

No. 1-10-0125

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 07 CR 14502
DARNELL RICHMOND,	)	No. 07 CR 12014
	)	
Defendant-Appellant.	)	Honorable
	)	Timothy Joseph Joyce,
	)	Judge Presiding.

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**ORDER**

JUSTICE SALONE delivered the judgment of the court.  
Justices Neville and Murphy concurred in the judgment.

*HELD:* "Invited- error" doctrine precludes defendant from challenging joinder; defense counsel not ineffective for not objecting to joinder motion or not moving to sever cases; evidence was sufficient to prove defendant guilty of robbery; trial court did not err in granting the State's motion *in limine* pursuant to the Rape Shield Statute; void concurrent sentence requires remand.

¶ 1 Defendant was convicted of three counts of aggravated criminal sexual assault in

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case number 07 CR 14502, robbery in case number 07 CR 12014, and acquitted of attempted robbery in case number 07 CR 12024 following a joint jury trial. He was subsequently sentenced as a Class X offender to three consecutive 18-year prison terms for aggravated criminal sexual assault and a concurrent seven-year term for robbery. On appeal, defendant contends that: (1) the trial court erred in granting the State's motion to join three separate cases, alternatively, he contends that his private counsel was ineffective for not objecting to the joinder motion and that appointed counsel was ineffective for not moving to sever the cases; (2) he was not proven guilty of robbery beyond a reasonable doubt; and (3) the trial court erred in granting the State's motion *in limine* to bar questioning related to the victim's prior sexual activity. For the following reasons, we affirm in part; vacate defendant's void concurrent sentence and remand for resentencing.

## ¶ 2 BACKGROUND

¶ 3 Defendant was charged with three counts of aggravated criminal sexual assault with a weapon (07 CR 14502), one count of robbery (07 CR 12014), one count of attempted robbery (07 CR 12024), and one count of aggravated robbery (07 CR 14503). Prior to trial, the State moved to join the separate indictments on the basis that the crimes were related because they all occurred on April 9, 2007, within 90 minutes of each other in the same neighborhood, and all involved female students from the University of Chicago. Private defense counsel agreed after speaking with defendant, and the trial court granted the joinder motion as to all four cases.

¶ 4 Prior to trial, private counsel was replaced with appointed counsel. Appointed counsel filed a motion to sever the robbery case (07 CR 14503), which was granted. The remaining cases

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proceeded to trial in a joint proceeding.

¶ 5 Also prior to trial, the State filed a motion *in limine* to bar questioning relating to the aggravated criminal sexual assault victim's prior sexual activity pursuant to the Rape Shield Statute (725 ILCS 5/115-7(a) (West 2006)). According to the motion, during medical treatment after the alleged assault, the victim disclosed to medical personnel that she had engaged in sexual activity within 72 hours prior to the incident. The motion sought to bar any questioning related to such statements or activity, contending that the victim's prior sexual activity is irrelevant and inadmissible to explain the DNA evidence. Defendant responded that such evidence was constitutionally required for his defense that other possible DNA contributors existed. The trial court subsequently granted the motion *in limine*, and the trial commenced.

#### ¶ 6 Aggravated Criminal Sexual Assault

¶ 7 C.L., a University of Chicago student, testified that on April 9, 2007, between 8:50 p.m. and 9:10 p.m., she walked towards her home near 55th and South Everett Streets in Chicago after purchasing chicken and beer. Before she reached her apartment on Everett Street, however, someone approached her from behind and applied pressure to her back. The person, who she was able to identify as a male, said to her, "I have a gun. Don't move. Give me your money." After indicating that her wallet was inside her backpack, C.L. retrieved her wallet from her backpack and gave it to the man, who was still standing behind her. Simultaneously, a woman walked towards them and the man told C.L. to pretend that nothing was wrong and warned her that she "would be shot" if she did not obey him. After the woman passed and entered an apartment building, the man took C.L. into the parking lot next to the building. Once inside the

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lot, the man took C.L. to a spot between a van and dumpster and told her to drop her pants. C.L. complied, the man stood behind her and unzipped his pants. He then moved his penis around her anal area, made contact with her anus, and entered her vagina. C.L. unsuccessfully attempted to turn around and see the man's face several times, but was always pushed back into position.

C.L., who was having her menstrual cycle, was wearing a tampon and sensing that it irritated the man, removed it because she was afraid that he would hurt her. The man then forced C.L. to turn around and perform oral sex on him while he held C.L.'s head down and prevented her from looking at his face. A noise from the street ended the assault and the man subsequently took some of C.L.'s beer and removed between \$50 and \$100 from her wallet before leaving. C.L. waited to make certain that the man was gone before running out of the parking lot. She saw a man in the middle of the street and told him that she had been raped and robbed. The man drove C.L. to the University of Chicago Hospital emergency room, where nurse Gail Gray was assigned to her care. C.L. was initially reluctant to speak to Nurse Gray, but subsequently detailed the incident to her. Nurse Gray and a doctor then examined C.L. and completed a rape kit for her, including swabs from her mouth, vagina and anus.

¶ 8 While at the hospital, C.L. also spoke to Chicago Police Detective John Halloran and his partners. She detailed the incident to the detectives and described the layout of the parking lot. C.L. described penetration by the attacker, both before and after the removal of her tampon, and told the detectives that the attacker had rubbed his penis on both her anus and vagina. A suspect was subsequently detained and agreed to provide a buccal swab for DNA testing.

¶ 9 After leaving the hospital, C.L. went to the police station, where she described the

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offender as a black man, "taller than me," wearing a puffy black jacket with a fur-lined hood. She viewed a lineup that included the suspect, but was unable to make an identification. C.L. also viewed a photo array, but was still unable to make an identification. On June 21, 2007, detectives and an assistant State's attorney traveled to C.L.'s home in New Jersey to show her another array of photos, but she was still unable to make an identification. C.L. explained that she was never able to identify her attacker because she could not get a good look at him in the darkness. At trial, C.L. was unable to make an in-court identification of defendant.

¶ 10 Lauren Schubert, a forensic scientist with the Illinois State Police Forensic Sciences Command, testified that she examined the evidence in C.L.'s rape kit and found a mixture of two DNA profiles present on the anal swab. The major profile matched C.L. and the minor profile belonged to an unknown male. The initial suspect was excluded based on Schubert's analysis, and the unknown male's DNA profile was entered into the DNA database. In May 2007, the DNA database had associated the male DNA profile with defendant. Detective Robert Distasio and his partners subsequently took defendant into custody. On August 27, 2007, investigator Kevin O'Laughlin went to Cermak Hospital, where a buccal swab had been taken from defendant, and inventoried the swab.

¶ 11 After receiving defendant's swab and generating a DNA profile for defendant, Schubert concluded that defendant could not be excluded as having contributed to the male profile identified in the anal swab from C.L.'s rape kit, and that approximately 1 in 3.9 trillion black, 1 in 750 trillion white, and 1 in 1.8 quadrillion Hispanic unrelated individuals could not be excluded from having contributed to the male profile identified on the anal swab from C.L.'s rape kit.

¶ 12 Erin Luboff - Robbery

¶ 13 Erin Luboff testified that on the evening of April 9, 2007, she was talking on her mobile phone as she walked to her apartment building at 5330 South Kimbark in Chicago. When she reached her building, Luboff unlocked the outer door and entered the lighted vestibule area, which was approximately six feet by six feet. Still on the phone, Luboff "fiddled" with her keys while looking for the key to the inside door. Before she could unlock the door however, Luboff was grabbed by the hips from behind. She told her sister to "hang on" and closed her phone to hang it up. The person behind her said something before grabbing her phone. Luboff turned towards the person, who was male, and he pushed her into the wall. She hit the wall then slid on the floor in a semi-sitting position. The man then punched Luboff in the face and reached into her bag before running from the building without taking anything besides her phone. The landlord's son heard Luboff screaming and crying, and came out of his apartment to assist her. She went to a neighbor's apartment and called the police. An ambulance arrived shortly thereafter and Luboff was taken to the hospital, where an x-ray revealed that her nose was broken. Luboff testified that even though the attacker's hood was up, she was able to see his face and described him as "a black male, about six feet tall," who weighed about "108 [sic] pounds," was "in his 20's," and wore a "dark coat with fur on the hood."

¶ 14 The next morning, Luboff viewed a photo array that did not include the defendant. She picked a photograph but was unable to make an identification and was only "about 80% certain" he was the attacker. On May 23, 2007, Luboff viewed a lineup that included defendant. One man "stood out," but she was not certain. Luboff then remembered that she was wearing heels

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when she was attacked, and viewed the lineup again while standing on tiptoe. Luboff was then able to positively identify the attacker as defendant, who was six feet tall and weighed 160 pounds at the time of the lineup. However, Luboff was unable to make an in-court identification of defendant.

¶ 15 Chicago police detective Robert Distasio testified that Luboff positively identified defendant at the lineup as her attacker.

¶ 16 At the close of the State's evidence in the Luboff case, defendant moved for a directed finding based on her inability to identify him in-court as the offender. The trial court denied the motion.

#### ¶ 17 Attempted Robbery

¶ 18 The evidence presented established that on April 9, 2007, at approximately 8:30 p.m., defendant attempted to rob Lia Skalkos near 5602 South Lake Park in Chicago. Skalkos, a University of Chicago student, testified that as she stood alone waiting for a school bus, she was approached by a black male who she believed to be in his twenties, between 5 feet 11 inches and 6 feet in height and weighing approximately 165 pounds. She saw that he wore a black puffy jacket with a fur-lined hood. Skalkos became nervous as the man approached and stepped into the street to try and avoid him. However, the man grabbed her arm, reached inside of his jacket and said, "this is a stickup." Skalkos screamed and ran away. Skalkos called the police after she had run one or two blocks. She later described the incident and the offender to police, indicating that although there was a street light not far from where the incident occurred, it was "pretty

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dim."

¶ 19 Skalkos viewed photo arrays on April 10, 2007, and May 22, 2007, but was unable to identify her assailant. On May 23, 2007, Skalkos made a tentative identification of defendant from a physical lineup, but was unsure as to whether he was her assailant. At trial, Detective Distasio testified that Skalkos was "tentatively positive" that the person she identified in the lineup was the same person who attempted to rob her.

¶ 20 The State rested its case-in-chief. Defendant did not testify on his own behalf, nor did he present any witnesses. Defendant again moved for a directed finding, arguing that Skalkos' and Luboff's identification testimony was inadequate. The trial court denied the motion, finding that Detective Distasio's testimony that Luboff identified defendant in the lineup without qualification approximately six weeks after the incident was "imminently acceptable from an evidentiary standpoint" under Section 115-12 of the Code of Criminal Procedure, and that a reasonable jury that "chooses to believe that testimony... could find that constitutes proof beyond a reasonable doubt."

¶ 21 After deliberating, the jury found defendant guilty of three counts of aggravated criminal sexual assault and one count of robbery. Defendant was found not guilty of attempted robbery.

¶ 22 Defendant's post-trial motion was subsequently denied and the matter proceeded to sentencing.

¶ 23 Following evidence presented in aggravation and mitigation, defendant was sentenced as a Class X offender to three consecutive 18-year prison terms for aggravated criminal sexual assault and a concurrent seven-year sentence for robbery. After the denial of his motion to

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reconsider sentence, this timely appeal followed.

#### ¶ 24 DISCUSSION

¶ 25 On appeal, defendant contends that: (1) the trial court erred in granting the State's motion to join three separate cases, alternatively, he contends that his private counsel was ineffective for not objecting to the joinder motion and that appointed counsel was ineffective for not moving to sever the cases; (2) he was not proven guilty of robbery beyond a reasonable doubt; and (3) the trial court erred in granting the State's motion *in limine* to bar questioning related to the victim's prior sexual activity. The State additionally contends that defendant's concurrent sentence for robbery was void as a consecutive sentence was required by statute.

#### ¶ 26 The State's Joinder Motion

¶ 27 Defendant first contends that the trial court erred in granting the State's motion to join the attempted robbery, robbery, and aggravated criminal sexual assault cases and alternatively, that defense counsel was ineffective for failing to object to joinder and for failing to move to sever the three cases. While acknowledging that there was no objection made at trial and the issue was not raised in his posttrial motion, defendant nevertheless contends that this issue is reviewable under either prong of the plain-error doctrine.

¶ 28 The State, in contrast, contends that the invited error rule applies because defendant agreed to the joinder. Additionally, the State contends that defendant cannot establish plain error and that his ineffective assistance of counsel argument fails.

¶ 29 Where as here, a defendant fails to object to an error at trial and include the error in a posttrial motion he forfeits ordinary appellate review of that error. *People v. Jamison*, 238 Ill. 2d

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478, 484 (2010 (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988))). Consequently, defendant forfeited his challenge to the joinder of his cases.

¶ 30 Under Illinois' plain-error doctrine, however, a reviewing court may consider a forfeited claim 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. Hammonds*, 409 Ill. App. 3d 838, 854 (2011). However, before we reach the issue of plain error, we must first determine whether any error occurred. *Hammonds*, 409 Ill. App. 3d at 854. Because we find, for the reasons discussed below, that no error occurred, we do not need to perform a plain-error analysis. See *Hammonds*, 409 Ill. App. 3d at 854.

¶ 31 In the case at bar, the trial court granted the State's motion to join defendant's multiple cases. The record shows that defendant and his initial counsel consented to joinder and that defendant's subsequent counsel later sought to sever only one of the cases, which was granted.

¶ 32 After an examination of the record, we find that it was not error for the trial court to join defendant's multiple cases. A defendant may be placed on trial in one proceeding for separate offenses if those offenses are part of the same comprehensive transaction. 725 ILCS 5/111-4(a) (West 2008)). The trial court has substantial discretion in determining the propriety of joinder and its determination will not be reversed absent a showing of an abuse of discretion. *People v.*

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*Harris*, 147 Ill. App. 3d 891, 894 (1986). The general test of the appropriateness of joinder is whether the offenses were of a similar nature or were part of a single transaction or common scheme. *People v. Harmon*, 194 Ill. App. 3d 135, 139 (1990). The most important factors to consider in determining whether offenses are part of a comprehensive transaction are their proximity in time and location and whether there is common evidence with respect to the offenses. *Harmon*, 194 Ill. App. 3d at 139-40.

¶ 33 Here, the State's unchallenged joinder motion alleged that the offenses occurred in close proximity in both time and location, namely the Hyde Park neighborhood of Chicago during an approximately 90-minute time frame on April 9, 2007. Each of the victims gave a similar description of the offender and an article of clothing he was wearing, specifically a black puffy jacket with a fur-lined hood. The State further alleged that defendant's *modus operandi* was similar in that he initially sought to rob the victims. The State's allegations served to demonstrate that the offenses were part of a comprehensive transaction, and we again note that after consultation with defendant, defense counsel did not object to the State's motion to join the multiple cases. We therefore conclude that it was not error to join the cases and find that the trial court did not abuse its discretion in so doing.

¶ 34 We further agree with the State that even if the trial court's grant of the joinder motion was error, the invited error doctrine would apply to bar defendant's challenge to joinder on appeal.

¶ 35 Under the invited error doctrine, " a party cannot complain of error which that party induced the court to make or to which that party consented. The rationale behind this well-

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established rule is that it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings.' " *People v. McDonald*, 366 Ill. App. 3d 243, 248 (2006) (quoting *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004)). As such, we find that the invited error doctrine would apply to preclude defendant from challenging the joinder of his multiple cases.

¶ 36 Because we have concluded that there was no error in the trial court's decision to join the cases and further that any error was invited by defendant, it follows then that defendant's ineffective assistance of counsel claim must fail. Defendant contends that he was prejudiced by having to defend all three cases simultaneously because the defense theories conflicted with one another.

¶ 37 To establish a claim of ineffective assistance of counsel, the defendant must show counsel's performance was deficient and the deficient performance resulted in prejudice. *People v. Phipps*, 238 Ill. 2d 54, 65 (2010). Failure to demonstrate either deficient performance or prejudice is fatal to an ineffectiveness claim. *People v. Garcia*, 405 Ill. App. 3d 608, 617 (2010). Nonetheless, ineffectiveness claims can be disposed of on the prejudice prong alone, without establishing whether counsel's performance was deficient. *Garcia*, 405 Ill. App. 3d at 617.

¶ 38 Here, counsel's failure to object to joinder or failure to move for severance of the cases cannot establish either prong of an ineffective assistance claim if the joinder was not erroneous. See *Phipps*, 238 Ill. 2d at 65. We have already concluded that the joinder was not erroneous and that the invited error doctrine applies to the challenge of the trial court's decision on the joinder motion, thus defendant's claim of prejudice fails. Without a showing of prejudice, defendant

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cannot establish his claim of ineffective assistance of counsel.

¶ 39 Sufficiency of the Evidence

¶ 40 Defendant next contends that the State failed to prove him guilty of robbery beyond a reasonable doubt. He argues that the complaining witness, Luboff, could not remember whom she picked out of the physical lineup, could not make an in-court identification, and the only other evidence connecting him to the offense was the description of a man wearing a black puffy coat with a fur hood, which was never recovered or presented in court.

¶ 41 When a court reviews a challenge to the sufficiency of the evidence, the relevant question 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. *People v. Lee*, 376 Ill. App. 3d 951, 954-55 (2007). A person commits robbery when he takes property from the person or presence of another by the use of force or threatening the imminent use of force. 720 ILCS 5/18-1(a) (West 2008); *People v. Runge*, 346 Ill. App. 3d 500, 505 (2004).

¶ 42 The prosecution has the burden of proving beyond a reasonable doubt the identity of the person who committed the crime. *In re Keith C.*, 378 Ill. App. 3d 252, 257-58 (2007). The reliability of a witness's identification of a defendant is a question for the trier of fact. *Keith C.*, 378 Ill. App. 3d at 258. Furthermore, it is the function of the trier of fact to assess the credibility of the witness, the weight to be given their testimony, and the inferences to be drawn from the evidence. *Keith C.*, 378 Ill. App. 3d at 258. The trier of fact must also resolve any conflicts or inconsistencies in the evidence. *Keith C.*, 378 Ill. App. 3d at 258.

¶ 43 In the case at bar, Luboff unequivocally described the events surrounding her robbery at

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trial including a description of the offender given to the police at the time of the offense. The evidence established that she was accosted in the vestibule of her apartment building as she attempted to enter the second security door. She was grabbed, pushed, and punched and her cellular phone was taken. Luboff admitted that although she made a tentative identification from a photo array which was not defendant, she was subsequently able to make a positive identification of defendant during an in-person lineup. Her identification of defendant at the in-person lineup was corroborated by Detective Distasio's testimony at trial. Defendant focuses on Luboff's inability to make an in-court identification and the fact that the black coat was not recovered as reasonable doubt of his guilt. We disagree. First, the State characterized Luboff's failure to identify defendant in-court as the offender as resulting from the passage of time between the date of the offense and the date of trial. The lapse of time goes only to the weight of the testimony, a question for the jury, and does not destroy the witness's credibility. See *People v. Austin*, 328 Ill. App. 3d 798, 805 (2002). Further, despite defendant's contentions to the contrary, Luboff's testimony was not the only evidence presented against him as the trials for the separate offenses were joined together. Thus, all of the evidence presented in each case was before the jury, including the similar descriptions of the offender, as well as the manner in which the offenses were committed. We conclude that all of the evidence presented at trial, viewed in the light most favorable to the State, was sufficient to find defendant guilty of robbery beyond a reasonable doubt.

¶ 44 Motion *in Limine* - Rape Shield Statute

¶ 45 Defendant further contends that he was denied the right to cross-examine and the right to

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present a defense where the court refused to allow him to question the complaining witness or the State's DNA expert about a possible DNA contributor other than himself due to an improper application of the rape shield statute (725 ILCS 5/115-7(a) (West 2008)).

¶ 46 Evidentiary rulings are reviewed for abuse of discretion. *People v. Santos*, 211 Ill. 2d 395, 401 (2004). Under the rape shield statute, the prior sexual activity or reputation of the alleged victim or corroborating witness in a sexual assault case is inadmissible, except (1) as evidence concerning the past sexual conduct between the alleged victim and the defendant, when offered to show consent, or (2) when "constitutionally required to be admitted." 725 ILCS 5/115-7(a) (West 2008). Thus, the statute absolutely bars evidence of the victim's prior sexual activity or reputation unless one of the two exceptions is present. *Santos*, 211 Ill. 2d at 401-02.

¶ 47 In the case at bar, there was no evidence of any past sexual activity between the alleged victim and defendant, so the first exception does not apply. Defendant contends that the second exception applies because the trial court's grant of the State's motion *in limine* violated his constitutional right to confront witnesses and consequently denied him a fair trial.

¶ 48 A defendant has a right, pursuant to the confrontation clause in the Sixth Amendment, to cross-examine a witness in order to show motive or bias or other factors which might influence testimony. *People v. Davis*, 337 Ill. App. 3d 977, 984 (2003). However, the scope of cross-examination and the admissibility of evidence are within the discretion of the trial court, and we will not disturb its ruling on review absent a clear showing of abuse of discretion. *Davis*, 337 Ill. App. 3d at 984-85.

¶ 49 In *People v. Sandoval*, 135 Ill. 2d 159, 175 (1990), the Illinois Supreme Court recognized

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that a defendant's constitutional right to confront witnesses, must, in certain circumstances, supercede the statutory exclusion. The "rape shield" statute was amended following the *Sandoval* decision to provide for the second exception of constitutional requirement. *Davis*, 337 Ill. App. 3d at 985. A defendant's constitutional right to cross-examine a witness is not defeated by the statute where the evidence of a victim's past sexual conduct is relevant and tends to establish bias, motive, or prejudice. *Sandoval*, 135 Ill. 2d at 174-75 (citing *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974)). See also *People v. Averhart*, 311 Ill. App. 3d 492, 497 (1999) (Limitation of a defendant's cross-examination of the bias or motive of a witness may violate a defendant's constitutional right to confront the witnesses against him).

¶ 50 As the supreme court noted in *Sandoval*, defendant's right of confrontation necessarily includes the right to cross-examine witnesses, but that right does not extend to matters which are irrelevant and have little or no probative value. *Sandoval*, 135 Ill. 2d at 178 (citing *People v. Cornes*, 80 Ill. App. 3d 166, 175-76 (1980)). A defendant establishes a violation of his rights under the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show bias, and thereby expose the jury to facts from which it could reasonably draw inferences about the witness's reliability. *People v. Prevo*, 302 Ill. App. 3d 1038, 1047 (1999).

¶ 51 Therefore, in order to be "constitutionally required," the evidence sought to be introduced by defendant had to be relevant and establish bias, motive, or prejudice. This court has previously held that a complainant's past sexual conduct has no bearing on whether she consented to sexual relations with defendant, and thus is irrelevant. *People v. Buford*, 110 Ill.

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App. 3d 46, 52 (1982). The same rule applies in the present case. Evidence of C.L.'s prior sexual activity does not establish bias, motive, or prejudice. Nor would it have added any information which could have helped the jury decide whether she consented to sex with this defendant or whether or not the DNA evidence excluded defendant as the offender. In fact, the testimony at trial established that the DNA evidence could not exclude defendant. Defendant's arguments to the contrary are of no consequence as they merely attempt to indirectly place evidence of the complainant's prior sexual activity before the jury. As such, we conclude that the second exception to the rape shield statute does not apply in this case. Accordingly, the trial court did not abuse its discretion in applying the rape shield statute to exclude evidence of C.L.'s prior sexual activity.

¶ 52 Further, defendant's reliance on *People v. Starks*, 365 Ill. App. 3d 592 (2006) is misplaced. In *Starks*, a post-conviction appeal, defendant filed a post-conviction petition alleging that post-conviction DNA test results were contrary to the trial testimony of the State's serologist, because the later test results excluded defendant as the source of semen on the victim's vaginal swab and underwear. *Starks*, 365 Ill. App. 3d at 596. Using the review provided for at the third stage of post-conviction proceedings, this court determined that the trial court should have determined whether the nonmatched DNA evidence is so conclusive that it would probably have changed the outcome on retrial. *Starks*, 365 Ill. App. 3d at 598. The State argued that the semen evidence found on the victim's underwear was not materially relevant to defendant's claim of innocence and would not have advanced his cause at the time of trial, thus would be inadmissible under the rape shield statute. *Starks*, 365 Ill. App. 3d at 600. This court disagreed,

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finding that the State used the rape shield statute to bar testimony on defendant's behalf despite the combination of the victim's impeachment by her admission she had not been sexually assaulted and the untruthful or incorrect testimony of the State's own expert regarding the serology results. *Starks*, 365 Ill. App. 3d at 600. Finding that the evidence was materially relevant, this court determined that "the serology results as they pertained to defendant, the use of incorrect expert testimony, the impeachment of the victim, and the preclusion of a defense by the offensive use of the rape shield statute, resulted in the denial of defendant's constitutional rights so as to be more than an adequate basis to reverse the trial court's dismissal of defendant's post[-]conviction petition for a new trial." *Starks*, 365 Ill. App. 3d at 600.

¶ 53 The circumstances presented in *Starks* are not the circumstances presented in this case. As stated previously, C.L.'s prior sexual history was irrelevant to whether or not she consented to sexual activity with defendant. Further, the DNA evidence did not exclude defendant as a contributor, and the jury had before it the DNA evidence from C.L.'s anal swab which indicated that defendant was not a conclusive match. Thus, evidence of C.L.'s prior sexual history would have only been collateral to the underlying issue raised at trial. Additionally, there was no evidence that the State's expert testified falsely, as in the *Starks* case. As such, we find *Starks* to be distinguishable from the instant case.

#### ¶ 54 Void Concurrent Sentence

¶ 55 Although not raised on appeal by defendant, the State notes that the trial court erred when it sentenced defendant to a concurrent seven-year sentence for robbery because section 5-8-4 of the Unified Code of Corrections (730 ILCS 5/5-8-4 (West 2008)) requires consecutive

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sentencing. The State requests that this court consider defendant's concurrent sentence void and remand for resentencing on the robbery conviction.

¶ 56 Defendant responds in his reply brief that should his robbery conviction not be vacated, this court should remand and order the trial court to reduce his sentences for aggravated criminal sexual assault so that his aggregate sentence remains the same.

¶ 57 Whether a sentence is void is a question of law subject to *de novo* review. *People v. Donelson*, 2011 IL App (1st) 092594, ¶ 7.

¶ 58 Our supreme court has held that concurrent sentences are void where the statutory requirements for mandatory consecutive sentences are met. *Donelson*, 2011 IL App (1<sup>st</sup>) 092594, ¶ 9 (citing *People v. Bishop*, 218 Ill. 2d 232, 254 (2006)). A conviction of aggravated criminal sexual assault (720 ILCS 5/12-14 (West 2008)) triggers mandatory consecutive sentences where the defendant is convicted of multiple offenses regardless of whether the multiple offenses were committed during a single course of contact or in separate courses of conduct. *Donelson*, 2011 IL App (1<sup>st</sup>) 092594, ¶ 9 (citing *People v. Harris*, 203 Ill. 2d 111, 116-17 (2003)). Here, defendant was convicted of multiple counts of aggravated criminal sexual assault. As such, the court should have imposed a consecutive sentence for his robbery conviction, based on section 5-8-4. Accordingly, we find that the concurrent sentence is void (*Donelson*, 2011 IL App (1<sup>st</sup>) 092594, ¶ 9), and we remand for imposition of consecutive sentences (*People v. Flaughner*, 396 Ill. App. 3d 673, 681 (2009)).

#### ¶ 59 CONCLUSION

¶ 60 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed

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in part, concurrent sentence is vacated and the cause is remanded for resentencing on the robbery conviction.

¶ 61 Affirmed in part; vacated in part; remanded.