SIXTH DIVISION
August 28, 2015

No. 1-13-1299

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.	)	Nos. 06 CR 26155
	)	06 CR 26158
ALBERT COLLINS,	)	
	)	Honorable
Defendant-Appellant.	)	Timothy J. Joyce,
	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for criminal sexual assault are reduced to convictions for attempted criminal sexual assault, and this matter is remanded for resentencing, where: (1) as the State concedes on appeal, defendant was improperly convicted of offenses that were not included in an amended indictment; but (2) defendant's remaining contentions—that his two cases where improperly joined, that he was placed in an unduly suggestive lineup, and that he was provided ineffective assistance of counsel—were unfounded.

¶ 2 After a bench trial, defendant-appellant, Albert Collins, was convicted of two counts of criminal sexual assault and one count of residential burglary in case number 06 CR 26155, and one count each of residential burglary and unlawful restraint in case number 06 CR 26158. He was then sentenced to a total of 48 years' imprisonment. On appeal, defendant contends: (1) he was improperly convicted of criminal sexual assault, where that offense was not included in the

amended indictment in case number 06 CR 26155; (2) his two cases where improperly joined for trial; (3) he was prejudiced after having been placed in an unduly suggestive lineup; and (4) he was provided ineffective assistance of counsel. Because we agree with defendant's first contention and reject the remaining three, we vacate defendant's convictions for criminal sexual assault, reduce those convictions to convictions for attempted criminal sexual assault, and remand this matter for resentencing.

¶ 3 I. BACKGROUND

¶ 4 In case number 06 CR 26155, defendant was charged by indictment with one count each of home invasion, criminal trespass to a residence, and unlawful restraint, as well as multiple counts of aggravated criminal sexual assault, criminal sexual assault, and residential burglary. All of these charges arose out of defendant's activities on or about October 29, 2006, at the residence of L.B., located at 6616 South Marshfield Avenue in Chicago. The record further reflects that defendant was also charged with a number of other, similar offenses in a number of other cases at about the same time. Relevant to this appeal is case number 06 CR 26158, in which defendant was charged with one count each of aggravated criminal sexual assault, unlawful restraint, and criminal trespass to property, as well as two counts of residential burglary. All of these charges also arose out of defendant's activities on or about October 29, 2006, at the residence of C.S., which was located at 6646 South Damen Avenue in Chicago, with the residential burglary counts alleging that defendant entered C.S.'s residence with the intent to commit criminal sexual assault.

¶ 5 After the State elected to proceed to trial on case number 06 CR 26155, it filed a motion to admit evidence of other crimes allegedly committed by defendant. Those other crimes included—*inter alia*—the crimes alleged in the indictment filed in case number 06 CR 26158, as

well as defendant's alleged actions in breaking into the apartment of M.W. on August 15, 2006, and grabbing her vaginal area before being scared off by M.W.'s brother. The trial court granted the State's motion, with respect to the crimes involving C.S. and M.W., finding them to be admissible at trial with respect to establishing identity, motive, intent, lack of consent, *modus operandi*, and defendant's propensity to commit sex crimes. The State's motion was, otherwise, denied.

¶ 6 Just before the start of a jury trial in case number 06 CR 26155, the State filed a motion seeking to join a number of other cases pending against defendant for trial, pursuant to section 114–7 of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 5/114-7 (West 2008). These included the charges contained in case number 06 CR 26158. The trial court denied the State's motion, concluding that it had been filed too late and that the trial court was "not really very comfortable with granting a consolidation of multiple felony cases on the day of jury selection."

¶ 7 The record reflects that defendant and the State thereafter agreed to a plea deal with respect to all of the cases then pending against defendant. In connection therewith, counts 8 and 9 of the indictment in case number 06 CR 26155, each of which had alleged criminal sexual assault, were formally amended to instead allege attempted criminal sexual assault. However, the plea was never fully consummated, and the matter continued to a jury trial in case number 06 CR 26155. At that trial, the State proceeded only on the amended counts 8 and 9 of the indictment, which alleged attempted criminal sexual assault, and count 11, which alleged residential burglary. Defendant was found guilty on each count. However, defendant's motion for a new trial was subsequently granted due to an evidentiary error at trial, and the State's motion to reconsider that decision was denied.

¶ 8 Prior to the retrial of case number 06 CR 26155, the State again filed a motion seeking to join for trial a number of other cases pending against defendant. After this matter was transferred to a new trial judge, the trial court first confirmed that the prior trial judge had ruled that evidence of the crimes alleged in case number 06 CR 26158 would be admissible at trial in case number 06 CR 26155 as proof of other crimes. The trial court then concluded that it was a "close case" as to whether these separate matters were part of the "same comprehensive transaction," such that joinder would be proper. Nevertheless, noting that the "fact finder is going to hear evidence regarding the [C.S.] instance in any event" and that it would, therefore, be "judicially economical" to join the matters, the trial court granted the State's motion with respect to case number 06 CR 26158. However, the trial court then concluded that the potential prejudice outweighed any benefit of joinder with respect to the remaining cases the State sought to join, and denied the State's motion with respect thereto.

¶ 9 Defendant subsequently waived his right to a jury, and the matter proceeded to a bench trial. The State chose to proceed only on counts 8, 9, 11, 13, and 14 of the indictment in case number 06 CR 26155 (counts 13 and 14 alleged, respectively, criminal trespass to property and unlawful restraint), one count each of residential burglary and unlawful restraint in case number 06 CR 26158, and to *nolle prosequi* all of the remaining charges in each case. The record on appeal reveals that there was some confusion at various points during defendant's bench trial regarding whether the counts 8 and 9 in case number 06 CR 26155 stood in their amended form, alleging attempted criminal sexual assault, or whether they had been reinstated to their original form and, therefore again, alleged criminal sexual assault. Ultimately, the trial court, the State, and defense counsel concluded that the original charges had in fact been reinstated after the motion for a new trial had been granted, and the bench trial proceeded under that understanding.

¶ 10 At trial, L.B. testified that in 2006, she lived in the second floor apartment of a two-unit apartment building located at 6616 South Marshfield Avenue in Chicago. She lived in that apartment with her sister, A.W., while their friend, Monique Evans, lived in the first-floor apartment. The door to the second-floor apartment had a hole in it that would allow someone to unlock the door from the outside, with that hole being covered only with duct tape.

¶ 11 On the evening of October 28, 2009, L.B., A.W., and Ms. Evans all went to a party. They stayed there until 2 a.m. the following morning when L.B., who had consumed alcohol to the point of intoxication, vomited upon herself. Another friend drove them home, and L.B. went to bed in her room dressed only in her underwear, with the television in her room turned on and the volume lowered.

¶ 12 L.B. testified that sometime between 3:00 and 3:30 a.m., she awoke naked on her bed with a naked man on top of her. L.B. testified that she could see that man's face by the light of the television, and L.B. identified that man in court as being defendant. Defendant had one hand over L.B.'s mouth as L.B. told defendant "don't kill me." With his other hand, defendant was attempting to place his penis inside L.B.'s vagina. Specifically, L.B. testified that while she struggled with defendant for 5 to 10 minutes, defendant's penis came into contact with her anus and vagina as defendant unsuccessfully attempted to penetrate her vagina. At some point, A.W. entered L.B.'s room and stated that she was going to call the police. Defendant then ran out of the front door of L.B.'s residence. The police arrived shortly thereafter, and L.B. was taken to the hospital. A sexual assault examination was completed at the hospital, and L.B. learned that she has a 0.15 blood-alcohol level.

¶ 13 Later that same day, L.B. viewed a police lineup and identified defendant as the person who had broken into her residence. In addition, L.B. identified photographs the police had taken

of her bedroom after the incident. She further testified that a black shirt with green writing, brown hooded sweatshirt, a blue lighter, and a lollipop depicted on her bed in those photos did not belong to her and were not present when she went to sleep prior to the incident.

¶ 14 A.W. testified consistently with L.B. with respect to their living arrangements and the fact that she, L.B., and Ms. Evans attended a party at which L.B. became intoxicated prior to the incident. She also testified that she took a bath upon returning home, and that following her bath she looked out the front window of her apartment and observed a male wearing a brown "hoody sweater" twisting the knob to the front door of the apartment building. The man ran off and A.W. went to sleep. As she went to her room, she noticed that L.B. was asleep in her room with the television on, dressed in her underwear.

¶ 15 A.W. subsequently awoke to the sound of L.B. crying in her room and saying "don't kill me" and an unknown male voice saying "shut up." A.W. entered L.B.'s room and observed a naked man on top of L.B. A.W. announced that she was going to call the police and left L.B.'s room to do so. The man then left the apartment as A.W. was calling the police, with A.W. never seeing his face. A.W. then observed that L.B. was naked and crying. L.B. was taken to a hospital shortly after the police arrived.

¶ 16 A.W. also viewed a lineup later that day, but identified someone other than defendant as the perpetrator. When she was informed that she had not picked out the police's suspect, A.W. told the police that she had only seen the perpetrator's back. A.W. also testified: (1) the items recovered on L.B.'s bed did not belong to L.B. and were not there when L.B. went to sleep; (2) the hoodey found on L.B.'s bed, matched the one she had earlier seen on the man at the front door; (3) following the incident, she observed that the duct tape covering the front door to her apartment had been ripped away following the incident; and (4) that Ms. Evan's apartment had

also been damaged, with security bars protecting one of Ms. Evan's windows having been pushed in.

¶ 17 C.S. testified that on October 29, 2006, she lived in a house located at 6646 South Damen Avenue in Chicago and slept in a bedroom that faced the back yard. One of the windows in her bedroom had been previously broken and had been covered by a sheet of plastic. Around 5:00 a.m., C.S. awoke to the sound of someone in her room. She then saw a man, whom she identified in court as being defendant, in her room without a shirt and wearing only pants and shoes. Defendant then closed the door to C.S.'s room, and the two began to struggle as C.S. attempted to reopen the door. When C.S. heard her roommate, Nathaniel Lacy, come home, she called for help. Mr. Lacy then forced open the door to C.S.'s room and escorted defendant out of the house. C.S. testified that she did not know defendant and did not invite him into her home. When she returned to her room, she did not notice anything missing, but she did notice that the plastic which covered her broken window had been torn. She later observed a garbage can outside, placed underneath that window.

¶ 18 Mr. Lacy testified he lived with C.S. and that he arrived home from work around 5:00 a.m. on October 29, 2006. He heard the door to C.S.'s bedroom opening and closing and heard C.S. saying "leave, get out, or something." Mr. Lacy pushed the door open enough for C.S. to exit her bedroom, and then managed to push the door open completely. He then observed a man he identified in court as defendant lying on C.S.'s bed. Defendant was not wearing a shirt or pants. Mr. Lacy then escorted defendant out of the house and onto the front porch. While Mr. Lacy never saw one at the house, defendant kept asking about his "hoody." The police arrived shortly thereafter, and defendant tripped and injured his face as he attempted to flee. Mr. Lacy then observed defendant being apprehended and handcuffed by the police in the alley behind the

house. Subsequently, Mr. Lacy observed that a garbage can he had last seen near the garage had been placed beneath C.S.'s broken bedroom window, and a plastic sheet covering that window had been torn off.

¶ 19 Chicago police Sergeant Robert Meyers, Officer Darnisha Johnson, and Officer Jacqueline Price testified regarding their involvement with the apprehension of defendant on October 29, 2006. After receiving a 911 dispatch around 4:00 a.m. that morning, Sergeant Meyers arrived at L.B.'s apartment. He, thereafter, sent out an alert with defendant's description and the police set up a perimeter around the neighborhood. Defendant was subsequently observed on the front porch of C.S.'s residence and defendant then fled. He was soon apprehended. At the time of his arrest, defendant was wearing pants and a jacket, but was not wearing a shirt. He also had a laceration on his face.

¶ 20 Chicago police Detective George Gallagher testified that he participated in the investigation into these matters and that, in connection therewith, he prepared a lineup which included defendant later in the day on October 29, 2009. Because defendant was arrested without a shirt and with a laceration under his right eye, Detective Gallagher provided defendant with a black t-shirt with yellow writing to wear, and provided the members of the lineup with bandages to wear under their right eyes. Although the lighter found at L.B.'s residence was submitted for forensic testing, no fingerprints could be recovered. The clothing left in L.B.'s bedroom was not examined for fibers or hairs.

¶ 21 Finally, the testimonies of L.B., A.W., and C.S. were subject to significant challenges by defense counsel at trial. For example, while L.B. testified that she went straight to bed after returning home from the party, A.W. testified that the two spoke for some time while A.W. was taking her bath. In addition, while L.B. testified that she told defendant "don't kill me,"

Detective Gallagher testified that L.B. never told him this fact. L.B. also admitted on cross-examination that her intoxication affected her ability to identify defendant. Furthermore, while A.W. testified that the man she observed at her front door wore a brown hoody, Detective Gallagher did not recall her telling him that fact at the time of the incident. Finally, while C.S. testified that she did not recall speaking with the police, at all, following the incident at her residence and that she awoke to find defendant in her room, Detective Gallagher testified that he did, in fact, interview C.S. after the incident, and C.S. informed him that she first discovered defendant, shirtless and in her bed, when she walked into her bedroom on the morning of October 29, 2006.

¶ 22 At the conclusion of the State's case-in-chief, defendant moved for a directed finding in which defense counsel briefly argued—*inter alia*—that the evidence suggested "a lineup that's highly suggestive." That motion was denied, defendant entered into evidence a single photograph of L.B.'s bedroom, and defendant then rested his case.

¶ 23 Following closing arguments, the trial court found defendant guilty on all counts in each case. In reaching this conclusion, the trial court acknowledged that the testimony of both L.B. and C.S. was somewhat marred by issues of credibility and impeachment. The trial court specifically found that, while L.B.'s testimony about what had happened at her home was not particularly impeached, her ability to actually identify defendant as the perpetrator was in question due to her intoxication. The circuit court also found that while C.S.'s testimony regarding exactly what took place in her bedroom was impeached, she was still a credible witness. Specifically, the trial court noted that her testimony, the testimony of Mr. Lacy, and the other evidence left no doubt about the fact that defendant was in C.S.'s room, without a shirt or pants. Ultimately, the trial court concluded: (1) the credible testimony and other evidence

regarding the time, location and method of defendant's entry into C.S.'s residence, along with the positive and credible identification of defendant at C.S.'s residence, supported the credibility of L.B.'s identification of defendant as being the perpetrator in the earlier incident at L.B.'s residence; and (2) in turn, the credible testimony regarding defendant's assault upon L.B., combined with the fact that defendant was not wearing any pants when he was in C.S.'s bedroom, established the intent of defendant in entering C.S.'s residence; *i.e.*, to commit a sexual assault.

¶ 24 Thereafter, defendant filed a *pro se* motion alleging he received ineffective assistance of counsel. After conducting a hearing on that motion pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), the trial court concluded that new counsel did not need to be appointed and that defendant's *pro se* motion should be denied. In addition, defense counsel filed a motion for a new trial which argued—*inter alia*—that L.B.'s pretrial identification of defendant was tainted by an unduly suggestive lineup, such that a new trial should be held at which L.B.'s identification of defendant would be suppressed. The motion for a new trial was also denied, and the matter proceeded to sentencing.

¶ 25 Following a sentencing hearing, the trial court merged defendant's convictions for criminal trespass to property and unlawful restraint into his other convictions and sentenced him to a total of 48 years' imprisonment on all of his convictions in each case. Defendant's motion to reconsider his sentence was denied, and defendant timely appealed.

¶ 26 II. ANALYSIS

¶ 27 Defendant raises a number of issues on appeal, which we consider in turn.

¶ 28 A. Improper Convictions

¶ 29 First, we address defendant's contention that he was improperly convicted of criminal sexual assault in case number 06 CR 26155, where that offense was not included in the amended indictment. The State concedes this issue on appeal and, following our *de novo* review of this issue, we concur. See *People v. Siverson*, 333 Ill. App. 3d 884, 886 (2002) (noting that, in general, a defendant may not be convicted of an offense for which he was not charged and that the question of whether the offense for which a defendant was convicted was included within the offense for which he was charged is a matter of law which is reviewed *de novo*); *People v. Landwer*, 166 Ill. 2d 475, 486 (1995) (same).

¶ 30 The record clearly reflects that, in case number 06 CR 26155, defendant was originally charged by indictment with two counts of criminal sexual assault. In connection with the State's initial plea offer, those counts were formally amended to allege attempted criminal sexual assault. Defendant was, ultimately, tried and convicted for those amended counts in the initial jury trial, before being granted a new trial.

¶ 31 The record further reflects some confusion at defendant's subsequent bench trial with respect to whether these charges remained in their amended form or whether they had been reinstated to their original form. Ultimately, the trial court, the State, and defense counsel concluded that the original charges had, in fact, been reinstated, and convictions were entered against defendant for—*inter alia*—two counts of criminal sexual assault. As the parties on appeal concede, and as our review of the record establishes, this conclusion was incorrect. At the time of defendant's bench trial, defendant actually still stood charged, in case number 06 CR 26155, with the amended charges of *attempted* criminal sexual assault. His convictions for criminal sexual assault were, therefore, improper. *People v. Kolton*, 219 Ill. 2d 353, 359 (2006) (noting a "defendant in a criminal prosecution has a fundamental due process right to notice of

the charges brought against him," and that "[f]or this reason, a defendant may not be convicted of an offense he has not been charged with committing.")

¶ 32 Defendant never objected to this error below and has, therefore, forfeited this issue. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion). However, we agree with defendant that this matter constitutes plain error. The plain error doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error." *People v. Herron*, 215 Ill. 2d 167, 186 (2005). The plain-error doctrine is applied where "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). As defendant correctly notes, his convictions for criminal sexual assault—an offense for which he was not actually charged at the time of the bench trial—constitutes plain error under the second prong of this test. *People v. McDonald*, 321 Ill. App. 3d 470, 472 (2001) (reviewing this very issue as plain error, because the entry of convictions for uncharged offenses challenged the integrity of the judicial process).

¶ 33 In light of this error, both defendant and the State ask this court—in the event that defendant's remaining arguments on appeal are rejected—to vacate defendant's convictions for criminal sexual assault in case number 06 CR 26155, enter convictions for attempted criminal sexual assault, and remand this matter for resentencing. Ill. S. Ct. R. 615(b)(3) (eff. Feb. 6, 2013), provides that an appellate court may "reduce the degree of the offense of which the

appellant was convicted." As our supreme court has noted, this rule "provides the appellate court with broad authority to reduce the degree of a defendant's conviction." *People v. Kennebrew*, 2013 IL 113998, ¶ 25. In light of this authority, the facts of this case, and the fact that—as discussed below—we do indeed reject defendant's remaining arguments, we agree that the parties have presented the proper course of action.[1] We, therefore, conclude that this error requires us to vacate defendant's convictions for criminal sexual assault in case number 06 CR 26155, enter convictions for two counts of attempted criminal sexual assault, and remand this matter for a new sentencing hearing.

¶ 34 B. Admittedly Moot Issues

¶ 35 Defendant also raises the following arguments on appeal that: (1) the State failed to prove he committed an act of penetration of L.B.'s vagina, rendering one of his convictions for criminal sexual assault unsupported by the evidence; and (2) his 48-year sentence was excessive.

¶ 36 As both defendant and the State concede, however, there is no need to address these arguments in light of our decision to vacate defendant's convictions for criminal sexual assault and remand for resentencing. See *People v. Blaylock*, 202 Ill. 2d 319, 325 (2002) ("A question is said to be moot when it presents or involves no actual controversy, interests or rights, or where the issues involved have ceased to exist."). We, therefore, need not further consider these arguments on appeal.

¶ 37 C. Joinder

¶ 38 We next address the first of defendant's contentions about which there is a dispute on appeal: *i.e.*, that he was prejudiced by the trial court's decision to join the charges he faced in case number 06 CR 26155 with those he faced in case number 06 CR 26158.

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[1] Defendant concedes on appeal that the evidence presented at his bench trial was sufficient to support a finding of guilt for attempted criminal sexual assault.

¶ 39 Section 114-7 of the Code permits a trial court to order two or more charges to be tried together if they could have been joined in a single charging instrument. 725 ILCS 5/114-7 (West 2010). In turn, section 111-4(a) of the Code provides that two or more offenses may be joined in a single charging instrument if the offenses are "based on the same act or on 2 or more acts which are part of the same comprehensive transaction." 725 ILCS 5/111-4(a) (West 2010). Courts may look to a number of different factors to determine if two or more offenses were part of the "same comprehensive transaction" so as to permit joinder. *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 69. Those factors include: the proximity in time and location of the offenses; the identity of evidence needed to demonstrate a link between the offenses; whether there was a common method in the offenses; and whether the same or similar evidence would establish the elements of the offenses. *Id*. Nevertheless, "[i]f it appears that a defendant or the State is prejudiced by a joinder of related prosecutions or defendants in a single charge or by joinder of separate charges or defendants for trial the court may order separate trials, grant a severance of defendants, or provide any other relief as justice may require." 725 ILCS 5/114-8 (West 2010).

¶ 40 A trial court has substantial discretion in determining the propriety of joinder, and it will not be reversed absent a showing of an abuse of that discretion. *People v. Marts*, 266 Ill. App. 3d 531, 542 (1994). An abuse of discretion occurs only where no reasonable person would agree with the trial court's ruling. *People v. Walston*, 386 Ill. App. 3d 598, 601 (2008)

¶ 41 On appeal, the parties spend a great deal of time disputing whether the trial court's decision to join these two cases constituted an abuse of discretion under the above standards. Defendant contends that it was an abuse of discretion, asserting that: (1) the only relevant factor weighing in favor of joinder was proximity in time, with the remaining factors weighing against;

(2) the trial court improperly relied upon an improper factor—judicial expediency—in ordering these two matters to be tried together; and (3) even if these two cases were part of the same comprehensive transaction, joinder was improper because of the great prejudice to defendant. In turn, the State contends that joinder was proper, arguing that all of the relevant factors weighed in favor of joinder. The State also contends that, because evidence of each incident would be admissible as other-crimes evidence in any separate prosecution on the other incident, any possible prejudice from joinder was eliminated.

¶ 42 Ultimately we need not decide if the joinder of these two cases was proper under the above-referenced analytical framework. It is well recognized that a defendant "is not prejudiced by the improper joinder of charges if, had separate trials been given, defendant still would have been convicted." *People v. Gonzalez*, 339 Ill. App. 3d 914, 922 (2003). Thus, misjoinder "will be deemed harmless where the evidence of all of the charged crimes would have been admissible in the separate trials that would have taken place if not for the misjoinder." *Walston*, 386 Ill.App.3d at 609; *People v. King*, 384 Ill. App. 3d 601, 606 (2008) (misjoinder is harmless where evidence of defendant's alleged attacks would have been admissible as other-crimes evidence in any separate trials); *People v. Trail*, 197 Ill. App. 3d 742, 746 (1990) (emphasizing that where other-crimes evidence is properly admissible, the potential prejudice to a defendant of having the trier-of-fact decide two separate charges is greatly diminished because the trier-of-fact is already going to be receiving evidence about both charges).

¶ 43 "Evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crime. [Citation.] Other-crimes evidence is admissible to show *modus operandi*, intent, motive, identity, or absence of mistake with respect to the crime with which the defendant is charged. [Citation.] However, even where relevant, the

evidence should not be admitted if its probative value is substantially outweighed by its prejudicial effect. [Citation.] The admissibility of evidence rests within the discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion. [Citation.]" *People v. Pikes*, 2013 IL 115171, ¶¶ 11-12.

¶ 44 At the time these two cases were joined, the trial court had already determined that evidence of the C.S. incident would be admissible as other-crimes evidence at any trial regarding the L.B. incident. We see no reason why that decision was incorrect. Indeed, the record on appeal clearly reflects that defendant's identity was an issue with respect to the L.B. incident, and that evidence of the C.S. incident was relevant to establish that fact. This was a proper use of that evidence, and would have been proper even if case number 06 CR 26158 had not been joined with case number 06 CR 26155. Furthermore, we see no reason why defendant would have been unduly prejudiced by the introduction of any such evidence if the joinder motion had not been granted.

¶ 45 Nor do we see any reason to believe that a similar conclusion would not have been reached with respect to evidence about the L.B. incident at any possible separate trial regarding the C.S. incident. Again, the record on appeal here clearly shows that defendant's intent in entering C.S.'s residence was at issue in case number 06 CR 26158, and the evidence of defendant's actions with respect to L.B. in case number 06 CR 26155 was relevant with respect to that issue. And again, we do not perceive that defendant would have been unduly prejudiced by the introduction of any such evidence at a separate trial. As such, we conclude that any possible misjoinder in this matter was not prejudicial, as evidence of both the L.B. and C.S. incidents would have been admissible as other-crimes evidence in any separate trials. *Walston*, 386 Ill. App. 3d at 609; *King*, 384 Ill. App. 3d at 606.

¶ 46 Finally, we note again that *this matter* was tried before the trial court as a bench trial. It has long been recognized that "in the absence of some indication to the contrary in the record, there is a presumption that the trial judge as the trier of fact in a bench trial has considered only competent evidence in making his findings of fact. [Citation.] The necessary corollary is that the trial judge in a bench trial is presumed to have considered testimony solely for purposes for which that testimony is competent." *People v. Fultz*, 32 Ill. App. 3d 317, 334 (1975). Here, the record is clear that: (1) with respect to case number 06 CR 26155, the trial court *only* considered the evidence of the C.S. incident as it related to the establishment of defendant's identity in the L.B. incident; and (2) with respect to case number 06 CR 26158, the trial court *only* considered the evidence of the L.B. incident as it related to defendant's intent in the C.S. incident. This was entirely proper. See also, *People v. Nash*, 2013 IL App (1st) 113366, ¶ 24 ("The rule generally barring other-crimes evidence is based on the belief that the introduction of the evidence may over-persuade a jury to convict a defendant only because the jury believes the defendant is a bad person deserving punishment. [Citation.] In a bench trial, this fear is assuaged; it is presumed that the trial court considered the other-crimes evidence only for the limited purpose for which it was introduced. [Citation.]").

¶ 47 D. Lineup

¶ 48 Defendant next contends that the trial court improperly rejected that portion of his motion for a new trial arguing that L.B.'s pretrial identification of defendant was tainted by an unduly suggestive lineup, such that a new trial should be held at which L.B.'s identification of defendant would be suppressed. A trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *People v. Rincon*, 387 Ill. App. 3d 708, 726 (2008). New trials should only be granted when the opposite conclusion is clearly apparent to the reviewing court, or the findings

of the trier of fact are unreasonable, arbitrary, and not based on the evidence. *People v. Gibson*, 304 Ill. App. 3d 923, 930 (1999).

¶ 49 As an initial matter, we conclude that defendant has forfeited this issue. Again, a defendant must both object at trial and include the alleged error in a written posttrial motion to preserve a claim for review. *Enoch*, 122 Ill. 2d at 186. Here, defendant never filed a motion to suppress L.B.'s identification of defendant before trial and never objected to the admissibility of this evidence at trial. The record of the trial proceedings only includes a brief reference to "a lineup that's highly suggestive," made in the context of defense counsel's argument on the motion for directed finding at the close of the State's case. Rather, defendant first raised the argument that L.B.'s identification should actually have been suppressed in his motion for a new trial. The failure to raise this argument until after trial constitutes forfeiture. Any possible forfeiture aside, however, we reject defendant's argument on appeal that L.B.'s pretrial identification of defendant was tainted by an unduly suggestive lineup.

¶ 50 At the time of defendant's trial, section 5/107A-5(c) of the Code provided that "[s]uspects in a lineup or photograph spread should not appear to be substantially different from 'fillers' or 'distracters' in the lineup or photograph spread, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect." 725 ILCS 5/107A-5(c) (West 2010). With respect to any attempt to suppress a pretrial identification made of a defendant during a lineup, the defendant bears the burden of proving that the pretrial identification procedure was impermissibly suggestive. *People v. Gabriel*, 398 Ill. App. 3d 332, 348 (2010). " 'Only where a pretrial encounter resulting in an identification is 'unnecessarily suggestive' or 'impermissibly suggestive' so as to produce 'a very substantial likelihood of irreparable misidentification' is evidence of that and any subsequent identification excluded by

law under the due process clause of the 14th Amendment.' " *People v. Love*, 377 Ill. App. 3d 306, 311 (2007) (quoting *People v. Moore*, 266 Ill. App. 3d 791, 796-97 (1994)).

¶ 51 Thus, the law does not require the participants in a lineup to be nearly identical, nor to exactly match the descriptions given by eyewitnesses. *Love*, 377 Ill. App. 3d at 311. The suggestibility of a lineup depends on " 'the strength of the suggestion made to the witness' " and, whether, through " 'some specific activity on the part of the police, the witness is shown an individual who is more or less spotlighted by the authorities.' " *Gabriel*, 398 Ill. App. 3d at 349 (quoting *People v. Johnson*, 149 Ill. 2d 118, 147 (1992)). Courts must examine the totality of the circumstances in determining whether a defendant has met the burden of showing the identification procedure was impermissibly suggestive. *People v. Prince*, 362 Ill. App. 3d 762, 771 (2005). If a defendant satisfies this burden of proof, only then will the burden shift to the State to show, by clear and convincing evidence, an independent basis of reliability for a later identification. *Id*.

¶ 52 Here, defendant contends that the lineup shown to L.B. was impermissibly suggestive because: (1) defendant was placed in a black t-shirt matching the one L.B. had been informed was found in her room; (2) defendant was the only individual in the lineup with blood visible on the bandage on his face; and (3) the fact that A.W. was told she picked out the "wrong person" indicates that the police were coaching witnesses as they were making their identifications. We reject all of these arguments.

¶ 53 First, defendant was not wearing a shirt, at all, when he was arrested. The record is quite clear that defendant was placed in t-shirt, not in order to spotlight him, but to allow him to better blend in with the other members of the lineup, all of whom were wearing shirts. Furthermore, and despite defendant's contention to the contrary, the shirt he wore in the lineup was not an

exact match for the one found in L.B.'s room. Defendant wore a black t-shirt with yellow writing in the lineup, while a black t-shirt with a much larger green design with green writing on it was found in L.B.'s room. Two other members of the lineup had shirts with writing, and one other member of the lineup wore a black shirt. And in any case, the police are not required to find matching clothing for all participants of a lineup (*People v. Peterson*, 311 Ill. App. 3d 38, 49 (1999)), nor is a lineup unduly suggestive simply because a defendant is the only person wearing a particular item of clothing purportedly worn by the offender at the time of the offense (*People v. Gabriel*, 398 Ill. App. 3d 332, 349 (2010); *People v. Johnson*, 149 Ill. 2d 118, 148 (1992)).

¶ 54 Second, it was not the fault of the police that defendant had a distinctive laceration on his face at the time of the lineup. Defendant inflicted that injury upon himself when he attempted to flee from C.S.'s residence. Moreover, rather than leave defendant as the sole member of the lineup with a bandage on his face, Detective Gallagher obtained identical bandages for all of the lineup members. Again, rather than attempt to highlight defendant, the record reflects that the police took measures to better allow defendant to blend in with the other members of the lineup. We also note that a lineup is not unduly suggestive merely because the defendant is the only member with a specific physical characteristic, in this case, blood on a bandage. *Peterson*, 311 Ill. App. 3d at 49 (collecting cases).

¶ 55 Third, we fail to see how informing A.W. that she had not identified defendant in the lineup, *after she had admittedly identified someone else*, shows that the police were coaching the witnesses to chose the "correct" person. The evidence simply reflects that A.W. did not get a "good look" at defendant's face, could not identify him, and was informed that she had not done so by the police after the lineup was complete. Moreover, there is simply no evidence of any "coaching" of L.B. with respect to her identification.

¶ 56 Ultimately, defendant bore the burden of proving that the pretrial identification procedure was impermissibly suggestive (*Gabriel*, 398 Ill. App. 3d at 348), and the totality of the circumstances must be considered in making that determination (*Prince*, 362 Ill. App. 3d at 771). Here, the photos of the lineup show that defendant was placed among four other males of the same race and similar height, weight, and general appearance. Moreover, the record reflects that the actions of the police, in placing defendant in a shirt, and in placing bandages on all the members of the lineup, were made in an effort to allow defendant to blend in. Even had this issue been preserved, there is simply no evidence that defendant was spotlighted by the police, and we therefore conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial on that basis.

¶ 57 E. Ineffective Assistance of Counsel

¶ 58 Defendant finally argues that his trial counsel provided ineffective assistance by: (1) failing to impeach L.B.'s trial testimony that defendant committed acts of sexual penetration by cross-examining her with her purportedly contrary testimony at the first trial or by calling Dr. Earl Frederick[2] to testify about her purportedly contrary statements to him on the day of the incident; and (2) failing to move for severance of these matters once the State chose to *nolle prosequi* the charges of criminal sexual assault in the C.S. case.

¶ 59 A claim of ineffective assistance of counsel is judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lawton*, 212 Ill. 2d 285, 302 (2004). In order to obtain relief under *Strickland*, a defendant must prove defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused defendant prejudice by creating a reasonable probability that,

[2] Dr. Fredrick had testified at defendant's first trial that he treated L.B. at the hospital, where L.B. told him that there had been no "sexual contact."

but for counsel's errors, the trial result would have been different. *People v. Wheeler*, 401 Ill. App. 3d 304, 313 (2010). The defendant must establish both prongs of this two-part test (*People v. Edwards*, 195 Ill.2d 142, 163 (2001)), and the defendant bears the burden of demonstrating he received ineffective assistance of counsel (*People v. Valladares*, 2013 IL App (1st) 112010, ¶ 52).

¶ 60 It must be also be noted that effective assistance of counsel refers to competent, not perfect, representation. *People v. Palmer*, 162 Ill.2d 465, 476 (1994). Thus, a petitioner must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Mims*, 403 Ill.App.3d 884, 890 (2010). "Decisions involving what evidence to present and which witnesses to call fall within the broad category of trial strategy and are not subject to a claim of ineffective assistance unless they deprive a defendant of a meaningful adversary proceeding." *People v. Smith*, 2012 IL App (1st) 102354, ¶ 86 (citing *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2005)). Similarly, " '[t]he manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court.' " *People v. Lacy*, 407 Ill. App. 3d 442, 461 (2011) (quoting *People v. Pecoraro*, 175 Ill. 2d 294, 326–27 (1997)).

¶ 61 In light of the above authority, defendant obviously faces significant hurdles with respect to establishing that his trial counsel's failure to impeach L.B.'s trial testimony was objectively unreasonable, as opposed to being a matter of trial strategy. The record shows that defendant's trial counsel made numerous attempts to impeach L.B. with her prior statements. Moreover, our own comparison of testimony at the first trial with the L.B.'s testimony at the second trial indicates that any possible impeachment is far less significant than defendant contends on appeal. However, we ultimately need not determine whether *any* of the purported failures cited by

defendant were objectively unreasonable, because it is evident that all of those purported failures have either been rendered moot, or did not cause defendant any prejudice.

¶ 62 With respect to the first issue, we note that the specific testimony defendant contends should have been impeached involved L.B.'s contention that defendant actually committed sexual penetration, testimony that supported the trial court's finding that defendant committed criminal sexual assault. As we have already concluded, however, defendant actually only stood charged with the amended charges of *attempted* criminal sexual assault of L.B. We have, therefore, already concluded that defendant's two convictions for criminal sexual assault must be vacated; convictions for two counts of attempted criminal sexual assault must be entered; and this matter must be remanded for a new sentencing hearing. The argument that defense counsel's failure to impeach this specific testimony, thus leading to defendant's convictions for criminal sexual assault, has, therefore, been rendered moot by this decision. See *People v. Flores*, 315 Ill. App. 3d 387, 395 (2000) (recognizing that decision on appeal granting defendant relief may render additional claims of ineffective assistance of counsel moot); *People v. Phillips*, 150 Ill. App. 3d 531, 533 (1986) (same).

¶ 63 In his reply brief, however, defendant makes the additional argument that "L.B.'s general credibility was always at issue" and, therefore, his trial counsel's failure to impeach L.B.'s testimony on this issue may still have caused him prejudice. We take this contention to be an argument that had L.B.'s general credibility been so impeached, defendant might not have been found guilty of any of the charges he faced in case number 06 CR 26155. We reject this argument for two reasons. First, it was not included in defendant's opening brief and has, therefore, been waived. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.");

Ill. S. Ct. R. 612(i) (eff. Feb. 6, 2013) (noting that the provisions of Rule 341 is applicable to criminal cases). Second, and as we have already discussed above, the trial court specifically recognized the flaws in L.B.'s testimony before finding the evidence overall to be sufficient to support defendant's convictions. This fact, combined with our conclusion that any possible impeachment would have been far less significant than defendant contends on appeal, leads us to conclude that defendant has failed to meet his burden to establish that he was prejudiced. *Valladares*, 2013 IL App (1st) 112010, ¶ 52. Indeed, it appears from the record that had defendant's trial counsel impeached L.B.'s testimony regarding penetration at trial, the trial court would likely have—at most—found that defendant was not proven guilty of criminal sexual assault in case number 06 CR 26155 but, rather, that defendant was proven guilty of only attempted criminal sexual assault and one count of residential burglary. That is exactly the position in which defendant now stands.

¶ 64 With respect to defendant's contention that his trial counsel was ineffective for failing to move for severance of these matters once the State chose to *nolle prosequi* the charges of criminal sexual assault in case number 06 CR 26155, any argument that such a failure caused defendant prejudice is belied by our conclusion that the joinder of these two cases was not prejudicial. *People v. Johnson*, 154 Ill. 2d 227, 236 (1993) (the failure to challenge a ruling that was not prejudicial will not support a claim of ineffective assistance of counsel); *People v. Smith*, 160 Ill. App. 3d 89, 98 (1987) (same). We, therefore, reject all of defendant's claims of ineffective assistance of counsel.

¶ 65 III. CONCLUSION

¶ 66 For the foregoing reasons, we vacate defendant's convictions for criminal sexual assault, reduce those convictions to convictions for attempted criminal sexual assault, and remand this matter for resentencing. The judgment of the trial court is, otherwise, affirmed.

¶ 67 Affirmed in part and vacated in part; cause remanded.