2015 IL App (1st) 142387-U

SIXTH DIVISION
December 18, 2015

No. 1-14-2387

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTHONY BERGAMINO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 CR 16153 Honorable Thomas V. Gainer, Judge Presiding

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** The evidence was sufficient to support defendant's conviction for criminal sexual assault. The State did not improperly amend its charges in violation of defendant's rights. The State's opening statement and closing arguments were proper. The State committed no *Brady* violation with respect to purported statements on the victim's cellular telephone. The trial court did not err in denying defendant's motion to obtain the victim's cell phone contents and her responses to a hotel spa questionnaire. The trial court properly limited defense counsel's questioning of various witnesses. Defendant's right to a speedy trial was not violated. Affirmed.

¶ 2 Following a jury trial, defendant Anthony Bergamino was convicted of criminal sexual assault and criminal sexual abuse. The trial court sentenced him to consecutive terms of four years' and two years' imprisonment, respectively. On appeal, he contends that (1) the evidence is insufficient to support his convictions, or in the alternative, that the indictment "suffered from a fatal variance or constructive amendment"; (2) the State improperly withheld material favorable evidence on the victim's cellular phone and made improper arguments to the jury; (3) the trial court erred in various pretrial rulings and in limiting the testimony of certain defense witnesses; and (4) he was deprived of his right to a speedy trial. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant Anthony Bergamino was charged by indictment with criminal sexual assault, criminal sexual abuse, and two counts of residential burglary. The indictment for criminal sexual assault alleged that defendant "placed his fingers into [the victim K.E.'s] vagina," by the use or threat of force, whereas the indictment for criminal sexual abuse alleged that defendant touched his mouth to the victim's breast for the purpose of sexual gratification by the use or threat of force.

¶ 5 On November 27, 2012, defendant filed a motion for "complainant to produce her mobile phone for forensic examination." The motion recalled that, two months prior, defendant had filed with the trial court a request for various text messages, "tweets, Facebook postings, and e-mails" that K.E. had sent and received between August 6 and 16, 2012. Defendant further noted that, in his prior request, he suggested that the trial court direct the State to produce K.E.'s phone. Defendant's motion, however, stated that he anticipated the State would respond that it did not possess K.E.'s phone, and he informed the trial court that he was seeking an order "directly to [K.E.] compelling the production" of her phone. At the hearing on defendant's

motion, defendant agreed that the phone did not belong to the State, and stated, "Of course, it's not in [its] possession or control." Following argument, the trial court stated that it would enter an order directing K.E. to not destroy or delete information on her phone and to maintain the phone in "its current condition." Defendant's trial counsel did not object.

¶ 6 On September 18, 2013, defendant filed a motion seeking to view the contents of K.E.'s check-in form for a hotel spa (the "Bliss spa") that had been furnished in a sealed envelope directly to the trial court. Defendant noted that K.E. had received a complimentary massage after the attack and that the form asked guests to list any "health issue" or "condition" as well as medications and areas of the body that the masseuse should avoid. The State objected, arguing in part that the form disclosed that the masseuse would not massage either the breasts or the genital area, and it was unlikely that a guest would list being the victim of a rape as a health "issue" or "condition." The State further observed that defendant had already received K.E.'s medical chart from Northwestern Memorial Hospital (Northwestern), where she had been treated following the attack. Finally, the State characterized this request as a "fishing expedition," because defendant did not have a good-faith basis to believe that K.E. had taken any prescription or nonprescription medications on the night of the attack. The trial court granted defendant's motion in part, and disclosed the two medications K.E. had listed on the form: Concerta and Tazorac. The trial court, however, told defendant that he would have to establish a link between heavy alcohol use and an adverse drug interaction in order to have the evidence admitted. The trial court, however, found defendant's other requests irrelevant.

¶ 7 Defendant filed a speedy trial demand on December 13, 2013, and trial was eventually set for Monday, February, 24, 2014. On the day trial was to begin, however, the trial court informed the parties that the presiding judge had received a copy of a motion that defense counsel had sent

by facsimile the prior Thursday. The trial court explained that it only became aware of this motion late on Friday, and discussed it with the parties via conference call. The trial court then stated that, since defendant's motion now provided a specific relevant reason to order the examination of K.E.'s phone (in contrast to prior motions which relied solely upon speculation), the trial court stated that it would be willing to order the forensic examination of the phone, but only if defendant was willing to "break" his speedy trial demand. The trial court observed that there would be a time delay in examining the phone, and it reasoned that it would be improper to charge that time to the State. Defendant informed the trial court that he had conferred with defense counsel and agreed with defense counsel's recommendation to maintain his speedy trial demand. The trial court explained that it could think of no reasonable strategic decision to forego the examination of the phone, and as a result, defendant could potentially be able to claim ineffective assistance of counsel on appeal. Defendant indicated that he understood the trial court's explanation, but he persisted with his speedy trial demand. Defendant's trial then began.

¶ 8 The trial court admonished the jury that opening statements were not evidence; they only represented what each side expected the evidence to show to assist them in understanding the evidence as it is introduced. The State made the following comment during its opening statement:

> "Whether you are a street person hiding in the shadows or *** an educated professional lurking at a hotel, you simply cannot enter someone's hotel room uninvited and force yourself on them. That is residential burglary."

Defendant objected, but the trial court overruled this objection.

¶ 9 Following opening statements, the jury heard the following evidence. The victim, K.E., testified that, on the evening of August 6, 2012, while in Chicago for a work conference, she had dinner with a friend (Lisa Barton), a coworker (Joel Heine), and Heine's friend "Jordan." Afterwards, the group walked back to the W Hotel on Lake Shore Drive, where K.E. had been staying, and went to the hotel's rooftop bar, where they stayed for about an hour.

¶ 10 At "around" 12:30 a.m. on August 7, K.E. returned alone to her room on the 31st floor of the hotel. She spoke to a friend of hers, Doug Pearson, and expected him to visit her later that evening, so she left the latch on her hotel room door open so that Pearson could let himself in. At "about" 1:20 a.m., K.E. changed into sleepwear (a t-shirt and "basketball shorts") and was lying in bed awaiting Pearson's arrival. K.E. briefly watched television but had turned it off.

¶ 11 K.E. said that she then saw defendant—whom she had never seen before—coming into her room. According to K.E., defendant got on top of her, and put his hand over her mouth. K.E. could not move because defendant's body weight pinned her down; she was 5′ 1″ tall and weighed 125 pounds. Defendant removed his hand from her mouth and began kissing her mouth and repeatedly told her, "I am going to fuck you," "[Y]ou are so fucking hot," and "I am going to fuck you." Defendant had alcohol on his breath and his speech was slurred.

¶ 12 K.E. stated that, during the struggle, defendant kept one hand on her arm so she could not move, and he put his other hand inside of her underwear. The following colloquy then occurred:

> "Q. [The State:] Where exactly did his hand go?
>
> A. His hand went into the folds of my vagina.
>
> Q. Did he—his hand or his fingers?
>
> A. His fingers.
>
> Q. Did his fingers go all the way up inside of you?

A. No. They did not.

Q. Did they go into your vagina?

A. Yes."

¶ 13 K.E. said that she was able to pull defendant's hand away while he was kissing her breasts. K.E. also stated that defendant had stuck his finger so far inside her mouth that she could not speak because she was choking. K.E. said she was able to push defendant off of her while his hands were on the lower part of her body. Defendant, however, took both of her wrists and pinned them behind her back while she was standing facing the bed she had been on. Defendant, who was standing behind her, then pushed her against the bed and said that he was going to return. K.E. said she fell to the ground and the mattress was pushed off of the bed frame. Defendant then left the room.

¶ 14 At that point, Pearson was calling K.E. K.E. told him that she was "not okay," but she did not tell him what had happened. K.E. said she was going to meet him at the hotel lobby. When she went to the lobby, Pearson was there with the hotel's head of security. K.E. testified that she spoke to the head of security, but she did not relay all of the details of the attack because she did not feel comfortable speaking to a man about the incident. Police officers arrived, and K.E. recounted the events of that evening to a female officer.

¶ 15 K.E. said she was then escorted by two officers back to her hotel room. The officers entered the room to ensure nothing had been stolen and to investigate. K.E. said that, while she was in "the hallway part of the room" with the police officers, defendant appeared in the hallway just outside of her room. The officers asked K.E. if defendant was the assailant, and when K.E. said that he was, the officers arrested him. K.E. later went to the police station and then the hospital.

¶ 16 At the hospital, K.E. said that a criminal sexual assault "kit" was collected from her and that she was examined. K.E. described various injuries she had suffered, including bruising and tenderness under her chest, sore arms, and bruises on her legs. K.E. also said that the anxiety from the incident caused her to vomit.

¶ 17 She returned to her hotel room at around noon, and met a friend to stay with her. K.E. explained that she felt very scared and could not sleep, so in order to get her "head to relax," she had a massage at the hotel, which hotel management arranged to give her on a complimentary basis. She returned home later that day.

¶ 18 On cross-examination, K.E. testified that she did not recall having a conversation with defendant when she was returning to the hotel with some friends after dinner. K.E. also replied "No" when asked whether she remembered inviting defendant to the hotel bar with her friends and telling him her room number. K.E. reiterated that she told a nurse and her treating physician at the hospital that defendant had put his fingers inside the folds of her vagina, but not "up inside of me." K.E. did not recall telling hospital personnel that there was no "vaginal penetration," nor that she had screamed during the attack. She also confirmed that, after the attack, she received a complimentary massage, but she did not ask the hotel to pay for it. K.E., however, did not recall whether she had to fill out a form prior to the massage. Finally, K.E. conceded that, following the attack and after defendant's arrest, she deleted an exchange of text messages with Pearson.

¶ 19 On redirect examination, K.E. confirmed that she did not see defendant while she was returning to her hotel, she did not have a conversation with him, and she did not invite him to her hotel room. K.E. also stated that, when defendant put his mouth on her breast, he pulled her shirt up and her bra down, and his mouth was directly on her skin.

¶ 20 Erin Klopack testified that she was working as a registered nurse in the emergency room at Northwestern in the early morning hours of August 7, 2012. Klopack stated that K.E. described being in her hotel room earlier that evening awaiting the arrival of a friend. According to Klopack, K.E. said that she left the door open for her friend, but defendant came into her room and tried to get on top of her. K.E. added that defendant was kissing her on the mouth, kissing and touching her chest area and breasts, and defendant tried to put his fingers in her vagina. K.E. also informed Klopack that defendant said he was going to "fuck" K.E. and that K.E. was "sexy." Klopack completed a sexual assault kit examination, which included taking swabs of K.E.'s mouth and breasts. In addition, Klopack noted that K.E. had vomited multiple times, and Klopack had to give her anti-nausea medication.

¶ 21 On cross-examination, Klopack agreed that K.E. denied "vaginal penetration," and that K.E. declined to have a vaginal swab taken. Klopack further admitted not knowing whether K.E.'s vomiting had been caused by "heavy drinking." Klopack also confirmed that K.E. claimed that, during the attack, she kept screaming louder and louder. On redirect examination, Klopack testified that K.E. did not appear intoxicated, and that Klopack did not consider a finger only in the fold of the vagina to be penetration. On recross-examination, however, Klopack stated that K.E. did not indicate that a finger had gone "into the fold of her vagina."

¶ 22 Eddie Brewer, the W Hotel's security officer, testified that he had been called to the lobby area because of an emergency. Brewer went there and initially met Pearson. Soon afterward, K.E. came down to the lobby area, crying and with her hands over her face. K.E. informed Brewer about the incident, Brewer contacted police, and he also wrote out an incident report. After the police arrived, Brewer returned to his office to determine whether the hotel security cameras were recording an individual matching the assailant's description, but he saw

nothing at the time. Brewer then returned to the lobby but saw that no one was there, so he went to floor where K.E.'s room was located. According to Brewer, as soon as the elevator doors opened, he saw defendant in handcuffs with police officers. Brewer eventually returned to the security office to review the security footage that had been recorded earlier in the evening. Brewer said that there was footage of defendant "roaming" the 33rd floor, where the bar was located, and then entering an elevator and getting off on the 32nd floor. Brewer explained that, while an individual would generally need a key to access the guest-room floors, defendant did not use a key to access the floors, which Brewer believed was due to the cleaning service disabling that security feature. Brewer did not see any other footage that included defendant. Brewer said that the only way for someone to access the 31st floor (where K.E.'s room was located) after getting off the elevators on the 32nd floor but not getting back on the elevator was to use the stairs.

¶ 23 On cross-examination, Brewer said that, although K.E. "smelled of alcohol," she did not appear intoxicated. Brewer also conceded that he did not provide any video recordings of defendant initially walking into the hotel or going up in the elevators to the 33rd floor. Brewer further testified that there are no surveillance videos of the hallways on the various floors. On redirect examination, Brewer confirmed that all of the video recordings of defendant around the time of the assault were given to the police. These recordings were played at trial for the jury.

¶ 24 Chicago police officer Willie Peoples testified that, at around 2 a.m. on October 7, 2012, he and his partner, Officer Morris, were dispatched to the W Hotel following the report of a criminal sexual assault. Peoples said that he met K.E., whom he described as hysterical, crying, and "like an emotional wreck." K.E. described the incident to him, and they went to her room.

¶ 25 According to Peoples, defendant was walking down the hallway toward K.E.'s room. Peoples asked K.E. if defendant, whom Peoples said was about 6 feet tall and weighed 185 pounds, was the assailant. When K.E. told him that defendant was the individual who attacked her, Peoples arrested defendant. Peoples put defendant into handcuffs, and defendant repeatedly told Peoples that he did not know K.E. Peoples and his partner took defendant to the police station.

¶ 26 When they arrived at the police station, they handcuffed defendant to a wall and a search of defendant's person revealed only some "Carmex" lip balm. Peoples said that he put the lip balm next to defendant and left, but when Peoples returned to defendant a short while later, Peoples saw that the lip balm was now empty and defendant's hands were covered in it. Louis Boone, an evidence technician with the Chicago police department, went to swab defendant's hands for DNA, but defendant refused.

¶ 27 The State concluded its case-in-chief, and defendant presented his case-in-chief by first testifying on his own behalf. Defendant stated that, on the evening of August 6, 2012, he had dinner and had drunk wine with friends for about two or three hours. Afterwards, defendant left to go home, but on his way, defendant stumbled briefly, and he saw that K.E. had seen him. Defendant made a joke about his stumbling, and K.E. laughed. They started walking together for about two blocks and talked, but defendant did not know whether K.E. was with friends. Defendant asked K.E. where she was going. K.E. told him that she was going with some friends to the bar in the W Hotel, where she was staying. According to defendant, K.E. invited him to join them, and defendant invited K.E. to his apartment, which was near the hotel. Defendant added that K.E. gave defendant her room number and he gave her his apartment number before parting. Defendant then went to a nearby pub alone.

¶ 28 Defendant stayed at the pub for a couple of hours, drinking three scotches and a beer, and he left the pub shortly before 1 a.m. on August 7. Defendant identified a receipt from the pub indicating that the bill was "closed" at 12:55 a.m. Defendant said he left alone and initially started toward his apartment, but then changed his mind and went to the W Hotel bar.

¶ 29 When defendant went up to the hotel bar and saw it was closed, he decided to see if K.E. was in her room. Defendant said that he took the elevator to the wrong floor initially and then immediately went back into the elevator to the correct floor, going to K.E.'s room.

¶ 30 Defendant knocked on K.E.'s door, and K.E. opened the door and said "Hi" to him. She then took defendant by the hand, and led him into her darkened room to the bed near the window. They then began kissing and touching. Although defendant claimed that he lifted her shirt to feel and kiss her breasts, defendant denied making any contact with her genitals.

¶ 31 Defendant said that, for the first few minutes, K.E. offered no resistance. A few minutes later, however, defendant claimed that K.E. suddenly became tense and sat up, stating that "Doug" was coming. Defendant told K.E. that he did not know who that was and that he wanted to have sex with her. K.E., however, refused and told defendant to leave. Defendant testified that his response was to say, " 'No' means 'No,' " and then he got up and left, telling K.E. that he would return later. Defendant returned to the W Hotel bar to use the restroom, after which he went down to the hotel lobby.

¶ 32 Defendant walked out of the lobby and sat in a rocking chair, looking at the lake and deciding whether to return to K.E.'s room. Defendant said that he decided to go back to K.E.'s room to see if she would like to go to his apartment. When he got off of the elevator on her floor, however, he saw a few men, one of whom was a police officer who arrested him. Defendant denied seeing K.E. in the hallway or telling the officer that he did not know her.

¶ 33 Defendant also explained that, while he was being brought to the police station, he had asked to use the restroom. According to defendant, Peoples allowed defendant to do so and removed his handcuffs. Defendant described the men's room as very dirty, so he tried to clean his hands afterwards by using the lip balm. Defendant also stated that, when Detective Maderer asked defendant for permission to swab defendant's hands, defendant asked Maderer if it would result in defendant "getting out sooner." Maderer told defendant it would not, so defendant refused.

¶ 34 Defendant then called Heine to testify. Heine remembered walking from the restaurant to the hotel with K.E. and two others, but he did not remember when they left the restaurant or arrived at the hotel and did not recall if they were walking together or in smaller groups. Heine also did not remember anyone meeting K.E. nor approaching their group during their walk. Defense counsel began asking Heine about specific questions that the defense investigator (Rachelle Humbert) had asked Heine, but the trial court sustained the State's objection. At a sidebar conference, defense counsel explained that he wanted to show that Heine had answered the investigator's questions on an individual basis except for the question regarding whether K.E. had spoken to someone on the street who had stumbled. The trial court suggested that defense counsel focus on the question to which Heine offered no comment, and defense counsel agreed. Heine then admitted that he responded, "No comment," when the investigator asked him whether K.E. had spoken to a man who had stumbled, but that he had otherwise answered all of Humbert's other questions. Heine later explained that he said he had no comment because he believed it to be a leading question and he did not recall that happening. Defendant later sought to question Humbert to impeach Heine and provide "context," but the trial court denied his request.

¶ 35 Dr. Matthew Kippenhan, an emergency room physician at Northwestern, testified that he treated K.E. after the incident. According to Kippenhan, K.E. told him that defendant tried to put his fingers into her vagina, but she was able to move his hand away before he penetrated the vagina. Kippenhan said that K.E. described other details of her assault and that, had she appeared intoxicated to him, he would have documented that fact, but there were no such notes. Kippenhan stated that the exterior folds of the vagina are called the labia. Kippenhan said that K.E. claimed that she was screaming during the attack and that she was experiencing nausea and soreness under her breasts. According to Kippenhan, he swabbed her chest and mouth but not her vaginal area, and he would not have done so if there was no blood or ejaculate present. Kippenhan explained that skin contact does not always leave evidence, and the absence of external injury to K.E.'s vagina was not unusual because her assault involved digital penetration.

¶ 36 Sanja Harvey, a triage nurse in the emergency room at Northwestern, testified that K.E. stated that a man entered her hotel room and began assaulting her, but when K.E. began screaming, the assailant left. On cross-examination, Harvey testified that K.E. reported a history of anxiety.

¶ 37 Jeremy Margolis also testified as to defendant's character. When defendant asked about Margolis's legal education and first employment after law school, the trial court sustained the State's objection. Margolis stated that he met defendant in 1991 when they both worked at the same law firm and on the same committees. Margolis testified that, based upon his personal and professional observations, defendant was a man of "extraordinary decency." During a subsequent sidebar conference, defendant explained that he wanted Margolis to testify as to his experience beginning in the 1970s and through the time period when Margolis served as a federal prosecutor to bolster Margolis's credibility. After noting that defendant failed to ask its

other character witnesses as to their careers prior to meeting defendant, the trial court stated that Margolis's public positions, in which he served about 15 years before he met defendant, had no bearing upon his opinion of defendant.

¶ 38 David Hodapp, a private investigator hired by defendant, testified that he had reviewed the usage information of K.E.'s mobile phone on August 6 and August 7, 2012. Based upon this review, Hodapp stated that, on August 7, 2012, Pearson had sent text messages to K.E. at 1:25 a.m., 1:33 a.m., and 1:43 a.m., and K.E. had called Pearson at 1:47 a.m.

¶ 39 In rebuttal, the State presented the testimony of Peoples and Maderer. Peoples stated that defendant neither asked nor used the restroom, and Peoples added that defendant's request would have been refused because defendant's hands were going to be swabbed and Peoples was concerned that defendant's washing his hands would taint any possible evidence. Maderer denied asking defendant if he would consent to a hand swab, and Maderer also stated that defendant never asked whether consenting would get defendant "out" any sooner.

¶ 40 The cause then proceeded to closing arguments. The trial court first admonished the jury that what the attorneys said during closing arguments was not evidence and the jury should not consider it as evidence. The State told the jury that the trial court would provide it with an instruction that the term sexual penetration meant any intrusion, however, slight of any part of the body of one person into the sex organ of another person. The State then argued as follows:

> "Ladies and gentlemen, make no mistake about it. When he put his fingers into the fold of [K.E.'s] vagina, that was an act of sexual penetration. Make no mistake about it. Use the law as your guide, and you heard her testimony. The law is your guide. Contact, however slight."

Defendant did not object, and the State then began arguing that defendant used force or the threat of force and that K.E. did not consent to the sexual penetration.

¶ 41 In his closing argument, defendant addressed the State's definition of sexual penetration, telling the jury, "That's fine. We embrace that[,] too," because the evidence was "overwhelming [that] there was not even touching in that area." Defendant also mocked the State's theory, arguing that the State attempted to characterize defendant as a "prowling sexual predator" who randomly chose one room with a partially open door and was "lucky" that a woman he had never met was in the room instead of a man, a family or a "weightlifter." Defendant further questioned K.E.'s motive to "lie," who "so obviously deceived" police, medical professionals and the jury.

¶ 42 In rebuttal, the State argued to the jury that defendant had an opportunity to follow K.E. to her room based upon the video recording of him getting into an elevator on the 33rd floor—where the hotel bar was located and where K.E. had been having drinks with friends. In addition, the State claimed that defendant was prowling the hallways "looking for an opportunity" and seized that opportunity when he found K.E.'s door open. The State also argued that defendant, and not K.E., was the person with the motive to lie, and after describing K.E. as a "woman who has a history of anxiety," the State questioned what K.E. could have gained from having to recount the assault to Pearson, Williams, the police, medical staff, prosecutors, and then to the jury. With respect to defendant's testimony about the requested hand swab, the State argued to the jury that it was not unreasonable and did not make any sense that a police detective would "advise [defendant] *** not to submit to the hand swab." The State reiterated that sexual penetration meant any intrusion, however slight, of any part of one person's body into another person's sex organ. It then added, "That is what [K.E.] told you happened."

¶ 43 Following closing arguments, the trial court instructed the jury that, *inter alia*, opening statements were made by the attorneys to acquaint the jury with the facts they expected to be proved. The trial court added that the attorneys' closing arguments were made to discuss the facts and circumstances in the case, and should be confined to the evidence and the reasonable inferences to be drawn from the evidence. The trial court also reiterated that neither opening statements nor closing arguments were evidence, and any statement or argument made by the attorneys not based on the evidence should be disregarded.

¶ 44 The jury found defendant guilty of criminal sexual assault and criminal sexual abuse, but not guilty of residential burglary. Defendant filed a motion for a new trial, which the trial court later denied. Following a sentencing hearing, the trial court sentenced defendant to consecutive terms of four years' imprisonment for criminal sexual assault and two years' imprisonment for criminal sexual abuse. This appeal followed.

¶ 45 ANALYSIS

¶ 46 Defendant's Appellate Briefs

¶ 47 As a preliminary matter, we must comment on defendant's briefs filed with this court. With few exceptions, the statement of facts in defendant's briefs does not cite to the record, but instead to various pages in the separate appendix to defendant's opening brief. The pages in the appendix, however, generally consist of either excerpts of the report of proceedings or selected documents from the common law record. This alone violates Supreme Court Rule 341, which plainly requires reference to "the pages of *the record on appeal*" and not the appendix to a brief. (Emphasis added.) Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). Defendant has also run afoul of Rule 342(a), which requires the appellant to provide in the appendix a table of contents to the

complete record on appeal. See Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005). Here, defendant's table only addresses the report of proceedings; there is nothing with respect to the common law record.

¶ 48 In addition, defendant's briefs contain excessive footnotes—one of which extends across three pages—containing statements and legal arguments that belong in the body of the briefs. The State argues that defendant is using the single-spaced footnotes to evade the 50-page length limitation also set forth in Rule 341. Defendant replies that the State has itself violated the page-length limitation by using "1.6x or 1.7x line spacing," instead of double spacing. Both parties ask that we disregard the other party's brief. We reject these requests: the proper procedure is to file a motion to strike with this court upon service of the offending brief, rather than lie in wait and improperly bury the request in the body of the response. See *John Crane Inc. v. Admiral Insurance Co.*, 391 Ill. App. 3d 693, 698 (2009). In any event, defendant acknowledges that Rule 341 discourages the use of footnotes, but sees no problem with the number of footnotes used in his brief. We disagree. Twenty-three verbose footnotes in a 50-page brief is a prolific, not a "discouraged," use of footnotes.

¶ 49 Supreme court rules are not mere suggestions; they are rules that must be followed. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57. "Where an appellant's brief fails to comply with supreme court rules, this court has the inherent authority to dismiss the appeal." *Epstein v. Galuska*, 362 Ill. App. 3d 36, 42 (2005). We recognize, however, that striking a brief for failure to comply with supreme court rules is a harsh sanction. *In re Detention of Powell*, 217 Ill. 2d 123, 132 (2005); *People v. Thomas*, 364 Ill. App. 3d 91, 97 (2006). Here, we are able to find the precise location in the record to which defendant's citations to the separate appendix refer, and we can discern the basis for defendant's claims of error, despite the violation of court rules and the overuse of footnotes. Accordingly, we will consider the merits of the appeal.

¶ 50 Finally, we note that defendant repeatedly refers to K.E. by her full name. While not explicitly prohibited, this has long been disapproved of, and we have consistently admonished the offending parties to discontinue this improper practice. See, *e.g.*, *People v. Leggans*, 253 Ill. App. 3d 724, 727 (1993). We continue to do so here.

¶ 51 The Sufficiency of the Evidence

¶ 52 Defendant first contends that the State failed to prove him guilty of criminal sexual assault and criminal sexual abuse beyond a reasonable doubt. Defendant first asserts that the State failed to prove penetration beyond a reasonable doubt. He also challenges K.E.'s testimony. Finally, he claims that there was a fatal variance between the offense charged and the evidence introduced at trial.

¶ 53 When reviewing 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). In addition, we may not retry the defendant; instead, the trier of fact must assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *People v. Evans*, 209 Ill. 2d 194, 209, 211 (2004). It is axiomatic that a jury is not required to accept any possible explanation compatible with a defendant's innocence and elevate it to the status of reasonable doubt. *People v. Herrett*, 137 Ill. 2d 195, 206 (1990). 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." *Evans*, 209 Ill. 2d at 209.

¶ 54 Defendant challenges his conviction for criminal sexual assault. Section 11-1.20(a)(1) of the Criminal Code of 2012 (Criminal Code) provides that a person commits criminal sexual assault if that person commits an act of sexual penetration and uses force or threat of force. 720 ILCS 5/11-1.20(a)(1) (West 2012). Sexual penetration is defined as, *inter alia*, "any intrusion, however slight, of any part of the body of one person *** into the sex organ *** of another person." 720 ILCS 5/11-0.1 (West 2012). Furthermore, it is well established that the female "sex organ" includes the labia majora, "the outer *** folds of skin of the external genital organs." *People v. W.T.*, 255 Ill. App. 3d 335, 347 (1994) (citing *People v. Ikpoh*, 242 Ill. App. 3d 365, 381-83 (1993); *People v. Hebel*, 174 Ill. App. 3d 1, 31-32 (1988), *abrogated in part on other grounds, People v. Lawson*, 163 Ill. 2d 187 (1994)).

¶ 55 In this case, there was ample evidence supporting penetration. The victim, K.E., repeatedly testified that, although defendant's fingers did not go "all the way up inside" of her, his fingers went either "into the folds" of her vagina or simply "into" her vagina. Contrary to defendant's claim, this testimony alone meets the definition of penetration under Illinois law. In addition, defendant's repeated assertions that the folds of the vagina do not exist are unavailing. As noted above, under the criminal sexual assault statute, the female sex organ includes, *inter alia*, the labia majora, *i.e.*, the outer folds of skin of the external genital organs. *W.T.*, 255 Ill. App. 3d at 347. In addition, Dr. Kippenhan, testifying on behalf of the defense, refuted defendant's additional argument that the State "managed to make up a new part of the female anatomy[:] the folds of the vagina." Kippenhan stated clearly that the "exterior folds" of the vagina are called the labia. We thus reject defendant's claim of error on this point.

¶ 56 Defendant's challenge to K.E.'s testimony also fails. Defendant complains that K.E.'s testimony was inconsistent as to: (1) whether there was penetration or injuries; (2) how much

alcohol she had drunk hours before the attack; (3) the specific timeline of events on the night of the incident; (4) whether she had screamed during the attack; (5) whether she had called Pearson immediately after the attack or whether he called her; and (6) the distance that defendant was from her room when he returned and she identified him in the presence of police.

¶ 57 To begin, defendant asserts that there was no evidence of penetration or injuries, in part, because there was no medical evidence supporting injuries. This claim is easily disposed of: physical evidence, such as trauma or even 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). Defendant's reference to K.E.'s failure to note these injuries in the check-in form at the hotel spa is also unavailing. As the State notes (and which defendant does not address), the trial court ruled that the form was inadmissible. Since this evidence was not before the trier of fact, defendant may not rely upon it here in his direct appeal. See *People v. Benson*, 256 Ill. App. 3d 560, 563 (1994) (citing *People v. Gacho*, 122 Ill. 2d 221, 254 (1988)).

¶ 58 Defendant also argues that K.E.'s claim of digital penetration was inconsistent with the testimony of hospital personnel, who testified that K.E. either did not report or specifically denied penetration. In addition, defendant contends that K.E.'s testimony was fatally weakened because she could not recall: how much alcohol she had drunk hours before the attack, the specific timeline of events on the night of the incident; whether she had screamed during the attack; whether she had called Pearson immediately after the attack or whether he called her; and the distance that defendant was from her room when he returned and she identified him in the presence of police. All of this evidence was presented to the jury, and it is not our role to retry defendant, nor to reassess the credibility of the witnesses, reweigh their testimony, and

resolve conflicts or inconsistencies in the evidence. *Evans*, 209 Ill. 2d at 209, 211. More importantly, in addition to the inconsistencies and contradictions defendant points out, the jury also heard K.E. identify defendant as her attacker—an accusation she never sought to recant. Furthermore, K.E.'s recounting of the attack was consistent: Defendant entered her room uninvited, repeatedly told her, "I am going to fuck you," placed his fingers in the folds of her vagina (but not "all the way up inside" of her), kissed her breasts, placed his fingers into her mouth (making her choke), and then left after she pushed him off of her. 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 based upon reasonable doubt necessarily fails.

¶ 59 We further reject defendant's assertion of a fatal variance between the offense as charged and the evidence produced at trial. To vitiate a trial, the variance between the allegations in the indictment and the proof at trial must be material and "be of such character as may mislead the defendant in making his or her defense, or expose the defendant to double jeopardy." *People v. Maggette*, 195 Ill. 2d 336, 351 (2001). Here, defendant does not claim that he will be exposed to double jeopardy; he only asserts that he was prejudiced in preparing his defense.

¶ 60 In this case, the count alleging criminal sexual assault accused defendant of having placed his finger in K.E.'s vagina by the use or threat of force, which adequately informed him of the kind of sexual conduct he was alleged to have perpetrated. As noted above, defendant's act of placing his fingers in the labia—or as stated at trial, the folds of K.E.'s vagina—sufficiently allowed him to prepare his defense. Nonetheless, even if the offense were improperly charged, defendant's trial strategy was to deny making any contact with K.E.'s

genitals. As such, defendant cannot show he was prejudiced in preparing his defense, and we therefore reject this additional claim. See *People v. Maggette*, 311 Ill. App. 3d 388, 397 (2000).

¶ 61 Finally, defendant's misplaced reliance upon *Maggette* does not alter our decision. In that case, the victim repeatedly testified on direct examination that the defendant rubbed her vagina "*over* her panties." (Emphasis in the original.) *Maggette*, 195 Ill. 2d at 352. Thus, our supreme court held that the State did not prove beyond reasonable doubt that an intrusion occurred where the victim made a single "brief and vague reference to her vaginal area" on cross-examination: namely, her fleeting reference to the defendant rubbing and caressing her underneath her panties "*in* my vagina area." (Emphasis in the original.) *Id.* By contrast, K.E. unequivocally testified in this case that defendant's fingers went *into* the folds of her vagina and *into* her vagina, but they did not go "all the way up inside" of her. *Maggette* is clearly distinguishable, and defendant's reliance upon it is misplaced.

¶ 62 The State's Alleged Misconduct

¶ 63 Defendant's next claim of error involves alleged prosecutorial misconduct during its opening statement and closing arguments, as well as a claim that the State failed to disclose exculpatory evidence, namely, text messages from K.E.'s cell phone, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). As to the opening statement, defendant argues that the State improperly remarked that defendant was an educated professional lurking in a hotel who committed residential burglary. With respect to closing arguments, defendant raises numerous purported misdeeds, alleging that the State: improperly made an argument contradicted by the evidence at trial, made various "factual misrepresentations," and misstated the law with respect to penetration. Defendant concedes that he failed to preserve most of these issues because he did not lodge an objection at trial and not raise the issues in his post-trial motion. Nonetheless,

defendant seeks plain error review, asserting that this court should remand for a new trial merely because the evidence turned on witness credibility "and was thus closely balanced."

¶ 64 The plain error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 185-87 (2005). Here, defendant only argues that the first prong of the plain error doctrine applies. In that instance, defendant must prove "prejudicial error," *i.e.*, where the evidence is so close that the jury's guilty verdict may have resulted from the error and not the evidence. *Id.* at 187. In other words, "defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Id.* However, before considering whether the plain error exception applies, we must first determine whether any error occurred. *Id.*

¶ 65 The State's Opening Statement

¶ 66 Defendant asserts that, during its opening statement, the State improperly characterized defendant as " 'an educated professional lurking at a hotel' who committed residential burglary." Defendant claims that the State went beyond simply explaining the facts it sought to prove and made an improper legal argument. As noted above, defendant has forfeited this argument because he failed to raise this matter in his post-trial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphases in original.)). Defendant, however, asks that we review this issue under the plain error doctrine. Plain error review, however, is unwarranted.

¶ 67 The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove, and it may include a discussion of the expected evidence and reasonable inferences therefrom. *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). While it is true that the State may not claim anything in its opening statement that it cannot or does not intend to prove, reversible error only occurs (1) if the State's opening statement is attributable to the "deliberate misconduct of the prosecutor" and also (2) results in "substantial prejudice to the defendant." *Id.*

¶ 68 Here, defendant cannot meet either prong of this test. Defendant points to nothing in the record to support any claim that the challenged statements were the result of "deliberate" prosecutorial misconduct, and we can find nothing. Second, as stated below, defendant did not suffer substantial prejudice such that, absent the remarks, his verdict would have been different: he was *acquitted* of residential burglary. Defendant's argument with respect to opening statements is without merit. Since there is no error, there cannot be plain error. *Herron*, 215 Ill. 2d at 187. In any event, even if the State committed error, defendant cannot meet the first prong of the plain error doctrine because he cannot show that the verdict may have resulted from the State's purportedly improper statement rather than the evidence. *Id.* We thus reject this claim.

¶ 69 The State's Alleged *Brady* Violation

¶ 70 Defendant next contends that the trial court erred in denying his claim that the State failed to disclose exculpatory evidence–specifically, the content of K.E.'s text messages to Pearson–in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

¶ 71 Under *Brady*, the State must disclose evidence favorable to the accused and material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73 (2008) (citing *People v. Harris*, 206 Ill. 2d 293, 311 (2002) (citing *Brady*, 373 U.S. at 87)). A *Brady* claim requires a showing that: (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or

impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *Id.* at 73-74. Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed, where "reasonable probability" is one that undermines confidence in the verdict. *Id.* at 74. In determining whether suppressed evidence was material, courts must consider the cumulative effect of all of the suppressed evidence, rather than considering each item of evidence on an individual basis. *Id.* Illinois has also codified this rule. See Ill. S. Ct. R. 412(c) (eff. Mar. 1, 2001).

¶ 72 The State's obligation under *Brady* includes evidence known to police investigators, but not the prosecutor. *Beaman*, 229 Ill. 2d at 73 (citing *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). It is, however, "axiomatic" that the failure of the State to disclose allegedly exculpatory evidence not in its possession does not violate due process, "since under such circumstances, nothing has been suppressed." *People v. Morissette*, 150 Ill. App. 3d 431, 441 (1986). In addition, where evidence has been either lost or destroyed and the contents are unknown, *Brady* is inapplicable for two reasons: (1) the remedy typically imposed for a *Brady* violation, remand for a new trial, would be ineffective because the undisclosed evidence would remain unavailable at the new trial; and (2) where there is no showing of bad faith on the part of the State, a defendant should not reap a windfall due to the inadvertent loss of an item of evidence where there remains other evidence sufficient to support his conviction. *People v. Hobley*, 159 Ill. 2d 272, 307 (1994) (citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)).

¶ 73 In the case before us, defendant's claim fails for multiple reasons. First, as defendant admitted at trial, the State never had possession of K.E.'s cell phone. Under the doctrine of invited error, "a party may not request to proceed in one manner and then later contend on appeal

that the requested course of action was in error." *People v. Denson*, 2014 IL 116231, ¶ 17 (citing *People v. Lucas*, 231 Ill. 2d 169, 174 (2008)); accord *People v. Abston*, 263 Ill. App. 3d 665, 671 (1994) ("where the trial court's course of action is taken at defendant's suggestion and the defendant thereafter acquiesces in the court's expressed course of conduct, the defendant should be precluded from raising such course of conduct as error on appeal"). Here, trial counsel conceded in his written motion for discovery and at the hearing on his motion that the State did not have possession of K.E.'s cell phone and suggested that any trial court order be directed at K.E. The trial court did so, and as a result, defendant may not now contend that the State had possession of K.E.'s cell phone. We therefore reject defendant's claim.

¶ 74 The State's Closing Arguments

¶ 75 Defendant's third claim regarding the State's purported misconduct centers on multiple comments during its closing arguments. Specifically, defendant contends that the State improperly argued to the jury that: (1) the placing of fingers "in or on" the labia constitutes penetration; (2) K.E. had a history of anxiety; (3) the labia is part of the vagina; (4) defendant was prowling the hotel hallways; (5) Detective Maderer advised defendant not to submit to a hand swab; (6) the definition of penetration includes "Contact, however slight"; and (7) defendant had an opportunity to follow K.E. to her room. Except for the last contention, defendant concedes that he forfeited each of these claims because he failed to both object at trial and also include the claims in his post-trial motion. *Enoch*, 122 Ill. 2d at 186. Defendant, however, again seeks refuge under the plain error doctrine.

¶ 76 The State is given considerable latitude in making closing arguments, and it may respond to comments that clearly invite a response. *People v. Hall*, 194 Ill. 2d 305, 346 (2000). "A prosecutor may argue the evidence presented, or reasonable inferences therefrom, even if the

inference is unfavorable to the defendant." *People v. Tolliver*, 347 Ill. App. 3d 203, 224-25 (2004) (citing *People v. Hudson*, 157 Ill. 2d 401, 441 (1993)). Furthermore, we must review the arguments of both the State and the defense in their entirety, with the challenged portions placed in their proper context. *People v. Cisewski*, 118 Ill. 2d 163, 175-76 (1987). A significant factor in determining the impact of an improper comment on a jury verdict is whether "the comments were brief and isolated in the context of lengthy closing arguments." *People v. Runge*, 234 Ill. 2d 68, 142 (2009). In addition, we must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict. *People v. Simms*, 192 Ill. 2d 348, 373 (2000). Finally, even if a prosecutor's closing remarks are improper, "they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *Hudson*, 157 Ill. 2d at 441. Due to an apparent conflict between two supreme court cases, it is unclear what the proper standard of review is when reviewing improper closing arguments. Compare *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (*de novo*), with *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (abuse of discretion). We need not resolve this apparent conflict, however: defendant's claim fails under either standard.

¶ 77 As a preliminary matter, the record flatly refutes three of defendant's assertions: (1) that the State told the jury that fingers "in or on" the labia meets the legal definition of penetration, (2) that K.E. had a history of anxiety, and (3) that the labia is not part of the vagina. Neither the specific page that defendant cites in support of this allegation, nor any other part of the State's argument, establishes that the State ever argued that placing a finger *on* the labia constitutes penetration. In addition, Harvey, the triage nurse, testified on cross-examination that K.E. reported a "history of anxiety." Finally, as noted above, Dr. Kippenhan (defendant's own witness), testified that the exterior folds of the vagina are called the labia. These last two

arguments were not merely reasonable inferences from the evidence; they were direct quotations. Where, as here, there is no error, there can be no plain error. *Herron*, 215 Ill. 2d at 187. Therefore, plain error review is inapplicable, and these arguments are forfeited.

¶ 78 The next three forfeited issues fare no better. The State's remark about defendant prowling the hotel hallway was a response to defendant's attempt to ridicule the State's theory by employing the same term. We see no error in the State responding to comments that clearly invite a response. *Hall*, 194 Ill. 2d at 346. In addition, although there was a video recording of defendant entering an elevator on the 33rd floor (where the hotel bar was located), there was no recording of defendant going from the 33rd floor to the 31st (where K.E.'s room was located), and Brewer's testimony established that the only way to go from the 33rd floor to the 31st without being video recorded was through the stairs. Therefore, the State's remark was a reasonable inference from the evidence adduced at trial, which the State is allowed to argue. See *Tolliver*, 347 Ill. App. 3d at 224-25 (citing *Hudson*, 157 Ill. 2d at 441).

¶ 79 As to the comment regarding Detective Maderer, defendant testified that he only refused a hand swab because Maderer told him it would not result in defendant "getting out sooner." The State's response to this testimony was primarily to challenge the credibility of this self-serving testimony through ridicule, which is proper. See *People v. Robinson*, 391 Ill. App. 3d 822, 840 (2009) (the State may refer to the defense theory as "ridiculous").

¶ 80 Defendant also complains on appeal about the State's comment during its initial opening statement that "Contact, however slight" met the definition of penetration, pointing out that defendant had been charged under the "intrusion" clause. This claim, however, is forfeited not only because defendant failed to object to the comment; he also affirmatively told the jury, "We embrace that [definition,] too." Since defendant electively chose to proceed in one manner at

trial, he may not complain of this error on appeal. See *Denson*, 2014 IL 116231, ¶ 17. In any event, this remark was prefaced by the State's comment that the jury would receive an instruction that penetration required an "intrusion, however slight," and this comment was isolated with the 14-page transcript of the State's initial closing argument (and without regard to the 17 pages comprising the State's rebuttal closing argument, during which the State reiterated the proper definition of penetration that the jury would receive). Since the challenged comment was isolated within a lengthy closing argument, this weighs significantly in favor of the State. See *Runge*, 234 Ill. 2d at 142.

¶ 81 Furthermore, the specific content of the challenged remarks are within the bounds of argument based upon well-established precedent. See, *e.g.*, *People v. Armstrong*, 183 Ill. 2d 130, 146 (1998) (prosecutor's rebuttal comment that the defendant "was treating [the murder victim] like she was a baby seal and [the defendant] was competing for poacher of the year" was not improper; in context, the remarks were to rebut the claim that the defendant lacked an intent to kill); *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994) (holding that, where defense counsel repeatedly insinuated during his closing argument that the defendant's statement to the police had been obtained illegally, there was no reversible error in the prosecutor's comment erroneously suggesting that the trial judge, who had ruled that the statement was admissible, also found the statement to be factually reliable).

¶ 82 In addition, the jury was instructed that closing arguments are not evidence and to disregard any comment not based upon the evidence, and defendant has provided nothing to counter the presumption that the jury followed the trial judge's instructions in reaching a verdict. *Simms*, 192 Ill. 2d at 373. Since the comments could not have resulted in such substantial prejudice to defendant that the verdict would have been different absent those remarks, the State

did not commit reversible error. *Hudson*, 157 Ill. 2d at 441. Since defendant's claims of error are without merit, plain error review is unwarranted, and we now turn to the sole issue preserved.

¶ 83 Defendant contends that the State improperly commented on rebuttal that defendant had an opportunity to follow K.E. to her room because it was not based upon the evidence. Defendant argues that the evidence at trial established that K.E. left the 33rd-floor hotel bar and returned to her room at around 12:30 a.m., whereas the video recording at the hotel shows defendant getting on the elevator on the 33rd floor at around 1:30 a.m. Defendant claims that this "egregious" error warrants reversal. We disagree. The evidence at trial established that K.E. did not maintain a precise chronology of when she left the restaurant, when she arrived at the hotel bar, and when she left it. She only testified that she left the hotel bar at "around" 12:30 a.m., meaning that she could have left sometime later than that, and that at "about" 1:20 a.m. she changed into sleepwear. In addition, the video recording of the elevators outside of the hotel bar show defendant entering the elevator at exactly 1:30 a.m. The State's argument was therefore a reasonable inference from the evidence at trial. Moreover, as noted above, the trial court properly instructed the jury before trial and at the close of the evidence that closing arguments are not evidence and to disregard any comment not based upon the evidence, and defendant presents nothing to rebut the presumption that the jury followed the instructions. *Simms*, 192 Ill. 2d at 373. Finally, the verdict would not have been different absent those remarks, so defendant did not suffer substantial prejudice and the State did not commit reversible error. *Hudson*, 157 Ill. 2d at 441. We are therefore compelled to reject this final contention of error.

¶ 84 The Cumulative Effect of the State's Alleged Errors

¶ 85 Finally, defendant devotes one sentence to a claim that the State's purported misconduct cumulatively constitutes reversible error. We find that this claim is meritless because the claimed errors individually are meritless. See *People v. Perry*, 224 Ill. 2d 312, 356 (2007).

¶ 86 The Trial Court's Alleged Errors

¶ 87 Defendant also complains of various errors on the part of the trial court. First, defendant contends that the trial court erroneously rejected his pretrial request to obtain the contents of K.E.'s cell phone and her written responses in the hotel spa form for the complimentary massage she received on the day after the attack. Second, defendant asserts that the trial court improperly hampered his defense during trial when it limited his direct examination of Heine, denied his request to present the testimony of his investigator (Humbert), and limited the testimony on direct examination of a character witness (Margolis).

¶ 88 The standard of review for all of these myriad claims is the same: we must uphold the trial court's decision absent an abuse of discretion. See *People v. Hall*, 195 Ill. 2d 1, 20 (2000) (evidentiary rulings may not be reversed absent a "clear abuse of discretion"); *Kliner*, 185 Ill. 2d at 130 (limitation on cross-examination subject to "a clear abuse of discretion resulting in manifest prejudice to the defendant"); *People v. Hanson*, 238 Ill. 2d 74, 101 (2010) (whether evidence is relevant and admissible). An abuse of discretion is one where the trial court's decision is "arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court." *People v. Ramsey*, 239 Ill. 2d 342, 429 (2010).

¶ 89 Defendant first challenges the pretrial denial of his request for statements in K.E.'s cell phone and the hotel spa form. Absent a privilege prohibiting disclosure, "and where the relevancy and competency of a statement or report has been established," the trial court must

order the document delivered directly to a defendant for inspection and use for impeachment. *People v. Wolff*, 19 Ill. 2d 318, 327 (1960). It is important to note, however, that *Wolff* implicitly held that the defense must first lay a foundation to show that the transcribed statement exists. *People v. Golson*, 37 Ill. 2d 419, 422 (1967) (citing *Wolff*, 19 Ill. 2d at 328). In addition, the State, upon demand, must tender to a defendant for use as possible impeachment specific statements that could be used as possible impeachment, and that (1) are in its possession or control, (2) were made by a State's witness, (3) have been shown to exist, and (4) are in the witness's own words or substantially verbatim. *People v. Allen*, 47 Ill. 2d 57, 59 (1970).

¶ 90 As to his first contention, regarding purported pretrial errors, defendant argues that the trial court improperly denied his request for the contents of both K.E.'s cell phone and the hotel spa form because the requested statements "both satisfied the four-part test just described [in *Allen*]." With respect to K.E.'s phone, and as noted above, the record establishes that the State did *not* possess or control it: K.E. did, and to reiterate, defense counsel freely admitted to this both in his motion seeking a forensic examination of the phone and in the hearing on that motion. The holding in *Allen* is therefore inapplicable. Moreover, defendant failed to provide the foundation to show that the text messages on the cell phone existed. See *Golson*, 37 Ill. 2d at 422. Finally, defendant failed to establish the relevancy of the text messages on the cell phone until it filed a motion—four days before trial—again requesting a forensic examination but this time establishing the relevancy of the messages, namely, that K.E. may not have agreed via text message to prop open her hotel room door, implying that defendant did not enter her room uninvited. The trial court then allowed the eleventh-hour motion, but only if defendant agreed to forego his speedy trial demand so that there would be sufficient time for the examination, correctly determining that it would be unfair to charge the examination time to the State because

of defense counsel's repeated failure to provide any relevance to the information sought. Defendant, however, refused to withdraw his speedy trial demand and instead abandoned his request for an examination of K.E.'s phone. On these facts, the trial court's decision was hardly arbitrary, fanciful, or unreasonable, such that no reasonable person would have adopted its view. See *Ramsey*, 239 Ill. 2d at 429. As such, there was no abuse of discretion.

¶ 91 The argument regarding the hotel spa form suffers a similar fate. Again, *Allen* is inapplicable because the record reveals that the State did not possess or control the hotel spa form, either. It was sent under seal directly to the trial court, not to the State. Defendant also failed to establish the relevance of K.E.'s responses on the form. The form asked spa customers to list all "health issues, including surgeries, conditions, allergies, and treatment plans." We do not find that the trial court abused its discretion in concluding that a rape victim would not consider a sexual assault to be a health "issue" or "condition." Furthermore, the form specifically indicated that neither the genital area nor the female breasts would be massaged, which were the only areas on K.E. that defendant sexually assaulted, so K.E.'s failure to list those as areas to avoid was also irrelevant and non-impeaching. Defendant's argument that her failure to list the bruised areas of her body as an area to be avoided is of no moment for two reasons. First, as the State notes (and as defendant concedes), defendant never raised this argument before the trial court until he filed his motion for a new trial. Accordingly, it is forfeited. See *Enoch*, 122 Ill. 2d at 186; *People v. Brown*, 11 Ill. App. 3d 67, 72 (1973). In addition, the extent and severity of her bruising at that time would not impeach her credibility because K.E. had testified that her bruises did not appear immediately after the assault, and she only testified to soreness under her breasts. With respect to her current medications, the trial court provided defendant with a list of the medications but on the condition that he could link

their use (combined with alcohol consumption) as affecting the ability to perceive or remember. Defendant, however, did not do so, and therefore provided no relevance that any of the medications K.E. had taken would have affected her memory or perception. Here, too, the trial court did not abuse its discretion.

¶ 92 Defendant next complains of the improper limiting of both the presentation of witness testimony. First, he contends that the trial court improperly limited his direct examination of Heine when it directed defense counsel to ask Heine in a summary manner whether Heine had responded to the majority of Humbert's questions but replied, "No comment," when she asked if K.E. met a man on the street on the way to the hotel bar. He also challenges the trial court's refusal of his request to call his investigator, Humbert, to testify regarding the responses Heine gave her during her interview of him. Defendant's third contention of error is that the trial court erroneously limited his direct examination of Margolis (a character witness for defendant) regarding Margolis's work history prior to meeting defendant.

¶ 93 In each of these instances, however, defendant has failed to show a "clear abuse of discretion resulting in manifest prejudice to the defendant." *Kliner*, 185 Ill. 2d at 130. With respect to Heine, defense counsel began by asking Heine a repetitive series of questions concerning solely whether the defense investigator (Humbert) asked him certain questions. The trial court sustained the State's objection that the questions were not impeachment, and it told defense counsel to "[g]et to the heart of the matter." In a sidebar conference, the trial court said that it understood that defense counsel was attempting to elicit from Heine that he had responded to all of Humbert's questions except as to whether K.E. met a man when their group was walking to the hotel bar, to which Heine told Humbert that he had no comment. The trial court then told defense counsel to simply ask Heine to confirm that he was able to respond to all of Humbert's

questions except the one relating to allegedly meeting defendant on the walk to the hotel bar, to which Heine answered, "No comment." Defense counsel did so, and Heine answered as expected. It has long been established that the rejection of evidence is not prejudicial error where, as here, the same or substantially the same evidence is elicited from the same witness. See *People v. Hoddenbach*, 116 Ill. App. 3d 57, 61 (1983) (citing *People v. Moretti*, 6 Ill. 2d 494 (1955), *cert. denied*, 356 U.S. 947 (1958)).

¶ 94 The trial court also properly denied defendant's attempt to call Humbert, who would have merely parroted Heine's testimony as to their conversation. Evidence is cumulative when it adds nothing that is already before the trier of fact. *People v. Molstad*, 101 Ill. 2d 128, 135 (1984). The exclusion of cumulative evidence is well within the discretion of the trial court. *People v. Culbreath*, 343 Ill. App. 3d 998, 1004 (2003) (citing *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495 (2002)). Accordingly, defendant's argument on this point is meritless.

¶ 95 Finally, defendant criticizes the trial court's rejection of his attempt to elicit from his character witness, Margolis, that he had worked as an assistant United States attorney soon after graduating from law school, but which took place 15 years before Margolis ever met defendant. We agree with the trial court that Margolis's work history 15 years *before* he met defendant was irrelevant to his opinion of defendant's character. For nearly a century, Illinois law has held that character evidence should not be too remote from the date of the commission of the crime. See *People v. Willy*, 301 Ill. 307, 318 (1921) ("[I]t would be improper to allow the defendant to go back to boyhood and put in proof which it would be out of the power of the prosecution to contradict or rebut."). For that reason, defendant's reliance upon *People v. Degorski*, 2013 IL App (1st) 100580, is unavailing because in *Degorski*, the witness's occupation *at the time of trial* (a circuit court judge) was held to be properly discussed on direct examination. *Id.* ¶ 58. The

court noted that a witness's current occupation is an ordinary part of the background of any witness. *Id.* ¶ 61. Here, by contrast, Margolis had long since left employment with the United States Attorney's office, and his current occupation as a partner in a law firm was presented to the jury. The trial court's sustaining of the State's objection to Margolis's dated work history was therefore not an abuse of discretion because its ruling was not "arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court." *Ramsey*, 239 Ill. 2d at 429.

¶ 96 The Speedy Trial Claim

¶ 97 Defendant's final contention of error is that he was denied his constitutional right to a speedy trial. As a remedy, defendant asks that we "dismiss [his] case with prejudice as untimely." For the following reasons, defendant's claim is meritless.

¶ 98 Both the federal and state constitutions guarantee to an accused the right to a speedy trial. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. The sixth amendment right to a speedy trial in the federal constitution is fundamental and is applicable to the states by the due process clause of the fourteenth amendment. See *Klopfer v. North Carolina,* 386 U.S. 213 (1967). We further note that, although there is a statutory right to a speedy trial in Illinois (see 725 ILCS 5/103-5 (West 2012)), defendant only alleges a violation of his constitutional right.

¶ 99 In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the Supreme Court implemented a four-factor balancing test to determine whether a defendant has been deprived of his constitutional right to a speedy trial: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. Our supreme court has adopted these factors. *People v. Bazzell*, 68 Ill. 2d 177, 182 (1977).

¶ 100 "The threshold question in a *Barker* analysis is whether the delay is presumptively prejudicial." *People v. Belcher*, 186 Ill. App. 3d 202, 205-06 (1989). The first factor is therefore a trigger, and we will not conduct the remaining analysis unless the period of delay is presumptively prejudicial. *People v. Silver*, 376 Ill. App. 3d 780, 784 (2007); *People v. Makes*, 103 Ill. App. 3d 232, 236 (1981). A delay approaching one year is generally considered presumptively prejudicial. *Crane*, 195 Ill. 2d at 52-53.

¶ 101 The second factor is the reason for the delay. It is the State's burden to justify any delay that has occurred. *Crane*, 195 Ill. 2d at 53. We assign different weight to the reasons offered to explain the delay. *Id.* The unavailability or inability to locate a witness is generally held to be a valid explanation justifying a reasonable period of delay, but evidence that the State intentionally delayed prosecution to gain a tactical advantage will be weighed very heavily against it. *Id.* at 53-54. By contrast, delay caused by the defense weighs against the defendant in determining whether his right to a speedy trial has been violated, and can be seen as a waiver of his right. *Vermont v. Brillon*, 556 U.S. 81, 90 (2009). An agreed continuance is generally considered a delay attributable to the defendant. *People v. Woodrum*, 223 Ill. 2d 286, 299 (2006); *People v. Kliner*, 185 Ill. 2d 81, 115 (1998); *People v. Wade*, 2013 IL App (1st) 112547 ¶ 26.

¶ 102 The third factor concerns whether the defendant asserted his right to a speedy trial. We must indulge " 'every reasonable presumption against waiver.' " *Barker*, 407 U.S. at 525 (quoting *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937)). In addition, courts cannot presume that a defendant's inaction constitutes a waiver of a fundamental right. *Crane*, 195 Ill. 2d at 58. Failing to assert this right, however, is weighed heavily against the defendant and makes it difficult for a defendant to prove that he was denied a speedy trial. *Id.*

¶ 103 The final factor of the *Barker* analysis is prejudice to the defendant. Prejudice must be assessed in the light of a defendant's three protected interests: (1) the prevention of oppressive pretrial incarceration; (2) the minimization of the defendant's anxiety and concern about the pending charge; and (3) the limitation of the possibility that the defense will be impaired by the delay. *Id.* at 59. Both the Illinois and United States supreme courts have considered the impaired-defense interest to be the most serious because a defendant's inability to adequately prepare his case " 'skews the fairness of the entire system.' " *People v. Kaczmarek*, 207 Ill. 2d 288, 299 (2003) (quoting *Doggett v. U.S.*, 505 U.S. 647, 654 (1992)). To show an impaired defense, a defendant may not simply allege possible prejudice; rather, he must show impairment resulting in "actual and substantial prejudice" resulting from the delay." *U.S. v. Koller*, 956 F.2d 1408, 1414 (7th Cir. 1992). There is prejudice if the defendant can show that a defense witness cannot accurately recall events of the distant past. *Kaczmarek*, 207 Ill. 2d at 299. However, none of these four factors are a necessary or sufficient condition to the finding of a speedy trial violation, so we must still engage in a sensitive and difficult balancing process. *Barker*, 407 U.S. at 533.

¶ 104 Defendant has failed to provide a complete record concerning six dates on which hearings were held. There is no report of proceedings for those hearings, the time span of which totals 93 days. Due to this insufficient record, it is impossible for us to determine whether the continuances ordered on these dates were by agreement or whether they are attributable to one party. An appellant has a duty to present a sufficiently complete record supporting the basis of his appeal, and any doubts that arise from the incompleteness of the record will be resolved against the appellant (here, defendant). *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Since this ambiguity is due to the incompleteness of the record, we resolve it against the defendant.

Although where the record is silent a delay will not be attributed to the defendant (see *People v. Sojak*, 273 Ill. App. 3d 579, 582 (1995)), here, the record is not silent; it is missing, and thus *Foutch* applies. We examine defendant's claim subject to this limitation.

¶ 105 Here, defendant was arrested on August 7, 2012, and his trial began on February 24, 2014–a total of 566 days. Since this delay exceeds one year, both parties have conceded, and we agree, that the delay is presumptively prejudicial. *Crane*, 195 Ill. 2d at 52-53. We therefore proceed to consider the second factor, the reason for the delay.

¶ 106 From the record, it is clear that 103 days are attributable to the State: from August 7, 2012 (defendant's arrest) to August 28, 2012 (his first court date), or 21 days; from August 28 to September 5 (on the State's motion), or 8 days; and from December 13, 2013 (when defendant demanded trial) to the trial date of February 24, 2014, or 74 days. We note that, between September 20, 2012, and December 13, 2013, or 449 days, defendant explicitly agreed to the continuances. As we have explained, an agreed continuance is generally attributable to defendant, and we follow that rule here. There is no report of proceedings for September 5, 2012, until September 20, 2012, so the 15 days are also attributed to defendant because any doubts arising from an incomplete record, as here, is resolved against defendant. *Foutch*, 99 Ill. 2d at 391-92.

¶ 107 Defendant's argument that the majority of the delay is attributable to the State fails. Defendant argues that the continuance on October 30, 2013 is attributable to the State because the State had an unavailable witness, but he ignores the fact that he agreed to the continuance. We also note that unavailability of witnesses is a justified excuse. Defendant next argues that there was a two-month delay resulting from the police officers' vacation time, but we have already attributed that period of time to the State for other reasons. Finally, the defendant

claims, with no citations to the record, that the State is responsible for a seventh month delay "by improperly limiting the defense's access to exculpatory evidence during discovery, most significantly the oft-requested cell-phone evidence." Again, this ignores the fact that the defendant agreed to all continuances between September 20, 2012, and December 12, 2013. Moreover, as noted above, the State did not improperly limit access to cell phone records because it was never in possession of K.E.'s phone, and the State properly argued that the request was overly broad. Accordingly, we find that since the majority of the delay is attributable to the defendant, and that the State is only responsible for 103 days of delay, the second factor weighs heavily against the defendant.

¶ 108 With respect to the third factor, defendant first demanded trial on December 13, 2013, and trial was held 74 days later, a delay that was attributed to the State. There were other trial dates set, but they were reset by agreement. Defendant did not timely assert this right any sooner than December 13. Therefore, this factor also weighs against the defendant.

¶ 109 The fourth factor, prejudice to the defendant, also weighs in favor of the State. Defendant was not incarcerated before trial, so the first interest underlying this factor, the prevention of oppressive pretrial incarceration, is inapplicable. Defendant offers nothing to show that the second interest, the minimization of his anxiety and concern about the pending charge, is applicable, nor can he: as the record shows, defendant repeatedly agreed to the vast majority of the trial continuances. The last interest, limiting possible impairment of the defense, does not advance defendant's claim. Defendant cannot show actual and substantial prejudice resulting from the delay. Although he asserts that the third interest weighs heavily in his favor because some witnesses forgot certain events and physical evidence was lost, the victim did not fail to remember meeting defendant–she consistently *denied* ever meeting him. In addition, no physical

evidence was lost; defendant provides nothing to indicate that the cell phone text messages (which occurred before the assault and were never actually shown to exist) substantially prejudiced his defense. The evidence in this case was substantial: K.E. identified defendant, both at the scene of her assault shortly after the incident and at trial, as the individual who sexually assaulted her, she made an immediate outcry, and she consistently reported to law enforcement as well as medical personnel that she had been sexually assaulted.

¶ 110 In any event, even if the fourth factor did weigh in the defendant's favor, the other three factors, particularly the second factor, weigh heavily against the defendant. As the trial judge pointed out, the defendant was still engaged in discovery in the beginning of December 2013. The defendant cannot allege that he was prejudiced by the result of a delay of trial, when the majority of the delay is attributable to him.

¶ 111 Therefore, after undertaking the required "difficult and sensitive balancing process" (*Barker*, 407 U.S. at 533), it is clear that defendant was not denied his constitutional right to a speedy trial. There were numerous discovery motions and requests for production, and the record is devoid of any indication that defendant would have been ready for trial at any time prior to his demand. Accordingly, defendant's final contention of error is unavailing

¶ 112 CONCLUSION

¶ 113 The evidence was sufficient to support defendant's conviction for criminal sexual assault, and defendant's claim in the alternative that the state improperly amended its charges is meritless. Neither the State's opening statement nor its closing arguments were improper, and the State did not violate *Brady* with respect to alleged statements on the victim's cell phone. The trial court properly denied defendant's motion to obtain both the victim's cell phone contents and her responses on a hotel spa form, and it did not abuse its discretion in limiting defense counsel's

questioning of various witnesses. Finally, defendant's constitutional right to a speedy trial was not violated. Accordingly, we affirm the judgment of the trial court.

¶ 114 Affirmed.