

No. 1-06-3738

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 19722
)	
JOHN BARNER,)	Honorable
)	Lawrence P. Fox,
Defendant-Appellant.)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Justice Palmer concurred in the judgment.
Presiding Justice Gordon dissented.

ORDER

¶ 1 *Held:* The trial court did not improperly deny defendant's motion for substitution of judge based on certain comments made by that judge which may have exhibited bias. Further, defendant was not denied a fair trial on the grounds that the State did not properly authenticate the equipment used to conduct a DNA analysis as being calibrated and functioning properly, or on the grounds of inappropriate prosecutorial commentary during closing arguments. Moreover, defendant's right

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to confrontation was not violated by witnesses' reliance on reports prepared by nontestifying forensic experts because such reports are not testimonial. Lastly, defendant was not denied effective assistance of counsel due to defense counsel's failure to introduce evidence that the victim had previously named another person as her attacker.

¶ 2 Pursuant to the supervisory order issued by the Illinois Supreme Court in *People v. Barner*, No. 112094 (2013), we vacated our previous order and reconsider our decision in light of *People v. Leach*, 2012 IL 111534.

¶ 3 Defendant, John Barner, appeals from his conviction for aggravated criminal sexual assault. At trial, the State presented forensic evidence to establish that defendant's DNA profile matched the DNA profile of sperm found on the victim's underwear when she was treated at the hospital immediately after the assault. This evidence was presented through the testimony of forensic scientists who did not personally perform the laboratory analysis but instead based their opinions on the analysis of other experts who did not testify at trial. Defendant contends on appeal that the court erred in admitting this forensic evidence because the State failed to establish a proper foundation for the admission of their opinions and because it purports to admit into evidence of the conclusions of the nontestifying experts thereby violating his right to confrontation under *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed 124 S.Ct. 1354 (2004). Defendant also claims that he was denied a fair trial because the trial judge, the Honorable Lawrence P. Fox, was prejudiced against him, a fact he claims is evidenced by numerous incidents that occurred both before and after the Honorable Bertina Lampkin denied defendant's motion for the substitution of Judge Fox for cause. Defendant additionally asserts that the State

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made improper, prejudicial statements during its closing argument, that his trial counsel rendered ineffective assistance, and that his sentencing mittimus must be corrected. For the reasons that follow, we affirm.

¶ 4 BACKGROUND

¶ 5 Prior to trial, defendant filed a petition for substitution of judge for cause. In that petition, defendant asserted that the judge assigned to the matter, the Honorable Lawrence P. Fox, was prejudiced against defendant and could not conduct defendant's trial in a fair and impartial manner. In support of this claim, defendant alleged that during a status hearing on June 6, 2006, defense counsel stated to the court that F.M., the "complainant," was currently on probation and the judge responded by stating that F.M. was a "victim" not merely a "complainant." The judge allegedly explained that he reached his conclusion after hearing F.M.'s "other crimes" testimony against defendant in another criminal trial. Defendant also contended that the judge was obligated to recuse himself from participation in defendant's trial because he previously sentenced F.M. to probation for a drug offense and was supervising her probation.

¶ 6 The petition was assigned to the Honorable Bertina Lampkin for ruling and a hearing on the matter was conducted on July 5, 2006. After considering the arguments of counsel, the court denied defendant's petition. In so doing, the court held that Judge Fox's comment that F.M. was a "victim" and not merely a "complainant" did not show that he was prejudiced against defendant noting:

"When the judge responded that this was a victim not merely a complainant, that is a correct statement, the State is the complaining witness not the witness. The State brings

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the charge and the State is viewed as the complainant and I think every public defender, every State's Attorney and almost every judge refers to the person who is the alleged victim as a quote victim unquote.

Doesn't mean that they made the decision that they are the victim, it's just the terminology that I have heard from almost every State's Attorney and almost every Public Defender."

¶ 7 Judge Lampkin also rejected defendant's claim that Judge Fox could not preside over defendant's trial in an impartial manner because he was supervising F.M.'s probation, stating: I can't imagine that that would hurt a defendant, it could only help them.

How a conviction of a complaining witness could inure to the defendant's detriment is beyond my comprehension. There is nothing demonstrating Judge Fox's prejudice against Mr. Barner so that petition for substitution of judge for cause is going to be denied and we will transfer this back to Judge Fox."

"As far as I am concerned the person being on probation [is] to Mr. Barner's benefit not to his detriment as the complaining witness has committed a crime and the judge knows it. How could that hurt the defendant that the complaining witness is a criminal?

¶ 8 Also before trial, the State filed motions *in limine* for leave to present incriminating forensic DNA evidence against defendant through the testimony of three experts: Greg DiDomenic, Edgardo Jove, and Jennifer Reynolds. In its motions, the State asserted that although the actual laboratory analysis in this case was completed by

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various non-testifying scientists working at the Illinois State Police Crime Laboratory and a private laboratory called Orchid Cellmark, it was permissible for the supervisors from those institutions, Jove, DiDomenic, and Reynolds, to testify as to results of that work. In response, defendant argued that the analysts who completed the actual DNA laboratory work were required to testify as to their findings and that the admission into evidence of the results of their work through the testimony of their supervisors violated defendant's right to confrontation under the Sixth Amendment of the United States Constitution (U.S. Const., amend. IV) as articulated by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed 124 S.Ct. 1354 (2004). After a hearing on the matter, the court rejected defendant's claim that the admission of the DNA evidence through the testimony of the supervisors would violate his rights under *Crawford* noting that the supervising experts would be subject to cross-examination. The court further held that the proffered testimony of those experts would not contravene the protections of *Crawford* because it would be "clearly allowed by Rule 703," which permits experts to rely on inadmissible evidence in forming their opinion as long as that evidence was of the type reasonably relied upon by experts in the field.

¶ 9 The matter then proceeded to jury selection. Defendant contends that the court again exhibited bias by improperly handling the *voir dire* of two potential jurors. The first of these potential jurors was Diane Watson. Upon examination by the court, Watson disclosed that she had been arrested for domestic violence for interceding in an altercation between her sister and another woman, but stated that the charge against her was dismissed. Later, defense counsel raised the fact that Watson's "rap sheet" indicated

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that she had been arrested for disorderly conduct on another occasion, a fact that she did not disclose. The court noted that the police report did not indicate the disposition of the disorderly conduct charge and stated “[a] disorderly with no disposition does not mean that she lied” by failing to disclose the arrest. The court called Watson back into the court room and the court asked her for her birthday to ensure the record was hers and asked her if she had been arrested in 1999. After Watson stated that she had not, the court denied defendant’s motion to strike her for cause stating “I don’t have any reason to doubt that she doesn’t remember being arrested. So your request to excuse her for cause is denied. I don’t know if it was her or not. I can’t tell.” In response, defense counsel stated, “Judge, again, we object. It seems as though, based on my prior experience in this courtroom, there now seems to be a different standard for the State’s objections and the Defense objections. And we are going to ask you to recuse yourself for your inability to operate fairly on both sides in this case.” The court declined to recuse himself from the case and defense counsel made an oral motion for substitution of judge for cause. The court then asked the State if it objected to dismissing Watson for cause and the State indicated that it did not. Watson was stricken, the oral motion for substitution of judge was apparently withdrawn, and jury selection continued.

¶ 10 When the court asked the venire if any of them would have trouble being impartial in a case of this type, another juror, Audrey Gilliam, raised her hand and the following colloquy was had:

THE COURT: Okay. And what do you want to say, ma’am?

MS. GILLIAM: Listening to the charges brought really made me think about it.

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THE COURT: Made you think about what?

MS. GILLIAM: Guilty

THE COURT: Okay—

MS. GILLIAM: And I heard all of what you said as far as questioning us.

THE COURT: Okay. Do you understand that this is a system where a charge is just a charge, and the State has to prove the charge against someone beyond a reasonable doubt?

MS. GILLIAM: Yes.

THE COURT: Now, your educational background is what, ma'am?

MS. GILLIAM: I'm a retired teacher.

THE COURT: Okay. So, you've got at least an undergraduate degree, I would think?

MS. GILLIAM: I have a graduate degree, doctoral.

THE COURT: Okay. So you're a highly educated person.

MS. GILLIAM: Yes.

THE COURT: Okay. So, you understand that as the Defendant sits there he is presumed innocent of the charges against him?

MS. GILLIAM: Yes.

THE COURT: And the State has to prove him guilty before the jury can return a verdict of jury.

MS. GILLIAM: Yes. It's just my personal prejudices.

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THE COURT: Okay. All right. Are you saying that as a highly educated retired school teacher that you cannot follow the law that you are bound to follow as a juror in a case like this? Is that what you're saying, Ms. Gilliam?

MS. GILLIAM: No, I'm saying that I don't feel I can be impartial. That's what I'm saying.

THE COURT: Okay. Well, you either can or you can't follow the law. Can you as a juror in this case listen to the evidence that's presented to you, okay, and decide whether you believe that the State has met their burden of proof and find the Defendant guilty if you feel that they have, or sign a verdict of not guilty if you feel they haven't? Can you do that?

MS. GILLIAM: Yes, I can do that.

THE COURT: Okay, fine.

MS. GILLIAM: I still have prejudices.

THE COURT: Okay. But not prejudices that would prevent you from being able to do that, correct?

MS. GILLIAM: Correct. In the way you phrase it, correct.

THE COURT: Okay. So, nevertheless, you would be able to do your duty as a juror in this case and listen to the evidence with an open mind and render what you felt was the correct verdict whether it be guilty or not guilty, correct?

MS. GILLIAM: I would be able to listen to the evidence presented.

THE COURT: And deliberate with the other members of the jury--

MS. GILLIAM: Yes.

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THE COURT: – as to whether you felt that the State has met their burden of proof or not?

MS. GILLIAM: Yes

¶ 11 Later, the court again examined Gilliam and asked if there was any reason why she could not be a fair and impartial juror and Gilliam stated, “I do have some serious, some deep feelings about the subject of whatever the charge is.” She then agreed, however, that if she were selected to be a juror, she could follow the law and be fair to both sides and render a fair verdict. Defense counsel also examined Gilliam and asked her if she honestly felt that she could be fair and impartial and give defendant a fair trial and she responded, “I hesitate because I can’t truthfully say yes or no. As I say, the way I feel about the subject, the strong feelings, I would try.” Defense counsel then asked, “Is it fair to say that you’re not—that you can be impartial” and Gilliam responded, “Yes, it’s fair to say.”

¶ 12 Defendant made a motion to strike Gilliam from the venire for cause because of her prior statements that she could not be impartial, but the court denied the motion stating, “[e]verybody has strong feelings about the subject matter of sexual assault. She is not alone in her strong feelings, obviously” and that she stated “over and over again that she’s a law-abiding citizen and would do her best to follow the law and that she could follow the law. She also stated over and over again that she’s a law-abiding citizen and would do her best to follow the law and that she could follow the law.” Defense counsel used a peremptory challenge to dismiss Gilliam from the venire and a jury was subsequently selected.

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¶ 13 At trial, F.M. testified that on March 13, 1999, at approximately 8:00 p.m., she was walking from the home of one of her sisters to the home of another sister on the south side of Chicago when she stopped to watch “a little prostitute girl” who was standing in the street, smoking drugs, and taking her clothes off. F.M. stated that she heard something behind her and turned to see if someone was there and saw nobody. After watching the girl for 30 to 40 minutes, F.M. heard a sound behind her again and turned to investigate when defendant grabbed her by the neck and dragged her towards a nearby abandoned building. She grabbed onto a fence outside the building and pleaded with defendant to not take her inside the building. Defendant would not let her go and repeatedly told her “Let go of the porch, bitch, or I’m going to break your neck.” F.M. let go of the porch and defendant dragged her inside the building. F.M. claimed that defendant made her walk through the building in the dark until they came into a room with a couch and a dirty mattress on the floor. Defendant then moved the couch in front of the door.

¶ 14 After they entered the room, defendant ordered her to take her clothes off and sit down on the mattress. F.M. asserted that she refused at first, but she complied with his order when he commanded her to do so again. F.M. testified that after she obeyed his order to lie on the mattress, he repeatedly had vaginal intercourse with her and forced her to perform oral sex on him until morning. F.M. asserted that in the morning, he helped her out of the building and let her go. As defendant was helping her out a window, his face was “a couple” inches from hers. F.M. positively identified defendant as her attacker in open court. After parting with defendant, F.M. ran to her sister’s house and

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was taken to the hospital for treatment. At the hospital, F.M. stated, a doctor swabbed her mouth and vagina and police took her panties, bra, t-shirt, and long underwear.

¶ 15 F.M. further testified that on May 30, 2002, nearly three years after the assault, officers showed her a photo array at her house and asked her if she recognized any of the men as her attacker and she made an identification. F.M. stated that she viewed a lineup at the police station on July 13, 2002, and she identified defendant as her attacker after the participants in the lineup individually stated the phrase “Bitch, if you don’t let go, I’ll break your neck.”

¶ 16 F.M. admitted that a warrant had been issued for her arrest due to her failure to appear at an earlier court hearing in the instant case and that she was incarcerated because of a drug conviction. F.M. explained, however, that she had failed to appear in court because she did not want to see defendant again. On cross-examination F.M. stated that defendant did not let her go to the bathroom and that she urinated on the floor. She also stated that she lost her keys during the incident. Defense counsel also questioned F.M. concerning the exact number of times each sex act was performed.

¶ 17 A registered nurse named Sharon Smith testified that on the morning of March 14, 1999, she treated F.M. at Provident Hospital. Smith averred that a doctor took swabs of F.M.’s vagina and mouth and that she sealed those swabs in a rape evidence kit and that she gave the kit to police along with F.M.’s panties and “longjohns.” Smith also stated that F.M. had an abrasion on her thigh and that her vagina was tender and bleeding. On cross-examination, Smith stated that F.M. exhibited no scratches, bruises,

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or other marks on her body other than on her thigh and that she suffered no tears in her vaginal area.

¶ 18 Detective Paulette Wright testified that she interviewed F.M. at the hospital the morning after the assault. Wright also averred that on March 15, 1999, she took F.M. to an abandoned building located at 5306 South Prairie Avenue to investigate and locate the set of keys F.M. had lost during the incident and F.M. took her to a room located on the third floor where the assault took place. Wright stated that the room contained a green couch, but that she did not see urine on the floor or a set of keys.

¶ 19 On April 29, 2002, Wright showed a photo array to F.M. at her home and F.M. “tentatively” identified Barner as her attacker. Wright stated that F.M. explained that she believed Barner’s picture depicted the man who assaulted her, but that she would need to see him in person to be “absolutely positive.” On July 13, 2002, after Barner was subsequently taken into police custody, F.M. viewed a lineup at the police station and stated that she thought defendant looked like her assailant, but that he looked thinner than he did at the time of the assault. F.M. asked if defendant could be ordered to say the phrase “I’ll break your neck bitch” and defendant was ordered to do so. After hearing defendant’s voice, F.M. said that defendant was “definitely” her attacker. On cross-examination, Wright stated that she received word that the DNA profile recovered from F.M.’s rape kit matched that of defendant in August of 1999, but could not find F.M. for approximately three years. During that time, Wright averred, she tried to contact F.M. by going to F.M.’s home and the homes of her sisters without success.

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¶ 20 The State then called G.W. as an “other crimes” witness. At the time of trial, G.W. was serving a sentence for convictions for drug possession and forgery. She testified that on the night of March 23, 2002, she was walking on 49th Street on the south side of Chicago, near the abandoned building where defendant assaulted F.M., when defendant approached her. G.W. stated that defendant attempted to make conversation with her, but she continued to walk. Defendant then grabbed her by the hood of her coat and began dragging her towards an abandoned building. She resisted, but defendant said “Shut up bitch, before I kill you.” G.W. averred that defendant ordered her to descend a stairwell into the abandoned building and when she refused, he hit her on the head with a beer bottle and pushed her down the stairs. G.W. testified that the fall broke her tail bone and one of her arms. Defendant pulled her to the back of the building and then ordered her to take her clothes off. He then had vaginal sex with her and forced her to perform oral sex on him repeatedly throughout the night. G.W. claimed that he let her go in the morning. G.W. stated that she later identified defendant in a police lineup.

¶ 21 Greg DiDomenic of the Illinois State Police Crime Laboratory testified for the State. After averring that his laboratory was accredited and followed national quality assurance guidelines for DNA analysis and that analysts employed by the laboratory are subject to periodic proficiency testing, DiDomenic was accepted by the court as an expert in the field of forensic DNA analysis. DiDomenic stated that he received a sexual assault kit containing vaginal and rectal swabs taken from F.M, F.M.’s underwear which was stained by semen, and a sample of F.M.’s blood. He specifically explained that he isolated F.M.’s DNA profile from the vaginal swab, but was unable to produce a profile

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for the donor of the sperm found on the vaginal or rectal swabs because each sample was of insufficient quantity to do so, but DiDomenic further stated that a DNA profile of the sperm donor was obtained from the semen stain on F.M.'s underwear and that the DNA profile matched that of defendant in a police database.

¶ 22 In reaching this conclusion, DiDomenic testified, over defense counsel's objection, that he reasonably relied on the work of two other analysts, namely Tanis Wildhaber and Joanne Olson. DiDomenic averred that he reviewed the laboratory notes produced by Wildhaber, which indicated that she received defendant's blood sample, preserved a portion of that sample, "dried it down" on filter paper, sealed it up, and placed it in storage all in compliance with procedural safeguards designed to ensure the integrity of the evidence. DiDomenic also reviewed the laboratory notes produced by Olson, which indicated that she was able to obtain a DNA profile from defendant's blood that was suitable for comparison. He stated that he was familiar with the procedure utilized by Olson and the safeguards that she followed to insure the integrity of the sample. Based upon his analysis of the sperm from the semen stain on F.M.'s underwear and the work of Wildhaber and Olson that produced defendant's DNA profile, DiDomenic averred that based upon his education, training, and work experience, he could opine within a reasonable degree of scientific certainty that the semen identified on the underwear was "consistent with having originated from John Barner."

¶ 23 On cross-examination, DiDomenic further explained that although he relied on their work, he did not observe Wildhaber or Olson execute their work and did not attempt to replicate their work by conducting the analysis again himself. He stated that he relied

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on the written notes that they made while working at the laboratory and explained that based on his examination of the notes of Wildhaber and Olson, his personal experiences working with them, and the fact that he received the same training and followed the same protocols as them, he agreed with their conclusions and believed that they “followed all of the procedures they should have in doing their work.”

¶ 24 The State also called Chicago police Detective Edgardo Jove, a group supervisor in the forensic biology DNA section of the Illinois State Police Science Center at Chicago. After being qualified as an expert in the field of forensic DNA analysis, Jove testified that he performed a “technical review” of analysis conducted by forensic chemist Sandra Lambatos in connection with this matter. Jove stated, over defense counsel’s objection, that based on his review of Lambatos’ laboratory notes he was able to conclude that she followed the scientific protocol established by the Illinois State Police, a protocol generally accepted in the forensic science community, in conducting her analysis. According to Jove, Lambatos performed a newer and more accurate form of DNA analysis than was completed by DiDomenic. Jove explained that this newer method, called the “short tandem repeat” method, was commonly accepted in the scientific community and compared 13 “areas of DNA” instead of the five “areas of DNA” analyzed under the method utilized by DiDomenic. Jove stated that Lambatos conducted DNA analysis on a semen stain from F.M.’s underwear and obtained a male DNA profile. Lambatos then compared that DNA profile to the “known standard of John Barner,” the defendant, and concluded that the two matched. Jove averred that defendant’s “known standard” was based on work completed by an analyst at an

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independent private laboratory called Orchid Cellmark located in Germantown, Maryland. Jove explained that the Illinois State Police Crime Laboratory had a standard practice of sending its DNA samples to Cellmark for analysis in order to decrease the “backlog of cases” requiring forensic analysis.

¶ 25 Jove also testified that he performed a “technical review” of the work done by Lambatos and the Cellmark analysts and concluded that the male DNA profile found in the semen stain on F.M.’s underwear matched that of defendant. He further opined that the DNA profile extracted from the semen stain would be “expected to occur in approximately one in 1.4 quadrillion black, one in 130 quadrillion white or one in 70 quadrillion Hispanic unrelated individuals.” On cross-examination, Jove admitted that he did not himself perform any laboratory work on the forensic evidence gathered in this case and did not try to duplicate the analysis completed by Cellmark.

¶ 26 Jennifer Reynolds, a former laboratory director at Cellmark also testified for the State. She testified that while she was employed at Cellmark, the laboratory was accredited by the American Society of Crime Laboratory Directors, Laboratory Accreditation Board, the American Association of Blood Banks, and the New York State Department of Health. Reynolds explained that the accreditation process is “incredibly involved,” and typically consists of a week-long audit by at least four members of the forensic community, who evaluate “everything from your physical laboratory space and how much space you’ve got available for certain functions to your protocols, to your staff, resumes and qualifications.”

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¶ 27 After being accepted by the court as an expert in the field of forensic DNA, Reynolds testified, over defense counsel's objection, that the Cellmark case file indicated that Cellmark received a sample of defendants' blood from the Illinois State Police. She also averred that she completed a "technical review" of the case file and reasonably relied on information contained therein. Reynolds claimed that the analysis performed by her employee on defendant's blood was of a type commonly accepted within the scientific community and followed proper protocols. When asked to explain this conclusion, Reynolds stated:

"I based this opinion on the case file and the control samples that were run with this case. There are controls that are processed alongside of case samples, and they all worked as expected. The laboratory notes are complete, and the data is interpretable, and I agree with the results that were reported."

¶ 28 She then averred that as a result of the forensic analysis completed at her laboratory, a DNA profile of defendant was produced and sent to the Illinois State Police. On cross-examination, Reynolds conceded that she did not complete any laboratory analysis of defendant's blood herself, but merely reviewed notes produced by another analyst who actually completed the work.

¶ 29 During closing arguments, the State summarized the evidence against defendant and commented upon certain of defense counsel's questions during the cross-examinations of the State's witnesses. In response to defense counsel's cross-examination of F.M. regarding the specific number of times defendant raped her vaginally and forced her to perform oral sex, the State commented:

“And let’s get one thing straight. [F.M.] is hysterical. She is being raped. She’s not sitting there with a notepad keeping charge of how many times so she could retell the events like some episode of Sex in the City. She is being raped. She’s not keeping track. She’s not keeping count. What is important is she remembers that she was violated over and over again by that man, and she came in here and testified to that.

And it’s not something that we make light of, that we joke around about or try and trip up. She was violated. She testified to that.”

¶ 30 In response, the defense argued in its closing argument that F.M. had consensual intercourse with defendant stating that she voluntarily met defendant and they had a “rendezvous.” Defense counsel continued:

“She [F.M.] has an intent to lie in this case. She goes off with John Barner. They stay the night together. At the [end] of the night, he doesn’t give her anything, no money, nothing. He leaves. She is alone, and she’s got to go back and explain to the one man who supports her, the only person she gets income from, where she has been all night and who she has been with. Ladies and gentlemen, she has an intent to lie in this case.

And not only does she have a motive to lie, she has a lot of commitment to this entire case. You heard Detective Wright told you she tried to get in touch with [F.M.] after this incident multiple times. She called her sisters, both sisters. She call[ed] the boyfriend. She called [F.M.]. She couldn’t get in touch with her. She had no contact from [the] woman for years. And not only did she have a lack of

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commitment after it happened, she had a lack of commitment to come in her to court to testify. You heard her say they had to arrest her and bring her in to get her to testify here in this case.”

¶ 31 Defense counsel also noted that F.M. was inconsistent in stating how many times defendant had sex with her and how many times he ejaculated. She also stated: “Also, watch her [F.M.’s] demeanor on the stand. If you notice when she came out, she seemed very upset. But as soon as the prosecutor was done, no more tears. She started having an attitude, started being evasive. Because it’s an act, ladies and gentlemen.” The defense continued:

“With respect to DNA, the DNA in this case points to one thing. And all the physical evidence that they collected points to one thing, the hairs, the fibers, the long johns, the panties, everything, it all points to [the] fact that these two people have sex. Nothing more. Nothing less. It doesn’t prove a rape occurred. It just proves they had sex.”

¶ 32 The defense further argued:

“And if the State really wanted to make a big deal about DNA, they should have brought in the people that actually did the test. Imagine, at the beginning of this case, Judge Fox told you, you’re welcome to take notes. You’re encouraged to take notes. But in the end, don’t rely on anybody else’s notes but your own. Why? Because somebody else might not take good notes, and they might not have the right answers. It’s the same with DNA evidence. If you’re going to bring in the person that did the notes, then bring them in to show what

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they did, what tests they performed, not somebody else who looked over their notes.”

¶ 33 The State then offered its rebuttal argument. As to the defense attack on F.M.’s demeanor on the stand, the prosecutors stated:

“You know what, when you saw [F.M.] testify, she testified clearly. She testified credibly.

Do you remember when she was being cross-examined, eventually, hey, it was obvious she started to shut down. She wasn’t going to sit there and be called a liar any more. She wasn’t going to sit there and have it made out that she’s the reason we’re here, she did something wrong.”

¶ 34 The State also stated “They can’t pick a theory. They’re throwing everything out there to see if something somehow sticks.” In response to defense counsel’s argument that F.M.’s failure to keep in touch with police officers and her reluctance to testify evidenced the fact that she fabricated her claims of rape, the State argued:

“She never wanted to see him again. Unfortunately, she’s brought back. Now she has to testify again. You think she is looking forward to reliving this nightmare again. Do you think she is looking forward to sitting in that witness stand 20 feet away from her attacker. You think she is looking forward to telling a roomful of strangers how this guy shoved his penis inside her vagina repeatedly, or do you think she’s looking forward to telling how this guy shoved his penis inside her mouth. You think she’s looking forward to testifying to all that. On

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top of that, you think she's looking forward to having somebody call her a liar up on that stand, make it look like she's the one at fault."

¶ 35 In response to defense counsel's argument that the State should have called the forensic analysts who actually completed the laboratory work to testify, the State asserted: "So ask yourself this, why are they even beating up on the DNA people. If it's consent, why are they beating up on them. Because they can't get away from the DNA now. So now all of a sudden, it's consent."

¶ 36 The jury found defendant guilty of two counts of aggravated criminal sexual assault. Defendant was subsequently sentenced to natural life imprisonment based upon his prior convictions for aggravated sexual assault and rape. The court also ordered that defendant's sentence be served consecutively, not concurrently, to a natural life term of imprisonment defendant received in a prior aggravated criminal sexual assault case. On December 13, 2006, defendant filed his notice of appeal. On December 15, 2006, the circuit court recalled defendant's case, stated that he had discovered that it was "inappropriate" to order two natural life terms to run consecutively, and ordered that the mittimus be corrected to reflect that the natural life sentence in this case would run concurrently with the natural life sentence imposed in the earlier conviction.

¶ 37 This court initially affirmed the judgment of the trial court in *People v. Barner*, Rule 23 Order No. 1-06-3738 (September 25, 2009), which we subsequently vacated pursuant to a supervisory order of the Illinois Supreme Court and reconsidered it in light of *People v. Williams*, 238 Ill. 2d 125 (2010), *aff'd*, 567 U.S. ___, 132 S. Ct. 2221 (2012). We again affirmed the trial court's decision in *People v. Barner*, Rule 23 Order No. 1-06-3738 (February 25, 2011),

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which was also later vacated pursuant to a new supervisory order from the Illinois Supreme Court in *People v. Barner*, No. 112094, and we now reconsider in light of *People v. Leach*, 2012 IL 111543.

¶ 38 ANALYSIS

¶ 39 On appeal, defendant advances six arguments. First, defendant argues that the court improperly denied his motion for substitution of judge for cause. Second, he contends that he was denied a fair trial when the State was permitted to present DNA evidence linking him to the assault on F.M. despite its failure to establish that the equipment used to conduct the DNA analysis was calibrated and functioning correctly. Third, defendant asserts that his right to confrontation under the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354 (2004), was violated when the State's forensic witnesses, who did not conduct laboratory analysis themselves, presented into evidence the conclusions of non-testifying forensic analysts who created defendant's DNA profile from a sample of his blood and a matching DNA profile from sperm found on F.M.'s underwear. Fourth, he contends that he was denied a fair trial when the prosecutor made various improper statements during closing arguments. Fifth, defendant asserts that he was provided with ineffective assistance of trial counsel when his attorney failed to introduce evidence that F.M. had previously named another man as her attacker. Sixth, defendant prays for this court to correct the mittimus in this case to reflect that his natural life sentence is to run concurrently, not consecutively to another natural life sentence imposed upon defendant in a different case. We will address each of these arguments in turn.

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¶ 40 Defendant first argues that the circuit court erred in denying his motion for substitution of judge for cause based on Judge Fox's off-the-record statement to defense counsel that F.M. was a "victim" and not a "complainant." The judge allegedly explained that he reached his conclusion after hearing F.M.'s "other crimes" testimony against defendant in another criminal trial. Defendant contends that this statement indicated that the judge had formed an opinion that defendant was guilty before hearing evidence at trial. As noted above, Judge Lampkin denied defendant's motion stating:

"When the judge responded that this was a victim not merely a complainant, that is a correct statement, the State is the complaining witness not the witness. The State brings the charge and the State is viewed as the complainant and I think every public defender, every State's Attorney and almost every judge refers to the person who is the alleged victim as a quote victim unquote."

Doesn't mean that they made the decision that they are the victim, it's just the terminology that I have heard from almost every State's Attorney and almost every Public Defender."

¶ 41 In order to prevail on a motion for substitution of judge for cause, a party must "demonstrate that there are facts and circumstances which indicate that the trial judge was prejudiced." *People v. Jones*, 219 Ill. 2d 1, 18 (2006). "Prejudice" is defined as " 'animosity, hostility, ill will, or distrust towards this defendant.' " *Jones*, 219 Ill. 2d at 18, quoting *People v. Patterson*, 192 Ill.2d 93, 131 (2000). The movant bears the burden of establishing actual prejudice, not just the possibility of prejudice and we will not reverse a trial court's determination on such a motion unless the court's finding was against the manifest weight of the

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evidence. *Jones*, 219 Ill. 2d at 18. Factual findings are against the manifest weight of the evidence “only when they are clearly erroneous or where the record commands an opposite conclusion.” *People v. Mercado*, 244 Ill. App. 3d 1040, 1047 (1993). “[A] judge who, before hearing a criminal case expresses conviction that the accused is guilty, cannot give that the accused a fair and impartial hearing, and is thereby disqualified to sit as a trial judge.” *People v. Robinson*, 18 Ill. App. 3d 804, 807 (1974).

¶ 42 On review, we find that Judge Lampkin’s decision denying defendant’s motion for substitution of Judge Fox was not contrary to the manifest weight of the evidence. Although Judge Fox’s comment that F.M. was a victim could possibly be interpreted as an indication that he believed F.M.’s testimony at the previous trial, we cannot say that the trial court’s decision to the contrary was clearly erroneous or that the record commands the opposite conclusion. In analyzing that statement, Judge Lampkin stated that “almost every State’s Attorney and almost every Public Defender” in her courthouse uses the term “victim” to refer to the individual who is the object of the misconduct charged against defendant without indicating a predetermination that those charges are in fact proven. She noted that in a criminal prosecution, the State, not any individual, is the “complainant,” and concluded that Judge Fox’s was technically correct when he stated that F.M. was a “victim” and not a “complainant.” That analysis was not contradicted by defendant and thus does not compel any conclusion contrary to that reached by Judge Lampkin.

¶ 43 Defendant nevertheless argues that in addition to the trial judge’s comment that F.M. was a “victim,” the fact that the trial judge was biased was evidenced by three other incidents that occurred after Judge Lampkin’s denial of his motion for substitution of judge. Defendant

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argues that the court's bias against the defense was evident when it refused to dismiss venireperson Diane Watson for cause for failing to disclose a previous arrest until defendant made an oral motion of substitution of judge and when it denied defendant's motion to dismiss venireperson Audrey Gilliam for cause even though she stated that she had "prejudices." Defendant also argues that Judge Fox revealed prejudice with his comment in regards to defendant's claim that the testimony of the State's DNA experts violated his right to confrontation under *Crawford* when he stated: "Let's be honest. What we're dealing with is the defense trying to call anybody—or the defense trying to force the State to call anybody and everybody who's had anything to do with the analysis of DNA evidence in this case in different states, in different labs, just to force the State to do that."

¶ 44 These claims were not objected to at trial and were not raised in a subsequent motion for substitution of judge, although defense counsel did respond to the court's denial of its motion to strike venireperson Diane Watson for cause by making an oral motion for substitution of judge, which, however, was apparently withdrawn when the State agreed to strike Watson for cause. Defendant's posttrial motion, however, did assert that the court's actions "both before and during the trial was that of an advocate, was far removed from impartial and often appeared more aggressive in the prosecution of Mr. Barner than even the prosecutors themselves." While generally the failure to object to an alleged error both at trial and in a posttrial motion results in the forfeiture of that issue on appeal (*People v. Jackson*, 250 Ill. App. 3d 192, 202 (1993)), "[b]ias in a judge is one of the few trial 'errors' that may not be deemed harmless" and the waiver rule "is less rigidly applied when the conduct of a judge is the basis for the appeal." *People v. Ramos*, 318 Ill. App. 3d 181, 188 (2000); *Jackson*, 250 Ill. App. 3d at 202.

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Consequently, we may consider the merits of defendant's claim that the trial judge was biased regardless of his failure to object to the bias during trial.

¶ 45 “A defendant's right to an unbiased, open-minded trier of fact is rooted in the constitutional guaranty of due process of law.” *People v. Johnson*, 199 Ill. App. 3d 798, 806 (1990). “In order to show bias or prejudice on the part of the trial court toward one of the parties, however, the record must show that there was active personal animosity, hostility, ill will or distrust toward the defendant and, absent such a showing, a court will not conclude that there was actual prejudice which prevented or interfered with a fair hearing.” *Johnson*, 199 Ill. App. 3d at 806.

¶ 46 We therefore return to defendant's argument that the trial judge's bias was evidenced by his refusal to dismiss two potential jurors. As previously noted, the first juror, Diane Watson, stated that she did not remember being arrested for disorderly conduct, even though a police report indicated that she was. The court noted that the police report did not list a disposition of the charge and stated “I don't have any reason to doubt that she doesn't remember being arrested.” These remarks suggest that the court simply did not believe that Watson lied about her previous conviction or that she should be disqualified from service on the jury, and do not indicate, on their face, any bias against defendant. The mere fact that this ruling did not go in defendant's favor does not establish bias. *People v. Moore*, 199 Ill. App. 3d 747, 768 (1990) (“mere fact that a judge has in a previous proceeding ruled adversely to the defendant does not disqualify the judge”).

¶ 47 Likewise, the failure of the trial judge to dismiss the second juror, Audrey Gilliam, who stated that she had “personal prejudices” does not compel a conclusion of judicial bias.

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Although in elaborating that she had “personal prejudices,” Gilliam stated that she had “deep, serious” reservations about the nature of the crime, she repeatedly averred that she could be impartial, follow the law, and give defendant a fair trial. In denying defense counsel’s request that Gilliam be excused for cause, the court stated that “Everybody has strong feelings about the subject matter of sexual assault. She is not alone in her strong feelings, obviously” and that she stated “over and over again that she’s a law-abiding citizen and would do her best to follow the law and that she could follow the law.” While the expression of these feelings by the juror could arguably support removal of that juror for cause, defendant does not claim the failure to remove for cause to be error, particularly because she was dismissed through defendant’s peremptory challenge and did not provide a basis for reversible error. Defendant only argues that the trial judge’s failure to act evidences his own personal bias. The judge’s ruling on this motion, however, does not compel the conclusion that he was biased against defendant. The judge may simply have believed that Gilliam’s expressions of intent to follow the law were sufficient to withstand removal for cause. While this supposition may well have been erroneous, incorrect rulings are insufficient to establish bias. See *U.S. v. Gallagher*, 576 F.2d 1028, 1039 (3d Cir. 1978) (“incorrect rulings do not prove that a judge is biased or prejudiced although errors may require a new trial”); *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (S.C. Ct. App. 1996) (“The fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings”); *Estudillo v. Security Loan & Trust Co of Southern California*, 158 Cal. 66, 70, 109 P. 884, 885 (Cal. 1910) (fact that trial court committed error alone “would not be sufficient to show bias on his part” for purposes of motion for change of venue).

¶ 48 Defendant also claimed that “the judge implied that Barner’s wholly meritorious argument attacking admission of DNA evidence via testimonial hearsay *** was motivated by bad faith” when he stated “Let’s be honest. What we’re dealing with is the defense trying to call anybody—or the defense trying to force the State to call anybody and everybody who’s had anything to do with the analysis of DNA evidence in this case in different states, in different labs, just to force the State to do that.” That statement alone does not compel a finding that the trial judge was prejudiced. Instead, the trial court may have been commenting about the practical ramifications of defendant’s argument that all technicians who participated in the analysis of the DNA materials in this case would need to testify. Indeed, we note that this very concern was the subject of both the majority and dissenting opinions in the United States Supreme Court’s decision in the related case of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). In *Melendez-Diaz*, the majority held that the State could not, consistent with the Confrontation Clause, prove that the substance found in defendant’s possession was cocaine merely by offering into evidence a certificate completed by a forensic scientist stating the weight and identity of the substance, but instead had to present that expert for cross-examination. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. at 2532. In his dissent, Justice Kennedy argued that such a rule “threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician *** simply does not or cannot appear” and suggested that “heavy societal costs” would accompany the requirement that forensic analysts testify at trial, namely in the form of a great time burden placed upon such experts. *Melendez-Diaz*, 129 S. Ct.

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at 2549-2550 (KENNEDY, J., dissenting). In response to this argument advanced by the dissent, Justice Scalia, writing for the majority, clarified:

“we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. While the dissent is correct that ‘[i]t is the obligation of the prosecution to establish the chain of custody,’ *** this does not mean that everyone who laid hands on the evidence must be called.” *Melendez-Diaz*, 129 S. Ct. at 2532, n.1.

¶ 49 Thus, the trial judge’s comments here are insufficient to establish that he was prejudiced against defendant and there is no indication that the trial judge would not apply the correct ruling regardless of the reasons for the law invoked.

¶ 50 While defendant has uncovered four instances of possible manifestation of judicial bias, no single instance is sufficient to compel that conclusion. These incidents constitute a small fraction of the interactions between the parties and defendant’s focus on those incidences ignores the fact that the court ruled in defendant’s favor on numerous occasions, a fact which defendant concedes.

¶ 51 Although some of the judge’s comments may have been inartful and best not said, they do not compel the conclusion that Judge Fox abandoned his role as an impartial jurist or that defendant was deprived of a fair trial.

¶ 52 Defendant next argues that he was denied a fair trial where the State failed to establish that the equipment used to conduct the DNA analysis was calibrated and functioning properly. As noted above, the State called three forensic experts: DiDomenic, Jove, and Reynolds.

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DiDomenic of the Illinois State Police testified that using a particular widely-accepted method of DNA analysis he created a DNA profile from the sperm found on F.M.'s underwear and opined that the DNA profile matched the defendant's DNA profile, which was created through the work of Wildhaber and Olson. DiDomenic testified that he reviewed the notes of Wildhaber and Olson and concluded that the two technicians followed correct protocol in their work. Jove, also of the Illinois State Police, testified that the forensic evidence in this case was analyzed using the newer and more accurate "short tandem repeat" method and also linked defendant to the victim. Jove stated that he conducted a technical review of the work of another analyst named Lambatos, who developed the DNA profile for the sperm found on F.M.'s underwear and concluded that she followed the scientific protocol established by the Illinois State Police. Jove averred that the DNA profile from the underwear matched the DNA profile of defendant developed by Cellmark. Reynolds, a director at Cellmark, testified that she completed a technical review of the development of defendant's DNA profile and concluded that all applicable protocols were followed.

¶ 53 Defendant specifically asserts the State elicited no evidence regarding the procedures, if any, used by the Illinois State Police or Cellmark laboratories to ensure that the equipment used to conduct the DNA analysis in this case was functioning properly and therefore failed to lay an adequate foundation for the admission into evidence of those test results. Defendant further notes that the State did not even present evidence as to what type of equipment was used in the course of the analysis.

¶ 54 In support of this argument, defendant cites our decision in *People v. Raney*, 324 Ill. App. 3d 703, 707 (2001). In that case, defendant was convicted of possession of a controlled

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substance with intent to deliver based, in part, on the admission into evidence of the results of scientific testing completed on a chromatography mass spectrometer (GCMS) machine showing that the substance was cocaine. *Raney*, 324 Ill. App. 3d at 705. The laboratory analyst who completed the test testified that she performed the test, but did not state whether the machine was functioning properly at the time she completed the tests. *Raney*, 324 Ill. App. 3d at 705. In reversing defendant's conviction, the appellate court noted that when an electronic or mechanical device, such as the GCMS machine, is used to complete scientific analysis, the " 'expert must offer some foundation proof as to the method of recording the information and proof that the device was functioning properly at the time it was used.' " *Raney*, 324 Ill. App. 3d at 707, quoting *People v. Bynum*, 257 Ill. App. 3d 502, 514 (1994). Because the expert in that case failed to offer evidence that the GCMS machine was functioning properly at the time it was used to test the suspected controlled substance found in defendant's possession, the court held that the State failed to provide the necessary foundation proof for admitting the expert's opinion. *Raney*, 324 Ill. App. 3d at 710. In doing so, the *Raney* court stated:

"Expert Bethea was never asked whether the GCMS machine was functioning properly at the time it was used to test the substance contained in *** the 14 packets of suspected cocaine. While she is not personally required to test the accuracy of the machine, at the very least she should be able to offer some testimony that the GCMS machine was functioning properly at the time it was used. There was no testimony verifying the accuracy of the GCMS machine. There was no evidence as to the policy or procedures maintained by her department regarding that specific GCMS machine to ensure that it was properly

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maintained in working order and would thereby provide accurate results.” *Raney*,
324 Ill. App. 3d at 708.

¶ 55 In response, the State argues that it did provide a sufficient foundation for the opinions of its forensic experts. It observes that DiDomenic testified that the Illinois State Police laboratory is accredited and follows national quality assurance guidelines for DNA analysis and that technicians at the laboratory are subject to routine proficiency tests. DiDomenic also testified, the State observes, that the laboratory employs various safeguards to prevent the contamination of samples and that he independently reviewed the notes of Wildhaber and Olson and concluded that the procedures were followed in this case. The State also suggests that it presented evidence of the accuracy of the testing in this case through the testimony of Jove, who testified that he conducted a technical review of the work of Lambatos’ and concluded that she followed the scientific protocol established by the Illinois State Police when she analyzed the evidence in this case. As to the testimony of Dr. Reynolds regarding the DNA profile of defendant created at her laboratory, Cellmark, the State contends that it provided an adequate foundation to show the accuracy of that evidence because Dr. Reynolds testified that her laboratory was accredited by the American Society of Crime Laboratory Directors, the American Association of Blood Banks and the New York State Department of Health after an extensive accreditation process. She further stated that employees were subject to proficiency testing and that her review of the file in this case indicated that the proper protocol was followed.

¶ 56 The precise argument advanced by defendant has now been analyzed and rejected by our supreme court in *People v. Williams*, 238 Ill. 2d at 140. In that case, a prosecution for aggravated criminal sexual assault, a forensic expert from the Illinois State Police testified that

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defendant's DNA profile matched the DNA profile of semen found on the victim's vaginal swabs. *Williams*, 238 Ill. 2d at 129. In reaching her conclusion, the expert stated that she reasonably relied on a report produced by Cellmark, an independent laboratory. *Williams*, 238 Ill. 2d at 129. The expert averred that Cellmark was an accredited laboratory and therefore was required to follow specified guidelines in performing DNA analysis for the Illinois State Police, so all calibrations and internal proficiencies of the equipment used would have been in place for the DNA analysis to be performed. *Williams*, 238 Ill. 2d at 129. According to Lombatos, Cellmark's testing and analysis methods were so generally accepted in the scientific community that she routinely relied on Cellmark's analysis *Williams*, 238 Ill. 2d at 129.

¶ 57 The defendant in *Williams*, like the defendant here, argued that the opinion of the State's forensic expert that his DNA profile matched the DNA profile of sperm found on a vaginal swab taken from the victim was inadmissible because no foundation was presented as to the precise conditions of Cellmark's equipment and testing of the instant samples. *Williams*, 238 Ill. 2d at 133. The supreme court in *Williams* rejected this argument, holding that a chemical analyst need not personally determine the reliability of the instrument being used to perform the evaluation at issue, where she testified to the guidelines followed by the laboratory, and conducted her own evaluation of the data related to samples of DNA, consistent with its prior ruling in *Wilson v. Clark*, 84 Ill. 2d 186 (1981). *Williams*, 238 Ill. 2d at 135. Therefore, because the expert in *Williams* testified that Cellmark was an accredited laboratory that follow specified, generally accepted, guidelines in performing DNA analysis and produced results that were routinely relied upon by others, the court held that the State provided a sufficient foundation for the expert's opinion. *Williams*, 238 Ill. 2d at 135-36.

¶ 58 In reaching this decision, the *Williams* court distinguished *Raney*, upon which defendant relied, observing that the court in *Raney* acknowledged that it “may not be feasible to require that an expert personally test the instrument relied upon for making the relevant determination” and finding the facts of *Raney* to be distinguishable from the facts presented in the case before the court. *Williams*, 238 Ill. 2d at 135-36. The *Williams* court noted that the DNA expert in *Raney* presented no testimony at all that the machine used was calibrated and working properly or how she knew its results were accurate, in contrast to the expert who testified against Williams, averring that Cellmark was an accredited laboratory and that its testing necessarily met the threshold of proper DNA analysis. *Williams*, 238 Ill. 2d at 135-36, citing *Raney*, 324 Ill. App. 3d at 710. Consequently, the *Williams* court held that the issue regarding the Lombatos’ reliance on Cellmark’s report “went to the weigh of her opinion and not its admissibility” and noted that “the trial court did not abuse its discretion in finding sufficient foundation in Lombatos’ testimony.” *Williams*, 238 Ill. 2d at 135-36.

¶ 59 Accordingly, we hold that the circuit court did not err in allowing into evidence the testimony of DiDomenic, Jove, and Reynolds. In doing so, we note that defendant premises his argument that the State failed to establish a sufficient foundation for the presentation into evidence of the opinions of these experts upon an alleged violation of the general rules of evidence, not upon a violation of the Confrontation Clause. As noted in *Williams*, 238 Ill. 2d at 136, under the general rules of evidence as construed by our supreme court in *Wilson v. Clark*, 84 Ill. 2d 186 (1981), it is sufficient that the testifying expert reasonably relies on the fact that the laboratory producing the report that provides a basis of his opinion is accredited and follows scientifically accepted procedures.

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¶ 60 In this case, DiDomenic testified that his laboratory, the Illinois State Police Crime Laboratory, was accredited, follows national quality assurance guidelines for DNA analysis, has employed strict safeguards to prevent tampering with evidence, and that technicians at the laboratory are subject to routine proficiency tests, as did the expert in *Williams*, 238 Ill. 2d at 136. Furthermore, DiDomenic testified that he reviewed the work of Wildhaber and Olson and concluded that these procedures were followed in this case. Similarly, Jove testified that he conducted a technical review of the work of Lambatos using the “short tandem repeat” method and concluded that she followed the scientific protocol established by the Illinois State Police when she analyzed the evidence in this case. Reynolds also testified that her laboratory, Cellmark, was accredited by the American Society of Crime Laboratory Directors, the American Association of Blood Banks and the New York State Department of Health after an extensive accreditation process, that employees were subject to proficiency testing, and that her review of the file in this case indicated that the proper protocol was followed. All three experts were subject to lengthy cross-examination as to the bases of their respective opinions and work on this case. Because the experts presented evidence that both laboratories that conducted laboratory analysis in this case were accredited and that the scientifically accepted protocols were followed by each analyst who worked on this case, the State sufficiently established the accuracy of the DNA analysis inculpatory defendant in this case. *Williams*, 238 Ill. 2d at 136.

¶ 61 Although defendant does not challenge the sufficiency of the foundational testimony under the Confrontation Clause, such a claim would be unavailing, as will be evident from our analysis below in connection with defendant’s next claim challenging the constitutional sufficiency of the substantive opinions of the testifying DNA experts. The decision of our

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supreme court in *People v. Leach*, 2012 IL 111534, relying on the United States Supreme Court in *Williams v. Illinois*, 567 U.S. ___, 132 S. Ct. 2221 (2012), which affirmed *Williams*, 238 Ill. 2d at 140, also analyzed and explicitly rejected the constitutional challenge of similar expert testimony based on the Confrontation Clause of the Sixth Amendment.

¶ 62 Defendant contends that his Sixth Amendment right to confrontation under the Sixth Amendment of the United States Constitution (U.S. Const., amend. VI) was violated when the State's forensic witnesses, who did not conduct laboratory analysis themselves, presented into evidence the conclusions of non-testifying forensic analysts who created defendant's DNA profiles from a sample of his blood and matching DNA profiles from sperm found on F.M.'s underwear. The Confrontation Clause states that, "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." In making this argument, defendant relies on the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354 (2004). In *Crawford*, defendant was charged with attempted murder of another man and claimed that he acted in self-defense. *Crawford*, 541 U.S. at 38, 158 L.Ed.2d 177, 124 S.Ct. at 1356-57. In an attempt to prove that defendant had not acted in self-defense, the State presented the tape recorded statement of defendant's wife which was made during her interrogation and indicated that the victim did not have a knife in his hands when defendant stabbed him. *Crawford*, 541 U.S. at 38-39, 158 L.Ed.2d 177, 124 S.Ct. at 1357. The wife's statement was admitted as a statement against penal interest because the evidence showed that defendant's wife led defendant to the victims apartment and had thus facilitated the assault. *Crawford*, 541 U.S. at 40, 158 L.Ed.2d 177, 124 S.Ct. at 1358. Defendant's wife did not testify, however, because she was barred from doing so

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under the state marital privilege law, which generally bars a spouse from testifying without the other spouse's consent and defendant was not able to cross-examine her regarding her statements to police. *Crawford*, 541 U.S. at 40, 158 L.Ed.2d 177, 124 S.Ct. at 1357-58.

¶ 63 On appeal, defendant asserted that the admission of his wife's tape recorded statement violated his constitutional right to confront the witnesses against him. *Crawford*, 541 U.S. at 40, 158 L.Ed.2d 177, 124 S.Ct. at 1357-58. The trial court rejected defendant's argument, relying on the Supreme Court's ruling in *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed.2d 597, 100 S. Ct. 2531 (1980), where the court held that the admission of an unavailable witness's testimony against a defendant does not violate the Confrontation Clause if the evidence bore an "adequate 'indicia of reliability,' " or, in more specifically, fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Crawford*, 541 U.S. at 40, 158 L.Ed.2d 177, 124 S.Ct. at 1358, quoting *Roberts*, 448 U.S. 56, 65 L.Ed.2d 597, 100 S. Ct. 2531. According to the trial court, the testimony of defendant's wife bore particularized guarantees of trustworthiness because her statement generally corroborated her husband's claim of self defense except for her statement indicating that defendant stabbed a weaponless victim, she had direct knowledge as an eyewitness, she was describing recent events, and she was being questioned by a "neutral" law enforcement officer. *Crawford*, 541 U.S. at 40, 158 L.Ed.2d 177, 124 S.Ct. at 1358.

¶ 64 The United States Supreme Court reversed defendant's conviction holding that his right to confrontation under the Sixth Amendment was violated. *Crawford*, 541 U.S. at 68-69, 158 L.Ed.2d 177, 124 S.Ct. at 1374. In doing so, the court held that the Confrontation Clause allows the use of "testimonial statements" of absent witnesses only "where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541

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U.S. at 59, 158 L.Ed.2d 177, 124 S.Ct. at 1369. The Court specifically noted that the Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Crawford*, 541 U.S. at 59, n. 9, 158 L.Ed.2d 177, 124 S.Ct. at 1369. The Court declined to articulate a precise definition of “testimonial” hearsay, but noted that “[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford*, 541 U.S. at 68, 158 L.Ed.2d 177, 124 S.Ct. at 1374. Subsequently, in *Davis v. Washington*, 547 U.S. 813, 822 (2006), the Supreme Court further elaborated on the distinction between testimonial and nontestimonial statements by holding that statements made to the police are testimonial where circumstances indicate that there is no ongoing emergency, and “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

¶ 65 Distinguishing *Crawford*, the United States Supreme Court, in *Illinois v. Williams*, 567 U.S. ___, 132 S. Ct. 2221 (2012), affirming *Williams*, 238 Ill. 2d 125, has rejected the argument that a DNA expert cannot, consistent with the Confrontation Clause, testify as to the results of laboratory analysis completed by another, non-testifying analyst. In *Williams*, defendant was convicted of aggravated criminal sexual assault based, in part, on inculpatory DNA evidence. *Williams*, 567 U.S. ___, 132 S. Ct. at 2229-31. At trial, a state forensic analyst Karen Abbinanti, testified that she conducted analysis of a sample of defendant’s blood and obtained defendant’s DNA profile from it. *Id.* at 2229. Sandra Lambatos, whose reports were also relied upon in this case, personally testified in *Williams* that the victim’s rape kit was sent to Cellmark for analysis, and that Cellmark sent them back with a deduced male DNA profile from the semen found in the

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rape kit and sent that profile to the Illinois State Police. *Id.* at 2230. Lambatos then compared the profile of defendant's DNA, compared it to the profile developed from the rape kit by Cellmark and determined that the profiles matched. *Id.* Lambatos admitted that she used the DNA profile from Cellmark to match the DNA profile from defendant's blood sample, which was in the ISP database, but averred that she trusted Cellmark to do reliable work because it was an accredited laboratory, and that in her experience, the ISP laboratory routinely sent evidence to Cellmark for DNA testing, and that she "didn't see any evidence" of sample degradation from the profile produced by Cellmark. *Id.* She further testified that it is "commonly accepted" practice in the scientific community for one DNA expert to rely on the report of another expert. *Id.* at 2229-30.

¶ 66 On appeal, defendant argued the Cellmark report violated his sixth amendment right to confrontation because without Cellmark's report, Lambatos could not have given her testimony that defendant's DNA matched the profile deduced from the victim's vaginal swabs. *Williams*, 567 U.S. ___, 132 S. Ct. at 2227. The United States Supreme Court affirmed defendant's conviction in a plurality opinion, in which five justices concluded that the introduction of expert testimony from a DNA expert who relied on a report from another expert did not violate the defendant's rights under the Confrontation Clause because the report was not testimonial. *Id.* at 2240. The plurality, written by Justice Alito, the Court reasoned that the report was not testimonial because it "was not prepared for the primary purpose of accusing a targeted individual," and noted that when the victim's vaginal swabs were taken to Cellmark for testing, "defendant was neither in custody nor under suspicion." *Id.* at 2243. It further explained that the technicians who prepared the DNA profile would not have known whether their report would

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ultimately incriminate or exonerate an individual. *Id.* at 2244. Justice Thomas, concurring in the judgment, stated that the report was non-testimonial, not merely because its primary purpose was not to incriminate defendant, but also because it and lacked the requisite solemnity of a testimonial statement for Confrontation Clause purposes. *Id.* at 2261.

¶ 67 Relying, *inter alia*, on *Williams*, 567 U.S. ___, 132 S. Ct. 2221, and *Davis*, 547 U.S. at 822, our supreme court recently upheld a trial court's decision to admit an autopsy report prepared by an expert who did not testify, in *People v. Leach*, 2012 IL 111534, ¶122-37. In that case, the medical examiner who conducted the victim's autopsy had since retired, and another examiner testified at trial about the results of the autopsy based on her review of the original examiner's report. *Id.* at ¶24-32. Our supreme court, in holding that the report did not violate defendant's rights under the Confrontation Clause, found that the uncertified report was not testimonial because: (1) its primary purpose was "not to accuse 'a targeted individual of engaging in criminal conduct,'" as in *Williams*, 567 U.S. ___, 132 S. Ct. at 2242; (2) was not sufficiently formal or solemn so as to be deemed testimonial under Justice Thomas' definition; and (3) it was not prepared primarily to provide evidence in a criminal trial, the deciding factor in *Davis v. Washington*, 547 U.S. 813 (2006). *Id.* at ¶130-31 (citing *Williams*, 567 U.S. ___, 132 S. Ct at 2242; *Davis*, 547 U.S. at 822).

¶ 68 In this case, although DiDomenic, Jove, and Reynolds relied on the work of other experts in reaching their conclusions, the results of the work of the nontestifying experts were not testimonial, as they are indistinguishable from those at issue in *Williams*. The State's first DNA expert, DiDomenic testified that he obtained a male DNA profile from a semen stain on F.M.'s underwear and that the profile matched the DNA profile of defendant. In reaching this

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conclusion, DiDomenic testified that he reasonably relied on the work of two other analysts, namely Tanis Wildhaber and Joanne Olson, who together worked to create a DNA profile from defendant's blood sample using widely-accepted scientific procedures. Similarly, Edgardo Jove testified that he relied on the work of other experts in determining that the male DNA profile obtained from F.M.'s underwear matched the DNA profile of defendant using the "short tandem repeat" method. He explained that forensic scientist Lambatos conducted DNA analysis on a semen stain from F.M.'s underwear and obtained a male DNA profile. He stated that he conducted a "technical review" of her work and concluded that she followed the scientific protocol established by the Illinois State Police, a protocol generally accepted in the forensic science community, in conducting her analysis. Jove also testified that he relied on a report produced by Cellmark providing defendant's DNA profile. Reynolds, from Cellmark, also testified that she reasonably relied on the case file produced by her employees in determining defendant's DNA profile. She further stated that she reviewed the notes of the technicians in her employ and concluded that they complied with all applicable protocols in their work.

¶ 69 Similarly to the testimony given in *Williams*, the experts in this case testified to the protocols followed in Cellmark, and defendant had the opportunity to cross-examine those who testified that his DNA profile matched the male DNA profile found on F.M.'s underwear. Further, as in *Williams*, while the reports from nontestifying analysts provided the expert witnesses with a DNA profile that ultimately matched defendant's DNA, both Jove and DiDomenic testified that they personally compared that profile to the one created from the stain in F.M.'s underwear before concluding that there was such a match.

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¶ 70 We note that, unlike *Williams*, defendant in this case was already a suspect when the DNA was compared, and some of the reports relied on by the experts in this case were prepared by DNA analysts who were employed by the Illinois State Police, rather than a private laboratory. However, in holding that the forensic reports relied on by the testifying experts were not prepared for the purpose of accusing a targeted individual, the decision in *Williams* did not turn on whether the nontestifying analysts worked at a private or police laboratory, but on the fact that the analysts who prepared the profile could not have known that it would inculcate that defendant. *Williams*, 567 U.S. ___, 132 S. Ct. at 2243-44. As the Court noted:

"When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation. The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating - or both." *Id.* at 2244.

¶ 71 Likewise in this case, while DiDominic relied on a DNA profile produced by another ISP technician, and both Lambatos and Jove relied on a profile produced by Cellmark, those profiles were not, in and of themselves, incriminating. It was not until each of those profiles were compared to the stain found on the victim's underwear that incriminating evidence was produced. Although some of the nontestifying technicians were employed by a law enforcement agency, nothing in the record suggests that they could have known whether the profile created

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would ultimately confirm F.M.'s identification of defendant as her attacker, or exonerate him. In fact, this court recently reached the same result in *People v. Negron*, 2012 IL App (1st) 101194, noting that when a DNA profile was produced by nontestifying analysts, those technicians "had no idea what the results would be." Thus, we conclude that the DNA profiles in this case were not created for the primary purpose of incriminating defendant, but for investigating the identity of F.M.'s rapist. Additionally, as per Justice Thomas' rationale, the reports on which the witnesses relied here, as in *Williams* and *Leach*, lacked the requisite formality and solemnity of a testimonial statement. Accordingly, as long as the testifying expert who reviewed the work of those technicians and drew conclusions based on it can be cross-examined to challenge those findings, we do not find that their reliance on those reports is a violation of the defendant's sixth amendment rights.

¶ 72 Defendant next asserts that the prosecutor made five specific statements during closing arguments that denied him a fair trial. He argues that the prosecutor acted improperly by: (1) explaining F.M.'s demeanor on the witness stand stating "Hey, it was obvious [F.M.] started to shut down. She wasn't going to sit there and be called a liar anymore. She wasn't going to sit there and have it made out that she's the reason we're here, she did something wrong. She's the one that's at fault here *** at some point, yes, she shut down and that was clear when they talked"; (2) stating that defense counsel's theories of the case amounted to "throwing everything out there to see if something somehow sticks"; (3) suggesting that the defense attorney's cross-examination of F.M. was "a shameful strategy" by remarking, "You think [F.M. is] looking forward to having somebody call her a liar up on that stand, make it look like she's the one at fault"; (4) arguing "Why are they even beating up on the DNA people. If it's consent, why are

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they beating up on them”; (5) seeking to minimize the significance of F.M.’s inconsistent statements regarding the number of times she had sex with defendant by stating “What is important is that [F.M.] was violated over and over against by that man, and came in here and testified to that. And it’s not something that we make light of, that we joke around about or try and trip up.”

¶ 73 As the State argues, and defendant apparently agrees, only one of these comments was objected to both at trial and in defendant’s posttrial motion for judgment notwithstanding the verdict and alternative motion for new trial, namely the first of the five statements of the prosecutor enumerated above beginning “Hey, its was obvious [F.M.] started to shut down.” Because these errors were not objected to both at trial and in defendant’s posttrial motion they were waived for purposes of appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant asks this court nevertheless to review his unpreserved claims that the prosecutor made improper comments during close arguments under the plain error doctrine. 134 Ill.2d R. 615 (a); *People v. Herron*, 215 Ill.2d 167 (2005).

¶ 74 We turn first to defendant’s preserved claim that the prosecutor acted improperly by stating: “Hey, its was obvious [F.M.] started to shut down. She wasn’t going to sit there and be called a liar anymore. She wasn’t going to sit there and have it made out that she’s the reason we’re here, she did something wrong. She’s the one that’s at fault here *** at some point, yes, she shut down and that was clear when they talked.” Defendant specifically argues that this comment was improper because it implied that defense counsel engaged in illegitimate trial strategy by cross-examining F.M. about her prior felony record, her unwillingness to come to court, and inconsistent statements made to police. Defendant contends that his attorney in no

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way suggested that F.M. was “at fault” or that she “did something wrong.” In response, the State contends that the prosecutor’s comments were not improper because, when viewed in context, the remark referenced F.M.’s demeanor on the witness stand and explained her trepidation and were made in response to defense counsel’s statements during closing argument that F.M. was lying during her testimony. The State specifically cites defense counsel’s repeatedly arguments that F.M. had “an intent to lie,” had a “commitment” to lie, and that she fabricated her story. The State also suggests that its comment that F.M “shut down” on cross-examination because she “wasn’t going to sit there and have it made out that she’s the reason we’re here, she did something wrong” or was at fault was made in response to defense counsel’s statement during closing argument: “Also, watch her demeanor on the stand. If you notice when she came out, she seemed very upset. But as soon as the prosecutor was done, no more tears. She started having an attitude, started being evasive. Because it’s an act, ladies and gentlemen.”

¶ 75 We agree with the State. Prosecutors are generally given wide latitude in making closing argument and “a reviewing court will find reversible error based upon improper comments during closing arguments only if a prosecutor remark was both improper and so prejudicial that ‘real justice [was] denied or that the verdict of the jury may have resulted from the error.’ ” *People v. Evans*, 209 Ill. 2d 194, 225 (2004), quoting *People v. Jones*, 156 Ill. 2d 225, 247-48 (1993). The prosecutor’s statements “must be considered in the context of the closing arguments as a whole” and “counsel may comment upon defense characterizations of the evidence or case.” *Evans*, 209 Ill. 2d at 225. “Further, in the context of rebuttal argument, ‘when defense counsel provokes a response, the defendant cannot complain that the prosecutor’s reply denied him a fair trial.’ ” *Evans*, 209 Ill. 2d at 225, quoting *People v. Hudson*, 157 Ill.2d 401, 445 (1993).

¶ 76 In this case, the prosecutors comments that F.M. “started to shut down” because she “wasn’t going to sit there and be called a liar anymore” or “have it made out that she’s the reason we’re here, she did something wrong” or that she was “the one that’s at fault” were invited by defense counsel’s repeated assertions to the jury that F.M. fabricated her story that defendant sexually assaulted her to explain her whereabouts to her boyfriend and that F.M.’s sexual relations with defendant were in fact consensual. Defense counsel stated that F.M. had “an intent” and a “commitment” to lie. Defense counsel also argued that this fabrication was evidenced by F.M.’s demeanor on the stand stating “Also, watch her demeanor on the stand. If you notice when she came out, she seemed very upset. But as soon as the prosecutor was done, no more tears. She started having an attitude, started being evasive. Because it’s an act, ladies and gentlemen.” The State’s comments attempting to explain F.M.’s demeanor on the stand were made in response and in counterpoint to defense counsel’s contrasting interpretation of her demeanor. In any event, even if otherwise improper, these comments were not so prejudicial that defendant was denied “real justice” or that the jury’s verdict may have resulted from the error.” *Evans*, 209 Ill. 2d at 224-25 (no reversible error where prosecutor’s mentioned O.J. Simpson prosecution because comment was made in response to “defense counsel’s theme phrase during closing statements that the police and prosecution had ‘tunnel vision’ and failed to do a thorough investigation or investigate other suspects”).

¶ 77 We next turn to defendant’s unpreserved claims that the prosecutor’s comments during closing arguments denied him fair trial. As noted above, although these errors are deemed waived for purposes of appeal because they not objected to both at trial and in defendant’s post-trial motion (*Enoch*, 122 Ill. 2d at 186), defendant requests this court to consider these claims

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under the plain error doctrine. 134 Ill.2d R. 615 (a); *People v. Herron*, 215 Ill.2d 167 (2005).

The plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error where either: (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *Herron*, 215 Ill.2d at 186-87. In the first instance, defendant must prove “prejudicial error,” i.e., that there was error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *Herron*, 215 Ill.2d at 187. Under the second prong of the plain error analysis, defendant must prove there was error and that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *Herron*, 215 Ill.2d at 187. In both instances, the burden of persuasion remains on the defendant. *Herron*, 215 Ill.2d at 187, citing *People v. Hopp*, 209 Ill.2d 1, 12 (2004).

¶ 78 We first observe that the evidence in this case was not closely balanced. DNA evidence established defendant’s sperm was on F.M.’s underwear immediately after the attack. F.M. testified credibly that defendant sexually assaulted her repeatedly and positively identified defendant as her attacker at a police lineup and in open court. Although F.M.’s testimony was slightly inconsistent on minor details and was reluctant to testify at trial, she was consistent in her claims that defendant assaulted her. Furthermore, G.W. testified that defendant attacked her in a very similar fashion, namely by attacking her on the street and forcing her into an abandoned building in the same general area and repeatedly engaging in non-consensual vaginal intercourse with her and forcing her to perform oral sex for hours until morning.

¶ 79 Furthermore, as shall be discussed below, the remaining four statements by the prosecutor did not constitute error, and even if they had been made in error, did not tip the scales

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of justice against defendant. We turn first to defendant's argument that the State suggested that the defense attorney's cross-examination of F.M. was "a shameful strategy" by remarking, "You think [F.M. is] looking forward to having somebody call her a liar up on that stand, make it look like she's the one at fault." On this point, we note that the State never asserted during closing argument that defense counsel's cross-examination of F.M. was "shameful" or otherwise improper as defendant suggests. Furthermore, the comment, when read in context, was made in response to defense counsel's theory of the case that F.M. fabricated her claim that defendant sexually assaulted her, a fact, defense counsel argued, was evidenced by her demeanor and "attitude" with defense counsel on cross-examination. The State explained:

"She never wanted to see him again. Unfortunately, she's brought back. Now she has to testify again. You think she is looking forward to reliving this nightmare again. Do you think she is looking forward to sitting in that witness stand 20 feet away from her attacker. You think she is looking forward to telling a roomful of strangers how this guy shoved his penis insider her vagina repeatedly, or do you think she's looking forward to telling how this guy shoved his penis insider her mouth. You think she's looking forward to testifying to all that. On top of that, you think she's looking forward to having somebody call her a liar up on that stand, make it look like she's the one at fault."

¶ 80 As noted above, defense counsel repeatedly asserted during closing argument that F.M. had consensual sexual relations with defendant and that she fabricated her story that defendant sexually assaulted her to explain her whereabouts to her boyfriend, stating that F.M. had "an intent" and a "commitment" to lie. Defense counsel also argued that this fabrication was

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evidenced by F.M.'s demeanor on the stand stating "Also, watch her demeanor on the stand. If you notice when she came out, she seemed very upset. But as soon as the prosecutor was done, no more tears. She started having an attitude, started being evasive. Because it's an act, ladies and gentlemen." The State's comments indicating the emotional difficulty and repulsion which a witness of normal sensibilities would feel in describing, in specific detail, the mode and duration of the assault to which she was subjected was a reasonable countervailing argument to negate the inference defense counsel sought to draw from the demeanor to establish fabrication and gamesmanship by the witness on the stand.

¶ 81 Defendant next argues that the State acted improperly when it suggested that defense counsel was "throwing everything out there to see if something somehow sticks" and when it asked the jury "Why are they even beating up on the DNA people. If it's consent, why are they beating up on them." He specifically argues these comments were improper because they constituted a personal attack on defense counsel's integrity. These statements appear to relate, not to the character of defense counsel, but to the fact that defendant advanced two conflicting defenses at trial, namely that the sexual relations were consensual and that the State's DNA evidence indicating that defendant had sex with F.M. was incorrect. The State could properly address the weakness of defendant's proffered defenses in its rebuttal argument and thus those comments were not erroneous. *People v. Zoph*, 381 Ill. App. 3d 435, 453 (2008) (prosecutor's comment that defense counsel's closing argument was "guess, conjecture, and speculation, [and] flights of fancy" did not constitute personal attack on defense counsel but permissible attack on the substance of defendant's theory of the case); *People v. Williams*, 205 Ill. App. 3d 715 (1990) (no error when the prosecutor referred to defendant's insanity defense as a "last resort effort")

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since no other defense was available because prosecutor was commenting on the evidence presented and reasonable inferences that could be drawn therefrom); *People v. Jennings*, 142 Ill. App. 3d 1014, 1022 (1986) (prosecutor's comment that rape defendant's inherently conflicting theories of consent and misidentification were "garbage" was not personal attack on defense counsel but permissible comment as to the worthlessness of such a legal posture).

¶ 82 Defendant next asserts that the State committed error when it suggested that defense counsel was making "light of" and "joking around" in cross-examining F.M. regarding her conflicting statements as to how many times defendant had vaginal sex with her, forced her to perform oral sex, and ejaculated. He contends that these comments were improper because they were disparaging the integrity of defense counsel. In response, the State asserts that these comments constituted a proper response to defense counsel's argument that F.M.'s testimony was unreliable given her inconsistent statements about the details of the sexual assault. In full context, the prosecutor stated:

"And let's get one thing straight. [F.M.] is hysterical. She is being raped. She's not sitting there with a notepad keeping charge of how many times to she could retell the events like some episode of Sex in the City. She is being raped. She's not keeping track. She's not keeping count. What is important is she remembers that she was violated over and over again by that man, and she came in here and testified to that.

And it's not something that we make light of, that we joke around about or try and trip up. She was violated. She testified to that."

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¶ 83 These comments were apparently made in response to defense counsel's argument that F.M.'s testimony was incredible because her statements were inconsistent regarding the specific number of times each particular sex act was committed. Even if the prosecutor's suggestion that defense counsel was making light of or joking about the specifics of the sexual assault were improper, we cannot say that these comments denied defendant a fair and impartial trial. *People v. Moss*, 205 Ill. 2d 139, 168-69 (2001) (prosecutor's statements that murder victim could not testify against defendant and that trial was her "day in court" did not constitute plain error because evidence of guilt was not closely balanced and "did not rise to the level whereby defendant was denied a fair and impartial trial").

¶ 84 Defendant next contends that he received ineffective assistance of trial counsel. He specifically asserts that defense counsel received documents indicating that F.M. had named another man named Carl Long as her attacker. These documents consisted of an order drafted by a Detective Stewart requesting a buccal swab from Long, an inventory sheet for the swab, and a phone log from a DNA technician noting a conversation with the detective, who told him that F.M. named Carl Long as an assailant and that F.M. had "credibility problems." Defendant contends that trial counsel was ineffective for failing to cross-examine F.M. as to her previous identification of Long as her attacker. He argues that, had F.M. been so cross-examined, F.M.'s testimony would have been undermined further and there would have been a reasonable probability of a change in the outcome of defendant's trial. In response, the State argues that defendant's ineffective assistance of counsel claim fails on both prongs of the Strickland analysis, asserting that the decision by defense counsel not to impeach F.M. regarding her apparently erroneous identification of Long as her attacker constituted sound trial strategy, and

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that even if such a failure was erroneous, defendant was not prejudiced because the evidence of defendant's guilt was overwhelming.

¶ 85 To prevail on a claim of ineffective assistance of counsel, defendant must establish that his attorney's representation fell below an objective standard of reasonableness, and that but for the attorney's errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). If defendant fails to satisfy either prong, his claim of ineffective assistance of counsel fails. *People v. Patterson*, 217 Ill. 2d 407, 441 (2000). "In considering whether counsel's performance was deficient, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy.' " *Patterson*, 217 Ill. 2d at 441, quoting *Strickland*, 466 U.S. at 689, 80 L.Ed.2d at 694-95, 104 S.Ct. at 2065. Generally, the decision whether to cross-examine a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). Also, the decision of defense counsel "whether to call particular witnesses is a matter of trial strategy and thus will not ordinarily support an ineffective-assistance-of-counsel claim." *Patterson*, 217 Ill. 2d at 442.

¶ 86 In this case, defendant has not shown that defense counsel's failure to impeach F.M. regarding her apparent implication of Long could not constitute sound trial strategy. On this point, we observe that defense counsel could have reasonably concluded that this evidence would conflict with one of defendant's proffered defenses, namely that F.M. engaged in consensual relations with defendant and fabricated her story of sexual assault. Additionally, an

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impeachment of F.M. would have presumably required defendant to call as a defense witness, Detective Stewart, who requested the buccal swab from Long and who learned of F.M.'s implication of Long as her attacker and defense counsel could have reasonably decided that Detective Stewart's testimony at trial was not in defendant's best interests.

¶ 87 Even assuming, *arguendo*, that defense counsel was objectively unreasonable in failing to impeach F.M. about her alleged prior statement that Long committed the attack, there is no reasonable likelihood that the result of defendant's trial would have been different in light of the consistent testimony of F.M. that defendant was her attacker, her unequivocal identification of defendant both during a police lineup and at trial, the DNA evidence linking defendant to the crime, and G.W.'s testimony that defendant attacked her in a similar fashion.

¶ 88 Lastly, defendant argues that this court must order the mittimus to be corrected to state that defendant's sentence of life imprisonment should be served concurrently, not consecutively. As noted above, the trial court originally entered a mittimus requiring defendant to serve the natural life sentence imposed in the case consecutively with a natural life sentence imposed for an earlier sexual assault conviction. The court subsequently corrected the mittimus to reflect that the two life sentences be served concurrently, but not until after defendant filed his notice of appeal.

¶ 89 Both defendant and the State agree that the mittimus should be so corrected, citing the Illinois Supreme Court's decision in *People v. Palmer*, 218 Ill. 2d 148, 163-170, which held that the imposition of consecutive natural life sentences was impermissible under Illinois sentencing law. The parties disagree, however, as to whether the court's correction of the mittimus was void for lack of jurisdiction because the correction postdated defendant's notice of appeal.

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Defendant asserts that this court must order that the mittimus be corrected because the trial court's correction was void for lack of jurisdiction. We note, however, that although a trial court generally loses jurisdiction after defendant files a notice of appeal, the court retains jurisdiction to perform ministerial functions. *People v. Hernandez*, 296 Ill. App. 3d 349, 351 (1998).

Because, as the State correctly notes, "the amendment of a mittimus is a ministerial act that does not change the underlying sentence," (*People v. Wright*, 337 Ill. App. 3d 759, 762 (2003)), the trial court had the authority to amend defendant's mittimus to reflect that his life sentences would be served concurrently while the instant appeal was pending. Therefore, there is no need for this court to order the correction of the mittimus.

¶ 90 For the aforesaid reasons, we affirm the judgment of the circuit court.

¶ 91 Affirmed.

¶ 92 PRESIDING JUSTICE GORDON, DISSENTING

¶ 93 In a supervisory order, the Illinois Supreme Court directed us to vacate our prior order and reconsider our decision in light of *People v. Leach*, 2012 IL 111534. My consideration of *Leach* causes me to reach a different conclusion than the majority and, thus, I must respectfully dissent.

¶ 94 In *Leach*, our supreme court held that "the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case." *Leach*, 2012 IL 111534, ¶ 122.

¶ 95 In the case at bar, defendant's DNA profile, which was created by two nontestifying DNA experts from defendant's blood sample, was prepared for the primary purpose of accusing a

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targeted individual, namely, defendant, and for the primary purpose of providing evidence in a criminal case against him. *Supra* ¶ 70 ("defendant was already a suspect in the case"). Thus, applying the holding of *Leach* to the facts of the case at bar, as our supreme court directed us to do, should lead us to the conclusion that the report at issue was testimonial and cannot be admitted as an exception to the rule against hearsay. *Leach*, 2012 111534, ¶¶ 70, 122.

¶ 96 In addition, the nontestifying witnesses were employees of the Illinois State Police. In its analysis, the majority relies on cases where nontestifying employees were not employed by the police. *Supra* ¶¶ 65, 66 (citing *Illinois v. Williams*, 567 U.S. ___, 132 S. Ct. 2221 (2012) (nontestifying DNA expert was employed by Cellmark)); ¶ 67 (citing *Leach*, 2012 111534, ¶¶ 122-137 (nontestifying witness was employed by the medical examiner's office), ¶ 71 (citing *People v. Negron*, 2012 IL App (1st) 101194 (nontestifying DNA expert was employed by Cellmark)). By contrast, the nontestifying witnesses in the case at bar were all employees of the police. As a result, the reports should not have been admitted into evidence. Our evidentiary rules have long acknowledged the confrontation clause concerns that arise particularly from reports generated by law enforcement personnel. Our supreme court in *Leach* observed: "Rule 803(8) codifies the long-standing hearsay exception for records 'of public offices or agencies, setting forth *** matters observed pursuant to [a] duty imposed by law as to which matters there was a duty to report, *excluding*, however, police accident reports and *in criminal cases* medical records and *matters observed* by police officers and other *law enforcement personnel*.'" (Emphasis added.) *Leach*, 2012 111534, ¶ 70 (quoting Ill. R. Evid. 803(8) (eff. Jan. 1, 2011)). The nontestifying witnesses in the case at bar were "other law enforcement personnel," and the DNA profile which they created was a "matter [] [they] observed." Thus, the report at issue in

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the case at bar is the very type of report which raised concerns for the drafters of our evidentiary rules.

¶ 97 Thus, applying the holding and the considerations raised in *Leach*, I conclude that the DNA profile created from defendant's blood sample was testimonial and I must respectfully dissent.