

sexual assault (720 ILCS 5/12-13(a)(2) (West 2004)), alleging he committed an act of sexual penetration on N.H. knowing N.H. was unable to give knowing consent. On February 8, 2005, the State charged defendant with a second count of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2004)), alleging defendant committed an act of sexual penetration with N.H. by the use of force.

¶ 5 At trial, the State presented evidence showing defendant was friends with N.H.'s roommate. On October 20, 2004, N.H. fell asleep on her living room couch and awoke to find defendant on top of her with his penis in her vagina. She testified she pushed defendant off of her and contacted a friend and, ultimately, the police. N.H. denied consenting to an act of sexual intercourse with defendant. She also denied kissing defendant, biting his lip, or digging her fingernails into any part of his body.

¶ 6 When police officers spoke with defendant, he admitted having sexual intercourse with N.H. Detective Keith Johnston testified defendant asserted he was not a rapist but a "person that decided to take advantage of a situation." Defendant reported the intercourse was consensual and N.H. enjoyed it because she dug her fingernails into his back and buttocks and bit defendant's lip. Defendant showed Johnston his lip, back, and buttocks, but Johnston did not observe any bite or scratch marks on defendant. Later, Johnston met with N.H. and observed that her fingernails were "extremely short." N.H. reported that she chewed on her nails all the time.

¶ 7 Johnston testified a sexual assault kit was completed while N.H. was at the hospital. However, it was not processed in light of defendant's admission that sexual penetration took place. The parties specifically stipulated that fingernail scrapings were taken from N.H. but were not analyzed due to defendant's admission. Defendant did not testify at trial.

¶ 8 The jury found defendant guilty of one count of criminal sexual assault based on the victim's inability to give knowing consent (720 ILCS 5/12-13(a)(2) (West 2004)). On March 18, 2005, the trial court sentenced defendant to 15 years in prison. Defendant appealed, arguing (1) the trial court should have instructed the jury on the affirmative defense of mistake of fact and (2) the court abused its discretion in sentencing defendant to 15 years' imprisonment. On September 11, 2006, this court affirmed defendant's conviction and sentence. *People v. Bradley*, No. 4-05-0405 (Sept. 11, 2006) (unpublished order under Supreme Court Rule 23).

¶ 9 On May 22, 2007, defendant filed a postconviction petition, alleging his appellate counsel was ineffective for failing to argue on direct appeal that (1) the State failed to prove "force," an essential element of the charged offense, (2) the State failed to disclose exculpatory DNA evidence, and (3) trial counsel was ineffective for (a) failing to request DNA testing and (b) stipulating that nail scrapings were not analyzed because defendant admitted penetration. On June 12, 2007, the trial court dismissed defendant's petition as frivolous and patently without merit.

¶ 10 Defendant appealed the trial court's dismissal of his postconviction petition. On appeal, OSAD moved to withdraw as appellate counsel asserting no meritorious issues could be raised. On June 6, 2008, this court granted OSAD's motion and affirmed the trial court's judgment. *People v. Bradley*, No. 4-07-0631 (June 6, 2008) (unpublished order under Supreme Court Rule 23).

¶ 11 On January 14, 2011, defendant filed a *pro se* motion to allow DNA testing pursuant to section 116-3 of the Criminal Procedure Code (725 ILCS 5/116-3 (West 2010)). On January 20, 2011, the trial court denied defendant's motion, noting his identity was not an issue at

trial and finding his motion was without merit.

¶ 12 This appeal followed. As stated, OSAD was appointed to represent defendant on appeal. On February 29, 2012, it filed a motion to withdraw as appellate counsel. The record shows service of the motion on defendant. This court granted defendant leave to file additional points and authorities. Both defendant and the State have responded.

¶ 13 II. ANALYSIS

¶ 14 Initially, the State argues this court lacks jurisdiction to consider defendant's appeal due to his deficient *pro se* notice of appeal. Specifically, it contends defendant's notice was improper because he failed to identify the relief sought from the appellate court and included the date of the jury's guilty verdict rather than the date of the trial court's denial of his motion for forensic testing.

¶ 15 The filing of a notice of appeal is jurisdictional and initiates review in the appellate court. *People v. Smith*, 228 Ill. 2d 95, 104, 885 N.E.2d 1053, 1058 (2008). Pursuant to Illinois Supreme Court Rule 303(b)(2) (eff. June 4, 2008), a notice of appeal must "specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court."

¶ 16 However, "a notice of appeal is to be liberally construed" and "will confer jurisdiction on an appellate court if the notice, when considered as a whole, fairly and adequately sets out the judgment complained of and the relief sought so that the successful party is advised of the nature of the appeal." *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 22, 958 N.E.2d 647, 653 (quoting *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433-34, 394 N.E.2d 380, 383 (1979)). "Where the deficiency in notice is one of form, rather than substance, and the appellee

is not prejudiced, the failure to comply strictly with the form of notice is not fatal.' " *Smith*, 228 Ill. 2d at 105, 885 N.E.2d at 1059 (quoting *Lang v. Consumers Insurance Service, Inc.*, 222 Ill. App. 3d 226, 230, 583 N.E.2d 1147, 1150 (1991)).

¶ 17 Here, defendant's notice of appeal identified the nature of the order appealed as the "denial of motion to allow DNA testing." Although he did not set forth the precise date of the trial court's denial of that motion or expressly state the relief sought, his *pro se* notice sufficiently advised the State of the nature of his appeal. The State does not allege it suffered any prejudice as a result of the deficiencies in defendant's notice and those deficiencies are not fatal. Defendant's notice of appeal was sufficient to confer jurisdiction on this court.

¶ 18 On appeal, OSAD argues the trial court committed no error in denying defendant's motion for DNA testing. We agree.

¶ 19 Pursuant to the Criminal Procedure Code, a defendant may move for postconviction DNA analysis "on evidence that was secured in relation to the trial which resulted in his or her conviction." 725 ILCS 5/116-3(a) (West 2010). The evidence must not have been subject to the requested testing at the time of trial and, if it was previously subjected to testing, the defendant must show the evidence "can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results." 725 ILCS 5/116-3(a) (West 2010). Additionally, a defendant must "present a prima facie case that: (1) identity was the issue in the trial which resulted in his or her conviction; and (2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect." 725 ILCS 5/116-3(b) (West 2010). If a *prima facie* case is made, the trial court will

allow testing upon a determination that testing results have the "potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence" and "the testing requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3(c) (West 2010).

¶ 20 "A section 116-3 motion for forensic testing is a legislatively created right." *People v. O'Connell*, 227 Ill. 2d 31, 37, 879 N.E.2d 315, 319 (2007). "The plain and unambiguous language of section 116-3 permits a motion for DNA testing only when a defendant has been convicted following a trial contesting identity." (Emphasis omitted.) *O'Connell*, 227 Ill. 2d at 37, 879 N.E.2d at 319. Identity must have been the central issue at the defendant's trial. *People v. Johnson*, 205 Ill. 2d 381, 393, 793 N.E.2d 591, 599 (2002).

¶ 21 In this case, identity was not a contested issue at defendant's trial. Defendant admitted sexual intercourse with N.H. but asserted it was consensual. On appeal, defendant acknowledges that identity was not at issue in his trial but argues testing should be allowed because it would produce new, noncumulative evidence materially relevant to his assertion of actual innocence. However, section 116-3 clearly requires a defendant to present a *prima facie* case that "identity was the issue" at his or her trial before the trial court may make a determination as to the potential relevancy of testing results. Defendant is unable to meet section 116-3's requirements and the trial court committed no error in denying his motion for DNA testing.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we grant OSAD's motion and affirm the trial court's judgment. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal.

¶ 24 Affirmed.