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THIRD DIVISION
October 7, 2015

No. 1-13-1869

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County, Illinois.
Plaintiff-Appellee,	)	
v.	)	No. 09CR7374
WHITNEY LANGFORD,	)	
Defendant-Appellant.	)	The Honorable Domenica A. Stephenson, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

ORDER

¶ 1 Held: Where the State provided sufficient evidence at trial to show element of force of threat of force, conviction of criminal sexual assault affirmed; where, in considering the totality of evidence adduced at trial, evidence was sufficient to raise the affirmative defense of mistake of age in trial for aggravated criminal sexual abuse, it was error for court to refuse to tender a mistake of age instruction to the jury; defendant was not denied a fair trial by particular challenged evidentiary issues or by challenged closing arguments; the DNA analysis fee assessed against defendant must be vacated, as defendant has previously been convicted of a qualifying felony and we can presume that defendant is already registered in the DNA database. Affirmed in part; reversed and remanded in part; order modified.

¶ 2 Following a jury trial, defendant Whitney Langford was found guilty of one count of criminal sexual assault and two counts of aggravated criminal sexual abuse. The court sentenced defendant to 28 years' incarceration on the criminal sexual assault conviction and two sentences of 7 years' incarceration to run concurrent with each other, but consecutive to the criminal sexual assault sentence. Defendant appeals, contending: (1) the State failed to prove him guilty of criminal sexual assault; (2) the trial court erred in denying defendant's request for a mistake of age jury instruction as to aggravated criminal sexual abuse; (3) defendant was denied a fair trial by the State's introduction of particular items into evidence and an allegedly inflammatory closing argument; (4) one of defendant's convictions for aggravated criminal sexual abuse should be vacated pursuant to the one-act one-crime doctrine; and (5) the DNA indexing fee assessed against defendant should be vacated. For the following reasons, we affirm in part, reverse and remand in part. We vacate that portion of the trial court's order requiring defendant pay the $250 DNA analysis fee.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged on April 28, 2009, with one count of criminal sexual assault, two counts of aggravated criminal sexual abuse (one based on contact between defendant's penis and M.C.'s vagina and the other based on contact between defendant's hand and M.C.'s breast, both where M.C. was at least 13 and under 17 years of age), one count of criminal sexual abuse, and one count of violation of the sex offender registration act[1] after having sex

[1] A nolle prosequi was entered on the criminal sexual abuse charge prior to trial, and on the violation of the sex offender registration charge after sentencing.

with his sister's boyfriend's stepdaughter, fifteen year-old M.C. Defendant was 35 years old at the time of the crime.

¶ 5 Prior to trial, the State filed a motion *in limine* requesting to introduce evidence regarding an altercation between defendant's sister and defendant that occurred immediately after defendant's sister, Toyla Rice, discovered that defendant had allegedly assaulted M.C. This altercation culminated in Rice stabbing defendant with a knife in the living room. The State sought to introduce the incident to show course of conduct, as the altercation brought the police to the scene of defendant's assault on M.C. Defendant objected, characterizing the evidence as not probative to the issues of the incident between defendant and M.C. The court allowed the State to bring out that Rice had a physical and verbal altercation with defendant, but excluded information regarding Rice stabbing defendant.

¶ 6 At trial, M.C. testified that she was 15 years old on March 28, 2009. At that time, her stepfather, Mark Rushing, was dating Rice, with whom she shared a close relationship. Rice had three children, ages 9, 10, and 11. M.C. often spent time at Rice's house, and would often babysit the children. On the night in question, M.C. was at Rice's home in the 7000 block of North Hoyne Avenue in the Rogers Park neighborhood of Chicago. She, Rice, Rushing, the three children, and defendant were in the apartment together. This was the second occasion on which she had met defendant. M.C. was not afraid of defendant when she met him.

¶ 7 On the night in question, M.C. was sitting in the front room next to defendant and one of Rice's children. The child made a rude or "smart" comment to M.C., to which defendant replied, "Don't talk to her like that. She's an adult." M.C. told defendant she was only a

teenager. M.C. testified she told defendant, "I'm not grown, I'm just a teenager." Specifically, M.C. testified:

> "[THE WITNESS M.C. A.] [Rice's child Ashanti and I] were talking and, of course, Ashanti being younger than me, she was kind of a smart aleck and she kind of talked back to me after I told her something, and [defendant] was kinda like, you know, 'Don't talk to her like that. She's an adult.'
>
> Q: Where was he when he said that?
>
> A: He was in the front room with us - - in, like, the same kitchen/front room area.
>
> Q: What happened when the defendant said, 'Don't talk back to her, she's an adult'?
>
> A: [Rice] and I - - not at the same time, of course, but we told him that I wasn't an adult.
>
> Q: And what did you say to him?
>
> ***
>
> A: I do know that - - of course I was like, you know, I'm not grown, I'm just a teenager."

¶ 8 M.C. testified that Rice also told defendant M.C. "wasn't an adult." She described their positions in the house during this interaction, explaining that she and Ashanti were in the front room. She was braiding Ashanti's hair at the time. Defendant was in the room with her. The apartment was laid out with the front room and the kitchen having an open connection to one another. M.C. testified that, while she, Ashanti, and defendant were in the front room, Rice was in the kitchen.

¶ 9 Later that night, around 10 p.m., Rushing and Rice left the house to go to the store. While out, they telephoned M.C. to tell her they would not be returning until the next day. M.C., defendant, and the three children were left in the apartment. As the night went on, the children went to bed and M.C. fell asleep on a chair in the living room. At some time in the night, defendant woke M.C. up and asked her to move from the chair. She moved onto a nearby couch and went back to sleep.

¶ 10 Sometime later, defendant again woke M.C. up, asking her when Rushing and Rice would be returning. M.C. told him they were staying the night at Rushing's house and not coming back that night. Defendant and M.C. were alone in the living room at this time. Defendant was the only adult in the house.

¶ 11 Defendant asked M.C. if she wanted to play "Truth or Dare." M.C. agreed, and they played truth or dare. During the game, defendant asked M.C. questions such as where she went to school, what was the age of the oldest person she had ever dated, and whether she had a boyfriend. M.C. "thought it was kind of weird," but she answered the questions.

¶ 12 As defendant talked to M.C., he got up from the chair on which he had been sitting and approached the couch where M.C. was sitting. He grabbed her by the wrist and pulled her up off the couch. He continued talking to her, still holding on to her wrist, and returned to the chair, where he physically pulled M.C. down onto his lap. M.C. immediately stood back up. Defendant stood up behind her and groped her breasts over her shirt. He then put his hands in her pants and fondled her genitals. M.C. was wearing loose pants that, when defendant pushed them down, fell around her ankles. M.C. testified she was "trying to move away" but defendant directed her towards the bedroom. Her pants came completely off as she walked. Defendant was directly behind M.C. as they walked to the bedroom. She testified:

> "[THE WITNESS M.C.] [Defendant] was kinda not tugging me but kinda like walking towards [the bedroom] and holding onto me and we were walking, and then he let go and, you now, I kinda just was like, okay, like I don't want - - I don't know what to do, so I just did what we wanted me to do and I went into the room."

¶ 13 Once in the bedroom, M.C. turned around. Defendant was close enough to M.C. that she could smell his breath. M.C. testified she "froze" and sat down on the bed. Defendant leaned over her, closing in to approximately one inch away from her, until she fell back onto the bed. Specifically, she testified that, when she turned around, she was "face to face" with him about one inch from him and "[t]he way we were turned, he was kinda up on me and, you know, I ended up falling backwards or sitting onto the bed."

¶ 14 Then, defendant pulled off M.C.'s underpants and unzipped his own pants. He told her not to tell anyone about this and "that it would be between us." He continued to tell her not to tell anybody as he inserted his penis into M.C.'s vagina. M.C. told defendant that, if he was going to have sex with her, not to ejaculate inside of her. M.C. did not insert defendant's penis into her vagina, nor did she ask or want defendant to do so. She testified, "I didn't want him in me at all and I really didn't want him to [ejaculate inside of me]." M.C. did not fight defendant because she was afraid he might attempt to assault the other children in the house. She admitted that defendant did not threaten the children before assaulting her, but, when asked why she did not fight back, she explained:

> "[THE WITNESS M.C.] There were other kids in the house and I didn't know how to handle it, I didn't know what to do, but I felt like if it was going to be anybody, I would rather it be me than the nine- and ten-year-old girls or the 11-

> year-old boy. I didn't know what would have happened if I wasn't there, so I would have rather it be me then them."

She said, "I didn't make a noise, I didn't do anything. I just did what he wanted me to do."

¶ 15 Defendant ejaculated inside of M.C. and pulled up his pants. M.C. got up, went into the bathroom, and put her clothes on. She took one of the children's mobile phones and went into another bedroom. Defendant had already returned to the front room, so M.C. closed the door almost all the way. M.C. texted with and eventually called a friend to tell her what had happened.

¶ 16 At approximately 2 a.m. on the morning of March 29, M.C. texted Rice and told her what had happened. Rice returned to the apartment and got into a verbal and physical altercation. During the fight, M.C. stayed in the children's bedroom with the other children. She could hear defendant and Rice fighting. The police arrived some time later. M.C. told them what had happened between herself and defendant. The police took M.C. to Swedish Covenant Hospital, where she spoke with and was examined by nurses and doctors.

¶ 17 While M.C. was still on the witness stand, the State showed her a number of photographs. Defendant objected to the photographs and requested a sidebar. Defendant objected to the admission of People's Exhibits 2 and 3, which are both photographs of the couch and chair in the living room. Defendant argued that the blood depicted in the photographs invited the jury to speculate that M.C. was injured during the assault. The State responded that the photographs were the best way to show the position of the couch and chair, and that the photographs did not include the knife that Rice had used to stab

defendant.[2] The court considered the photographs and determined that the blood in People's Exhibit 2 was depicted in such a way that the jury would not recognize it as blood unless it was identified as such for them. Moreover, there had been evidence introduced at trial regarding a prior altercation. The court allowed Exhibit 2 but reserved ruling on publication, explaining:

> "THE COURT: Well, in regards to People's Exhibit No. 2, there are some - - this picture shows the couch on the left and it shows the chair in the photograph as well. There are some stains on the arm of the couch. I don't know if anybody would know that those stains are, they're dark in color. If you didn't know what it was, I don’t know that you could say what those stains are. The same thing with there's some droppings like reddish brown circular droppings. It almost looks like spots on the floor. Again, I don't know that anyone would say it was blood if you didn't know what it was.
>
> There's already been some testimony that there was a physical altercation in here. It would in no way indicate whatsoever that there was a knife used or not, and as I said, I'll note that - - you can't tell what those - - what that is, but in People's Exhibit No. 3, it's a close-up of the couch and it has the arm that has the stains on it a little bit closer. In that picture, it looks to me - - you could tell more what those stains are. There are droppings on the top of the arm and then lines that drip down, but to me that one is more questionable as to - - I shouldn't say questionable, more clear as to what the stains may be. People's Exhibit No. 2 is not so much of a close-up of the couch.

[2] Both photographs in question are included in the record on appeal.

I'm not going to allow People's Exhibit No. 3 because it doesn't – it only has the sofa and not the chair, so your objection to People's Exhibit No. 3 is sustained."

¶ 18 M.C. then identified where in Exhibit 1 she was standing when defendant pulled her down onto his lap. She also identified where in Exhibit 2 she was when defendant first grabbed her and opened her pants, as well as the door to the children's bedroom where she went to text and make telephone calls after having sex with defendant.

¶ 19 Toyla Rice also testified for the State. Rice is defendant's sister. She was dating M.C.'s stepfather Mark Rushing in March 2009. M.C. regularly babysat for Rice's three children. On the evening of March 28, 2009, she, defendant, M.C., Rushing, and Rice's three children were at Rice's apartment.

¶ 20 When her child made a rude comment to M.C. and defendant told the child, "Don't talk to her like that. She's an adult," Rice told defendant M.C. was "only 15." Rice testified that this interaction occurred while she, defendant, and M.C. were at the kitchen table. Specifically, Rice testified:

"[WITNESS RICE. A.] Initially my daughter and [M.C.] were talking with each other, and then my daughter Ashanti said something smart to [M.C.].

Q: What happened when she said something smart to [M.C.]?

A: [Defendant] stated, "Don't talk to adults like that," and I'm like - -

Q: What did you do when you heard that?

A: I said, "she's not, she's only 15."

***

Q: How far away was [defendant] from you when you said that?

A: We were at the table, so I would say less than three feet.

Q: Did he indicate that he heard that to you?

A: Yes.

Q: How did he indicate that?

A: Because his response was "So what, she still shouldn't talk to her like that."

¶ 21 Eventually, Rice and Rushing left the apartment to walk to the store. Rice later called M.C. to tell her she and Rushing were going to stay the night at Rushing's home. They fell asleep there.

¶ 22 In the middle of the night, Rice awoke to Rushing's ringing telephone. By the time she reached the phone, it had stopped ringing. Then Rice began to receive text messages from M.C. The first text read, "Your brother screwed me." Rice tried unsuccessfully to rouse Rushing. She then ran the 12 blocks back to her apartment where she found defendant sitting on the couch. She confronted defendant, asking what he did to M.C. Initially, he denied knowing what she was referring to and said he did not do anything. Rice continued to confront him, telling him M.C. had texted her and that M.C. had no reason to lie. Over a defense objection, Rice testified that defendant told her, "I'm sorry. I got weak." Again over a defense objection, Rice testified that she took the statement, "I'm sorry. I got weak" to mean "he had raped" M.C.

¶ 23 Defendant and Rice then got into a physical altercation. No details of the altercation were given at trial although Rice, in fact, stabbed defendant.

¶ 24 Dr. John Graneto testified he was the supervising emergency room physician at Swedish Covenant Hospital on the night M.C. was treated for sexual assault. Both doctors and nurses were involved in her care, and a sexual assault kit was collected. M.C. was also

examined. The physical examination revealed no obvious signs of injury. Dr. Graneto clarified that an examination revealing no obvious sign of injury is typical in the "majority" of sexual assault cases. Although M.C. was crying, tearful, and failed to make eye contact during much of the examination, she was also cooperative throughout.

¶ 25 The parties stipulated that the swab taken from M.C.'s vagina indicated the presence of semen. The parties also stipulated that the male DNA profile from the vaginal swab collected from M.C. matched the DNA profile from defendant, and would be expected to occur in approximately one in 26 quintillion black, one in 1.1 sextillion white, or one in 12 sextillion Hispanic unrelated individuals.

¶ 26 Chicago Police detective Ed Heerdt testified that he spoke briefly with M.C. at Swedish Covenant Hospital on March 29, 2009. He then proceeded to St. Francis Hospital in Evanston and spoke with defendant. Detective Heerdt testified that defendant refused to sign a criminal complaint against Rice for his injuries.

¶ 27 Two other crimes witnesses, T.M. and Chicago Heights Police detective Mikhal El Amin, also testified for the purpose of proving defendant's motive, intent, and absence of mistake. Prior to the testimony, the court instructed the jury:

> "THE COURT: Before the State calls their next witness, I want to give the jury instruction: Evidence will be received that the defendant has been involved in an offense other than those charged in the indictment. This evidence will be received on the issues of the defendant's intent, motive, absence of mistake and may be considered by you only for that limited purpose.

> It is for you to determine whether the defendant was involved in that offense, and if so, what weight should be given to this evidence on the issues of intent, motive and absence of mistake."

¶ 28 T.M. testified that she was 17 years old on September 24, 2002. She was walking near a forest preserve by Chicago Heights around 5:40 p.m. when a man whom she identified as defendant approached her and began talking with her. After some conversation, he began making sexual advances at T.M. and invited her to go someplace to hang out together. She declined. Then, from behind, defendant grabbed T.M. by the neck and dragged her into a clearing in the forest preserve. T.M. screamed and tried to escape, and defendant punched her in the eye. Defendant told T.M. to remove her pants. T.M. kept screaming. Two men heard T.M. shouting, and they shouted back. Startled, defendant released his grip on T.M. T.M. picked up a glass bottle, hit defendant with it, ran toward the shouting men, and called the police. The two men detained defendant until the police arrived.

¶ 29 Detective El Amin testified he was assigned to work on T.M.'s case. Detective El Amin interviewed defendant at the Chicago Heights police department. After being informed of his rights, defendant admitted to the detective that he accosted T.M. after she refused his advances because he wanted to have sex with her. Detective El Amin also testified he was present for a second interview the following day with defendant and an assistant state's attorney, when defendant again admitted to trying to have sex through force after T.M. refused him.

¶ 30 The State rested. Defense counsel made motions for a mistrial, directed verdict, and to reconsider the court's earlier ruling on a *Montgomery* motion. In discussing which exhibits would be admitted, defendant did not object to the admission of Exhibit 2, but reserved an

objection to the publication of Exhibit 2. After hearing arguments from the parties, the court denied defendant's motions.

¶ 31 Defendant did not testify.

¶ 32 At the jury instruction conference, the State objected to the third proposition in IPI 11.56, arguing that there was no evidence M.C. consented to the sexual act. The defense argued that there was slight evidence of implied consent because M.C. did not tell defendant "no," push him away, pull up her pants, or outwardly manifest that the sex was not consensual. The court found there was slight evidence of consent and gave the instruction over the State's objection.

¶ 33 Defendant also requested the fourth proposition in IPI 11.62A, that for reasonable mistake of age, be provided to the jury. Defendant argued that both M.C. and Rice attributed statements to defendant that show he thought she was older than 15, which could mean he reasonably thought she was 17 or older. Additionally, defendant argued that his acknowledgment of M.C.'s age was only brought about by Rice's testimony, which was impeached by the fact that Rice omitted the statement when she spoke with the police. The State countered that defendant presented no evidence of his reasonable belief, and that the State's evidence as a whole showed that defendant knew M.C. was only 15 years old. The court found there was no evidence that M.C. was anything other than 15 years old and that defendant acknowledged M.C.'s age:

> "THE COURT: Regarding the proposition fourth, that the defendant did not reasonably believe [M.C.] to be 17 years of age or older, in looking at the evidence that's come in, the only evidence that there is is that [M.C.] was 15. There's no evidence that she was anything other than 15, not even slight evidence

> that she was anything other than 15, and there's no evidence as to what the defendant believed her to be. So the testimony is that when the defendant said don't say something smart to an adult, and this is coming from Miss Rice, she told the defendant, who is sitting at the table with her approximately three feet way, is that [M.C.] - - she said don't say that, she's not an adult, she's only 15, and the defendant acknowledged it by saying, so what, you still don't talk to her like that. There's absolutely no evidence that [M.C.] was anything other than 15 years old.
>
> So I am going to deny the defense's request for the fourth proposition."

¶ 34 Defendant also objected to the publication of People's Exhibit 2, arguing the picture was overly prejudicial because there was only limited information surrounding Rice's attack on defendant, and the picture displayed blood. The State countered that the photograph had been marked by the victim and shows a unique perspective of the apartment layout. Additionally, the State argued that the substance was not even readily recognizable as blood. The court allowed publication of Exhibit 2, noting that the jury had already heard about the physical and verbal altercation between Rice and defendant and that defendant was taken to the hospital. The jury had not heard evidence of a stabbing. The court found that the probative value of the photograph outweighed any prejudice to defendant, as it showed the bedroom door where M.C. went to call and text after the incident, and the relationship between the chair and the sofa.

¶ 35 The parties then presented closing arguments. The jury was instructed and sent out to deliberate. At that time, defendant made a motion for a mistrial based on the State's rebuttal argument. Specifically, defendant's concern lies with four arguments from rebuttal: that M.C. told her friend she was raped, that defendant commanded M.C. into the back bedroom,

that defendant leaned M.C. back onto the bed, and that M.C. cried for help. After hearing arguments from the parties, the court denied the motion.

¶ 36 The jury returned a guilty verdict on all counts. Defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial, which the court denied. After hearing arguments in aggravation and mitigation, the court sentenced defendant to 28 years' incarceration on the criminal sexual assault conviction, and concurrent sentences of 7 years' incarceration on the two counts of aggravated criminal sexual abuse, to run consecutive to the criminal sexual assault sentence.

¶ 37 Defendant appeals.

¶ 38 II. ANALYSIS

¶ 39 i. Use of Force, Criminal Sexual Assault

¶ 40 Defendant first contends the State failed to prove him guilty beyond a reasonable doubt of criminal sexual assault based on force or threat of force, where there was no evidence adduced at trial that defendant either used force or threatened to use force against M.C. Defendant admits to having had intercourse with M.C. He agrees that, because of M.C.'s age, the sex was an illegal act, but just not the illegal act of criminal sexual assault by force or threat of force for which he was convicted. He argues that the evidence at trial was insufficient to show that the intercourse took place by force or threat of force where there was no evidence that the victim cried for help or attempted to fight off defendant, and there was no evidence of physical injury to the victim. We disagree.

¶ 41 When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime proven beyond a

reasonable doubt. *People v. Campbell*, 146 Ill. 2d 363, 374 (1992). We will not substitute our judgment for that of the trier of fact. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). A reviewing court must construe all reasonable inferences from the evidence in favor of the prosecution. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). We will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Ortiz*, 196 Ill. 2d at 259.

¶ 42 To support a conviction for criminal sexual assault as charged under section 11-1.20(a)(1) of the Criminal Code of 1961 (Code), the State must prove that a defendant committed an act of sexual penetration upon the victim by the use of force or threat of force. 720 ILCS 5/11-1.20(a)(1) (West 2012). "Force or threat of force" is defined as:

> " 'Force or threat of force' means the use of force or violence or the threat of force or violence, including, but not limited to, the following situations:
>
> (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believes that the accused has the ability to execute that threat; or
>
> (2) when the accused overcomes the victim by use of superior strength or size, physical restraint, or physical confinement." 720 ILCS 5/11-0.1 (West 2012).

¶ 43 There is no specific standard regarding the amount of force which the State is required to show, and each individual case is fact-sensitive. *In re C.K.M.*, 135 Ill. App. 3d 145, 151 (1985). "Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent." 720 ILCS 5/12-17(a) (West 2012). Particularly relevant to the case at bar, a "victim's failure to cry out

or resist does not establish consent in sex cases if the victim is threatened or in fear of being harmed." *People v. Brials*, 315 Ill. App. 3d 162, 173 (2000). "If circumstances show resistance to be futile or life-endangering or if the victim is overcome by superior strength or fear, useless or foolhardy acts of resistance are not required." *Brials*, 315 Ill. App. 3d at 173. Moreover, the issues of consent and force or threat of force are matters of credibility, or questions best left to the trier of fact who heard the evidence and saw the demeanor of the witnesses. *People v. Barbour*, 106 Ill. App. 3d 993, 998 (1982). "Where an outcry by the victim is useless or restrained by fear, the failure to do so does not indicate consent." *People v. Thomas*, 96 Ill. App. 3d 443, 451 (1981). Additionally, a child is neither expected nor required to offer as much resistance as might be expected of an adult. *In re C.K.M.*, 135 Ill. App. 3d 145, 151 (1985). In weighing evidence of force, it is appropriate to consider the place and conditions under which the attack occurred. *People v. Hines*, 105 Ill. App. 3d 35, 37 (1982).

¶ 44 Defendant's argument amounts to an attack on the victim's credibility, that is, an attack on M.C.'s testimony that she was sexually assaulted by defendant. Defendant argues that, where the examining physician testified M.C. exhibited no signs of external or internal injury and defendant himself did not testify at trial, all evidence of force stemmed from M.C.'s testimony, which was testimony of "unforced" sex.

¶ 45 Based upon its verdict, the jury found M.C.'s testimony to be credible and resolved any factual disputes against defendant. The jury's determinations in this regard are entitled to "great deference" and, as a reviewing court, we will not substitute our judgment for that of the jury's on these issues. See *People v. Moss*, 205 Ill. 2d 139, 166 (2001). A criminal sexual assault conviction can be sustained on the victim's testimony alone, and there is no

requirement that the victim's testimony be corroborated by physical or medical evidence. *People v. Shum*, 117 Ill. 2d 317, 356 (1987); *People v. Le*, 346 Ill. App. 3d 41, 50 (2004). We find that M.C.'s testimony alone was sufficient to support the jury's verdict.

¶ 46 a. The Use of Force

¶ 47 We first consider the element of force. After determining that no other adults were in the house or would be returning to the house that night, defendant used his superior strength as a 35 year-old, 180-pound man to force M.C. off of the couch, pulling her by her wrists. He then physically pulled M.C. down onto his lap. She immediately stood back up. Nonetheless, defendant continued his pursuit of 15 year-old M.C. by groping her breasts, opening her pants, and fondling her genital area. M.C. testified she was "trying to move away," but defendant directed her towards the bedroom, staying right behind her all the way to the bedroom. M.C. turned to face defendant, who was so close she could smell his breath. M.C. "froze." Defendant then used his superior size to edge in on M.C. until she fell backward onto the bed. Specifically, M.C. testified that, after she turned toward defendant, face to face, defendant was very close to her and, "[t]he way we were turned, he was kinda up on me and, you know, I ended up falling backwards or sitting onto the bed." Defendant did not stop, but continued leaning over her, closing in to approximately one inch away from her. She continued leaning back and he continued leaning closer to her until she fell back onto the bed.

¶ 48 Then, defendant pulled off M.C.'s underpants and unzipped his own pants. He told her not to tell anyone about this and "that it would be between us." He continued to tell her not to tell anybody as he inserted his penis into her vagina. M.C. told defendant that, "if he was going to" have sex with her, not to ejaculate inside of her. M.C. did not insert defendant's

penis into her vagina, nor did she ask or want defendant to do so. She testified, "I didn't want him in me at all and I really didn't want him to [ejaculate inside of me]."

¶ 49 M.C. did not fight defendant because she was afraid he might attempt to assault the other children in the house. She admitted that defendant did not threaten the children before assaulting her, but, when asked why she did not fight back, she explained:

> "[THE WITNESS M.C.] There were other kids in the house and I didn't know how to handle it, I didn't know what to do, but I felt like if it was going to be anybody, I would rather it be me than the nine- and ten-year-old girls or the 11-year-old boy. I didn't know what would have happened if I wasn't there, so I would have rather it be me then them."

She said, "I didn't make a noise, I didn't do anything. I just did what he wanted me to do." The fact that the 15-year-old victim did not scream or fight defendant is not determinative of the issue of force. See *In re C.K.M.*, 135 Ill. App. 3d at 151 (a child is neither expected nor required to offer as much resistance as might be expected of an adult).

¶ 50 Defendant claims the State failed to introduce evidence of force where the victim did not testify that she called out for help, did not tell defendant to stop, and defendant did not specifically threaten her. In fact, defendant characterizes his groping of the 15 year-old victim's breasts and putting his hands into her pants to feel her genital area as "what, in age appropriate circumstances, would be considered foreplay." This court has stated:

> "Merely because a victim does not cry out for help or try to escape at the slightest opportunity is not determinative on the issues of whether she was being forced to have sexual intercourse, or whether she consented to having sexual intercourse, especially if she was threatened or in fear of being harmed [Citation],

> overcome by the superior strength of the assailant, or paralyzed by fear. The significance of the failure to cry out or attempt to escape depends upon the circumstances of each case and are merely factors to be considered by the trier of fact in weighing the witnesses' testimony.
>
> Similarly, the lack of medical evidence of physical injury does not establish the victim consented to have sexual intercourse. Physical injury or resistance is not necessary to prove a victim was forced to have sexual intercourse [Citations.] and a victim need not subject herself to serious bodily harm by resisting in order to establish penetration was nonconsensual [Citation.]." *People v. Bowen*, 241 Ill. App. 3d 608, 620 (1993).

¶ 51 Defendant's claims regarding M.C.'s lack of resistance are unpersuasive to this court. M.C. resisted by attempting to move away from defendant and by standing up when he pulled her down onto his lap. Neither of these attempts at resistance were successful. M.C. was not required to continue to resist where she was paralyzed with fear (or "froze," in her words), and felt that, if she resisted, the children in her charge could be harmed. See *Bowen*, 241 Ill. App. 3d at 620.

¶ 52 In considering whether defendant forced M.C. into sexual penetration, it is also proper to consider the "disparity in the size and strength of the parties and the conditions under which the act took place." *Barbour*, 106 Ill. App. 3d at 998. Although there is no evidence of M.C.'s height and weight, she was a 15 year-old girl at the time of the incident. Defendant, on the other hand, was a 35 year-old male who was 5 feet, 10 inches tall and weighed 180 pounds. The jury, which viewed both defendant and the victim at trial, would

have noted the disparity in the size and strength of the two individuals and could properly have considered this disparity when reviewing the testimony about the night in question.

¶ 53 Considering the facts of this case in the light most favorable to the State, as we must on appeal (*Bush*, 214 Ill. 2d at 326), we find that a reasonable trier of fact could have found defendant used force to commit an act of sexual penetration against M.C. where he physically pulled her from the couch and then physically pulled her down upon his lap. Then, when she resisted by standing up, groped her breasts and genitals, then, directing her to the back bedroom, he used his superior size to force her to lie down upon the bed before having intercourse with her. M.C. was reasonably paralyzed with fear (or "froze," as she described it) in the situation in which she found herself with defendant, having resisted his advances to no avail, knowing the other adults would not be returning that night, and being aware that she was responsible for the other three young children in the house. As such, she need not have cried out for help or attempted to further resist defendant in order for the act to be forced on her against her will. See *People v. Bolton*, 207 Ill. App. 3d 681, 686 (1990) ("If circumstances show resistance to be futile or life endangering or if the victim is overcome by superior strength or fear, useless or foolhardy acts of resistance are not required.").

¶ 54 b. The Threat of Force

¶ 55 Even if we were to find the State failed to prove defendant used force in committing an act of sexual penetration against M.C., we nonetheless would affirm defendant's conviction, as the State also proved defendant used the threat of force in committing an act of sexual penetration.

¶ 56 Essentially, on the night of the assault, defendant discovered he, a 35 year-old man, was alone with M.C., a 15 year-old girl, and three young children. He took advantage of that

situation, physically moving M.C. at least two times, first from the couch by grabbing her by the wrists, and then onto his lap, by physically pulling her down on top of him. She resisted by immediately standing back up. He responded by standing up, as well, and groping her breasts, opening her pants, and fondling her genital area. This showed M.C., a 15 year-old girl, that resisting defendant would be futile. See *Brials*, 315 Ill. App. 3d at 173 ("If circumstances show resistance to be futile or life-endangering or if the victim is overcome by superior strength or fear, useless or foolhardy acts of resistance are not required"); see also *Thomas*, 96 Ill. App. 3d at 451 ("Where an outcry by the victim is useless or restrained by fear, the failure to do so does not indicate consent"). Then defendant directed M.C. to the back bedroom where he used his superior size to lean her back upon the bed. See *Barbour*, 106 Ill. App. 3d at 998 (In considering whether defendant forced M.C. into sexual penetration, it is also proper to consider the "disparity in the size and strength of the parties and the conditions under which the act took place"). He removed her underpants and, as he had intercourse with her, told her repeatedly not to tell anyone. M.C. was afraid that, if she did not comply with defendant's physical demands, defendant would hurt the other children. Considering the facts of this case in the light most favorable to the state, as we must on appeal (*Bush*, 214 Ill. 2d at 326), we find that a reasonable trier of fact could have found defendant used the threat of force to commit an act of sexual penetration against M.C.

¶ 57 We acknowledge that defendant relies on a number of sex assault cases in which, on appeal, no use of force or threat of force was found, *e.g.*, *People v. Warren*, 113 Ill. App. 3d 1 (2012); *People v. Taylor*, 48 Ill. 2d 91 (1971). However, as noted above, sexual assault cases, including the one at bar, are fact-intensive and each case is unique. See, for example, *In re C.K.M.*, 135 Ill. App. 3d at 151 (quoting *People v. Sprouse*, 94 Ill. App. 3d 665, 673

(1981)) (" 'Those facts which will, or will not, establish these elements [of the offense charged] beyond a reasonable doubt will vary as might ages, or places or times. For example, the failure of an alleged rape victim to scream or cry out may be of pivotal importance in one case and quite insignificant in another . . .. It is the totality of facts and circumstances which must be carefully examined in each case.' [Citation omitted.]"). This case, like all criminal sexual assault cases, rests on its unique facts.

¶ 58 Considering the totality of facts and circumstances presented at trial, in addition to the legal precedent discussed herein, as well as in consideration of our standard of review, that is, whether a rational trier of fact could have found force or threat of force, we find the State presented sufficient evidence to support a conviction for criminal sexual assault by use of force or threat of force under section 11-1.20(a)(1) of the Code.

¶ 59 We affirm defendant's conviction for criminal sexual assault.

¶ 60 ii. Jury Instruction, Mistake of Age

¶ 61 Next, defendant contends that the trial court erred when it denied defendant's request to instruct the jury on the affirmative defense of mistake of age as to the aggravated criminal sexual abuse charges. Specifically, defendant argues that, where testimony shows defendant referred to M.C. as an "adult" on the evening of the assault, evidence shows he thought she was an adult and, therefore, the jury should have been instructed on the mistake of age defense. The State responds that, although testimony showed defendant referred to M.C. as an adult, it also shows that defendant was immediately corrected by both M.C. and Rice. M.C. told him she was "not grown" and was "just a teenager." Rice informed him M.C. was only 15 years old. This, according to the State, negates defendant's argument that he was mistaken about M.C.'s age and, therefore, the trial court was not mistaken in its denial of the

mistake of age jury instruction. Defendant responds that he could reasonably have believed that "just a teenager" meant M.C. was 17, 18, or 19 years of age.

¶ 62 As an initial matter, defendant has preserved this issue by first raising it at trial and again raising it in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988) (In order to preserve an issue for appeal, a party must first make an objection to the alleged error at trial, and then raise it in a posttrial motion).

¶ 63 Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it may reach a correct verdict. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007) ("The function of jury instructions is to provide the jury with accurate legal principles to apply to the evidence so it can reach a correct conclusion"); *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). A defendant is entitled to have the jury instructed on his theory of the case if the evidence provides some foundation for the instruction. *People v. Jones*, 175 Ill. 2d 126, 132 (1997). Evidence, however slight, which supports an affirmative defense will entitle a defendant to a jury instruction, even if the evidence is conflicting. *Jones*, 175 Ill. 2d at 132; accord, *People v. Mohr*, 228 Ill. 2d 53, 65 (2008) (a defendant is entitled to an instruction on his theory of the case if there is "some" evidence in the record to support it); *People v. Uptain*, 352 Ill. App. 3d 643, 646 (2004) (very slight evidence on the theory of defense will justify giving an instruction).

¶ 64 On review, the question is whether the instructions, considered as a whole, fully and fairly announce the law applicable to the theories of the parties. *Mohr*, 228 Ill. 2d at 65. Generally, the decision whether to give a jury instruction is within the trial court's discretion and will not be reversed absent an abuse of that discretion. *People v. Jones*, 219 Ill. 2d 1, 31 (2006). However, whether the defendant introduced sufficient evidence to obtain an

instruction on his theory of the case is a question of law that is reviewed *de novo*. *People v. Dunlap*, 315 Ill. App. 3d 1017, 1024 (2000). It is an abuse of discretion for the trial court to refuse to instruct the jury on the defendant's theory of the case, even where only "very slight" evidence supports that theory. *Jones*, 175 Ill. 2d at 132. Our supreme court has explained:

> "In order to avail himself of the affirmative defense [of mistake of age] at issue, a defendant is required to produce some evidence at trial to demonstrate the existence of a reasonable belief that the victim was 17 years of age or older. [Citations.]
>
> However, the defendant will be excused from presenting any evidence where the evidence presented by the State raises the issue of the affirmative defense. [Citations.] In essence, unless the evidence before the trial court is so clear and convincing as to permit the court to find as a matter of law that there is no affirmative defense, the issue of whether a defendant should be relieved of criminal liability by reason of his affirmative defense must be determined by the jury with proper instruction as to the applicable law." *Jones*, 175 Ill. 2d at 132; accord, *Uptain*, 352 Ill. App. 3d at 646

¶ 65 At the jury instruction conference in the case at bar, defendant requested the fourth proposition of Illinois Patter Jury Instructions, Criminal, No. 11.62A (IPI Criminal No. 11.62A), that for reasonable mistake of age, be provided to the jury. That provision provides, in pertinent part:

> "When the defendant is charged with aggravated criminal sexual abuse under Chapter 720, Section 12-16(d) *** and the defense that the defendant

reasonably believed the victim to be 17 *** years of age or older is raised by the evidence, give the following instruction as the final proposition:

'Fourth Proposition: That the defendant did not reasonably believe ____ to be [17] years of age or older.' " IPI—Criminal 11.62(a).

Had the fourth proposition been presented to the jury, it would have been given along with IPI Criminal 11.62(a), which was given to the jury. That instruction provides:

"To sustain the charge of aggravated criminal sexual abuse, the State must prove the following propositions:

First: That the defendant committed an act of sexual conduct with [M.C.]; and

Second: That [M.C.] was at least 13 years of age but under 17 years of age when the act was committed; and

Third: That the defendant was at least 5 years older than [M.C.].

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." IPI—Criminal 11.62(a).

¶ 66 Defendant argued that both M.C. and Rice attributed statements to defendant that show he thought she was older than 15, which could mean he reasonably thought she was 17 or older. Additionally, defendant argued that his acknowledgment of M.C.'s age was only brought about by Rice's testimony, which was impeached by the fact that Rice omitted the

statement when she spoke with the police. The State countered that defendant presented no evidence of his reasonable belief, and that the State's evidence as a whole showed that defendant knew M.C. was only 15 years old. The court found there was no evidence that M.C. was anything other than 15 years old and that defendant acknowledged M.C.'s age:

> "THE COURT: Regarding the proposition fourth, that the defendant did not reasonably believe [M.C.] to be 17 years of age or older, in looking at the evidence that's come in, the only evidence that there is is that [M.C.] was 15. There's no evidence that she was anything other than 15, not even slight evidence that she was anything other than 15, and there's no evidence as to what the defendant believed her to be. So the testimony is that when the defendant said don't say something smart to an adult, and this is coming from Miss Rice, she told the defendant, who is sitting at the table with her approximately three feet way, is that [M.C.] - - she said don't say that, she's not an adult, she's only 15, and the defendant acknowledged it by saying, so what, you still don't talk to her like that. There's absolutely no evidence that [M.C.] was anything other than 15 years old.
>
> So I am going to deny the defense's request for the fourth proposition."

¶ 67 We find the court's decision to refuse the instruction to be in error. In considering the facts of this case, we cannot say the evidence was so clear and convincing as to justify a failure to instruct the jury as to whether defendant should be relieved from criminal liability based upon his reasonable belief of M.C.'s age. See *Jones*, 352 Ill. App. 3d at 132 ("In essence, unless the evidence before the trial court is so clear and convincing as to permit the court to find as a matter of law that there is no affirmative defense, the issue of whether a

defendant should be relieved of criminal liability by reason of his affirmative defense must be determined by the jury with proper instruction as to the applicable law").

¶ 68 The State presented the following evidence at trial: (1) M.C. was 15 years old at the time of trial;[3] (2) M.C. had met defendant one time previously; (3) the night of the incident, defendant referred to M.C. as "an adult"; (4) M.C. testified that, after defendant referred to her as an adult, she told him, "I'm not grown, I'm just a teenager." M.C. testified that, when she said this, she and defendant were in the front room and Rice was in the kitchen; (5) Rice testified that, after defendant referred to M.C. as an adult, she advised him M.C. was not an adult, but was "only 15." Rice testified this occurred when M.C., defendant, her child, and she were all at the kitchen table together.

¶ 69 Defendant was not required to present any evidence that he believed M.C. was at least 17. See *Jones*, 175 Ill. 2d at 132 (The defendant is excused from "presenting any evidence where the evidence presented by the State raises the issue of the affirmative defense." Only where the evidence is so "clear and convincing" such that the trial court can find as a matter of law that there is no affirmative defense, should the jury not be instructed on an affirmative defense). The evidence presented—defendant thought M.C., who was old enough to be responsible for Rice's three children overnight, was an adult, that M.C. responded she was a teenager, and that Rice, possibly speaking from another room, told him M.C. was 15, was sufficient to raise the affirmative defense. We are cognizant, of course, "that only '[v]ery slight evidence' upon a given theory justifies giving the instruction." *Uptain*, 352 Ill. App. 3d at 647 (quoting *Jones*, 175 Ill. 2d at 132. We find that the testimony presented is sufficient to present the question to the jury.

[3] By the time M.C. testified at defendant's trial, she was 18 years old.

¶ 70 We also note with concern that the evidence presented at trial was conflicting as to the position of defendant, Rice, and M.C. during the pivotal conversation wherein defendant supposedly learned M.C. was only 15 years old. Specifically, M.C. testified that, when this interaction occurred, she and defendant were in the front room and Rice was in the kitchen. Rice, however, testified that she, M.C., the daughter, and defendant were seated together at a kitchen table. It appears the trial court, when making its ruling regarding the instruction at issue, misremembered this portion of conflicting testimony, as the court specifically stated that defendant was sitting at a table with Rice at that time. The court failed to mention that M.C. had testified the conversation occurred when the parties were in different parts of the, albeit connected, front room and kitchen. Factual disputes should be presented to the jury for its determination, and the jury, had the instruction been properly presented, may well have determined defendant could have had the reasonable belief that M.C. was older than she was where he may have only heard M.C. and Rice say M.C. was "not an adult" but a teenager, and not Rice say, from a different room, that she was actually only 15 years old. See *Jones*, 175 Ill. 2d at 134 ("Ultimately, it was for the jury to determine whether defendant had a reasonable belief that the victim had attained the age of 17 years. Absent defendant's tendered instruction, the jury lacked the necessary tools to analyze the evidence fully and to reach a verdict based on those facts.").

¶ 71 We are mindful that our role today is not to weigh the evidence, but rather, our inquiry is specific to determining whether some evidence supported defendant's theory. We find that it did. In order to find defendant guilty of aggravated criminal sexual abuse, the jury had to find the following: (1) defendant had committed an act of sexual conduct or penetration; (2) M.C. was at least 13 but under 17 years of age; and (3) defendant was at least 5 years older

than M.C. However, the trial court, in refusing the jury instruction at issue, barred defendant from informing the jury that mistake of age was an affirmative defense to the crime. "Ultimately, it was for the jury to determine whether defendant had a reasonable belief that the victim had attained the age of 17 years. Absent defendant's tendered instruction, the jury lacked the necessary tools to analyze the evidence fully and to reach a verdict based on those facts. [Citation.] The resulting denial of due process requires that defendant be granted a new trial." *Jones*, 175 Ill. 2d at 134. Considering the totality of the evidence presented at trial, we find that the jury should have been given the opportunity to determine whether defendant had a reasonable belief that M.C. was 17 years old. By refusing the jury instruction, the trial court effectively denied defendant due process and, accordingly, defendant is entitled to a new trial as to the aggravated criminal sexual abuse conviction.

¶ 72 Upon retrial, we caution that defendant can be convicted of and sentenced for, at most, one count of aggravated criminal sexual abuse. At his initial trial, defendant was convicted of two counts of aggravated criminal sexual abuse. Defendant was convicted as charged in count 1 of the indictment for committing the offense of criminal sexual assault in that he "knowingly committed an act of sexual penetration upon [M.C.], to wit: contact between [defendant's] penis and [M.C.'s] vagina, by the use of force or threat of force." Defendant was convicted as charged in count 2 of the indictment for committing the offense of aggravated criminal sexual abuse in that he "knowingly committed an act of sexual penetration with [M.C.], to wit: contact between [defendant's] penis and [M.C.'s] vagina." The trial court merged defendant's sentence for count 2 into his sentence for count 3, which charged defendant with aggravated criminal sexual abuse based on contact between defendant's hand and M.C.'s breast, and sentenced defendant to 7 years' incarceration. Thus,

both convictions (Count 1 and Count 2) stemmed from the same physical act, as both were predicated on defendant's inserting his penis into M.C.'s vagina.

¶ 73 Under the one-act, one-crime doctrine, multiple convictions may not be based on the same physical act. See *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). If the same physical act forms the basis for two separate offenses charged, a defendant could be prosecuted for each offense, but only one conviction and sentence may be imposed. *People v. Segara*, 126 Ill. 2d 70, 77 (1988). "[I]f a defendant is convicted of two offenses based upon the same single physical act, the conviction for the less serious offense must be vacated." *People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 74 Pursuant to the one-act, one-crime doctrine, then, upon retrial, defendant can only be convicted of and sentenced for, at most, one count of aggravated criminal sexual abuse.

¶ 75 iii. Evidentiary Issues

¶ 76 Next, defendant contends he was denied a fair trial where: (1) the trial court allowed an allegedly prejudicial photograph into evidence; (2) the trial court allowed Rice to testify to the contents of one text message sent from the victim after the assault; and (3) during rebuttal closing arguments, the State allegedly argued facts not in evidence and suggested defense counsel attempted to trick the jury.

¶ 77 As an initial matter, defendant has preserved each of these issues except for the trickery issue by first raising them at trial and again raising them in posttrial motions. See *Enoch*, 122 Ill. 2d at 186-87 (In order to preserve an issue for appeal, a party must first make an objection to the alleged error at trial, and then raise it in a posttrial motion).

¶ 78 a. The Photograph

¶ 79 We first consider the photograph in question. Defendant contends the court erred in allowing the introduction and publication of Exhibit 2, arguing it is a "misleading, prejudicial photograph of a bloodied couch." Defendant argues the prejudice against him outweighed the probative value of the photograph where the condition of the room depicted in the picture (*i.e.*, with blood spatter) differs from the way the room looked during the actual crime; where the photograph was not actually relevant to the determinative issues of defendant's mistake of M.C.'s age or the absence of force; where, because the jury was not allowed to hear evidence of Rice stabbing defendant, it was left to infer the source of the blood which would have led the jury to infer either that M.C. left the blood there or that defendant had been involved in "additional criminal conduct than that for which he was being tried; and the State invited the jury to "look closely" at the photograph which, defendant believes, prejudiced defendant because it made the jury consider more carefully the photograph that depicted blood.

¶ 80 We have carefully reviewed Exhibit 2, which is included in the record on appeal, and describe it here. Exhibit 2 is a color photograph depicting the living room area of Rice's house, including the couch, the chair, an open floor area, and a set of two steps leading to a door. The couch and chair are red leather and the floor is a blonde hardwood. The arm of the red couch has some spots on it and three narrow, extended lines that look like something was spilled on the top of the armrest and then dripped down the side of the couch. The floor has three small areas near the couch where there are groupings of circular reddish-brown stains. It is far from a gruesome crime scene picture, but instead depicts an unremarkable living room with some spots of reddish-brown stains along the floor and side of the couch. It is in no way a picture of a living room "covered in blood" as defendant describes it.

¶ 81 Evidence is relevant when it (1) renders a matter of consequence more or less probable or (2) tends to prove a fact in controversy. *People v. Lynn*, 388 Ill. App. 3d 272, 280 (2009). "If photographs are relevant to prove any fact at issue, they are admissible and can be shown to the jury unless their nature is so prejudicial and so likely to inflame the jurors' passions that their probative value is outweighed." *People v. Terrell*, 185 Ill. 2d 467, 495 (1998); see also *People v. Henderson*, 329 Ill. App. 3d 810, 826 (2002) (Photographs are admissible at trial if they are relevant and their probative value is not outweighed by their prejudicial effect). "The responsibility of weighing the probative value and potentially prejudicial effect of photographic evidence rests within the discretion of the trial court." *Henderson*, 329 Ill. App. 3d at 826.

¶ 82 It is within the trial court's discretion to decide whether evidence is relevant and admissible. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). A trial court's decision regarding the admission of evidence will not be overturned absent an abuse of discretion. *Morgan*, 197 Ill. 2d at 455. A trial court abuses its discretion only when its decision is arbitrary, unreasonable, or fanciful or where no reasonable person would take the trial court's view. *People v. Bean*, 389 Ill. App. 3d 579, 590 (2009) (adding that "[a]side from no review at all, the abuse-of-discretion standard is the most deferential standard of review"); see also *People v. Watkins*, 2015 IL App (3d) 120882, ¶ 34 ("Reasonable minds can disagree about whether certain evidence is admissible without requiring a reversal of a trial court's evidentiary ruling under the abuse of discretion standard").

¶ 83 At trial, defendant objected to the admission of People's Exhibits 2 and 3. Both are photographs of the living room where defendant abused M.C. We described Exhibit 2 above. Exhibit 3, which this court has also inspected, is a close-up of the armrest of the red leather

couch. The close-up shows reddish-brown spots on the armrest that look like a liquid was dripped on to the armrest. There are three narrow, longer lines going down the side of the couch that look like the liquid dripped down the side of the couch. At trial, defendant argued that both exhibits displayed too much blood and that the blood depicted alluded to the stabbing that occurred after the crime at issue, evidence of which was barred by defendant's motion *in limine*. The State argued that the two exhibits were necessary to display the relationship of the furniture where the abuse took place. In addition, the State informed the court that the other photographs it had actually included the knife. The court then looked at the photographs and determined that Exhibit 2 accurately depicted the relationship of the furniture where M.C. was attacked. It also found that the questioned stains were ambiguous, stating:

> "THE COURT: *** There are some stains on the arm of the couch. I don't know if anybody would know what those stains are, they're dark in color. If you didn't know what it was, I don't know that you could say what those stains are. The same thing with there's some droppings like reddish brown circular droppings. It almost looks like spots on the floor. Again, I don’t know that anyone would say it was blood if you didn't know what it was."

The court also noted that there had been previous testimony about an altercation in the living room, and found that Exhibit 2 was in line with that testimony.

¶ 84 When it considered Exhibit 3, the close-up of the stained couch, the court determined that Exhibit 3 was "more clear" as to the fact that the stain was blood than was Exhibit 2. The court did not allow Exhibit 3.

¶ 85 The State then asked M.C. to mark the locations on Exhibit 2 that showed the place "where the defendant initially grabbed you;" the location where defendant took "your pants off and everything;" and the bedroom where M.C. hid to send texts after the attack. M.C. marked Exhibit 2 accordingly.

¶ 86 Then, after jury instructions, the court revisited the matter of the publication of Exhibit 2. Defendant renewed his objection, arguing that its publication would be overly prejudicial because the jury was presented with only limited information as to the altercation between defendant and Rice. The State responded that there was no testimony as to blood regarding the assault by defendant on M.C., and that the probative value was increased because M.C. had marked both where the events transpired and where she ran to after the assault. The State argued that the layout and size of the apartment was relevant to the case. The court allowed the publication of Exhibit 2, noting, in part:

> "THE COURT: *** [T]here are drops on the floor, they're circular drops, and they-re in - - they're kind of grouped together, it looks like there's three separate groups, and then there's some drops and some drips on the arm of the couch. The jury has already heard that. There was some physical and verbal altercation between the defendant and Miss Rice. They know that the defendant went to the hospital and he was spoken to at the hospital. There's been no mention of the stabbing because I found that the prejudicial effect outweighed the probative value on that instance, but I allowed them to get into the confrontation. This photograph is the only photograph, I believe, that does show the bedroom door where I believe that's the girls' bedroom if I'm not mistaken, and that's where [M.C.] went to make the phone calls and texts after the incident, and it shows the

chair in relationship to the sofa as well. I find that the probative value outweighs any prejudice to the defendant or any prejudicial effect, and it's more probative than prejudicial.

So I am going to allow People's Exhibit No. 2 to be published over the defense objection."

¶ 87 Then, in closing argument, the State used Exhibit 2 to show the jury how the apartment was laid out. The State told the jury that the photograph showed the door into which M.C. ran after defendant abused and assaulted her. The State relied on the photographic exhibits to explain to show the jury what a small space this incident took place in, including the placement of the furniture during the commission of the crime. The State also relied on Exhibit 2 argue to the jury that, when Rice said M.C. was only 15 years old, defendant would surely have heard it because the apartment was so small.

¶ 88 We cannot conclude that the trial court's ruling allowing the photograph was so arbitrary, fanciful or unreasonable that no reasonable man would take the view adopted by the trial court. See *Bean*, 389 Ill. App. 3d at 590. Rather, Exhibit 2 was taken the same evening as the crime occurred, it depicted the layout of the apartment, including the couch from which defendant physically pulled M.C. by the wrists, the chair upon which defendant physically pulled M.C. down upon his lap and from which confrontation M.C. immediately resisted by standing back up. It depicted the area where defendant first groped M.C.'s breasts and then unzipped her pants and fondled her genitals. It also depicted the door of the bedroom into which M.C. retreated after the abuse and assault. All of these places were labeled by M.C. The photograph clearly helped explain M.C.'s testimony, giving spatial significance to her testimony about where the abuse and assault took place.

¶ 89 Defendant's concern that the photograph is overly prejudicial is unavailing. Defendant's characterization that the photograph shows the couch "splattered with unexplained blood," "obvious blood," a "living room splattered in blood," and a "picture of the scene covered in blood" is a great exaggeration. We find no abuse of discretion in the trial court's determination that Exhibit 2 was not overly prejudicial where: (1) there was sufficient evidence already admitted at trial that, following the abuse and assault on M.C., defendant and Rice got into a physical and verbal altercation which led to the arrival of the police and sent defendant to the hospital; and (2) the stains in the photograph were not so obviously created by blood spill that the scene photograph became more prejudicial than probative, where the spots were small and nondescript and the photograph itself illustrated an important part of the victim's narrative of the spatial layout of the apartment where the abuse and assault occurred, as well as the size of the apartment insofar as the State argued the victim felt confined as a 15-year-old babysitter in a small apartment with a larger, older man. In addition, the jury already had before it affirmative evidence that the victim was not injured because it had heard Dr. Graneto testify that there were no physical signs of injury to M.C. when she was examined at the hospital later that night.

¶ 90 Exhibit 2 was properly admitted.

¶ 91 b. The Text Message

¶ 92 We next consider the text message. Defendant contends he was denied a fair trial where the trial court allowed evidence of a text message sent from M.C. to Rice after the assault and abuse. He contends the content of the text message, "your brother screwed me" was inadmissible hearsay which prejudiced him at trial. We disagree.

¶ 93 Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted. *People v. Jura*, 352 Ill. App. 3d 1080, 1085 (2004). "However, testimony about an out-of-court statement that is being offered for a purpose other than to prove the truth of the matter asserted is not hearsay." *People v. Peoples*, 377 Ill. App. 3d 978, 983 (2007). "[I]f a statement is offered to prove its effect on the listener's state of mind, or to show why the listener acted as he did, the statement is not hearsay." *People v. Dunmore*, 389 Ill. App. 3d 1095, 1106 (2009); *People v. Carroll*, 322 Ill. App. 3d 221, 223 (2001) ("Statements offered for their effect on the listener or to explain the subsequent course of conduct of another are not hearsay"); *People v. Sangster*, 2014 IL App (1st) 113457, ¶ 76.

¶ 94 Here, Rice testified that she began to receive text messages from M.C. at about 2 AM on the morning of the assault. The State asked Rice what she did after receiving those texts, and Rice responded, "The initial text that I got was Your brother screwed me, and so I text back What do you mean?" Defendant objected, and the court overruled the objection. The State then asked Rice what she did at that time, to which Rice responded, "I text back, I asked, What do you mean? And she responded again saying, He just fucked me." Defendant again objected, and the court sustained the objection. The State then asked Rice what she did after the texts, and Rice said she tried unsuccessfully to rouse Rushing and, when she could not wake him, she ran the 12 blocks back to her apartment where defendant, M.C., and Rice's children were.

¶ 95 Rice's testimony regarding the text message at issue, *i.e.* the message stating "your brother screwed me" is not hearsay because it was not offered to "prove the truth of the matter asserted." See *Peoples*, 377 Ill. App. 3d at 983. Instead, the truth of the statement "your brother screwed me," with which defendant is concerned, was not at issue at trial, as

defendant never denied having had intercourse with M.C. Rather, defendant argued consent at trial and proffered a mistake of age jury instruction. He also conceded in opening statement and again in closing argument that he engaged in intercourse with M.C. Stipulated evidence came in at trial that the swab taken from M.C.'s vagina on March 29, 2009, indicated the presence of semen. The parties also stipulated that the male DNA profile from the vaginal swab collected from M.C. matched the DNA profile from defendant, and would be expected to occur in approximately one in 26 quintillion black, one in 1.1 sextillion white, or one in 12 sextillion Hispanic unrelated individuals. As there was never any question at trial that defendant had intercourse with the victim, the text message, "your brother screwed me" was not offered to prove the truth of the statement, but rather the effect the statement had on the recipient. See, *e.g.*, *Carroll*, 322 Ill. App. 3d at 223 ("Statements offered for their effect on the listener or to explain the subsequent course of conduct of another are not hearsay"). The effect shown here was that Rice received the message from M.C., determined there was a problem, got dressed, and ran 12 blocks to her home in the middle of the night. The message did not come in substantively, but only to show the course of conduct. As such, it does not qualify as hearsay and was properly admissible.

¶ 96 Defendant offers various other arguments, all of which are unavailing.

¶ 97 Defendant also invokes the best evidence rule, arguing that the State should have produced the actual text message itself. " 'The best evidence rule applies only when the contents or terms of a writing are in issue and must be established.' " *People v. Davis*, 2014 IL App (4th) 121040, ¶ 21 (quoting *People v. Pelc*, 177 Ill. App. 3d 737, 742 (1988) and citing *Ill. R. Evid. 1002* (eff. Jan. 1 2011) (" 'To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise

provided in these rules or by statute.' ")). Here, the best evidence rule did not apply because, as previously determined, the State did not seek to prove the content or terms of the text message, but only to show the effect it had on the recipient and her subsequent course of conduct.

¶ 98 Defendant asserts the State failed to lay a proper foundation to introduce the contents of the text message. Defendant relies on *People v. Chromik*, 408 Ill. App. 3d 1028 (2011); *People v. Campbell*, 28 Ill. App. 3d 480 (1975); *People v. Poindexter*¸ 18 Ill. App. 3d 436 (1973); and *State v. Rosenbery,* 197 Ohio App. 3d 256 (2011) to support his argument. These cases are all inapposite to the case at bar where the message at issue here only came in to show course of conduct and was not offered substantively. In his reply brief, defendant relies heavily on *People v. Watkins*, 2015 IL App (3d) 120882. We note briefly that the *Watkins* court specifically found that the "contents of the text messages [at issue] went to the very heart of the main charge" against defendant. *Watkins*, 2015 IL App (3d) 120882, ¶ 39. This is clearly distinguishable from the text message in the case at bar, which content did not go to the "very heart of the main charge," that is, that defendant had forced sexual relations with M.C. Rather, the text message only came in to show Rice's course of conduct, shedding light on why Rice woke up in the middle of the night, got dressed, and ran 12 blocks through the city to get to the scene of the abuse and assault.

¶ 99 Finally, defendant argues that the tone of the text had negative connotations such that the "content of the text itself was inherently prejudicial." While admitting that he had intercourse with M.C., defendant argues that the term "screwed" was, itself, prejudicial. We reject this argument, as there was no argument put forth at trial and no proof other than this

bald assertion on appeal that the term "screw" is anything more than a colloquialism for intercourse.

¶ 100 Here, the text message "your brother screwed me" was not offered to prove the truth of the matter asserted, as, at trial, there was never a contention that defendant did not have sex with M.C. Rather, defendant freely admits to having had intercourse with M.C., but argues that the sex was consensual and that he was mistaken about M.C.'s age. Therefore, as the content of the text was not offered to prove truth of the matter asserted, it was not hearsay at all. The trial court's evidentiary ruling was not error.

¶ 101 c. Closing Arguments

¶ 102 Next, defendant contends he was prejudiced where the State improperly argued facts not in evidence and asserted defendant's defense was an attempt to trick the jury.

¶ 103 Generally, the prosecution is given "wide latitude" in making its closing argument. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). In closing, the prosecutor may comment on the evidence and any "fair, reasonable inferences" from it, even if those inferences reflect negatively on the defendant. *Nicholas*, 218 Ill. 2d at 121. But the closing argument must serve a purpose other than merely "inflaming the emotions of the jury." *Nicholas*, 218 Ill. 2d at 121. " 'In reviewing allegations of prosecutorial misconduct, the closing arguments of both the State and the defendant must be examined in their entirety, and the complained-of remarks must be placed in their proper context.' " *People v. Caffey*, 205 Ill. 2d 52, 104 (2001) (quoting *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994)). In closing arguments, the prosecutor may comment upon and challenge defense characterizations of the evidence and attack the defense theory. *People v. Phillips*, 127 Ill. 2d 499, 523-26 (1989); *People v. Doyle*, 328 Ill. App. 3d 1, 12 (2002) ("The prosecution may attack a defendant's theory of

defense during closing arguments and may respond to any statements by defense counsel that invite a response"). Where a jury is properly instructed as to the role of arguments and informed that arguments are not evidence and not to be considered as evidence, the jury is presumed to follow the law. *People v. Sutton*, 353 Ill. App. 3d 487, 501 (2004).

¶ 104 "[I]n the context of rebuttal argument, 'when defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial.' " *People v. Evans*, 209 Ill. 2d 194, 225 (2004) (quoting *People v. Hudson*, 157 Ill. 2d 401, 441 (1993)).

¶ 105 Regarding the standard of review when considering statements made by a prosecutor during closing arguments, the fifth division of this court has recently noted:

> "Our supreme court has held: 'Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*.' *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). However the supreme court in *Wheeler* cited with approval *People v. Blue*, 189 Ill. 2d 99 (2000), in which the supreme court had previously applied an abuse of discretion standard. *Wheeler*, 226 Ill. 2d at 121. In *Blue* and numerous other cases, our supreme court had held that the substance and style of closing argument is within the trial court's discretion, and will not be reversed absent an abuse of discretion. *Blue*, 189 Ill. 2d at 132 ('we conclude that the trial court abused its discretion' by permitting certain prosecutorial remarks in closing; *People v. Armstrong*, 183 Ill. 2d 130, 145 (1998); *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Our supreme court has reasoned: 'Because the trial court is in a better position than a reviewing court to determine the prejudicial effect of any remarks, the scope of closing argument is within the trial court's discretion.' *People v.*

> *Hudson*, 157 Ill. 2d 401, 441 (1993). Following *Blue* and other supreme court cases like it, this court had consistently applied an abuse of discretion standard. *People v. Tolliver*, 347 Ill. App. 3d 203, 224 (2004); *People v. Abadia*, 328 Ill. App. 3d 669 (2001)
>
> Since *Wheeler*, appellate courts have been divided regarding the appropriate standard of review. *Alvidrez*, 2014 IL App (1st) 121740, ¶ 26 (noting that the issue remains divided). The first and third divisions of the First District have applied an abuse of discretion standard, while the Third and Fourth Districts and the fifth division of the First District have applied a *de novo* standard of review. Compare *People v. Love*, 377 Ill. App. 3d 306, 316 (1st Dist. 1st Div. 2007) and *People v. Averett*, 381 Ill. App. 3d 1001, 1007 (1st Dist. 3d Div. 2008) with *People v. McCoy*, 378 Ill. App. 3d 954, 964 (3rd Dist. 2008), *People v. Paler*, 382 Ill. App. 3d 1151, 1160 (4th Dist. 2008), and *People v. Ramos*, 396 Ill. App. 3d 869, 874 (1st Dist. 5th Div. 2009). However, we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this case would be the same under either standard." *People v. Kelley*, 2015 IL App (1st) 132782, ¶¶ 75-76.

Here, too, our resolution of this issue would be the same under either standard of review.

¶ 106 Defendant asserts that the State argued: (1) that M.C. told her friend she was raped; (2) that defendant commanded M.C. into the back bedroom; and (3) that defendant leaned M.C. back on the bed. Defendant admits that trial counsel objected to these "misstatements of the evidence" and admits that the trial court sustained these objections, but argues that,

because defendant's jury heard these "inflammatory arguments," some of which occurred during rebuttal argument, defendant was prejudiced.

¶ 107 Defendant also asserts that, during closing argument, the State "belittled" defendant's defense theory that the State had failed to present evidence of threat of force or use of force. Defendant characterizes the State's argument as "mocking" his theory of the case. This particular comment was made at the very beginning of the State's closing argument:

> "[ASSISTANT STATE'S ATTORNEY BOERSMA:] Ladies and gentlemen, let's be clear about one thing [] right now, [M.C.] is not on trial here today. There's only one person that is, and it's this man who sits before you, and he's on trial for two, three very serious crimes for violating the - - in the most intimate way a 15-year-old girl.
>
> Now, it's real neat to play little lawyer games and ask the victim over and over did he force you, did he threaten you - -
>
> [ASSISTANT PUBLIC DEFENDER IVORY:] Objection.
>
> THE COURT: OVERRULED.
>
> MR. BOERSMA: Does little [M.C.], does she [have] a legal mind, does she know that three and a half years later she might need to know the legal meaning of the word force or threat of force, it's preposterous, preposterous. It's not to be believed. [M.C.] is not on trial. There is not a script, there is not a textbook that 15-year-oldgirls get on how to react when a man like this takes advantage of her. Does she have to fight back? Does she have to say no when she's confined in an apartment with three little kids in her charge?
>
> MS. IVORY: Objection.

THE COURT: Overruled."

¶ 108 As is proper when reviewing an argument regarding a prosecutor's closing argument, we have reviewed the entirety of closing arguments by both defendant and the prosecution. See *Caffey*, 205 Ill. 2d at 104 (quoting *Kitchen*, 159 Ill. 2d at 38) (" 'In reviewing allegations of prosecutorial misconduct, the closing arguments of both the State and the defendant must be examined in their entirety, and the complained-of remarks must be placed in their proper context' ").

¶ 109 Defense counsel began her argument in the following manner:

> "[ASSISTANT PUBLIC DEFENDER IVORY:] Did [defendant] ever force you. No. Did [defendant] ever threaten you. No. Did [defendant] ever threaten his nieces and nephew. No. That's what [M.C.] told you yesterday. He did not threaten me and he did not threaten his nieces and nephew, he did not threaten anyone I knew. That's what [M.C.] told you from that witness stand.
>
> Criminal sexual assault, that's the State's burden on that first count. Criminal sexual assault, and to prove it, first they have to prove that there was sexual penetration. No dispute whatsoever, there was sexual penetration between [defendant] and [M.C.], no dispute.
>
> The second thing they have to prove is that the sexual penetration was by force, force from [defendant], or threat of force, threat of force by [defendant], and you've heard no evidence whatsoever that [defendant] on March 29, 2009, forced [M.C.] to do anything. She told you that. She was asked, did he push you. No. Did he drag you. No. Did he threaten you. No. Did he force you. No. Those were her answers. That's what she told you from that witness stand."

¶ 110 Defense counsel then proceeded to argue that the State had failed to prove defendant had used force or threat of force. Counsel argued:

> "[ASSISTANT PUBLIC DEFENDER IVORY:] There was no force, no threats of force. That's what they have to prove, and [M.C.] told you there wasn't any."

¶ 111 Defense counsel repeatedly told the jury there was no force. She argued that, although defendant pulled M.C. off the couch, it was not actually force:

> "[ASSISTANT PUBLIC DEFENDER IVORY:] [M.C.] then says that [defendant] pulls her up off the couch. She was asked, did he yank you up, did he grab you. No. And what she told you about what the State wants to claim is force is that he pulled me up and kind of had me by the wrist, and I was still kind of sleeping, I was not getting up all the way off the couch, at that point I was sitting up, and he kind of pulled me up. Does that sound like force, he kind of pulled me up, not he yanked me up, he grabbed me. Those are her words. That's what she told you from that witness stand. The State wants to argue that that's force. That's not what she says."

¶ 112 Counsel argued to the jury that, after defendant pulled M.C. onto his lap and she immediately stood up from his lap, defendant did not use force to stop her from standing up.

¶ 113 Counsel then argued that, when defendant began fondling M.C.'s breasts, he was not forcing her because he was not "holding" or "grabbing" her. Counsel then argued that M.C. willingly moved to Rice's bedroom with defendant, stating:

> "[ASSISTANT PUBLIC DEFENDER IVORY:] And [defendant and M.C.] are still in the living room area, and [defendant] is not touching her at this point. [Defendant] is behind her and she's in front, and then there is a move to the back

bedroom, and she told you how it is that she came from the living room to the back bedroom. Did [defendant] push you that way. No. Did he have a hand on your shoulder and guide you that way. No. She was in front of him. She walked to that back bedroom. That was her testimony.

She went with it. That's what she told you. She went from the living room and she led [defendant] into that back bedroom. And when she got into the back bedroom, what did she tell you she did. She said I turned toward him. Did he spin you toward him? Was he touching you at any point. No. Her words. She turned towards him, and then she sat on the bed.

Did [defendant] tell you [] to sit on the bed. No. Did he push you on the bed. No. Did he hold you down on the bed. No. Was he touching you at all when you sat on the bed, and her response was no. She sat on the bed. No force. No threat of force whatsoever on [defendant]."

¶ 114 Defense counsel argued that M.C. lay down willingly on the bed without defendant touching her.

¶ 115 Defense counsel then argued that M.C. made the entire story up because defendant ejaculated inside of her even though she asked him not to do so. Counsel argued:

"[ASSISTANT PUBLIC DEFENDER IVORY:] State says why would she make it up. You know the answer to that. She told you from the witness stand the [answer] to that. It's because when [defendant and M.C.] began having sex not by force or any type of threat from [defendant], as they're having sex, [M.C.] says one thing, she doesn't say no or leave me alone or push him away, she had one request of [defendant], and she told you what it was from that witness stand, don't

nut in me, those were her words. That's what she testified to when asked what did you say to [defendant]. She didn't want him to nut in her, those were her words. You meant you didn't want him to ejaculate in you. Yes. Not that she didn't want him to have sex with her. She didn't want him to ejaculate in her. That's what she requested. And what did she tell you, he did, he ejaculated in her. But that is not the charge. Sexual penetration the State has to prove, and that the sexual penetration is by force or threat of force, but the one thing [M.C.] asked him to do or not to do, the one thing he didn't listen to, and that's where the State wants to say, why would she make it up. You know why. She told you why, she asked him not to do something and he did it."

¶ 116 Defense counsel then argued that M.C. did not immediately call Rice and tell her she was raped or assaulted, but that she only decided to call Rice after first talking to a friend. Counsel invited the jury to "use their common sense" as to what that conversation entailed. She argued:

"[ASSISTANT PUBLIC DEFENDER IVORY:] The State says that she made all these texts and she called [Rice]. Well, think about who it is she called first. You have to get that correct. She doesn't call her stepdad or Miss Rice, girlfriend's stepdad, she gets up, she goes into the bathroom, [defendant], goes into the kitchen. He's doing something, and she doesn't know what he's doing. She goes in the bath, she says she gets her clothes, she gets back dressed, she goes into a bedroom, gets her cell phone, and she calls a girlfriend, that's who she told you she texted and called first, it's a girlfriend, after [defendant] had just done something she asked him not to do, don't nut in me is what she said, she calls her

girlfriend. She doesn't call [Rice] and says I just got raped, I just got assaulted, that's not what she does. She calls the girlfriend and has a conversation with her girlfriend. That's what she told you from that witness stand is what she did, and it's only after talking with the girlfriend, and we can use our common sense as to that conversation between [M.C.] and her girlfriend.

***

She testified as to the text, he screwed me is what the text said, that's what was the text, no force, no threat of force ***."

¶ 117 Counsel acknowledged that M.C. testified she felt if she did not go along with defendant, he might harm the other children, but argued there was no evidence to support that fear. Counsel conceded that Rice testified she received a text message from M.C. stating that defendant "screw[ed] me," and that Rice then came running home. Counsel argued that the conversation Rice recounted having with defendant did not suggest that defendant forced M.C. to have sex, but rather that he merely admitted to having sex with M.C., arguing:

"[ASSISTANT PUBLIC DEFENDER IVORY:] [Rice] was asked again, Miss Rice you were yelling at [defendant], what were you yelling about. Was it regarding him having sex with [M.C.] Her answer yes. That's why she was upset because they had sex, not because there was any force or any threats made against [M.C.]"

¶ 118 In rebuttal argument, the State opened their argument with the following statement:

"[ASSISTANT STATE'S ATTORNEY BOERSMA:] Ladies and gentlemen, let's be clear about one thing [] right now, [M.C.] is not on trial here today. There's only one person that is, and it's this man who sits before you, and he's on

trial for two, three very serious crimes for violating the - - in the most intimate way a 15-year-old girl.

Now, it's real neat to play little lawyer games and ask the victim over and over did he force you, did he threaten you - -

[ASSISTANT PUBLIC DEFENDER IVORY:] Objection.

THE COURT: OVERRULED.

MR. BOERSMA: Does little [M.C.], does she [have] a legal mind, does she know that three and a half years later she might need to know the legal meaning of the word force or threat of force, it's preposterous, preposterous. It's not to be believed. [M.C.] is not on trial. There is not a script, there is not a textbook that 15-year-oldgirls get on how to react when a man like this takes advantage of her. Does she have to fight back? Does she have to say no when she's confined in an apartment with three little kids in her charge?

MS. IVORY: Objection.

THE COURT: Overruled."

Counsel continued:

"MR. BOERSMA: There is no textbook. She did what she did. It doesn't mean he didn't force himself on her. It doesn't mean that she consented. Just use your common sense at a very minimum. She had met him briefly two days ago, very minimum exchange of information.

And two days later while her attention is mostly on those little kids, all of a sudden, the kids go to sleep, and she's going to throw herself at Cassanova here (Indicating). I mean it makes no sense, no sense.

> You saw her shirt. She's dressed like a teenage girl. Look, her shirt. This is not a sophisticated woman who wants to engage in sexual activity with somebody who is essentially a stranger to her.
>
> We're going to talk about all these things because it's preposterous that she consented."

¶ 119 Counsel then described how M.C. testified she was scared, arguing:

> "MR. BOERSMA: She didn't get instructions on how to respond when he grabbed her and pulled her and started groping her. She [froze] in fear. In fact, I asked her were you afraid at the time when [he] first started grabbing you, and she said yes. She already knew what was happening. And she told you why, she feared for those other kids, she froze and was scared."

¶ 120 Counsel then argued that the testimony that M.C. was afraid negated a finding that M.C. consented, stating:

> "MR. BOERSMA: But most importantly, the lack of verbal or physical resistance meaning that she didn't say no or fight or submission by the victim, which arguably is what she did here.
>
> Resulting from the use of force or threat of force by the defendant. In the instruction, you will get a very crucial word shall, shall not constitute consent. That's very simple, ladies and gentlemen. When he uses force or threat of force, and she doesn't say no, she doesn't fight back, and she submits, that is not consent, you cannot deviate from that instruction."

¶ 121 In discussing the jury instructions, the prosecution revisited the definition of force, reviewed the totality of the circumstances on the night in question, including the disparity in

age, size, and strength between M.C. and defendant. The State emphasized the role that physical confinement plays in finding the element of force, and asked the jury to inspect the photographic exhibits of the apartment.

¶ 122 Again, the specific arguments with which defendant takes issue are when the State said: (1) M.C. told her friend she was raped; (2) defendant commanded M.C. into the back bedroom; and (3) defendant leaned M.C. back on the bed. Defendant concedes that defense counsel made a contemporaneous objection to each of these comments, and the court sustained each objection.

¶ 123 While the jury was deliberating, the defense made a motion for a mistrial, arguing that these three comments were prejudicial to defendant. Although the court had sustained the objections when made, upon considering the motion for a mistrial, the court found that each of the three comments were either supported directly by the evidence or were reasonable inferences from the evidence. The court stated:

> "THE COURT: All right. Regarding the fact that the state argued victim told the friend that she was raped, there was an objection, and I sustained it. I think it would be invited to comment and a reasonable inference. The victim did testify that after this incident happened, that she told her friend what happened and said she wasn't sure if she should tell anyone, it's a reasonable inference. But even that being said, I sustained the objection, and the State never mentioned it again. If there is any error, it would not be reversible error.
>
> * * * [P]oint number two, that the defendant- - they argued that the defendant commanded the victim into the bedroom, I believe there was an objection to that and I sustained that as well, and then the State talked about how

> he directed her into the bedroom. She testified to that, he directed her into the bedroom, he was behind her, he was very close behind her when she was walking in front of him to the bedroom. I think that it's a reasonable inference as well. And - - oh, I didn't say that, but regarding word rape, I think it is a reasonable inference as well when she said she told her friend what happened, and not sure if she should tell anyone, but I sustained the objection to the word 'commanded' but it would be a reasonable inference as well. But then the State just said that he directed her, which is exactly what the victim testified to.
>
> Regarding point number three, that the defendant leaned the victim back, she testified that he leaned over her, and it's a reasonable inference that he leaned over her and that's leaning her back. The State didn't say that he pushed her, he shoved her, he touched her, or that she said that in any way, shape, or form. It is a reasonable inference, and it would also rebut what the defense argued in their closing argument."

The court denied the motion for a mistrial, concluding, "I don't think that anything that the State said - - rises to the level - - was improper where it would rise to the level to grant a mistrial."

¶ 124 We find no error, where all three challenged comments were supported by the evidence or reasonable inference drawn therefrom. See *Nicholas*, 218 Ill. 2d at 121 (in closing, the prosecutor may comment on the evidence and any "fair, reasonable inferences" from it, even if those inferences reflect negatively on the defendant).

¶ 125 First, regarding the prosecution's characterization that, after the abuse and assault, M.C. called her friend and told her she was raped, the specific statement was:

"MR. BOERSMA: [M.C.] sought help from her friend who she said she told what happened, she told she was raped."

¶ 126 The evidence at trial was that, after having intercourse with defendant, M.C. took a cell phone, went into a different bedroom, and began texting a friend. She eventually spoke on the telephone with this friend and was "telling her what happened." After that conversation, she called Rice. Specifically, the testimony was:

"[ASSISTANT STATE'S ATTORNEY BOERSMA] Q. While you were on the phone, you said you were texting your friend?

[THE WITNESS M.C.:] A. Yes. And then I ended up calling her.

Q: And you called her as well?

A: Yes.

Q: After you talked to her, what did you do?

A: I was telling her what happened - -

[ASSISTANT PUBLIC DEFENDER IVORY:] Objection.

THE COURT: Overruled.

THE WITNESS: I was telling her what happened. I didn't know if I should say something or not, and she insisted that I say - -

MS. IVORY: Objection.

THE COURT: Sustained.

MR. BOERSMA: You spoke with her.

A: Yes.

Q: Did you eventually tell her what happened?

A: Yes.

Q: After you told her what happened, what is the next thing that you did?

A: I ended up texting [Rice].

Q: Okay. The defendant's sister?

A: yes.

Q: Did you also tell [Rice] what happened?

A: Eventually."

¶ 127 This challenged comment is supported by the record and reasonable inferences therefrom, where M.C. testified that defendant put his penis into her vagina and ejaculated inside of her, despite her telling him not to. M.C. testified that, after she was assaulted by defendant, she called her friend and told her "what happened." Immediately after that conversation, M.C. texted Rice, whom she also told what happened. It is a reasonable inference that a 15-year-old girl who has just been sexually assaulted would call a friend and, after having a conversation about the sexual assault, then alert an adult.

¶ 128 Moreover, this comment by the State was invited by defense counsel's argument when defense counsel characterized M.C.'s actions saying:

> "[ASSISTANT PUBLIC DEFENDER IVORY:] The State says that she made all these texts and called [Rice]. Well, think about who it is she called first. You have to get that correct. She doesn't call her stepdad or Miss Rice, girlfriend's stepdad, she gets up, she goes into the bathroom, [defendant], goes into the kitchen. He's doing something, and she doesn't know what he's doing. She goes in the bath, she says she gets her clothes, she gets back dressed, she goes into a bedroom, gets her cell phone, and she calls a girlfriend, that's who she told you

> she texted and called first, it's a girlfriend, after [defendant] had just done something she asked him not to do, don't nut in me is what she said, she calls her girlfriend. She doesn't call [Rice] and says I just got raped, I just got assaulted, that's not what she does. She calls the girlfriend and has a conversation with her girlfriend. That's what she told you from that witness stand is what she did, and it's only after talking with the girlfriend, and we can use our common sense as to that conversation between [M.C.] and her girlfriend."

We find no error here where the complained-of comment made by the State was made in response to and provoked by defense counsel's characterization of the evidence in counsel's argument. See *Evans*, 209 Ill. 2d at 225 (quoting *Hudson*, 157 Ill. 2d at 441) ("[I]n the context of rebuttal argument, 'when defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial' ").

¶ 129 We next consider the second comment of which defendant complains, that the prosecutor said defendant "commanded" M.C. to go to the bedroom. In context, the prosecutor had just described the small size of the apartment. Then, the prosecutor said, "When he commands [M.C.] to go into the bedroom - - ". Defense counsel objected, and the court sustained the objection. The prosecutor continued:

> "MR. BOERSMA: The doorway is right there. He directs her to this back room, it's right off the kitchen. There's nowhere for her to go…"

The statement was objected to, the objection was sustained, and the prosecutor immediately used the word "directed" rather than "commanded." Regardless, we find that the comment itself was both supported by the evidence and was a reasonable inference drawn from the evidence at trial. The evidence at trial showed that defendant woke M.C. from sleep and

determined that the other adults in the household were gone for the night. Defendant pulled M.C. up from the couch by her wrists. He then pulled her down on top of him to sit on his lap in another chair. When M.C. resisted by standing up, her resistance was futile, as defendant immediately stood up behind her and groped her breasts and genitals. Then, M.C. testified that defendant directed her toward the bedroom, and that defendant was walking toward the bedroom directly behind her. We find no error here, where the complained-of remark that defendant "commanded" M.C. to the bedroom was based on the evidence that defendant directed and guided M.C. to the bedroom; the term "commanded" merely showed that M.C. was not acting of her own volition, but was instead acting at defendant's behest.

¶ 130 We now consider the third comment of which defendant complains, that the prosecutor argued in rebuttal that defendant "leaned" M.C. back on the bed. Specifically, the prosecutor stated:

> "MR. BOERSMA: * * * [Defendant] then leans over and does what you all know he did, the DNA confirms it, there's no dispute about. He used his size, he leaned over her, he leads her back and she pleaded with him, if you're going to do this - -
>
> MS. IVORY: Objection.
>
> THE COURT: Sustained."

¶ 131 This comment, also, is both supported by the evidence at trial and is a reasonable inference from the evidence. M.C. testified that defendant leaned her back on the bed, that he was so close to her as he leaned in that he was an inch away from her face, that she could smell his breath, and defendant continued leaning over her as she continued to lean back. On cross-examination, defense counsel asked:

"MS. IVORY: Q. When [defendant] leaned toward you, he was leaning over you, correct?

[THE WITNESS M.C.] A. Yes.

Q. And you leaned back on the bed, correct?

A. Yes.

Q. You lied back on the bed, correct?

A. Yes."

¶ 132 We find no error here, where the complained-of statement is taken nearly verbatim from M.C.'s testimony, and, in addition, it is a reasonable inference from the testimony at trial that the 35-year-old defendant leaning in close to the 15-year-old M.C. until she lies upon the bed was using his size to lean her over onto the bed.

¶ 133 We also find no error here where the complained-of comment made by the State was made in response to and provoked by defense counsel's characterization of the evidence in counsel's argument. See *Evans*, 209 Ill. 2d at 225 (quoting *Hudson*, 157 Ill. 2d at 441) ("[I]n the context of rebuttal argument, 'when defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial' "). The comment by defense counsel that invited this response was the following:

"MS. IVORY: She went with it. That's what she told you. She went from the living room and she led [defendant] into the back bedroom. And when she got into the back bedroom, what did she tell you she did. She said I turned toward him, not away from him. Again her words. I turned towards him. Did he spin you toward him? Was he touching you at any point. No. Her words. She turned towards him, and then she sat on the bed.

> Did [defendant] tell you [] to sit on the bed. No. Did he push you on the bed. No. Did he hold you down on the bed. No. Was he touching you at all when you sat on the bed, and her response was no. She sat on the bed. No force. No threat of force whatsoever on [defendant].
>
> And after she sat on the bed, she said he leaned forward [*sic*] me. Bu when he leaned towards you, did you [sic] touch you at any point to push you back. No, again, I laid back. Her words, I laid back. [Defendant] didn't touch me."

We find no error here, where this portion of argument presented by defense counsel invited a response from the prosecutor.

¶ 134 We next turn to defendant's argument that the prosecutor "belittled" his theory of defense and implied defense counsel was trying to trick the jury when the prosecutor remarked, at the beginning of rebuttal arguments:

> "MR. BOERSMA: Ladies and gentlemen, let's be clear about one thing [] right now, [M.C.] is not on trial here today. There's only one person that is, and it's this man who sits before you, and he's on trial for two, three very serious crimes for violating the - - in the most intimate way a 15-year-old girl.
>
> Now, it's real neat to play little lawyer games and ask the victim over and over did he force you, did he threaten you - -
>
> MS. IVORY: Objection.
>
> THE COURT: Sustained."

¶ 135 Defendant has forfeited this issue for review by failing to raise it in a posttrial motion. See *Enoch*, 122 Ill. 2d at 186-87 (In order to preserve an issue for appeal, a party must first make an objection to the alleged error at trial, and then raise it in a posttrial motion).

¶ 136 iv. The DNA Indexing Fee

¶ 137 Finally, defendant contends, the State concedes, and we agree that the $250 DNA assessment fee assessed against him in his fines and fees order should be stricken as void under our supreme court's decision in *People v. Marshall*, 242 Ill. 2d 285 (2011). Section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2012)) authorizes a trial court to order the taking, analysis, and indexing of a qualifying offender's DNA, and corresponding payment of the analysis fee only once where the defendant is not currently registered in the DNA database. *Marshall*, 242 Ill. 2d at 303. An order imposing a duplicative DNA analysis fee is void and must be vacated, as it exceeds statutory authority. *Marshall*, 242 Ill. 2d at 302. Defendant has 2005 felony convictions for attempt aggravated criminal sexual assault and kidnapping. Therefore, we can presume that defendant is already registered in the DNA database. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38 (holding that in order to vacate a DNA fee under *Marshall*, a defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998). Accordingly, we agree with defendant that the $250 DNA analysis fee assessed against him is void and must be vacated.

¶ 138 Because defendant had previous felony convictions sufficient to show prior DNA collection and registration, the assessment imposed pursuant to the instant conviction is void and must be vacated.

¶ 139 III. CONCLUSION

¶ 140 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed in part, reversed in part, and remanded. The portion of the trial court's order requiring defendant pay the $250 DNA analysis fee is vacated.

¶ 141 Affirmed in part; reversed and remanded in part; order modified.