



a reasonable doubt. We affirm.

¶ 3 The evidence presented at defendant's second trial revealed that the victim worked as a desk clerk at a hotel in Vienna, Illinois. On September 9, 2000, the victim arrived to work around 1 a.m. When the next clerk arrived to replace her at 6:15 a.m., the victim was missing and the cash drawer was empty. Around 4 p.m. that same day, the victim was brought back to the hotel by an acquaintance who had found her walking along a nearby interstate. She was crying, shaking, and visibly upset and had to be helped inside. The victim told everyone that she had been raped and that the man had had a knife.

¶ 4 According to the victim, at around 2 a.m. while she was working at the front desk of the hotel, a man came through the hallway. He walked up to the counter and asked for aspirin, claiming to have had a headache. As the victim turned around to get the aspirin, the man came over the front desk and placed his hand over her mouth. He then ordered her to give him all the money from the register. After stuffing the money into his pockets, he took the victim to a white SUV in the hotel parking lot and told her he would not hurt her if she did not fight him. He then opened the driver's door, shoved her into the passenger seat, took a seat belt, wrapped it around the victim's neck, and pulled her down into his lap as they drove out of the lot. The victim claimed that the passenger door handle had a piece of plastic on it to prevent her from opening the door.

¶ 5 The man, defendant, drove onto the interstate toward Kentucky but soon exited the interstate and drove down a dirt road on farmland to a wooded area. He then stopped the vehicle, pulled the money out of his pockets, and began to count it. He also pulled out a pocketknife and opened it. The victim asked if he was going to kill her, to which defendant responded that if she did not try anything, he would not kill her. Defendant got out of the vehicle and took the victim to the rear cargo area of the vehicle. Using another piece of seatbelt, he tied her hands above her to the vehicle. He then took off her shorts, underwear,

shoes, and socks. After taking two more pieces of seatbelt, he wrapped them around each of her legs and tied them to each side of the vehicle. He pulled down his pants and tried to enter her vagina. He was unable to do so at first, so he spit on his hand and rubbed it on his penis and attempted to enter again. Being unable to do so again, he licked her vagina with his tongue before attempting once more. This time he was successful. After he finished, he untied her, placed her back in the passenger seat of the vehicle, and tied her up once again. He then got in the rear cargo area alone and went to sleep. When the sun came up, he got back out of the vehicle and came up to the driver's side. He told the victim that he had to make everybody else suffer because he suffered. He then got some lotion out of the console of the vehicle, pulled the victim back out, and took her back to the rear cargo area and raped her again. During this second attack, the victim observed a knife in the rear cargo area lying beside her. After being poked in the chest by the victim's name tag, defendant removed it and threw it out of the vehicle. He later took the victim back to the passenger seat and tied her up once again. This time, however, he gave her back her clothes. The victim asked if she could go to the bathroom and walk around a little bit. Defendant agreed and she was allowed out of the car. While the victim was outside the vehicle, both heard the engine of a four-wheeler driving nearby. Defendant jumped into the vehicle and drove away, leaving the victim behind. The victim ran through the fields and walked to the interstate, where she started flagging down cars. She was picked up by an acquaintance who happened to be passing by the area and noticed her.

¶ 6 The testimony from defendant's first trial, as read into evidence at his second trial, confirmed much of the victim's testimony. Defendant had been staying in a wooded area for several days and ran out of money. On the evening of September 9, 2000, he went to the motel intending to rob the place, tie up the clerk, and leave her in the pool room. After discovering that the pool room was locked, he did not know what else to do but take the clerk

with him. He denied tying the seatbelt around the victim's neck but did admit to holding his hand on the seatbelt buckle so that she could not unfasten it. After deciding he should not release the victim until daylight, he drove back to his campsite and parked the vehicle. He proceeded to count the money. Concerned that the victim might use his knives against him, he allegedly took the knives along with the victim's shoes, put them on the back floorboard, and folded the back seat over the top of them so she could not get to them. After falling asleep, he later had sex with the victim believing that she was possibly consenting because she just laid there with her eyes closed. He denied using his fingers or tongue in or on her vagina. He later allowed her to put her clothes back on and walk around outside the car. When he heard a vehicle engine, he drove off, leaving the victim behind, and went to Nevada. In Nevada, he forced the police to shoot him before being taken into custody. After his arrest, he was diagnosed as a paranoid schizophrenic.

¶ 7 Other evidence revealed that the Nevada sheriff's crime scene investigator who searched the 1994 white Toyota Land Cruiser found inside the vehicle in defendant's possession at the time of his arrest two pocketknives and two seatbelts cut from the right rear seat and trunk area of the vehicle. An investigator with the Illinois State Police who worked the campsite where the victim was held and assaulted found car parts, including seatbelts, in the grass nearby as well as the victim's employee name tag among the food wrapper debris inside the tree line. At the conclusion of all the evidence presented, the jury found defendant guilty of three counts of aggravated criminal sexual assault and kidnaping.

¶ 8 Defendant first argues on appeal that he was denied his constitutional right to a speedy trial. Defendant points out that our mandate remanding his cause was filed by the circuit court on November 3, 2003. He, however, was not brought to Illinois until February 13, 2006, more than two years after the mandate was filed, and did not appear before the circuit court until February 23, 2006. He further points out that he filed a *pro se* motion to dismiss

the charges on October 6, 2004, while still being held in Nevada. While a delay of more than one year does appear at first sight to be unreasonable (see *People v. Crane*, 195 Ill. 2d 42, 46-48, 743 N.E.2d 555, 562 (2001)), we do not believe defendant's constitutional right to a speedy trial was violated in this instance.

¶ 9 Both the United States Constitution and the Illinois Constitution guarantee an accused the right to a speedy trial. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. Under *Barker v. Wingo*, 407 U.S. 514 (1972), four factors are to be considered in determining whether a defendant's speedy trial right has been violated. *People v. Kaczmarek*, 207 Ill. 2d 288, 294-95, 798 N.E.2d 713, 718 (2003). The four factors are the length of delay, the reasons for the delay, the defendant's assertion of his right, and prejudice, if any, to the defendant. *Barker*, 407 U.S. at 530. In examining the four factors, no one factor is dispositive. *Kaczmarek*, 207 Ill. 2d at 295, 798 N.E.2d at 718.

¶ 10 Here the delay between our mandate and defendant's arrival in Illinois was over two years. During this time, defendant was serving a sentence in Nevada for other offenses, however, and contrary to defendant's assertions, his case was not ignored by the State between the date of remand and his return to Illinois. On December 2, 2003, a status hearing was held at which time an attorney was appointed to represent him and a bench warrant was issued. On February 26, 2004, additional counsel was appointed to represent defendant. On September 28, 2004, defendant's attorney was instructed to deal with the Nevada authorities to find out defendant's release date. On October 6, 2004, defendant filed his *pro se* motion to dismiss. Defendant's attorney later filed an amended motion to dismiss with prejudice on February 17, 2005, alleging violation of defendant's speedy trial rights. It was noted at that time that the assistant State's Attorney was to continue with extradition proceedings. Defendant had been provided with extradition forms several months prior to September 28, 2004, but defendant had not responded. The record shows that the process to bring defendant

back to Illinois for retrial was started as early as December 2, 2003, one month after his case was remanded. While awaiting retrial, defendant failed to contact his attorneys concerning the detainer process and failed to respond to communications pertaining to waiving extradition. Defendant had the opportunities and the tools to move his case along at a faster pace if he so desired. Moreover, when defendant decided to do something, he chose to file a *pro se* motion to dismiss. He, however, did not properly assert his right to a speedy trial through that motion as he was represented by counsel. A represented defendant cannot simultaneously proceed *pro se* and by counsel, and therefore his motion was not properly before the court. *People v. Flynn*, 341 Ill. App. 3d 813, 821, 792 N.E.2d 527, 535 (2003). Defense counsel filed an amended motion to dismiss requesting that the charges against defendant be dismissed with prejudice because of the State's alleged failure to bring him to trial in a timely manner, but it too did not demand a speedy trial. Defendant also did not follow the proper procedure under the interstate agreement on detainers (Agreement) (730 ILCS 5/3-8-9 (West 2004)). A defendant may not file a valid request for a speedy trial under the Agreement until a detainer is lodged against him by the State. See *People v. Daily*, 46 Ill. App. 3d 195, 200, 360 N.E.2d 1131, 1135-36 (1977). More importantly, however, we agree with the State that defendant did not suffer prejudice as a result of the delay. Defendant argues that, because of the delay, the appointed psychiatrist could not properly determine whether defendant was insane at the time of the kidnaping and sexual assaults. As the State points out, three years had already lapsed since the offenses took place when we remanded his cause for retrial. If we were to accept defendant's argument, there would have been no purpose for the remand in the first place. Additionally, defendant had already been evaluated by a psychiatrist in Nevada shortly after his arrest in that state who opined that defendant suffered from paranoid schizophrenia. The psychiatrist who examined defendant in Illinois was able to use this evaluation as the basis for his own conclusion that defendant

was mentally ill at the time of the offenses. We further note that even after defendant was returned to Illinois, defendant himself contributed to delaying his trial by nearly another two years. He filed numerous motions that delayed his trial, including two motions for substitution of judges. He also requested new counsel or requested to proceed *pro se* several times throughout the proceedings. Clearly, any delay did not impair the presentation of his defense. Defendant therefore cannot establish that he was prejudiced by the delay prior to retrial. Accordingly, after weighing all of the *Barker* factors, even though the delay between remand and retrial may have been lengthy, we conclude that defendant's constitutional right to a speedy trial was not violated.

¶ 11 Defendant also argues on appeal that his conviction for aggravated criminal sexual assault based upon digital penetration must be reversed because the evidence was insufficient to prove the element of digital penetration beyond a reasonable doubt. It is true that on retrial the victim did not testify that defendant digitally penetrated her. She did testify, however, that she was sexually assaulted by defendant three times. And, the evidence presented by the State clearly showed that defendant sexually penetrated the victim's vagina three distinct times. Defendant was charged with three counts of aggravated criminal sexual assault, each requiring the element of sexual penetration. The fact that the charges distinguished between separate acts of sexual penetration is of no import as any act within the statutory definition of sexual penetration fulfilled that element of the charges. See *People v. Smith*, 209 Ill. App. 3d 1043, 1059, 568 N.E.2d 482, 492 (1991). The type of penetration that constitutes the sexual assault is not an essential element of the offense. *People v. Tanner*, 142 Ill. App. 3d 165, 169, 491 N.E.2d 776, 778 (1986). See also *People v. Ross*, 395 Ill. App. 3d 660, 670-71, 917 N.E.2d 1111, 1121-22 (2009) (allegation as to the means used to accomplish aggravated criminal sexual assault is not an essential part but rather a formal part of indictment). The inclusion in the indictment of the type of sexual penetration was merely

surplusage. *People v. Carter*, 244 Ill. App. 3d 792, 803-04, 614 N.E.2d 452, 460-61 (1993). Again, the State presented evidence establishing that defendant kidnaped the victim and took her to a wooded area where he committed three acts of sexual penetration by the threat of force after displaying a pocketknife and telling the victim that he would not kill her if she did not try anything. The record supports the fact that each sexual assault rose to the level of aggravated criminal sexual assault because of defendant's display of a dangerous weapon. Each of the convictions for aggravated criminal sexual assault, therefore, were supported by the evidence presented by the State. In determining whether a conviction should be overturned due to insufficient evidence, a reviewing court must ask whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004). A rational trier of fact clearly could have found that the essential elements of the crimes here were proved beyond a reasonable doubt. Accordingly, defendant's convictions must be affirmed.

¶ 12 For the forgoing reasons, we affirm the judgment of the circuit court of Massac County.

¶ 13 Affirmed.