by his attorney's performance.

¶ 113 To prevail, the defendant must satisfy both prongs of the *Strickland* test. *Colon,* 225 Ill. 2d at 135; *Evans,* 209 Ill. 2d at 220. "That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham,* 206 Ill. 2d 465, 476 (2003). We do not need to consider the first prong of the *Strickland* test when the second prong cannot be satisfied. *Graham,* 206 Ill. 2d at 476.

¶ 114 In the case at bar, we cannot say that defense counsel was ineffective. As we noted, none of the challenged comments in the State's closing argument were improper. Thus, defense counsel's performance in failing to object to them did not fall below an objective standard of reasonableness and defendant was not prejudiced by the failure to object. Consequently, defense counsel was not ineffective in failing to properly preserve the issues on appeal.

¶ 115 CONCLUSION

¶ 116 For the reasons set forth above, we find: (1) the State proved that defendant was T.T.'s father beyond a reasonable doubt; (2) the jury was not encouraged to convict on the basis of touching over clothing; and (3) the State's closing argument was not improper.

¶ 117 Affirmed.