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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court of
) Cook County.
)
)
 Plaintiff-Appellee,)
)
 v.) No. 11 CR 17054
)
)
 GYASI BANNER,)
)
) Honorable Neera Lall Walsh,
 Defendant-Appellant.) Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 **Held:** The evidence was sufficient to support defendant’s conviction for aggravated criminal sexual assault. Defendant’s trial counsel did not render ineffective assistance by failing to either (1) request severance of the sexual assault charge from the other charges or (2) present evidence that would have impeached the sexual assault victim’s credibility. The count in defendant’s indictment alleging he violated an order of protection was not void for failing to adequately inform defendant of the nature of the charge against him. We vacate defendant’s conviction for aggravated discharge of a firearm on one act, one crime principles. Defendant is entitled to 41 days of additional presentence custody credit. We affirm the judgment of the trial court as modified.

¶ 2 Following a jury trial, defendant Gyasi Banner was convicted of attempted murder, aggravated criminal sexual assault, aggravated discharge of a firearm, and the violation of an order of protection. The trial court sentenced him to 47 years' imprisonment. On appeal, defendant contends that (1) the State failed to prove him guilty of aggravated criminal sexual assault beyond a reasonable doubt; (2) his trial counsel rendered ineffective assistance by failing to both seek severance of the aggravated criminal sexual assault from the remaining charges and also present evidence that would have impeached the victim of the aggravated criminal sexual assault; (3) the violation of an order of protection charge is void because it alleged disparate acts that did not apprise him of the charge against him; (4) his conviction for aggravated discharge of a firearm should be vacated under the one act, one crime doctrine; and (5) he is entitled to additional presentence custody credit. We affirm as modified.

¶ 3 BACKGROUND

¶ 4 Defendant Gyasi Banner was charged in a multi-count indictment with, *inter alia*, aggravated criminal sexual assault, aggravated discharge of a firearm, attempted first degree murder (for having shot at an individual while armed with a firearm), and, in count 11, the violation of an order of protection. Count 11 of the indictment alleged that defendant knowingly or intentionally violated a prior order of protection (issued in case number 11-DV-74835) that prohibited him from “physical abuse, harassment, willful deprivation, stalking, intimidation of a dependent or interference with personal liberty of protected person(s),” and that defendant had prior notice of the protective order because he had been previously convicted of domestic battery under the same case.

¶ 5 The jury heard the following evidence at trial. The victim, J.M., testified that she began a relationship with defendant on February 9, 2010. The relationship lasted almost two years and

produced a child, Gyasi Jr., who was born in February 2011. On July 4, 2011, J.M. obtained an order of protection against defendant following an altercation in which she received a black eye that burst open from swelling, a “busted” lip, and a bruise on her right elbow.

¶ 6 J.M. then recalled the events of September 20, 2011. At that time, she and her infant son were living with her aunt, Tonia Darby-Jones, J.M.’s four-year-old sister, and Darby-Jones’s three children. In addition, her aunt’s boyfriend, Capton Brown, had spent the prior night at the house. Early that morning, J.M. spoke to defendant by phone. While speaking to defendant, she heard the doorbell ring, and soon afterwards her aunt told J.M. that defendant was at the front door. J.M. said that defendant asked to see his son, and J. M. agreed to bring their son to see him despite the order of protection.

¶ 7 J.M. stepped out onto the porch, and while she was still holding the baby, defendant hugged and kissed the baby, and told him that defendant loved him and would see him “in heaven.” J.M. said she “kind of” pushed defendant and told him not to say that to the baby. J.M. then turned to go back into the house. Defendant turned and started walking off of the porch, but then told J.M. to wait because defendant had something for her. Defendant looked through his book bag and pulled out a gun.

¶ 8 J.M. tried to go into the house, but defendant grabbed the back of her head and held the gun to her chin while J.M. was holding the baby. According to J.M., defendant told her that there would be “problems” if he found out the baby was not his or if J.M. was “messing around” on defendant. J.M. asked him if he intended to “do this” in front of the baby, and defendant responded that he would not hurt the baby but would instead “end it” for both of them right there. Defendant started to force J.M. upstairs, and when J.M. said she did not want to go, defendant told her, “I ain’t asked you that,” and kept holding the gun to J.M.’s face.

¶ 9 They went upstairs, and defendant told J.M. to put the baby in a car seat so that they could talk. J.M. said she did not want to talk to him, so defendant took the baby from J.M., placed him in a car seat in the upstairs bedroom and told J.M.'s four-year-old sister to watch him. J.M. and defendant then went into the bathroom, and defendant locked the door.

¶ 10 J.M. was standing in front of the bathroom sink, and defendant, who was standing right behind her, began kissing her around her neck. J.M. told him that she did not want to have sex, but defendant responded, "I didn't ask you what you wanted to do, I'm gonna take it." Defendant then placed the gun on the sink. J.M. said she was about two inches from the gun, but she could not leave the bathroom. According to J.M., defendant pulled down her pants and underwear, bent her over toward the bathtub and placed his penis in her vagina.

¶ 11 Afterwards, J.M. said she was going to leave the bathroom, but defendant prevented her because he did not tell her she could leave at that time. Instead, defendant told J.M. to "fix" her face because she had been crying. Defendant left the bathroom and took the baby, telling J.M. that if she did not meet him downstairs in 15 minutes there would be "a problem." J.M. said she quickly got dressed and immediately went downstairs.

¶ 12 J.M. said she met defendant back on the porch, and defendant gave her the baby. Defendant told J.M. that she was "messing up his life," and blamed her for preventing him from getting to the age of 21 without a criminal record. J.M. told the court that she was "kind of laughing at him" for blaming her for something defendant did. Defendant reacted by telling her that, if she laughed at him again, he would "slap the dog shit out of [her]." J.M. laughed again, and defendant slapped her face. J.M.'s lip hit the baby's forehead, and the baby started crying.

¶ 13 J.M.'s aunt (Darby-Jones) then came out onto the porch and told J.M. to come back inside the house, but defendant told J.M. to "hold on" and that Darby-Jones "can wait." Darby-

Jones again told J.M. to go into the house and that J.M. did not have to be scared of defendant. J.M. stated that, rather than “walking the correct way” into the house, she walked behind her aunt to avoid defendant.

¶ 14 Once inside, J.M. noticed that the baby had fallen asleep, so she put the baby to bed and called the police, explaining that she felt she now had an opportunity to do so. J.M. testified that she told the police that defendant was at her house with a gun and that she had an order of protection on him.

¶ 15 After she hung up, she could hear arguing on the porch between her aunt, Brown, and defendant. She went to the living room near the front door and saw Brown and defendant in a fistfight that began off of the porch and continued down the street. J.M. called the police a second time and reiterated that defendant had a gun and that they should come quickly. Darby-Jones overheard this and asked J.M. if it was true. J.M. said it was and that the gun was in the book bag that defendant left on the porch just before the fight with Brown began. Darby-Jones brought the bag into the house and locked the door. She looked for the gun but did not find it until J.M. told her where it was located.

¶ 16 Defendant walked up to the door and asked for the bag, but Darby-Jones replied that defendant would not get it until after the police arrived. Defendant then tore the door off of its hinges and took the bag. At that point, Brown’s aunt yelled to her that defendant had a gun. J.M. said she and her aunt were standing in the doorway, about two feet from defendant, when J.M. saw defendant walk out onto the porch, remove the gun, and begin firing at Brown. After shooting at Brown, defendant returned the gun to the book bag, and walked away. Darby-Jones got into a car to go find where defendant went. The police arrived, and J.M. spoke to a detective at the police station, after which her DCFS (Department of Children and Family Services)

caseworker transported her to the hospital. J.M. explained that she had a DCFS caseworker because she had been a ward of the state since she was three months old.

¶ 17 J.M. testified that she went to the hospital to have a “rape kit” done. J.M. was brought to an examination room and told to undress and wear a hospital gown. J.M. saw a nurse return to the room with “some stuff, I guess to do the testing with”: Q-tips, swabs, and a speculum. J.M. said she believed the nurse was conducting the rape kit at that time. A few hours later, J.M. declined the nurse’s offer of medication for “treatment for STDs or something like that.” After “[a] few hours,” the nurse gave J.M. discharge papers. Finally, J.M. admitted that she wrote to and visited defendant after the assault, explaining that she still wanted her child to have a father.

¶ 18 On cross-examination, J.M. agreed that defendant placed Gyasi Jr. in a car seat and left the baby with J.M.’s little sister, but J.M. did not say anything to her or ask her to get J.M.’s aunt. J.M. also admitted that, after defendant took her into the bathroom, defendant placed the gun on the sink, but J.M. did not attempt to “brush pas[t]” him. The following exchange then occurred:

“Q. [Defense counsel] You stay in the bathroom, and then you’re in the bathroom for a few minutes?

A. [J.M.] Yes.

Q. Once you’re in that bathroom you tell him that you don’t want to have sex; is that right?

A. Correct.

Q. But he didn’t ask you; is that right?

A. Correct.

Q. So you have sex with [defendant]?

A. No.^[1]

Q. You've had sex with him in the past; is that right?

A. Yes."

¶ 19 J.M. conceded that, after the assault, she did not have to clean up afterwards; instead, she immediately went outside. J.M. also agreed that, when she went outside to speak with defendant after the assault, the conversation continued for "awhile [*sic*]" and ended when J.M.'s aunt came out and told her to go back into the house.

¶ 20 J.M. further conceded that she visited defendant more than 10 times since the time of the assault, but only because defendant was the father of her baby. In addition, J.M. acknowledged writing letters to defendant in October 2011, December 2011, and February 2012. J.M. denied having written a fourth letter that purportedly had her name typed at the bottom. The trial court denied defendant's motion to admit the letters into evidence.

¶ 21 In the October 2011 letter, J.M. wrote that she wanted to apologize but did not know whether defendant wanted to speak with her. J.M. said that she had not intended to go to the police, but DCFS came and told her that if she did not "go through with it," she was "allowing it to happen," and they would take Jr. due to "child endangerment, negle[c]t and some other shit."

¶ 22 The December 2011 letter stated that J.M. did not know whether defendant should "move on," but she said that she would not beg defendant to stay and she said that she was "damn sure not gonna play 2nd to no bitch!"

¶ 23 The February 2012 letter, like the other letters, is replete with spelling and grammatical errors. To avoid excessive alterations, we quote the relevant portions verbatim:

¹ J.M. later explained on redirect that what happened in the bathroom was rape, not voluntary sex.

“Well I don’t kno where to begin 1st I wanna say sorry! I never meant to hurt you or get you locked up, but if I wudn’t have made the statement den they said the wud take Jr. . . . I’m sorry and I wish you were here cause raisin Jr by myself is hard, but you have to take into consideration, I did wat any gud mother wud do, and protect my child.”

J.M. further wrote that she loved and missed defendant.

¶ 24 J.M. agreed that her child (with defendant) had an older brother, but that she was not the mother of that older child. When asked whether defendant “was actually in another relationship, as well,” J.M. replied, “Not of [*sic*] my knowledge.” J.M. did, however, state that she was aware that there was another baby, and that she spent time with her child and the older brother. On redirect examination, J.M. said her child had both an older brother and a younger brother, and that she was not the mother of those two siblings. J.M. also testified that the younger sibling was 10 or 11 months younger, and that J.M. always encouraged her son to have a relationship with that younger brother because she wanted her son to know all of his siblings.

¶ 25 Darby-Jones testified that she was J.M.’s aunt and that, on September 20, 2011, J.M. was living with her at her house with Darby-Jones’s four children and J.M.’s son (Gyasi Jr.), as well as Darby-Jones’s niece (who was visiting at that time). Darby-Jones further noted that she was dating Brown at that time and that he had spent the previous night at her house.

¶ 26 At around 8:30 a.m. on September 20, Darby-Jones awoke to the sound of the doorbell and a knock on the door. Darby-Jones’s four children had already left for school, so she went to the door and saw defendant. Defendant asked if he could see J.M., so she called J.M. and told

J.M. that defendant was at the door. She saw J.M. come down while talking to defendant on the phone. Darby-Jones did not let defendant into the house, and she went back to her room to sleep.

¶ 27 Darby-Jones and Brown both testified that they slept for either “a couple” or “a few” hours. When Darby-Jones awoke, she saw J.M. and Gyasi Jr. in the kitchen. Darby-Jones said she asked J.M. why defendant was at her house at that early hour. Darby-Jones then asked J.M. whether J.M. had fed Gyasi Jr., and J.M. said she had not. Darby-Jones then stated that she started cooking something for J.M.’s sister and the baby, and she saw J.M. go out the front door with the baby. Darby-Jones said she was “cooking and getting dressed” and had asked her niece to tell J.M. to come back inside because the food was ready. Darby-Jones noted, however, that J.M. never came in, so she told J.M. a few more times to do so, commenting that “it was like a back and forth thing for awhile.”

¶ 28 Darby-Jones stated that Brown had been entering and leaving the house while getting ready to go to work, and at one point, Brown entered and told her that defendant was going to slap J.M. Darby-Jones then went to the porch and asked J.M. to come into the house. J.M., however, said nothing and only remained standing, “looking straight ahead” while holding the baby. Darby-Jones again told J.M. to go into the house, and J.M. walked around her instead of walking around defendant. Darby-Jones knew then that J.M. was scared. When J.M. went into the house, Darby-Jones told J.M. to not talk to defendant or open the door for him. Darby-Jones returned to the porch and told defendant to leave, but defendant replied, “Bitch, I ain’t going nowhere,” and told her that she was going to have to call the police to get him to leave. Darby-Jones began arguing with defendant, demanding that he leave, and Brown, who had been standing in front of Darby-Jones’s car, walked over and also told defendant to leave. Brown and defendant began arguing, and then started fighting. The fight continued from her porch down

toward an alley nearby. Darby-Jones, however, saw defendant shake Brown's hand, so she believed the fight was over and the two began walking back toward her house.

¶ 29 Darby-Jones walked into her house and received a call from the police asking to confirm that there had been a report of a person with a gun. After J.M. told her where it was, Darby-Jones saw the gun in defendant's book bag and brought it back into her house. Darby-Jones was in the living room with J.M. when she heard defendant walk up the stairs to the porch and demand his book bag. Darby-Jones refused and told him that the police were coming. The outer door was locked, but Darby-Jones said defendant "pushed" the door in (she later clarified that defendant kicked the door off its hinges, from the top to the bottom of the door frame). Darby-Jones leaned against the second, interior, door to prevent defendant from entering, but defendant pushed that door open, took the bag from the living room couch, and left the house. Defendant put the bag down on the porch, and took out the gun.

¶ 30 Darby-Jones could not see Brown, so she yelled out to him to run because defendant had a gun. Darby-Jones said defendant "unloaded" the gun, shooting five or six times in Brown's direction. Brown testified that he heard Darby-Jones yell to him and began running down the street when he saw defendant remove the gun. Although he heard the shots, Brown did not see defendant actually shoot at him.

¶ 31 Defendant then took his book bag, removed his shirt, put the shirt in the book bag, and left, going in the opposite direction Brown had been running. Darby-Jones called the police and then got into a car and followed defendant down the street.

¶ 32 Darby-Jones and Brown, however, both agreed that, when Darby-Jones returned to bed after answering the door that morning and seeing defendant, she did not hear a scuffle or commotion, crying, or movement up the stairs. Darby-Jones further conceded on cross-

examination that, after she woke up and J.M. entered Darby-Jones's room, J.M. did not tell her that J.M. had just been raped or that defendant had a gun. Darby-Jones, however, could not recall how much time passed during the time Darby-Jones repeatedly asked J.M.'s sister to tell J.M. to come into the house to feed the baby.

¶ 33 Dionne Coleman also testified on behalf of the State that she was working as a registered nurse in the emergency department at Advocate Trinity Hospital on September 20, 2011. Coleman treated J.M., and noted that she was assessed at the hospital at around 6 p.m. that evening. Coleman said that J.M. told her that she had forced vaginal intercourse at around 9 or 9:30 a.m. that morning at her home. Coleman reviewed J.M.'s medical records and stated that a doctor performed a genital and anal examination on J.M. Coleman confirmed, however, that she was not present for that examination. Coleman added that the records further indicated that the doctor found a small injury to J.M.'s upper inner lip. Coleman testified that J.M. was also tested for sexually transmitted diseases through a blood draw and a vaginal specimen.

¶ 34 On cross-examination, Coleman testified that J.M., although initially consenting to the rape kit, later refused to have her clothing collected, and therefore the rape kit was not completed. J.M.'s medical records confirmed that J.M. refused a "sexual assault collection." On redirect examination, Coleman noted that J.M. had been at the hospital from 5:51 p.m. until 11:44 p.m., and that a pelvic examination had been completed.

¶ 35 The State argued during its closing argument that defendant's actions in raping J.M. were motivated by defendant's need for "control." Turning to defendant's shooting at Brown, the State first recalled that defendant initially backed down from Brown during their fistfight and then went back to the porch knowing that the gun was in his book bag. The State also observed that J.M. told her aunt that there was a gun in the bag, and after J.M.'s aunt brought the bag into

the house, defendant broke into the house to get it. The State then argued that defendant retrieved the gun and shot at Brown because defendant intended to win the fight with Brown and to “control that situation, too.”

¶ 36 The jury found defendant guilty of attempted murder, aggravated criminal sexual assault, aggravated discharge of a firearm, and violation of an order of protection. The jury also found that, during the commission of the attempted murder offense, defendant was armed with and personally discharged a firearm. The trial court sentenced defendant to consecutive terms of 26 years and 21 years for the attempted murder and aggravated criminal sexual assault convictions, respectively. The trial court also imposed concurrent sentences of four years and three years on the aggravated discharge of a firearm and violation of an order of protection convictions, respectively. The trial court awarded the defendant 673 days of presentence custody credit. This appeal followed.

¶ 37

ANALYSIS

¶ 38

The Sufficiency of the Evidence

¶ 39 Defendant first contends that the State failed to prove him guilty of aggravated criminal sexual assault beyond a reasonable doubt. Defendant argues that his contention is supported by the lack of physical corroboration, J.M.’s contradictory testimony, other witnesses’ testimony that contradicted J.M.’s, and her behavior following the assault. Defendant asks that we reverse this conviction outright.

¶ 40 When presented with a challenge to the sufficiency of the evidence, this court must determine “ ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” (Emphasis in original.) *People v. De Filippo*, 235 Ill. 2d 377, 384-85

(2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007) (citing *People v. Smith*, 185 Ill. 2d 532, 541 (1999)), *aff'd*, 236 Ill. 2d 1 (2009). This court may not retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, it is for the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *Id.* at 211. In essence, this court will not reverse a conviction unless the evidence is “so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant’s guilt.” *Id.* at 209.

¶ 41 Defendant challenges his conviction for aggravated criminal sexual assault. Section 11-1.30(a)(8) of the Criminal Code of 2012 (Criminal Code) provides that a person commits aggravated criminal sexual assault if that person “commits criminal sexual assault and *** the person is armed with a firearm.” 720 ILCS 5/11-1.30(a)(8) (West 2012). The Criminal Code further defines criminal sexual assault in relevant part as an act of sexual penetration and the use or threat of force. 720 ILCS 5/11-1.20(a)(1) (West 2012). Finally, sexual penetration is defined as, *inter alia*, “any contact, however slight, between the sex organ *** of one person and *** the sex organ *** of another person.” 720 ILCS 5/11-0.1 (West 2012).

¶ 42 In this case, there was ample evidence supporting the jury’s verdict. As a preliminary matter, defendant’s challenge to his conviction because of a lack of physical corroboration is meritless. Physical evidence, such as trauma or the presence of DNA, is not necessary to maintain a sexual assault conviction. *People v. DuPree*, 161 Ill. App. 3d 951, 961 (1987) (citing *People v. Morrow*, 104 Ill. App. 3d 995, 1000 (1982)); see also 720 ILCS 5/11-0.1 (West 2012) (“Evidence of emission of semen is not required to prove sexual penetration.”).

¶ 43 Defendant further argues that the time line J.M. provided was contradicted by Darby-Jones and Brown. According to defendant, J.M. testified that the assault lasted “only a few minutes,” and it only took her 45 seconds to go downstairs, whereas Darby-Jones and Brown both testified that, after defendant arrived at their residence, they went back to sleep for a couple/few hours and then saw defendant back on the porch after the assault had occurred. It is unclear, however, that defendant’s view of the testimony is correct. On cross-examination, defense counsel asked J.M. about being in the bathroom for “a few minutes,” which J.M. confirmed, and *then* counsel began asking about the rape itself. A reading of this exchange supports either defendant’s interpretation or one in which J.M. remained in the bathroom for a few minutes before defendant returned from leaving his infant son with J.M.’s four-year-old sister and began assaulting J.M. Moreover, neither Darby-Jones’s nor Brown’s testimony is any more specific than the vague description of a “couple” or “few” hours passing; nothing established a specific time when they awoke the second time.

¶ 44 Defendant further complains that J.M. refused to undergo a rape kit at the hospital, and she did not immediately report the assault. The record in this case, however, reveals that J.M. spent six hours at the hospital, and she eventually underwent a pelvic examination, which J.M. believed was the kit, so she refused to submit to still additional testing, leaving the hospital 12 hours after the attack and still wearing the same clothes. These facts, as the State points out, distinguish this case from *People v. Schaeffer*, 2014 IL App (1st) 113493, ¶¶ 11, 52, where the victim in that case not only refused *any* physical examination whatsoever, she also provided a description of her assailant that was “unquestionably inaccurate.”

¶ 45 Defendant also notes that, when J.M. came downstairs after the assault and saw her aunt, J.M. did not immediately tell Darby-Jones about the assault, nor did J.M. immediately telephone

the police while defendant was waiting on the porch. In addition, when they called the police after defendant began shooting at Brown, J.M. again did not tell the police that defendant had raped her. We note, however, that the evidence in this case was that, immediately after the attack, defendant—whom J.M. knew was armed with a firearm and who would later break down the front door to retrieve his book bag that contained the gun—was waiting for her on the front porch of the residence with her infant son. From these facts, the jury could reasonably have inferred that J.M. did not wish to provoke defendant’s violent character any further, especially while he was holding her baby. The jury could reasonably infer that, once defendant began shooting at Brown and the police were called to the scene, there was no further need to add on a rape allegation. In any event, in sexual assault cases involving family relationships, the victim’s credibility is not lessened if there is no immediate outcry. *People v. Duplessis*, 248 Ill. App. 3d 195, 199-200 (1993). Here, defendant was also the father of J.M.’s child, so the fact that she reported the rape after defendant’s arrest—a time span of only a couple of hours—does not appreciably lessen her credibility. See, e.g., *People v. Foley*, 206 Ill. App. 3d 709, 716 (1990) (14-year-old victim’s delay in reporting incident for “several months” held reasonable where the assailant was her adoptive father).

¶ 46 All of this evidence was presented to the jurors, and it was their role, not ours, to resolve inconsistencies and contradictions in the evidence. *Evans*, 209 Ill. 2d at 211. In addition to the inconsistencies and contradictions defendant points out, the jury also heard J.M. identify defendant as her attacker—an accusation she never sought to recant. J.M.’s recounting of the attack was consistent. We do not find that the evidence in this case is “so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant’s guilt.” *Id.* at 209. Consequently, we may not reverse the jury’s verdict, and defendant’s claim of error must fail.

¶ 47 Defendant maintains otherwise, relying on authorities such as *People v. Herman*, 407 Ill. App. 3d 688 (2011), and *People v. Smith*, 185 Ill. 2d 532 (1999), neither of which the State addresses. His reliance on these cases is misplaced.

¶ 48 In *Herman*, the defendant, a police officer, was convicted of, *inter alia*, aggravated criminal sexual assault and official police misconduct. *Herman*, 407 Ill. App. 3d at 688-89. The evidence at trial, however, revealed that the victim was an admitted crack addict, impeached with her deposition testimony that she did not do “rocks,” and conceded that she was “high” during the entire night of the encounter. *Id.* at 705. In addition, the victim changed the time of the purported attack at least six times after her initial report of about 3:30 a.m. *Id.* at 705. At trial, the victim again changed her time line, initially testifying that she met the defendant at around 5 a.m., but changed her testimony on cross-examination, stating that the encounter took place at 5:25 a.m. *Id.* at 706. Her daughter’s testimony, however, flatly contradicted these revised times. *Id.* The uncontradicted evidence was that the defendant’s whereabouts were known from about 3 a.m. until 4:50 a.m., and from 5:28 to 5:58 a.m. *Id.* at 705-06. The victim also made a prior statement that she sat behind the driver’s seat of the defendant’s police car, but at trial, she said she sat on the rear passenger’s side. *Id.* Although she did not see a “boom[]box’ ” on the driver’s side, an evidence technician recovered one. *Id.* at 706-07. The victim further testified that the vehicle had a cage when it did not. *Id.* at 707. In addition, she claimed that the defendant had a gun in an ankle holster, but none was ever recovered. *Id.* Finally, a witness testified that the victim was babysitting her children on the evening of the alleged offense, but the victim denied this and testified that she was babysitting her other daughter’s children. *Id.*

¶ 49 In *Smith*, our supreme court reversed the defendant’s murder conviction based upon insufficient evidence. *Smith*, 185 Ill. 2d at 534. The court noted that the State’s evidence

“hinge[d]” on the testimony of one witness, Debrah Caraway, the only witness to directly link the defendant to the crime. *Id.* at 542. Caraway’s credibility was undermined, however, when she denied using drugs every day despite having admitted to it in a statement to a defense investigator. *Id.* at 544. In addition, although Caraway contended that the defendant and the victim were alone together at the time of the shooting, two witnesses, including a bartender, testified that the victim left with two other people, both of whom were next to the victim when he was shot. *Id.* at 542-43. The court reasoned that the bartender was more credible than Caraway because he feared that the defendant was going to rob the bar and thus he had a greater motive to carefully watch the defendant. *Id.* at 542-43.

¶ 50 Caraway’s credibility was further damaged when she failed to seek help or even report the crime to the police until two days had passed, noting further that she had a motive to falsely implicate the defendant because a possible alternate suspect was her sister’s boyfriend, and the police suspected her sister of providing the gun to the shooter. *Id.* at 544. Finally, the court observed that the only circumstantial evidence of the defendant’s involvement in the crime was his presence in the bar and the dark clothing that he wore. The court thus concluded that the evidence merely “narrowed the class of individuals” who may committed the offense, but it did not point specifically to the defendant, because there were two other men with the defendant on the night of the shooting, and both also wore dark clothing. *Id.* at 545.

¶ 51 In this case, J.M.’s testimony is hardly as riddled with inconsistencies and contradictions as that of the victim in *Herman*. While J.M.’s statement as to the time frame of the attack arguably conflicts with her aunt’s and Brown’s testimony, her statement at trial did not conflict with *her own* statements. In addition, J.M.’s credibility was far stronger than Caraway’s credibility in *Smith*. There was no evidence that J.M. had a daily drug habit (as did Caraway).

Although the bartender in *Smith* was deemed more credible because he had a motive to observe the defendant's movements very carefully (because of his fear of defendant robbing him), defendant in this case points to nothing in the record to indicate that J.M.'s aunt or Brown are inherently more credible than J.M. with respect to the time frame of the attack. *Herman* and *Smith* are therefore unavailing because both of those cases are factually distinct.

¶ 52

Trial Counsel's Performance

¶ 53 Defendant next contends that his trial counsel was constitutionally ineffective in two respects: (1) trial counsel should have sought a severance of the aggravated criminal sexual assault charges from the other charges; and (2) trial counsel improperly failed to present impeachment evidence that would have shown J.M.'s bias. Defendant argues that, as to his first point, the sexual assault and the shooting took place at different locations and times, but trial counsel's failure to sever the charges allowed the State to "bolster its weak sexual assault case with other, unrelated evidence that [defendant] behaved violently." With respect to his second allegation, defendant argues that trial counsel had letters that J.M. had written to defendant that "repeatedly suggested that [J.M.] had fabricated the sexual assault accusation," but trial counsel failed to use them to show J.M.'s bias against defendant. Defendant asserts that these errors, both individually and cumulatively, warrant a new trial.

¶ 54 Claims of ineffective assistance of counsel are governed by the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). To establish ineffective assistance, a defendant must show both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. *Id.* Deficient performance is performance that is objectively unreasonable under prevailing professional norms, and prejudice

is found where there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 496-97. The failure to establish either prong of the *Strickland* test is fatal to the claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010) (citing *Strickland*, 466 U.S. at 697).

¶ 55 Matters of trial strategy, however, are generally immune from claims of ineffective assistance of counsel except where the trial strategy results in no meaningful adversarial testing. *People v. West*, 187 Ill. 2d 418, 432-33 (1999). Moreover, even if trial counsel makes a mistake in trial strategy or tactics or an error in judgment, this will not render representation constitutionally defective. *Id.* In other words, the effective assistance of counsel merely refers to “competent, not perfect,” representation. *People v. Stewart*, 104 Ill. 2d 463, 491-92 (1984). Consequently, a reviewing court must be highly deferential to trial counsel as to trial strategy, and it must evaluate counsel’s performance from her perspective at the time, and not “through the lens of hindsight.” *Id.* Whether to seek severance of offenses and whether to cross-examine or impeach a witness are matters of trial strategy. See *People v. Gapski*, 283 Ill. App. 3d 937, 942 (1996) (severance); *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997) (impeachment).

¶ 56 Whether a defendant received ineffective assistance of counsel presents is a mixed question of fact and law. *Strickland*, 466 U.S. at 698. We thus defer to any findings of fact, but review *de novo* the ultimate legal issue of whether counsel’s purported omission supports an ineffective assistance claim. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004). We note, however, that the issue of severance concerns undisputed facts, so the issue becomes a question of law subject to *de novo* review. *People v. Berrier*, 362 Ill. App. 3d 1153, 1167 (2006).

¶ 57

Counsel's Failure to Request a Severance

¶ 58 Defendant first argues that his trial counsel was ineffective because she failed to seek a severance of the aggravated criminal sexual assault charge. Specifically, defendant claims that the aggravated criminal sexual assault charge was not part of the same “transaction” as the attempted murder and aggravated discharge of a firearm charges. According to defendant, joinder of the charges allowed the jury to improperly consider evidence of one crime in determining guilt on the other. Defendant seeks a new, severed, trial.

¶ 59 Section 111-4(a) of the Code of Criminal Procedure of 1963 (Procedure Code) provides that two or more offenses may be charged in the same indictment in a separate count for each offense “if the offenses charged *** are based on *** 2 or more acts which are part of the same comprehensive transaction.” 725 ILCS 5/111-4(a) (West 2012). There are no precise criteria for determining whether separate offenses are part of the same comprehensive transaction, and the decision to sever charges rests largely within the discretion of the trial court. *Gapski*, 283 Ill. App. 3d 937, 942 (1996). Nonetheless, factors to consider with respect to severance are: (1) the proximity in time and location of the offenses; (2) the identity of evidence needed to demonstrate a link between the offenses; (3) whether there was a common method in the offenses, and (4) whether the same or similar evidence would establish the elements of the offenses. *Id.* In deciding whether offenses are part of a comprehensive transaction, the first two factors are the most important. *People v. Quiroz*, 257 Ill. App. 3d 576, 586 (1993). If, however, a defendant would be prejudiced by the joinder of charges, the trial court may sever them. 725 ILCS 5/114-8 (West 2012).

¶ 60 Because those factors do not weigh in favor of severance, we cannot find that trial counsel was ineffective. First, the offenses were in close proximity both with respect to location

and time. Defendant raped the victim in the upstairs bathroom of the house where she was living, and then he later shot at Brown just outside of the house. In addition, the rape occurred shortly before the shooting. Defendant argues that the offenses were not closely linked in time because other witnesses testified that a couple of hours had passed between the time the rape would have occurred and when the shooting began. However, the mere passage of a certain amount of time is not by itself determinative of whether joinder was improper. See *People v. Wells*, 184 Ill. App. 3d 925, 930 (1989). Even assuming the other witnesses were correct as to the passage of time, numerous cases have found joinder appropriate with even less proximity of time and location. See, e.g., *People v. Stevens*, 188 Ill. App. 3d 865, 885 (1989) (first offense, theft and sexual assault, occurred at 8 p.m., whereas the second offense, a break-in, occurred at 10:15 p.m.); *People v. Mays*, 176 Ill. App. 3d 1027, 1038 (1988) (no error in joinder of murder charge occurring six hours before and several miles away from attempted murder of police officer); but see *People v. Fleming*, 121 Ill. App. 2d 97, 102-03 (1970) (eight-month passage of time between theft of automobile and its sale for cash and clothing too remote to support joinder). Therefore, the passage of even “a couple of hours” does not shift this factor to defendant’s favor.

¶ 61 The second factor, the identity of evidence needed to demonstrate a link between the offenses, also weighs in favor of joinder. Defendant used the same gun in both the aggravated criminal sexual assault charge (when he pointed it at the victim in order to force her to go inside the house and up to the bathroom where he raped her) and the other charges (when he pointed it and shot at Brown). Defendant’s use of the same handgun links the aggravated criminal sexual assault offense with the remaining offenses.

¶ 62 The third factor, whether there was a common method in the offenses, has been “more aptly characterized as asking whether the offenses were part of a ‘common scheme,’ so that each of the offenses supplies a piece of a larger criminal endeavor.” *People v. Walston*, 386 Ill. App. 3d 598, 606-07 (2008) (citing *Quiroz*, 257 Ill. App. 3d at 586; and *People v. Reynolds*, 116 Ill. App. 3d 328, 335 (1983)). Here, the offenses were properly joined because the subsequent shooting was an outgrowth of the rape of J.M. and allowed the State to proceed on the theory that both offenses were motivated by defendant’s need for “control.”

¶ 63 Finally, the fourth factor, whether the same or similar evidence would establish the elements of the offenses, weighs slightly in favor of the State. As discussed, defendant used the same firearm to accomplish both the aggravated criminal sexual assault as well as the aggravated discharge of a firearm and attempted murder offenses. The State charged defendant with aggravated criminal sexual assault under section 11-1.30(a)(8) of the Criminal Code, which required the State to prove that defendant committed rape while armed with a firearm. 720 ILCS 5/11-1.30(a)(8) (West 2012). The charge of aggravated discharge of a firearm also required the State to also prove defendant was armed with a firearm. 720 ILCS 5/24-1.2(a)(2) (West 2012). Finally, the attempted murder indictment was predicated upon defendant’s shooting at Brown with the firearm. We acknowledge that the elements of aggravated criminal sexual assault are otherwise unrelated to the offenses of attempted murder and aggravated discharge of a firearm. Consequently, this factor provides only weak support for joinder.

¶ 64 On balance, these factors, particularly the first two, which are “most important” (*Quiroz*, 257 Ill. App. 3d at 586), weigh decidedly in favor of joinder. Moreover, we have already rejected defendant’s contention that the evidence supporting defendant’s convictions was weak. As such, we must also reject his claim that he was prejudiced by the failure to sever the charges.

Thus, trial counsel was not ineffective for failing to pursue a meritless motion to sever. See *People v. Williams*, 147 Ill. 2d 173, 238-39 (1991) (“defense counsel is not required to undertake fruitless efforts to demonstrate his effectiveness”).

¶ 65 Counsel’s Failure to Question the Victim as to Alleged Bias

¶ 66 Defendant’s second ground for his ineffective assistance claim is that trial counsel improperly failed to present impeachment evidence that would have shown J.M.’s bias. Specifically, defendant argues that trial counsel had letters that J.M. had written to defendant that “repeatedly suggested that [J.M.] had fabricated the sexual assault accusation” but trial counsel failed to use them to show J.M.’s bias against defendant. According to defendant, these letters would have “devastated” J.M.’s credibility and exposed her motivation to falsely accuse defendant. Defendant concludes that, with this evidence, there is a reasonable probability that he would have been acquitted of aggravated criminal sexual assault. We disagree.

¶ 67 In this case, *both* the State *and* defense counsel had already elicited from J.M. a concession that she had written and visited defendant multiple times while he had been incarcerated following these offenses. In addition, the potential evidence of J.M.’s motive to lie based upon jealousy was similarly before the jury: trial counsel questioned J.M. regarding her knowledge that defendant had fathered another child by another woman. The importance of the letters are not enhanced by defendant’s argument that J.M. denied knowing that defendant had been in another relationship. She had acknowledged her awareness of defendant’s children by other women—one of whom was about ten months younger than her son—and that she had spent time with them and her son.

¶ 68 Finally, defendant’s claim fares no better with respect to the statements in the letters that DCFS told J.M. that she could lose her child if she didn’t “go through with it.” This purported

evidence of bias is equivocal: The jury could reasonably infer from this statement that DCFS was strongly recommending that J.M. either simply tell the truth (and say that she was raped) *or* lie (and say that she was raped). Nowhere in the letters does J.M. indicate that DCFS was coercing her to fabricate this crime and falsely accuse defendant to keep custody of her child.

¶ 69 Under these circumstances, trial counsel could reasonably have decided that, strategically, placing this evidence before the jury would bolster the State's case and that it was better to leave the details out and allow the jury to draw the inference of a wrongful accusation followed by remorseful visits and letters. As noted above, whether to impeach a witness is a matter of trial strategy that is generally immune from ineffective assistance of counsel claims except where the trial strategy results in no meaningful adversarial testing. *Pecoraro*, 175 Ill. 2d at 326; *West*, 187 Ill. 2d at 432-33. Trial counsel's strategy did not result in no meaningful adversarial testing. To the contrary, J.M. was cross-examined regarding (1) her continued communication with defendant both immediately after the assault and later (when he was in jail), and (2) her knowledge of defendant's involvement with another woman. Consequently, the statements in the letters concerning these two points would have been cumulative to what had already been presented to the jury, which does not meet the prejudice prong of *Strickland*. See *People v. Pulliam*, 206 Ill. 2d 218, 239 (2002); *People v. Johnson*, 262 Ill. App. 3d 781, 791 (1994). With respect to the statements regarding DCFS, since those statements were equivocal, counsel's decision not to pursue this line of cross-examination "can hardly be viewed as a grave error in trial strategy." *People v. Madej*, 177 Ill. 2d 116, 151 (1997), *overruled on other grounds by People v. Coleman*, 183 Ill. 2d 366 (1998). We therefore reject defendant's claim of error.

¶ 70 Furthermore, our holding is unaffected by defendant's reliance upon *People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 187 (2001). There, the victim, the sole eyewitness against the

defendant, had various pending charges for retail theft and domestic battery against her mother and was in State custody at the time of the defendant's trial. *Id.* at 187. The court held that trial counsel erroneously assumed that the evidence was inadmissible and that the evidence was admissible to show bias or a possible reason for the victim to fabricate her testimony. *Id.* By contrast, the evidence in this case regarding J.M.'s previous letters and visits with defendant, as well as defendant's involvement with another woman, were already presented to the jury. In addition, as noted above, the evidence regarding DCFS was equivocal in that it could also have bolstered the State's and J.M.'s claims. *Anthony Roy W.* is therefore unavailing.

¶ 71 The Cumulative Effect of the Alleged Errors

¶ 72 Finally, defendant claims that the cumulative effect of his trial counsel's alleged errors deprived him of the effective assistance of counsel. Since we have rejected both of these claims individually, we need not undertake a cumulative-effects analysis. See *People v. Perry*, 224 Ill. 2d 312, 356 (2007). Defendant's citation to *People v. Gallagher*, 2012 IL App (1st) 101772, ¶ 32, is meritless. *Gallagher* concerned a single ineffective assistance claim, not the cumulative effect of multiple claims, and the precise paragraph defendant cites merely states the court's holding but not any legal analysis that would support his claim. *Gallagher* is thus inapplicable.

¶ 73 The Indictment for the Violation of the Order of Protection

¶ 74 Defendant next contends that count 11 of his indictment is duplicitous in that it charges disparate and alternative acts. He argues that this prevented him from knowing which of the various acts he was charged with committing. He requests reversal of his conviction on that count.

¶ 75 Section 111-3 of the Procedure Code provides that a charge shall be in writing and must allege the commission of an offense by setting forth "the nature and elements of the offense

charged.” 725 ILCS 5/111-3(a)(3) (West 2012). Since defendant challenges the sufficiency of an indictment for the first time on appeal, we only need to determine “whether the charging instrument apprised the defendant of the precise offense charged with enough specificity to prepare his *** defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct.” *People v. Maggette*, 195 Ill. 2d 336, 347-48 (2001). We may resort to the record to make this determination. *Id.* at 348.

¶ 76 Here, defendant was charged with the violation of an order of protection. Under section 12-3.4(a) of the Criminal Code, an accused commits the offense of violating an order of protection if he knowingly commits an act prohibited by a court or in violation of “a remedy in a valid order of protection authorized under paragraph[] (1) *** of subsection (b) of Section 214 of the Illinois Domestic Violence Act of 1986 [750 ILCS 60/214(b)(1) (West 2012)]” and the violation occurs after the accused has been served notice of the contents of the order. 720 ILCS 5/12-3.4(a)(1)(i), (a)(2) (West 2012); *People v. Brzowski*, 2015 IL App (3d) 120376, ¶ 25. In turn, section 214(b)(1) of the Illinois Domestic Violence Act of 1986 (the Act) provides in pertinent part that, in addition to other civil or criminal remedies, the following remedies may be included in an order of protection: “Prohibition of *** respondent’s harassment, interference with personal liberty, intimidation of a dependent, physical abuse, or willful deprivation, ***, or stalking of the petitioner.” 750 ILCS 60/214(b)(1) (West 2012).

¶ 77 We cannot agree that count 11 was duplicitous. Duplicity is “the joinder of separate offenses in a single count of an indictment.” *People v. Whitlow*, 89 Ill. 2d 322, 336 (1982). “It arises from charging more than one offense, and not from charging a single offense in more than one way, or pleading different acts contributing to the ultimate charged offense.” *People v. Ross*, 21 Ill. 2d 419, 420-21 (1961). Here, the allegations in count 11 (namely, that defendant

physically abused J.M., interfered with her personal liberty, intimidated her, and harassed and stalked her) were not for the purpose of establishing separate charges of assault, unlawful restraint, and stalking. The prior order of protection—knowledge of which defendant does not challenge—enumerated various acts that defendant could not perform, such as physically abusing J.M., interfering with her personal liberty, intimidating her, harassing her, and stalking her. Count 11 charged defendant with the sole offense of violation of an order of protection, and the allegations merely showed the acts that contributed to the ultimate charged offense. On this basis alone, we may reject defendant contention of error.

¶ 78 Since defendant challenged the indictment for the first time on appeal, we only need to determine whether it was specific enough to allow defendant to prepare his defense and prevent subsequent prosecution based upon the same conduct. *Maggette*, 195 Ill. 2d at 347-48. Defendant asserts that he was unable to prepare his defense because the acts alleged were disparate, *i.e.*, he did not know which precise act of the acts alleged he had to defend against. We disagree. The order of protection plainly prohibited defendant from physically abusing and harassing J.M. We cannot hold that count 11 somehow did not inform defendant that he violated the protective order when he went to her residence, pointed a gun at her, raped her, hit her, and then shot at Brown.

¶ 79 Finally, the statute at issue, the violation of an order of protection statute, does not contain multiple acts, any one of which would support a charge. Rather, the accused need only violate the order despite having knowledge of it. 720 ILCS 5/12-3.4(a)(1)(i), (a)(2) (West 2012); *Brzowski*, 2015 IL App (3d) 120376, ¶ 25. This is precisely what the State alleged in count 11: defendant had notice of the order of protection but committed multiple acts in violation of it.

¶ 80 The One-Act, One-Crime Rule and Defendant's Mittimus

¶ 81 Next, defendant contends, and the State agrees, we must vacate his conviction for aggravated discharge of a weapon under the one-act, one-crime doctrine because that conviction was carved from the same physical act as his attempted murder conviction: namely, his shooting at Brown. The State also agrees with defendant's contention that his mittimus should be corrected to reflect 714 days of presentence custody credit.

¶ 82 Under one-act, one-crime principles, a defendant cannot be convicted of multiple offenses "carved from the same physical act," where "act" is defined as "any overt or outward manifestation which will support a different offense." *People v. King*, 66 Ill. 2d 551, 566 (1977). When multiple convictions are obtained for offenses arising from a single act, the trial court should impose sentence on the more serious offense and vacate the conviction on the less serious offense. See *People v. Lee*, 213 Ill. 2d 218, 227 (2004) (citing *People v. Garcia*, 179 Ill. 2d 55, 71 (1997)). We review one-act, one-crime challenges *de novo*. *People v. Artis*, 232 Ill. 2d 156, 161 (2009).

¶ 83 We agree with the parties. The same physical act provided the basis for both the attempted murder and the aggravated discharge of a firearm convictions. The State charged defendant with attempted murder for having "shot at *** Brown while armed with a firearm, knowing that such act created a strong probability of death or great bodily harm." The State also charged defendant with aggravated discharge of a firearm for having "knowingly discharged a firearm in the direction of another person." The State, however, did not apportion the charges to different discrete acts: The attempted murder count merely alleged that defendant "shot at" Brown while armed with a firearm, and the aggravated discharge of a firearm count charged defendant with knowingly "discharging a firearm" in the direction of another person. Under the

facts of this case, the attempted murder count and the aggravated discharge of a firearm count were carved from precisely the same physical act: shooting at Brown. As such, defendant's conviction for aggravated discharge of a firearm cannot stand because it is a less culpable offense than attempted murder. See *Lee*, 213 Ill. 2d at 227; 720 ILCS 5/8-4(c)(1) (West 2012) (attempted first degree murder is a Class X felony); 720 ILCS 5/24-1.2(a)(2), (b) (West 2012) (aggravated discharge of a firearm is a Class 1 felony).

¶ 84 Finally, defendant contends, and the State concedes, that he is entitled to presentence custody credit of 714 days. Defendant was arrested on September 20, 2011, and remained in custody until his sentencing on September 3, 2013, a total of 714 days. Defendant's mittimus, however, erroneously indicates only 673 days of credit.

¶ 85 Therefore, pursuant to Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967)), we direct the circuit clerk to: (1) vacate defendant's conviction for aggravated discharge of a firearm, and (2) correct defendant's mittimus to reflect 714 days of presentence custody credit. See also *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) (holding that remand is unnecessary because the court may directly order the clerk to correct the mittimus).

¶ 86

CONCLUSION

¶ 87 The evidence was sufficient to support defendant's conviction for aggravated criminal sexual assault. Defendant's trial counsel did not render ineffective assistance for failing to either sever the aggravated criminal sexual assault charges from the remaining charges or challenge J.M.'s potential bias with respect to the letters she had written to defendant. The indictment charging defendant with violation of an order of protection was not void. Finally, the circuit clerk is directed to vacate defendant's conviction for aggravated discharge of a firearm and

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correct defendant's mittimus to reflect 714 days of presentence custody credit. Accordingly, we affirm the judgment of the trial court as modified.

¶ 88 Affirmed as modified.