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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Kendall County.
Plaintiff-Appellee,)	
)	
)	No. 10-CF-0072
)	
DALE FRY,)	Honorable
)	John A. Barsanti,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The State produced sufficient evidence to sustain defendant's conviction for criminal sexual assault. In addition, defendant did not suffer prejudice as a result of trial counsel's failure to introduce evidence of defendant's erectile dysfunction or for counsel's failure to object to alleged hearsay testimony. As a result, defendant's ineffective-assistance-of-counsel claim failed. Thus, we affirmed defendant's conviction.

¶ 2 Following a bench trial, the trial court found defendant, Dale Fry, guilty of one count of criminal sexual assault pursuant to section 12-13(a) of the Criminal Code of 1961 (the Criminal Code) (720 ILCS 5/12-13(a)(4) (West 2010)). Defendant's conviction stemmed from a relationship that he had with the victim, A.G., who was his student at Oswego high school. Defendant now

appeals his conviction, contending that (1) the State failed to prove him guilty beyond a reasonable doubt; and (2) he was denied the effective assistance of counsel. We affirm.

¶ 3 I. Background

¶ 4 The record reflects that defendant, born in June 1955, taught English, humanities, and contemporary literature at Oswego high school. Defendant routinely taught approximately 90 students per semester and commonly asked students for their cell phone numbers, particularly from his upperclassman students.

¶ 5 The victim, born in April 1992, enrolled in defendant's honors humanities course that met during the spring 2009 semester. The victim also enrolled in defendant's contemporary literature course that met during the fall 2009 semester. Defendant and the victim developed a close relationship. The victim would often stay after class, and she and defendant would discuss academics, literature, philosophy, family, and the victim's depression. Defendant and the victim were also friends on Facebook.

¶ 6 On May 25, 2010, a grand jury indicted defendant on two counts of criminal sexual abuse and one count of criminal sexual assault. The sexual abuse charges alleged that, in May 2009, defendant placed his mouth on and fondled the victim's breast. The sexual assault charged alleged that, in September 2009, defendant placed his penis in the victim's mouth.

¶ 7 A bench trial commenced on July 19, 2011. The State first called Fred Zimmer. Zimmer testified that he attended Oswego high school with the victim. Zimmer testified that he graduated in 2008, but remained in contact with defendant, who was his former teacher. Zimmer testified that he attended a luncheon meeting with defendant in April 2009 and noted that the victim's birthday was that day. Zimmer testified that, pursuant to defendant's request, he gave defendant the victim's

phone number so defendant could wish her a happy birthday. Zimmer testified that defendant commented that the victim's senior photo looked "spanking."

¶ 8 The State next called Debra Metcalf, a maintenance worker at Oswego high school. Metcalf testified that, in September 2009, she went to defendant's classroom. Metcalf testified that the door was locked and the lights were off, although that was not unusual. Metcalf testified that she used her key to enter the room and turned on the lights. Metcalf testified that, upon entering, defendant asked who was present, and Metcalf identified herself. Metcalf testified that she briefly left the room, and upon re-entering, she observed defendant walk behind a cabinet door, unbutton his pants, tuck in his shirt, and re-button his pants. Metcalf testified that she also saw an unfamiliar girl standing behind defendant and straightening her shirt. Metcalf testified that she could not tell what defendant and the girl were doing, but they indicated that they were putting away books. Metcalf testified that she heard the girl ask defendant about a box of books and observed her put some books in a cabinet.

¶ 9 The State next called Kelly Garcia. Garcia testified that she was employed by the Oswego police department and was assigned as the school resource officer for Oswego high school. Garcia testified that on September 10, 2009, the students were dismissed at 12:30 p.m.

¶ 10 The State next called Robert Sherwood, a police officer with the Oswego police department. Sherwood testified that, on February 11, 2010, he attended a meeting at Oswego high school with Garcia, the victim, the victim's parents, and other staff from the high school. Sherwood testified that he examined text messages on the victim's cell phone that were purportedly sent from defendant and took custody of the phone. Sherwood testified that he received authorization for an overhear and was present each of the three times the victim called defendant pursuant to the overhear. Sherwood identified transcripts of those phone conversations.

¶ 11 Deshawn Stennis, a records custodian for Verizon Wireless, testified next for the State. Stennis identified text messaging records between May 15, 2009, through April 15, 2010. Stennis identified in excess of 700 text messages between the victim's and defendant's cell phones.

¶ 12 The victim testified next. The victim testified that, at the time of trial, she was studying philosophy in college. The victim testified that she was an honors student at Oswego high school, with a class rank of 29 out of 370 classmates.

¶ 13 The victim testified that her first intimate contact with defendant occurred in early May 2009, in an elevator close to defendant's classroom. The victim testified that, after school ended for the day, defendant asked her if she wanted a ride in the elevator. The victim testified that, after hesitating, she went on the elevator. The victim testified that, inside the elevator, defendant put his arm around her waist and kissed her on the mouth. The victim testified that they both kissed with their tongues and that her arms were on his shoulders. When the elevator reached the ground floor, defendant pushed her away, and they exited the elevator.

¶ 14 The victim testified that her next intimate contact with defendant also occurred in early May 2009 when, after completing theater work, she went to defendant's classroom at approximately 7:30 p.m. The victim testified that, while she and defendant initially talked with the door open, defendant kissed her and she observed an erection. They both used their tongues while kissing, and the victim had her hands on defendant's shoulders. The victim testified that a similar sequence of events occurred the next evening. The victim testified that, at defendant's suggestion, he led her to a corner of the classroom, continued kissing her, and fondled her breasts both over and under her clothing. The victim testified that defendant complimented her breasts, proceeded to kiss them, and indicated that he had an erection. The victim testified that she and defendant had a similar encounter the

following night, the third evening in a row. The victim testified that she did not tell anyone about the elevator incident or the three evening incidents in defendant's classroom.

¶ 15 The victim testified that she and defendant remained in contact during the summer through phone calls, text messages, and Facebook. The victim testified that September 10, 2009, was a half school day that ended at 12:30 pm. The victim testified that, after the school day ended, she remained in defendant's classroom for an hour or two. The victim testified that the blinds were partially closed and that, for the first hour or so, she and defendant talked and moved items around the room. The victim testified that, while they were near a cabinet in the corner of the room, they began kissing with their tongues, which ultimately led to "oral copulation." The victim testified that, although her eyes were closed, she felt defendant's hands on her hair and his penis in her mouth. The victim testified that, as defendant held her head, he began "to move it back and forth." The victim was not sure whether defendant ejaculated. The victim testified that she and defendant pulled away from each other when they heard someone at the door.

¶ 16 The victim testified that she and defendant continued to stay in touch, and that, following their encounter, she told him by text message and in-person that she cared for him and loved him. The victim testified that she did not report the incident until February 2010. The victim testified that she realized her relationship with defendant was inappropriate and abusive after watching an Oprah Winfrey television program. The victim testified that she reported the incident to a teacher, who advised her to speak with her mother. The victim told her mother, but did not mention explicit sexual contact between her and defendant, and acknowledged that defendant never used force or threatened to use force against her.

¶ 17 The victim testified regarding three overhear phone calls she made to defendant. The trial court admitted the transcripts of the phone conversations that were subject to the overhear. A

transcript from a February 23, 2010, overhear, reflected that the victim told defendant that her mom found the text messages and asked her what happened. The victim advised defendant that she told her mom “that all we had done is kiss, and it was an isolated incident.” The victim later said that she did not want to mention to her mom “the head in September, so what would you advise me to say *** .” Defendant told the victim to “stick to the story you gave your mother I guess *** .”

¶ 18 The State next called Jennifer Ash, a history teacher at Oswego high school. Ash testified that the victim was her teacher’s aide during the victim’s junior year. Ash testified that the victim was very intelligent. Ash testified that, on February 16, 2010, the victim told her about the interactions with defendant. Ash testified that the victim was “physically shaking, very nervous.”

¶ 19 The State next called Tracy Contino, an English teacher at Oswego high school. Contino testified that she sponsored a community outreach organization led by the victim. Contino testified that she spoke with the victim on February 10, 2010, and the victim was upset. Contino told the victim to speak with her mother. Contino testified that she spoke with the victim’s mother later that evening, and then called a Department of Children and Family Services number she found online.

¶ 20 The State next called Marianne Clark, the registrar at Oswego high school. Clark testified regarding the victim’s attendance record during the 2008-09 and 2009-10 school years. The State rested.

¶ 21 Defendant’s wife, Leslie Fry, testified on defendant’s behalf. Leslie testified that defendant had numerous physical ailments, including two knee replacements, two back surgeries, rotator cuff surgery, and abdominal problems. Leslie identified a list of medications defendant was taking during the first nine months of 2009, and testified that, although defendant did not use a wheelchair, he had difficulty kneeling and standing.

¶ 22 Defendant next called Garcia. Garcia testified that she spoke to the victim's mother regarding the victim's allegations of abuse. Garcia referred to a summary report of her interview with the victim's mother. Garcia testified that her report reflected that the victim's mother "made it clear" that the victim denied having sex with defendant. Defendant called Sherwood. Sherwood testified that he interviewed the victim on February 16, 2010. Sherwood testified that his report of that interview did not reflect that the victim indicated that defendant pulled her hair during the September 10, 2009, incident. Sherwood acknowledged that "if it was mentioned to me, I probably should have included it [in the report]."

¶ 23 Defendant testified on his own behalf. Defendant provided details of his background in education and scouting. Defendant testified that the victim was an excellent student in his honors class and that teachers commonly shared their cell phone numbers and e-mail addresses with students. Defendant testified that, as the spring 2009 semester progressed, the victim came to his classroom more frequently to discuss philosophical and personal issues.

¶ 24 Regarding the elevator incident, defendant testified that he was recovering from knee surgery in spring 2009 and taking medication to relieve his pain, along with medication to treat depression, blood pressure, and other physical problems. Defendant testified that he had difficulty walking, used a cane, and taught from a sitting position. As a result, he needed to use the school's elevator to get between the first and second floors. Defendant testified that he asked the victim if she wanted a ride on the elevator. She agreed and, while in the elevator, she kissed him on the mouth for more than a second. Defendant testified that he gently put his hands on her shoulders, pushed her away, and told her that her behavior was wrong.

¶ 25 Defendant testified that on the evening of May 6, 2009, between 7 p.m. and 7:30 p.m., the victim came to his room while he was working. Defendant testified that she remained there for

about an hour and the door remained open. Defendant denied that they had physical contact that evening. Defendant denied that he visited with the victim the next two evenings, and testified that he did not see her until the fall semester. Defendant testified that, while his medication was helping to control his pain, he had no libido, and “[t]here was no way that I felt any desire sexually at any time.” Defendant testified that he sent the victim a text message because she did not finish her final project. Defendant testified that he had another knee surgery during the summer and that he taught the victim during the fall 2009 semester. Defendant testified that he continued using the same medication as had been using during the previous spring semester, and that due to his condition, he had students help him move into his new classroom.

¶ 26 Defendant testified that, on September 10, 2009, the victim came to his classroom after the shortened school day had ended. Defendant testified that the victim helped him unload materials in a cabinet located halfway between the door and the back of the classroom. Defendant testified that the blinds on the classroom’s one window were open and that the door was locked, although he usually kept the door locked out of habit. Defendant testified that he and the victim were talking while they put away materials, but maintained that there was no physical contact. Defendant testified that Metcalf came into the room, briefly left, and then re-entered. Defendant testified that he was tucking in his shirt, which had become untucked while he was placing materials on the top shelf of the cabinet. Defendant testified that both Metcalf and the victim remained in the room for a short amount of time before leaving, and that the victim exited first. Defendant testified that he “absolutely” did not have the victim perform oral sex on him.

¶ 27 Defendant testified that the victim remained in his class that semester and that they continued to send text messages to each other. Defendant identified a thank-you note the victim had given him in 2010, along with two photographs. In the thank-you note, the victim wrote:

“Words fail to adequately express all you have done for me. To fit space constraints and to maintain some semblance of legibility (a hopeless task), I must limit my gratitude to a series of thanks. You are free to draw your own conclusions from there.”

The thank-you note listed a number of “thanks” and concluded “thank you, one million times over.” Defendant testified that he was shocked when he first heard about the allegations.

¶ 28 During cross-examination, defendant admitted that he was Facebook friends with the victim and that he saw pictures of her on her Facebook page. Defendant acknowledged that he and the victim sent each other in excess of 700 text messages between April 2009 and February 2010. Defendant admitted that he sent the victim a text message telling the victim that he missed her and that he was smitten. Defendant acknowledged that, on a taped conversation with the victim, he told her to “stick to the story,” but maintained that statement had been taken out of context. Defendant reiterated that the kiss on the elevator had been an isolated incident and that the text messages with the victim was dialogue based on literature about which they had talked.

¶ 29 On redirect examination, defendant testified that he spoke with the victim about the kissing incident in the elevator within a week. Defendant testified that he told the victim that the kissing “was incorrect” and that “a physical relationship was not ethical.” Defendant testified that the victim told him that she did not believe in love and that they were “engrossed in a dialogue concerning love.” Defendant testified that he used the word “love” in text messages platonically, which comes from the philosopher Plato, which he taught in his class. Defendant testified that he used the word “smitten” in the context of their interests being closely aligned, which included philosophy and literature. Defendant testified that he told the victim to “stick to her story” because it “was the truth as far as I knew at that point in time.” Defendant rested after his testimony.

¶ 30 On July 21, 2011, the trial court found defendant guilty of all three counts alleged in the indictment. The trial court found the victim's testimony more credible than defendant's testimony, and found that the victim's testimony was corroborated by the State's other witnesses and the text messages. The trial court found that "there was an act of sexual penetration with the victim" who was under 18 years of age and that defendant held a position of trust, authority, or supervision in relationship to the victim.

¶ 31 Following trial, defendant retained new counsel and filed a timely posttrial motion. Defendant's motion argued that the trial court erred in granting the State's motion to amend counts II and III of the indictment, at the close of proofs, to add the legal elements of criminal sexual abuse; and by doing so, defendant was denied due process. Defendant's motion argued that the State failed to prove the criminal sexual abuse charges and the criminal sexual assault charge beyond a reasonable doubt. Defendant's motion further argued that he did not receive the effective assistance of trial counsel because his trial counsel failed to introduce evidence of defendant's erectile dysfunction, which would have undermined the victim's testimony.

¶ 32 On March 9, 2012, a hearing commenced on defendant's posttrial motion. Defendant's wife Leslie testified on defendant's behalf. Leslie testified that defendant was diagnosed with erectile dysfunction in 2004. Leslie testified that, after her husband's diagnosis, defendant's physician prescribed him Viagra. Leslie testified that, after 2004, her husband could not engage in a sexual relationship, and that defendant could not maintain an erection when she attempted oral sex. Leslie testified that, to her knowledge, defendant's trial counsel never attempted to obtain defendant's medical records. Leslie testified that her husband's sexual desire had "lessened" since defendant's erectile dysfunction diagnosis. During cross-examination, Leslie acknowledged that she never saw the prescription for Viagra, but that defendant told her that his doctor prescribed him the medication.

Leslie testified that she and defendant had “few” attempts at sexual relations during May 2009 because they realized “that it was futile” due to defendant’s inability to maintain an erection. Leslie clarified that, while defendant could get an erection, “it didn’t last,” and that “[m]ost times he could not even start the sexual act.” At a subsequent hearing, Leslie brought a bottle of Viagra that she found in defendant’s dresser. The bottle was dated September 22, 2010, and contained approximately 30 pills.

¶ 33 Defendant testified next. Defendant testified that he had a positive relationship with his wife, including a sexual relationship, until his erectile dysfunction diagnosis. Defendant testified that he could not maintain an erection, and had a decreased libido and low testosterone levels. Defendant testified that he discussed his diagnosis with his trial counsel “a minimum of four times,” making clear to his trial attorney that “I could not have performed as it was claimed that I performed.” Defendant testified that his trial attorney never discussed presenting that information at trial or prepared him to be questioned on that issue.

¶ 34 Defendant’s trial attorney, Phillip Nathe, testified on behalf of the State. Nathe testified that defendant raised his medical issues with him during trial preparation, including knee surgeries and pain medications. Nathe testified that he discussed defendant’s depression, anti-depressants, and anxiety medication. Nathe testified that the combination of those medications resulted in defendant having a decreased libido. Nathe testified that he did not recall defendant discussing his erectile dysfunction with him, nor recalled defendant advising him that he had been treated by a physician for that condition. Nathe testified that his discussions with defendant focused on defendant’s denial of committing the acts and on defendant’s decreased libido resulting from his medications.

¶ 35 On cross-examination, Nathe acknowledged that whether defendant could have maintained an erection would have been germane to whether the accusations against his client were truthful.

Nathe admitted that he never sought to obtain defendant's medical records because he believed that defendant testifying about his decreased libido would have been sufficient. Nathe admitted that credibility of the witnesses, and particularly that of the victim and defendant, was a "central theme" of the defense's case.

¶ 36 The State next called Armando Rodriguez, a probation officer in the court services department in Kendall County. Rodriguez testified that he prepared a pre-sentence investigation report for defendant, which included information related to defendant's employment history, medical issues, education, and family. Rodriguez testified that he asked defendant about his medical conditions, but defendant refused to release his medical records. Rodriguez testified that defendant told him about his depression and anxiety, but did not mention erectile dysfunction. Rodriguez testified that defendant's pre-sentence investigative report listed depression, anxiety, and diverticulitis, but did not list erectile dysfunction.

¶ 37 The trial court issued its ruling on July 12, 2012. The trial court concluded that the State improperly amended counts II and III of the indictment and vacated the guilty finding for those counts. The trial court denied defendant's posttrial motion with respect to the sufficiency of the evidence and the ineffective-assistance-of-counsel claims. With respect to the latter claim, the trial court concluded "In the end, I do not find that *** there's a reasonable probability that the trial would have been different if [Nathe] had done what [defendant] argues here ***." Defendant timely appealed.

¶ 38

II. Discussion

¶ 39

A. Sufficiency of the Evidence

¶ 40 Defendant's first contention on appeal is that the State failed to prove him guilty of criminal

sexual assault beyond a reasonable doubt. In support of this contention, defendant emphasizes that the victim did not report her accusation for five months; she denied that a sexual act occurred when initially discussing the matter with her mother; and defendant has consistently denied the allegations. Defendant further notes that the victim remained in defendant's class after the September 10, 2009, incident, and because she was highly intelligent, her theory that she did not realize the abusive nature of her relationship with defendant until she watched the Oprah Winfrey show was "simply incredible." Defendant stresses that his testimony "should have carried great weight with the lower court" because he was a respected teacher and scouting leader.

¶ 41 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When reviewing a challenge to the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 42 Due process requires that to sustain a conviction of a criminal offense, the State must prove a defendant guilty beyond a reasonable doubt of the existence of every element of the offense. *People v. Lucas*, 231 Ill. 2d 169, 178 (2008) (citing *Jackson*, 443 U.S. at 316). Section 12-13(a)(4) of the Criminal Code provides that a person commits criminal sexual assault if that person commits an act of sexual penetration; is over 17 years of age; holds a position of trust, authority, or

supervision in relationship to the victim; and the victim is at least 13 years old but under 18 years old.

¶ 43 The only factual issue in dispute is whether defendant committed an act of sexual penetration. In *People v. Groel*, 2012 IL App (3d) 090595, a grand jury indicted the defendant for criminal sexual assault. *Id.* ¶ 3. At trial, the victim, who was 21 at the time of trial, testified that she entered foster care when she was 8 years old and was placed with Judy Morris when she was 13 years old. *Id.* ¶ 11. The victim testified that Morris would leave the victim with Morris's daughter, Cathy, and Cathy's husband, the defendant, when Morris left to play bingo. *Id.* The victim testified that, when she was 14 years old, the defendant engaged in a sexual act with her. *Id.* The victim testified that, while she told Morris and Cathy, she did not report the defendant to the police because she was afraid of the defendant and Cathy. *Id.* ¶ 12. The victim admitted to "having problems" with Morris and Cathy, but denied "wanting to get back at them." *Id.*

¶ 44 Morris testified that she left the victim alone with Cathy because Cathy was a babysitter approved by Catholic Charities, but did not leave the victim alone with the defendant because he was not an approved babysitter. *Id.* ¶ 17. Cathy testified for the defense, testifying that she never left the defendant alone with the victim because the defendant was not an approved babysitter, and her other foster children never complained to her about the defendant acting inappropriately. *Id.* ¶ 25. The defendant testified that Cathy never left the victim alone in his care and denied having sexual contact with the victim. *Id.* ¶¶ 28-29. The jury found the defendant guilty. *Id.* ¶ 33.

¶ 45 On appeal, the defendant challenged the sufficiency of the evidence with respect to whether he held a position of trust, supervision, or authority over the victim; and further argued that the victim's testimony was inconsistent, lacked credibility, and was contrary to human experience. *Id.* ¶ 53. In rejecting this argument, the reviewing court first concluded that it "was not unreasonable"

for the jury to conclude that the defendant held a position of trust, authority, or supervision over the victim. *Id.* ¶ 57. Regarding the victim's inconsistencies, the reviewing court noted that the defendant used the victim's alleged inconsistencies in an attempt to discredit her, but "[c]learly, the jury was faced with credibility decisions which were resolved in favor of [the victim]." *Id.* The reviewing court concluded that, when viewing the evidence in the light most favorable to the State, the State met its burden of proof. See *id.*

¶ 46 We find the reasoning in *Groel* instructive. As the court in *Groel* noted, the defendant in that case attempted to use inconsistencies in the victim's testimony to discredit her, but the jury rejected those attempts. Similarly, in this case, the victim was subject to vigorous cross-examination. Defendant's attorney attempted to discredit her by noting that she did not report her allegations for five months, remained in defendant's class following the September 10, 2009, incident, and that the victim did not initially tell her mother about an explicit sexual act, but instead said only that she had been abused. Further, defendant testified to his background in education and as a scouting leader; and further introduced the thank-you note the victim wrote to him in 2010. As in *Groel*, the trier of fact faced credibility decisions and resolved those in favor of the victim. See *id.* We see no basis for substituting our judgment with respect to credibility for that of the trial court.

¶ 47 We are cognizant that defendant denied committing the acts and testified that he had a reduced libido resulting from his medications. However, the victim's testimony contradicted defendant's testimony, and "[i]t is well settled that a criminal sexual assault conviction may be sustained on the victim's testimony alone." *People v. Carlson*, 278 Ill. App. 3d 515, 521 (1996). Moreover, we note that the State introduced the numerous text messages between defendant and the victim, including text messages from defendant to the victim that he missed her and that he was

smitten. The trial court could have relied on this evidence when assessing the victim's testimony and credibility that she and defendant had a physically intimate relationship.

¶ 48 Finally, while we recognize that the victim did not report the September 10, 2009, incident until the following February, a victim's testimony cannot be rejected merely because she did not immediately report the incident. *People v. Bowen*, 241 Ill. App. 3d 608, 620 (1993). "To fix a time limit in which a complaint must be made with the police in order for a victim's testimony to be deemed credible would place an unnecessary burden on the victim," and in this case, the trial court could have accepted as credible that a 17-year-old victim did not recognize the abusive nature of a relationship for 5 months. See *id.* We further note that the victim reported her relationship with defendant within a short period once she concluded that the relationship was abusive.

¶ 49 In sum, defendant is asking us to retry the State's case. As a reviewing court, it is not our function to retry defendant, and we will not reverse a conviction merely because the evidence is contradictory or because defendant claims that a witness is not credible. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 242-43 (2009) (holding that, in a bench trial, the testimony of a single witness, if positive and credible, is sufficient to convict, even if a defendant contradicts the witness's testimony). Accordingly, after viewing the evidence in the light most favorable to the State, we conclude that the State met its burden of proof. See *Groel*, 2012 IL App (3d) 090595, ¶ 57.

¶ 50 B. Ineffective Assistance of Counsel

¶ 51 Defendant's next contention on appeal is that he was denied the effective assistance of counsel because his trial attorney failed to introduce evidence of defendant's condition of erectile dysfunction. According to defendant, such evidence "would have had a devastating impact on the believability of [the victim's testimony] and should have raised a reasonable probability that [the victim] has not been candid in describing the alleged sexual assault." Defendant further maintains

that his trial counsel was ineffective because he failed to object to the hearsay testimony of Ash and Contino, which “improperly corroborated” the victim’s testimony.

¶ 52 A defendant’s right to the effective assistance of counsel is provided by the sixth and fourteenth amendments to the United States Constitution. *People v. Angarola*, 387 Ill. App. 3d 732, 735 (2009) (citing U.S. Const., amends. VI, XIV). To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). To satisfy the first prong, the defendant must show that trial counsel’s performance was deficient because the representation fell below an objective standard of reasonableness. *People v. Harris*, 206 Ill. 2d 1, 16 (2002) (discussing an ineffective-assistance-of-counsel claim in the context of a postconviction petition). To meet the second prong, the defendant must demonstrate prejudice by showing that there is a reasonable probability that, but for trial counsel’s errors, the result of the proceeding would have been different. *Id.* A defendant must satisfy both *Strickland* prongs, and if an ineffective-assistance-of-counsel claim can be disposed of because the defendant did not suffer prejudice, a court need not determine whether counsel’s performance was deficient. *People v. Villanueva*, 382 Ill. App. 3d 301, 308 (2008).

¶ 53 Defendant’s contention that he was denied the effective assistance of counsel is unavailing. Regarding the failure to introduce evidence of erectile dysfunction, we initially note that whether defendant’s trial counsel was aware of defendant’s erectile dysfunction before trial is disputed. Nathe testified during the posttrial hearing that he did not recall discussing defendant’s erectile dysfunction with him. In addition, Rodriguez, who prepared defendant’s pre-sentence report, testified that, while defendant advised him of his depression and anxiety, defendant did not mention his erectile dysfunction. Thus, because the record is disputed as to whether defendant informed Nathe of his erectile dysfunction before trial, it is unclear whether defendant has a colorable

ineffective-assistance-of-counsel claim. See *People v. Burks*, 343 Ill. App. 3d 765, 777 (2003) (concluding that the defendant did not have a colorable claim of ineffective assistance of counsel claim as a result of his trial attorney failing to introduce evidence because there was no indication that his attorney was privy to that information).

¶ 54 Even if Nathe was aware of defendant's diagnosis of erectile dysfunction, however, defendant's claim still fails because he cannot satisfy the prejudice prong under *Strickland*. Defendant stresses that evidence of his erectile dysfunction would have had a "devastating" effect on the victim's credibility, who testified that she felt an erection during the May 2009 incidents and the September 10, 2009, incident. However, based on our review of the record, we conclude that, even if the trial court had information of defendant's erectile dysfunction, that information would not have affected the outcome of the trial. During the posttrial hearing, Leslie acknowledged on cross-examination that, while defendant had trouble maintaining an erection and that he typically "could not even start the act," he could get an erection. Thus, contrary to defendant's assertion, the victim's testimony that she felt an erection during her physical encounters with defendant could have been consistent with defendant having trouble maintaining an erection due to erectile dysfunction. In addition, we note that defendant testified regarding his low libido due to medications he was taking, and evidence of defendant's low sex drive resulting from erectile dysfunction would have been cumulative. Thus, we conclude that any failure by Nathe to introduce evidence of defendant's erectile dysfunction did not prejudice the outcome of the case. See *People v. Bailey*, 167 Ill. 2d 210, 242-43 (1995) (overruled on other grounds) (holding that trial counsel's failure to subpoena and introduce medical and hotel records did not affect the outcome of the trial, and therefore, the defendant's *Strickland* claim failed).

¶ 55 We next turn to defendant’s argument that he was denied the effective assistance of counsel because his attorney failed to object to hearsay testimony from Ash and Contino. Defendant maintains that their testimony “suggested that [the victim] told a consistent story repeatedly” and the “improper bolstering of [the victim’s] version of events also prejudiced [defendant] due to the otherwise dearth of corroborative testimony.”

¶ 56 Defendant’s argument is unpersuasive. “A defense counsel’s decision not to object to the admission of purported hearsay testimony involves a matter of trial strategy and, typically, will not support a claim of ineffective assistance of counsel.” *People v. Theis*, 2011 IL App (2d) 091080, ¶40. Nonetheless, even if Nathe’s failure to object could support a claim of ineffective assistance of counsel, defendant cannot satisfy the prejudice prong pursuant to *Strickland*. As noted above, in addition to the victim’s testimony, the State introduced in excess of 700 text messages between May 15, 2009 and April 15, 2010, including text messages from defendant telling the victim that he was smitten and that he missed her. Zimmer also testified that defendant remarked that the victim looked “spanking” in her senior photo and Metcalf testified that she entered defendant’s classroom after school hours and found defendant and the victim alone with the classroom door locked. In light of this other evidence, “it is unlikely” that the trial court’s judgment would have been different but for the admission of Ash’s and Contino’s testimony. See *id.* ¶ 47 Thus, defendant’s claim of ineffective assistance of counsel regarding defendant counsel’s failure to object to Ash and Contino alleged hearsay testimony fails. See *id.* (citing *Strickland*, 466 U.S. at 687).

¶ 57

III. Conclusion

¶ 58 For the foregoing reasons, we affirm the judgment of the circuit court of Kendall County.

¶ 59 Affirmed.