FOURTH DIVISION
June 23, 2016

No. 1-13-1475

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 21742
	)	
STANLEY KIRKMAN,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated criminal sexual assault affirmed. Defendant was not denied right to present defense due to inability to call two witnesses to impeach victim's credibility or restriction of defendant's cross-examination. Trial judge did not display improper bias or hostility that deprived defendant of fair trial. Prosecutors' closing arguments were not improper or prejudicial. No correction of mittimus necessary with respect to mandatory supervised release term where court imposed proper term, but mittimus corrected to reflect 2,028 days in presentence custody credit.

¶ 2 After a jury trial, defendant Stanley Kirkman was convicted of aggravated criminal sexual assault and sentenced to 50 years' incarceration. He appeals, raising five contentions of error: (1) that the trial court deprived him of his constitutional right to present a defense when it precluded him from calling two witnesses who would have impeached the victim's credibility and restricting his cross-examination of a police officer; (2) that the trial court displayed

improper bias and hostility toward the defense both before and during trial; (3) that the prosecution made improper comments during its closing arguments; (4) that his mittimus should be corrected to reflect the proper, three-year term of mandatory supervised release (MSR); and (5) that he is entitled to an additional 28 days of credit against his sentence for time he spent in custody before his sentencing.

¶ 3 We disagree with each of defendant's contentions, except the fifth. Defendant was not denied his right to present a defense where he had failed to subpoena either of the two witnesses he claimed he should have been able to call, and the trial court's decision to deny him a continuance during trial to subpoena those witnesses was not an abuse of discretion. Moreover, the trial court did not improperly restrict defendant's cross-examination of one of the police officers where counsel's attempt to impeach the victim through the officer lacked proper foundation.

¶ 4 Nor did the trial court display improper bias and hostility toward the defense. Before trial, the trial court did not prevent defendant or his attorney from developing the record or making sufficient arguments to preserve their claims for appeal. And during the trial, the trial court did not make improper comments in front of the jury. The allegedly objectionable comments by the trial judge were simply attempts to maintain decorum during the trial, to expedite the proceedings, and to clarify the testimony that the jury had heard.

¶ 5 We also disagree that the prosecution committed misconduct during its closing arguments. The prosecution's comments regarding the defendant and the victim were not improper appeals to the jurors' sympathies; they were based on the evidence presented at trial and were proper arguments concerning their credibility. Nor did the State mischaracterize the evidence or improperly suggest that the defense was fabricated.

¶ 6 We also find no error with regard to defendant's MSR term. While defendant contends that the trial court imposed an improper three-years-to-life MSR term in violation of *ex post facto* principles, the record shows that the trial court imposed the proper, three-year term. And there is no need to correct defendant's mittimus where it also reflects the proper term. But we agree with defendant that his mittimus must be corrected to reflect an additional 28 days of credit against his sentence for the time he spent in custody prior to his sentencing.

¶ 7 I. BACKGROUND

¶ 8 A. Pretrial Proceedings

¶ 9 The State charged defendant with numerous counts of aggravated criminal sexual assault, alleging that defendant penetrated both M.C.'s vagina and anus with his penis. Defendant filed an answer, listing consent as an affirmative defense.

¶ 10 During discovery, defendant filed a motion to produce evidence regarding M.C.'s boyfriend, Antoine Johnson,[1] who would contradict M.C.'s account of an argument between her and her assailant three or four days before she was assaulted. Defendant noted that, according to the police reports, M.C. told the police that her boyfriend was present for this argument and could identify her assailant. But Johnson would testify that he had no knowledge of the prior argument or the assailant's identity.

¶ 11 At a status hearing, the State told the court it had tracked down Johnson and would provide defense counsel with "his correct address and everything." On a later date, the court asked defense counsel if he had located Johnson. Defense counsel replied that he and an

[1] The motion to produce listed Johnson's name as "Lamar Jones" based on information contained in one of the police reports. But it became evident in subsequent proceedings that his actual name was Antoine Johnson.

investigator had visited Johnson's mother's house, where Johnson lived, and given his mother a subpoena informing Johnson to appear for trial. Defense counsel had not personally served Johnson.

¶ 12 Defendant filed a motion *in limine* with regard to the testimony of Dr. Richard Schmitt, the emergency room doctor who had treated M.C. Defendant sought to exclude "any opinion by Dr. Schmi[t]t that a complaint or injuries are consistent with sexual assault or caused by sexual assault." In response to this motion, the State said, "Judge, we can cut to the chase. We don't intend to put in his testimony, so there is no motion on this." Defendant also sought to exclude any evidence regarding the psychological effects of the assault on M.C., to which the State again responded that it did not "intend to put in any of this evidence." The court declined to rule on these motions in light of the State's responses.

¶ 13 Defendant also requested permission to present the prospective jurors with a questionnaire regarding their experiences with sexual assault. The State argued that the questions were unnecessary. The court allowed defense counsel an opportunity to respond to the State's argument. The court then denied defendant's motion but said it would allow the parties to ask the jurors questions "to uncover fairness and impartiality." After clarifying its ruling for defense counsel, defense counsel asked, "May I make one point just, Judge, for the record?" The court replied, "I'm sorry. I have ruled. If your client is convicted, and if he wishes to appeal, you can make that point to the Appellate Court. But at some point I've got to exercise my discretion. I did."

¶ 14 The court then proceeded to consider defendant's motion to exclude evidence of his four prior convictions, which the State intended to introduce for impeachment purposes if defendant elected to testify. The court noted that Illinois Supreme Court precedent required it to rule on

defendant's motion before trial but expressed difficulty in ascertaining the probative value or prejudice of such evidence before hearing any of the evidence at trial. The court then asked if, despite these concerns, defendant wanted a ruling on his motion, and defense counsel indicated that he did. The court then said:

> "And I just want the record to be clear that I'm only ruling now because the defendant requested.
>
> If you don't like my ruling, it's because you wanted me to rule this way now.
>
> Who knows? I could rule differently after I have heard this case. But I can't tell you that now because I can't speculate as to what I might know.
>
> If you want me to rule, now, I will, because this is your request."

After hearing argument from defense counsel, the court permitted the State to introduce evidence of three of defendant's four convictions.

¶ 15 On the day the case was set for trial, the State answered ready, but defendant requested a continuance. Defense counsel explained that Johnson was "still not under [defense] subpoena" and that Johnson would impeach M.C.'s account of the argument occurring three or four days before the assault. Defense counsel recounted the efforts he and his investigator had made to locate Johnson and said that Johnson's testimony would "provide[ ] crucial impeachment of [M.C.] as to the events and a potential motive for [the alleged] criminal sexual assault."

¶ 16 The State responded by questioning the value of the impeachment evidence, noting that "[t]here [was] no indication by [M.C.], either at the time that she gave a statement, to the police or to [the Assistant State's Attorneys] at any point, that her boyfriend was even aware of her exchange with the defendant three to four days earlier." The State also argued that defense counsel "had ample time to locate" Johnson before trial.

¶ 17 The trial court denied defendant's motion for a continuance. The court began by finding that the defense had been diligent in its efforts to locate Johnson. But, the court stated, if Johnson's testimony would be used to disprove the existence of a motive, "the State is not required to prove motive, so *** motive really is irrelevant." And to the extent that Johnson's testimony would be used to undermine M.C.'s identification of defendant, the court said that, in light of the DNA evidence, it did not find Johnson's potential impeachment to be "that probative." But, the court added, it was possible that defense counsel could locate Johnson during the course of the trial and personally serve Johnson with a subpoena in order to secure his appearance.

¶ 18 Defense counsel then asked for a few minutes to speak with defendant in a conference room about a note that defendant had handed defense counsel that morning. Defense counsel said that he needed to ask defendant if he had "any additional basis *** to make a record for a continuance." The court replied, "And you will tell me this and say that you exercised due diligence if you're telling me about an 11th-hour conversation?" Defense counsel said that he was "trying to preserve the record." The court said:

> "So [defendant] is looking for you to defense [*sic*] him at this trial. He is not interested in you preserving a record for review. You may be considering that, you know, some other judge five or ten years down the line will review what happens here, but what I think you want is your day in court right now, and I think what you want is for the factfinder to rule in your favor, so making a record for appeal frankly doesn't seem to be serving [defendant]. Go in the conference room. I will give you five minutes. See, the problem is the sheriff has to get a jury panel. *** I would prefer to get the jury on the way.

> What I think I'm going to do is I'm going to direct the sheriff to go get the jury and bring them down here. During that period of time you can speak with [defendant]. If there is something I need to consider, I will consider it and we'll go from there, but I don't want to delay the next step that I have."

The court added, "When you are done, *** come back here and let me know if you're asking for another continuance." After the case was passed and recalled, defense counsel said he had "no additional bases" to request a continuance.

¶ 19 B. Trial

¶ 20 In its opening statement, the State highlighted the DNA evidence it would present to link defendant to the crime. During the defense opening statement, defense counsel said, "I want to clear something up right away. This case is not about the science. And it's not about the science and the results of the DNA because [M.C.] had consensual sex with [defendant] on July 8, 1999."

¶ 21 M.C. testified that she was 15 years old on July 8, 1999. At that time, M.C.'s mother was incarcerated and M.C. had a 10-month-old child. M.C. lived with her grandmother and her child lived with her aunt. M.C. had to take public transportation to travel between her grandmother's house and her aunt's house in order to visit her child.

¶ 22 M.C. had a boyfriend at that time. She said his name was "Antoine" but she did not recall his last name. He was "approximately 30, 33" years old. She hung out with him every day.

¶ 23 M.C. testified that, three or four days before July 8, 1999, she and her boyfriend were hanging out on Waller Avenue with 10 to 15 other people she did not know. A car pulled up and the passenger, whom she identified as defendant, tried to talk to her. M.C. testified that, when she refused to respond to defendant, he "said something smart" and "very disrespectful," and she

"cussed him out." The car then drove off. On cross-examination, M.C. testified that no one in the car said that he would get her, and that her boyfriend did not have a fight with anyone in the car.

¶ 24 In the early morning hours of July 8, 1999, M.C. and her boyfriend were walking toward a bus stop at the corner of Chicago Avenue and Waller Avenue, which was about six blocks east of the 15th District police station. M.C. was planning to take the bus to her aunt's house and she had $250 with her that she planned to use to buy some things for her son.

¶ 25 M.C. and her boyfriend had a disagreement, and she walked away from him, toward the police station. Her boyfriend tried to catch up with her initially but he eventually left. Within a block of the police station, M.C. was near an empty lot and a gas station, which were separated by an alley.

¶ 26 M.C. testified that she walked into the alley, when someone walked up behind her and put his arms around her "real tight." As the person walked M.C. deeper into the alley, M.C. turned around and recognized the man as defendant. She also noticed a black gun in defendant's waistband. Once they were about two buildings behind the gas station, M.C. noticed a car parked in the alley. She could see there was a person in the car but could not see that person's face. She did not cry out to the person in the car but said she did not do so because she was afraid defendant would shoot her.

¶ 27 M.C. said that defendant pushed her against a fence, told her not to move, and told her to remove her clothes. He asked M.C. if she had any weapons, and she told him she had a knife in her purse. Defendant told her to drop her purse, and she threw it to the ground next to a garbage can. Defendant removed M.C.'s pants.

¶ 28 M.C. testified that a little boy rode his bicycle through the empty lot next to the alley and said something. Defendant told the boy to "mind [his] business," and the boy rode away. M.C.

did not yell out to the boy. Again, she said that she did not do so because defendant had a gun and she was afraid that defendant would kill her.

¶ 29 M.C. testified that defendant brought her to the back of a house, an area she described as "filthy" and littered with "[g]arbage" and "weeds." Defendant made her lie face-down on the ground and took off her shirt. M.C. testified that she was lying on "rocks" and "glass" on the ground.

¶ 30 M.C. testified that she said, "Please don't do this to me," and defendant replied, "Shut the fuck up, I told you I was going to get you."

¶ 31 M.C. testified that defendant then put his penis in her vagina and anus. According to M.C., as defendant raped her, he held the gun in his hand. He tried to put his penis in her mouth as well, but she refused to open her mouth.

¶ 32 M.C. testified that, when she refused to let defendant put his penis in her mouth, he put the gun to her head and pulled the trigger, but the gun did not fire. M.C. said she "heard a click and then all the bullets fell out." Defendant tried to gather the bullets, but M.C. could not tell whether he had picked up any of them. Defendant told M.C. to count to 100, got up, and left. M.C. testified that she heard a car start when defendant left.

¶ 33 M.C. testified that she ran through a gangway adjacent to the empty lot and into the police station parking lot. Officer Emil Bux approached M.C., held her, and covered her in a shirt. M.C. testified that she described her attacker as 6'0" to 5'11" tall, 180 pounds, with a goatee beard and an afro hairstyle.

¶ 34 After speaking to the police, M.C. went to the hospital, where a doctor took swabs from her vagina and anus. M.C. also testified that her "chest area was real sore and had scratches and bruises * * * [f]rom laying [*sic*] on the ground." On cross-examination, she added that she had

scratches on her cheek from where defendant pressed her face into the ground. She also said that the palms of her hands were "real red." She did not remember whether her hands were bleeding.

¶ 35 On cross-examination, M.C. testified that she told Detective Poli about the argument she had with defendant three or four days before July 8, 1999. She testified that she told Poli that her boyfriend was with her when she argued with defendant and that her boyfriend's name was Antoine Johnson. She denied telling Poli that her boyfriend's name was Lamar Jones.

¶ 36 Defense counsel asked if M.C. had also told Poli that her attacker was 5'7" to 5'9" tall with a chubby build, a full beard, and mustache, and M.C. responded that she did not remember. M.C. denied that defendant picked her up in his car, that they had consensual sex in his car, and that he paid her for the sex.

¶ 37 During the cross-examination of M.C., the State objected to questioning regarding M.C.'s description of the offender to Detective Poli. At a sidebar, the State indicated that the defense did "not have a subpoena on Detective Poli, who has *** retired from the Chicago Police Department." The State argued that the defense could not prove up its impeachment of M.C. unless the defense could call Poli to testify to contradict M.C.'s testimony. Defendant's attorneys responded that they had asked for a continuance to subpoena Poli, but the court had denied it.

¶ 38 The trial court sustained the State's objection, finding that the defense could not properly perfect the impeachment without Poli testifying. The court added that Poli's testimony about M.C.'s inconsistent description of her attacker would be collateral:

> "THE COURT: But it also seems to me that your opening statement was that your client had sex with the victim. That was your opening statement that you gave, right?
>
> MS. GILL [Defense Counsel]: Yes.

THE COURT: Identification of the person that she had sex with is not an issue in this case because you have taken it out of play. Not only does the DNA, which is the State's evidence, you've conceded that it was your client, is that correct?

MS. GILL: But the credibility of the witnesses—

THE COURT: No, I'm sorry. You conceded the identification of the person who had sex with the victim in your opening statement, is that correct?

* * *

You're saying that the sex was consensual, but you conceded the identity, is that correct?

MS. GILL: Yes.

THE COURT: All right. Identification is, therefore, not a material issue in this trial. The material issue in this trial is force and the use of force.

Because identification is not a material issue in this trial, any questions that goes [*sic*] to identification is collateral. What that means is any answers that you get from the witness are collateral answers and you are not to perfect impeachment for collateral issues. So any questions you ask about identification is [*sic*] collateral.

Whatever the witness says that's what the witness says. You aren't able to prove up impeachment on the collateral issues. Therefore, you can ask her all the questions you want to about identity, it would go to her credibility, and whatever answer she gives is the answer that you have to stick with as far as her answer and her credibility because you don't prove up impeachment on collateral matters.

> You were the one that took identity out of play when you gave your opening statement. You didn't have to give an opening statement saying consent, but when you did you took out identity.
>
> For that reason continue on with your examination, test the witness's credibility, but understand when it comes to identification it is a collateral matter, and, therefore, whatever answers that you get from the witness, you don't have to prove up. So it doesn't matter if you can get Detective Poli in here or anything because it's collateral."

¶ 39 Defense counsel noted that M.C.'s inconsistencies regarding the description of the offender affected her credibility, "which is never collateral." The court agreed that those contradictions affected her credibility and said, "[Y]ou are free to argue that it bears upon her credibility." The court then added:

> "You can argue whatever you want to argue, but I'm talking about your proving up. So whatever her answers are, that's what her answers are and those are the answers that stand. You can say that those answers make her incredible, but they are collateral. And we're not going to prove up collateral impeachment during the trial because that's not what we do, all right?"

¶ 40 Later in the trial, defendant's attorneys requested a rule to show cause for Detective Poli. They produced copies of two subpoenas served on the Chicago police department for Poli and Officer Mendro. And they argued that the State had not informed them that Poli and Mendro had retired until the day before. The State argued that the defense had not properly served Poli or Mendro because they no longer worked for the police department. The trial court denied the rule to show cause because defense counsel had not personally served either officer. The court added,

"Now, with that I'll give you an opportunity to develop your investigation of this matter. This trial is not over, but I'm not going to continue the case."

¶ 41 Officer Bux testified that, on July 8, 1999, he was working at the 15th district police station shortly after midnight, when he heard a woman screaming, "I've been raped." Bux saw M.C., naked, approaching the police station. He described her as "visibly shaken" with "tears in her eyes." Bux asked a man nearby to take off his shirt and put the shirt on M.C.

¶ 42 On cross-examination, Bux testified that he did not notice any scrapes or redness on M.C.'s hands. But Bux added that he was "mainly" looking into M.C.'s eyes. Bux testified that M.C. did not tell him anything about her boyfriend.

¶ 43 During defense counsel's cross-examination of Bux, the State objected to defense counsel "testifying to the jury." The court then chided defense counsel for not looking at Bux:

> "Well actually, [defense counsel] Mr. O'Hara, it is a basic sign of civility that you look at the person you are talking to. You are talking to this witness on the witness stand, but you are directing your attention and turning towards the jury. You'll have an opportunity to argue to the jury. You'll have an opportunity to argue to the jury. They hear you. They get it. Please show the witness respect. Look at the witness when you ask questions.
>
> As to the substance of the objection, the objection is overruled."

Defense counsel responded, "Judge, I meant no disrespect to the witness."

¶ 44 Defense counsel also asked about flash messages—messages relaying information concerning a suspect to officers in the area—and Bux said that it was important to put out information quickly and "to get *** many police officers *** to secure the area." Defense counsel then asked, "And as you know time is of the essence in a case like this, right?" The court

interjected, "I'm sorry. *** [T]ime is of the essence here, too. Why don't you ask the question that relates to what this officer knows about, not his general impressions of what is important to investigate crime."

¶ 45 Officer Randall Ugorek testified that he was also working at the 15th district that night. Ugorek was with Officer Mendro, loading equipment into his squad car, when he heard a woman scream and Officer Bux call his name. Ugorek and Mendro went toward the sound and found Bux and M.C., who was only wearing a t-shirt. M.C. told Ugorek and Mendro that she had been raped. M.C. told Ugorek that the offender was a black male, about 5'11" tall, 175 pounds, with an afro haircut and a goatee beard, wearing a "starter jacket with black sweat pants." Ugorek disseminated that description to other squad cars in the area via a flash message.

¶ 46 According to Ugorek, M.C. described the gun that the offender had "as a blue steel semi-automatic handgun," which contradicted M.C.'s description of the gun simply as "black." Ugorek also testified that M.C. said the bullets fell out of the gun while the offender was dressing, not when he pulled the trigger. Ugorek testified that he did not see any redness, scratches, or bruises on M.C.

¶ 47 After M.C. went to the hospital, Ugorek and Mendro went back to the alley and found M.C.'s purse and an unfired bullet. The purse was returned to M.C.; it was not inventoried as evidence. Ugorek testified that Detective Poli handled the rest of the investigation. Ugorek was not present when Poli interviewed any witnesses.

¶ 48 During Ugorek's cross-examination, defense counsel asked whether M.C. ever told Ugorek that her attacker said, "I told you I would get you." The State objected, and the court sustained that objection. Defense counsel then asked Ugorek if he wrote in his police report that M.C. said that her attacker said, "I told you I would get you," which prompted another State

objection, which the trial court sustained. Defense counsel said, "Judge, we perfected that impeachment. We laid the foundation for that impeachment, now we are perfecting it." The court replied, "I indicated to you that's collateral based on your opening statement. The objection is sustained."

¶ 49 After a break in the trial, defense counsel filed a motion asking the trial court to reconsider its ruling prohibiting him from looking at the jury during his examination of witnesses. Defense counsel argued that the trial court's ruling would lead the jury to believe "that it is improper to look at us or *** for us to look at them." The court said it had "the discretion to maintain the decorum in [its] courtroom" and noted that the jury had been instructed not to consider the personalities of the lawyers in reaching its verdict.

¶ 50 Defendant also moved for a mistrial. Defendant argued that, by interjecting during the defense examination of witnesses and prohibiting the defense attorneys from making eye contact with the jury, the trial court had improperly favored the State in front of the jury. Defense counsel also argued that the trial court's refusal to grant a continuance so that he could locate Johnson, Detective Poli, and Officer Mendro prejudiced defendant's ability to impeach M.C. Defense counsel added that the nurse who treated M.C. at the hospital was also unavailable to testify because she recently had a baby. Defense counsel argued that the nurse would contradict M.C.'s testimony that she was going to the bus stop on July 8, 1999 before she was attacked; the nurse would testify that M.C. told her that she was going to the gas station nearby. Defense counsel noted that he had served the nurse with a subpoena through the hospital.

¶ 51 The court denied the motion for a mistrial. The court noted that it had only interjected because defense counsel's questioning was improper. With respect to the absent witnesses, the court declined to continue the case:

"I've ruled on the defense['s] inability to perfect process and their ability to bring in their witnesses. What I hear about the nurse frankly is no different. I set this matter down for trial September 14, 2009, *** so it has been more than three[ ] months. It seems to me that the witnesses that need to be obtained and the information that needs to be obtained on behalf of [defendant] is not something that [defendant] can do directly, that is what his lawyers are supposed to do. And if you are not able to serve witnesses then you can't serve witnesses. I've ruled about the value of those witnesses. I do think that the nurse['s] testimony would be material because it would be directed toward [M.C.'s] credibility in general. It won't be directed to identification which is collateral because [defendant] concedes that he's the one that had sex with [M.C.] But as to where she was headed before she encountered [defendant], I think it does go to credibility and I'm not saying that that is collateral.

However to continue this case for some period of time for the defense to determine when this nurse would be available I think would be speculative. I have no idea[ ] of the nature of the nurse['s] delivery, her health or her child's health and whether or not this nurse would be available to come in here to testify to something that I don't know that she needs to testify to at this point."

¶ 52 Dr. Richard Schmitt, whom the trial court admitted as an expert in emergency-room medicine, testified that he treated M.C. in the emergency room on the morning of July 8, 1999. The State asked Schmitt to describe her demeanor, and he replied, "She was extremely distraught as though she had been abused." Defense counsel objected to that testimony and asked that the court strike it, but the court overruled the objection, noting, "I'll give you an opportunity to cross-examine on that point." Schmitt described M.C. as "quite active in the examination room,"

making "a lot of arm movement," pacing, and "appearing frustrated, confused, wondering what's going on."

¶ 53 Schmitt testified that M.C. did not have any "acute trauma," but noted that she "did have a small bruise on her left chest." Schmitt did not document any scratches on M.C.'s body.

¶ 54 Dr. Schmitt took swabs of M.C.'s cervix and anus. M.C. had no tears or bruises on her vagina or anus but she complained of "a good amount of tenderness to the rectal area." Over defense counsel's objection, Schmitt testified that it was not unusual for a sexual assault victim not to have trauma on her vagina or anus. On cross-examination, he testified that tenderness in the anus could be caused by consensual sex. On redirect examination, the State asked Schmitt whether the trauma to M.C.'s anus was consistent with someone who routinely had anal sex, and Schmitt responded that it "appeared to be an acute assault." Defense counsel objected but was overruled. The State again asked Schmitt whether her trauma was consistent with someone "who routinely or consensually engage[d] in anal sex." Defense counsel objected on the basis that the question violated the motion *in limine*, but the trial court replied, "Actually it is in response to a question that you asked in cross-examination, the objection is overruled you could [*sic*] answer." Schmitt testified, "This appeared to be an acute assault to the identified area, something that [M.C.] is not participating in on a regular basis." Defense counsel objected again, but was overruled. On recross examination, Schmitt testified that he did not know M.C.'s normal sexual behavior.

¶ 55 After Dr. Schmitt finished testifying, defendant made another motion for a mistrial, this time on the basis that Schmitt stated opinions that violated of the pretrial motion *in limine*. Defense counsel noted that Schmitt had opined that M.C.'s demeanor indicated that she had been sexually assaulted and that her rectal soreness was consistent with a sexual assault. The State

responded that it never asked Schmitt for an opinion as to whether or not M.C. had, in fact, been assaulted, it simply asked if her behavior and injuries were consistent with someone who had been raped. The court denied the motion for a mistrial.

¶ 56 After that ruling, defendant, in the presence of the jury, said he no longer wanted to be present for the trial because he believed that the prosecution and the judge were working together to ensure his conviction. After the jury was removed from the courtroom, defense counsel moved for a mistrial based on defendant's outburst, but the trial court denied that motion.

¶ 57 The State's physical evidence consisted of an unfired bullet found in the alley and DNA evidence. The bullet had no fingerprints suitable for comparison. With respect to the DNA evidence, no semen was detected on M.C.'s vaginal swab, but semen was detected on her rectal swab. However, only an incomplete DNA profile of nine loci could be developed from the semen on the rectal swab; there was not enough semen to develop a full 13-loci profile. The incomplete profile was not linked to anyone until 2006, when it was associated with defendant's profile in the Combined DNA Index System (CODIS) database. In order to confirm the association, a buccal swab was taken from defendant, which matched the incomplete profile taken from M.C.'s rectal swab. According to Kelly Biggs, the Illinois State Police forensic scientist who made the association, the profile developed from the rectal swab would be expected to be found in 1 in 460 billion black individuals. Biggs opined that defendant's DNA matched the DNA found on the rectal swab.

¶ 58 After the DNA testing, Detective Susan Barrett of the Chicago police department contacted M.C. to determine if she wanted to proceed with the prosecution. On October 3, 2007, Barrett arranged a four-person lineup, from which M.C. identified defendant as her attacker. On cross-examination, Barrett conceded that the initial case report described the suspect as having

dark skin and that two of the four lineup participants did not have dark skin. She also conceded that the report described the suspect as being 30 to 35 years old and that the only other dark-skinned lineup participant other than defendant was 23 years old.

¶ 59 Before beginning the defense case, defense counsel renewed the motions for a continuance and a mistrial on the basis that Detective Poli, Officer Mendro, and the nurse who had treated M.C. could still not be located. The court denied both motions.

¶ 60 Defense counsel then asked the court to permit the defense to call an investigator to testify regarding the attempts to locate Antoine Johnson in order to dispel the possibility that the jury would hold the defense's inability to secure Johnson's presence against defendant. The court denied the motion. The court said, "First of all, I don't think that your efforts were diligent, and so that may be your position, but that's not how I've ruled consistently with [*sic*] this matter." The court added that Johnson's potential testimony would "fairly go[ ] to identification" but that, "[b]ecause the identity of the defendant is not at issue, *** the matter is collateral." According to the court, Johnson's testimony would not be "particularly relevant anyway."

¶ 61 Defendant testified that, in the summer of 1999, he first saw M.C. in a corner store on Waller Avenue. He spoke to M.C. and she told him that her name was "Hazel." He denied having any argument with M.C. on that day.

¶ 62 Defendant testified that he saw M.C. again on the corner of Waller Avenue and Superior Street. Defendant drove by her but did not stop or speak to her.

¶ 63 Defendant testified that he saw M.C. for a third time outside the corner store where he had first met her. He and M.C. made small talk. They did not argue or swear at each other.

¶ 64 According to defendant, he saw M.C. for the fourth time on the evening of July 7, 1999 into the early morning hours of July 8, 1999. He was driving west on Chicago Avenue toward

Waller Avenue, when he saw M.C. walking down the street in the opposite direction. Defendant made a U-turn and stopped to talk to her because he found her attractive. Defendant testified that he thought M.C. was "[a]bout 20" years of age.

¶ 65 Defendant said that he pulled up next to M.C. at the mouth of the alley between the gas station and the empty lot. Defendant testified that there were a lot of people out on Chicago Avenue at that time because it was a location known for selling drugs. Defendant asked M.C. where she was going, and she replied that she was going to pick up her son. She said she could not take the bus because her boyfriend had her purse. Defendant asked her how far she was going, and M.C. got into his car.

¶ 66 Defendant testified that he asked M.C. how old she was, and she said she was 19. M.C. told defendant "how hard it was to raise a boy *** at that age" and said she needed shoes for her son. Defendant told M.C. that he would "look out for her" and that he would "give her a few dollars."

¶ 67 Defendant testified that he asked M.C. if she wanted "to hang out," which defendant meant as a request for M.C. to have sex with him. M.C. told defendant to drive into the alley. Defendant drove to the end of the alley, where there was "a big lot." Defendant testified that M.C. lifted her skirt over her hips and that she was not wearing underwear. Defendant said, "[W]e first started I kissed [M.C.], I fingered [her] and we was doing all that, I was playing with her titties, all that in the front seat of my car."

¶ 68 Defendant testified that he and M.C. then moved to the backseat of the car, where they had oral, vaginal, and anal sex. When defense counsel asked whether defendant performed oral sex on M.C., defendant replied, "Yes, I did, because she was aggressive like that. She wanted,

you know, to *** get off, too, you know what I mean?" He testified that he ejaculated while having anal sex with M.C.

¶ 69 Defendant testified that M.C. never told him "no" or told him to stop. He denied showing M.C. a gun or having a gun. He also denied forcing to have sex or threatening her into having sex with him.

¶ 70 Defendant testified that, once they finished having sex, they climbed back into the front seat of his car and got dressed. Defendant then gave M.C. $23, which was all of the money defendant had on him. Defendant testified that M.C. got upset about the money, saying "that $20 [could not] get her boy *** shoes." M.C. yelled and cursed at defendant.

¶ 71 Defendant testified that he drove back to the mouth of the alley at Chicago Avenue, where M.C. told him to take a left because she saw her boyfriend in the other direction. Defendant refused to because he was not going that way. M.C. got out of the car and called defendant "a cheap bastard." Defendant drove away.

¶ 72 Defendant testified that he was 5'9" tall and weighed 160 to 165 pounds on July 8, 1999. He said that he shaved his head at that time because his hair was receding, but he did have a goatee.

¶ 73 On cross-examination, defendant denied that, during the police's attempt to question him, a detective told him that his buccal swab had matched the partial profile taken from M.C.'s anal swab. In rebuttal, the State called Detective Patricia Dwyer, who testified that she did tell defendant that information.

¶ 74 The State also re-called M.C. to testify in rebuttal. M.C. denied ever using the name Hazel in 1999, meeting defendant in or near the corner store, or having consensual sex with him. She also denied engaging in prostitution.

¶ 75 Finally, for purposes of impeachment, the State presented the certified copies of defendant's prior convictions for armed robbery, vehicular hijacking, and attempted burglary.

¶ 76 After closing arguments, the jury began to deliberate. The jury eventually sent out a note reading, "The jury is split evenly. We have not made any progress in moving people from one opinion to the other. Nothing has changed for six hours. Now what?" The court told the jury to review their instructions and to continue deliberating. After the jury deliberated for another two-and-a-half hours without reaching a verdict, the court elected to sequester the jury for the night.

¶ 77 When the jurors returned in the morning around 10:15 a.m., the court read them the deadlocked jury instruction (Illinois Pattern Instructions, Criminal, No. 26.07 (4th ed. 2000)), told them to reread their instructions, and told them to resume their deliberations. The jury deliberated throughout the day, periodically sending out notes requesting to see certain transcripts and pieces of evidence. At 7:45 p.m., the jury sent out another note reading, "Judge Brown, if we are sequestered again tonight, will our loved ones be contacted again to let them know of our whereabouts/situation? Some of us have considerable worry/concern over this issue." The State had no objection to the jurors being allowed to talk to their family members, but defense counsel objected to their being sequestered for a second night. The court elected to sequester the jury again.

¶ 78 On the third day of deliberations, the jury deliberated for several hours before returning a verdict. The jury found defendant guilty of aggravated criminal sexual assault based on defendant's penetration of M.C.'s anus, but not guilty of aggravated criminal sexual assault based on defendant's penetration of M.C.'s vagina.

¶ 79 C. Posttrial Proceedings

¶ 80 After defendant was found guilty, the court appointed defendant new counsel to investigate whether defendant had received ineffective assistance of trial counsel based on his attorneys' failure to file a motion to dismiss the indictment due to pretrial delay by the State. Posttrial counsel filed a motion for a new trial raising trial counsel's ineffectiveness as well as other errors, but the trial court denied it.[2]

¶ 81 The court sentenced defendant to an extended-term sentence of 50 years' incarceration and "a period of mandatory supervis[ed] release *** for three years." The court awarded defendant 2,000 days credit for time he served in custody awaiting trial. Defendant appeals.

¶ 82 II. ANALYSIS

¶ 83 A. Right to Present a Defense

¶ 84 Defendant first argues that the trial court deprived him of his right to present a complete defense where it precluded defendant from introducing three pieces of evidence that would have attacked M.C.'s credibility: (1) that M.C. gave Detective Poli a description of her attacker that did not match the description she testified to at trial; (2) that M.C.'s boyfriend, Antoine Johnson, would contradict M.C.'s testimony that she had an argument with defendant three or four days before the night of the incident; and (3) that, when M.C. spoke to Officer Ugorek immediately after the offense, she did not tell him that her attacker said that he would get her. Defendant argues that these pieces of evidence were especially important because his trial boiled down to a credibility contest between him and M.C.

¶ 85 A criminal defendant has a constitutional right to a " 'meaningful opportunity to present a complete defense.' " *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 133 (quoting *People v.*

[2] The court granted the motion to vacate certain convictions that failed to state an offense under the statute in effect at the time of the offense. Those counts are not at issue.

Ramirez, 2012 IL App (1st) 093504, ¶ 43); see also U.S. Const., amends. VI, XIV; Ill Const. 1970, art. I, § 8. When, as in this case, a party claims that his right to present a complete defense was denied due to improper evidentiary rulings, we apply an abuse-of-discretion standard of review. *Burgess*, 2015 IL App (1st) 130657, ¶ 133. "A trial court abuses its discretion when its decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." (Internal quotation marks omitted.) *People v. Kladis*, 2011 IL 110920, ¶ 23.

¶ 86 We now address, individually, the three pieces of evidence that defendant alleges he should have been permitted to present. We also address defendant's argument that the cumulative effect of the exclusion of these pieces of evidence deprived him of a fair trial.

¶ 87 1. Detective Poli

¶ 88 The first piece of evidence that defendant argues he should have been permitted to introduce was testimony from Detective Poli that M.C. described her attacker as being 5'7" to 5'9" tall with a chubby build, a full beard, and a mustache. This would contradict M.C.'s trial testimony that she described her attacker to the police as being 6'0" to 5'11" tall and 180 pounds, with a goatee beard and an afro hairstyle.

¶ 89 At trial, defense counsel attempted to ask M.C. about her description of her attacker to Poli, but the State objected on the basis that defendant had not subpoenaed Poli. Defense counsel conceded that he had not personally served Poli with a subpoena; he had only served the Chicago police department, but Poli was no longer employed by the police department.

¶ 90 Defendant does not contend that the trial court erred in finding that he had not properly served Poli. Nor does defendant claim that he could have perfected his impeachment of M.C. without Detective Poli's testimony. We fail to see how the trial court acted to impede defendant's

presentation of Poli's testimony where he had not properly ensured that Poli could be compelled to testify.

¶ 91 Defendant claims that any attempt to subpoena Poli would have been "futile" because the trial court incorrectly ruled that Poli's testimony would only go to the collateral matter of identity, and defendant had no right to prove up impeachment on collateral matters. While the court did describe the issue of identification as collateral, it also agreed with defense counsel that Poli's potential testimony could be used to impeach M.C.'s credibility, which is not collateral:

> "MR. O'HARA [Defense Counsel]: Judge, the matters about identification go towards the witness's credibility in general and, therefore, are not inherently collateral. We are not conceding that matters of identification are completely collateral or that are [*sic*] irrelevant.
>
> Judge, we are saying that the matters of identification, specifically her contradictions and inability to tell the same story twice, goes to her credibility, which is never collateral. And we would be seeking to prove up those matters on impeachment with Detective Poli, who we validly served a subpoena on.
>
> THE COURT: The questions relating to identification is collateral. *It goes to her credibility and you are free to argue that it bears upon her credibility*. But the status of the questions as it relates to identification is [*sic*] collateral matters." (Emphasis added.)

The trial court accurately stated the law. Moreover, when defendant later requested a rule to show cause for Detective Poli, the court said that it would "give [defense counsel] an opportunity to develop [his] investigation of this matter," although the court declined to continue the case mid-trial. But defense counsel never took that advice; counsel never served Detective Poli with a subpoena during the course of the trial.

¶ 92 To the extent that defendant argues that the trial court erred in failing to grant him a continuance to locate Poli mid-trial, we disagree. The decision to grant or deny a continuance is a matter resting in the sound discretion of the trial court. *People v. Walker*, 232 Ill. 2d 113, 125 (2009). In *Walker*, our supreme court laid out the factors we should examine in determining whether a continuance should have been granted:

> "Factors a court may consider in determining whether to grant a continuance request by a defendant in a criminal case include the movant's diligence, the defendant's right to a speedy, fair and impartial trial and the interests of justice. [Citations.] Other relevant factors include whether counsel for defendant was unable to prepare for trial because he or she had been held to trial in another cause [citation], the history of the case [citation], the complexity of the matter [citation], the seriousness of the charges [citation], as well as docket management, judicial economy and inconvenience to the parties and witnesses [citation]." *Id*. at 125-26.

This court has also stated that, "[w]hen the defendant has failed to exercise diligence to insure that [a] witness would be available, [a] motion for a continuance will be denied." *People v. Allen*, 268 Ill. App. 3d 279, 287 (1994).

¶ 93 In this case, defendant failed to show that he had exercised diligence in serving Detective Poli. On June 12, 2009, the court set a first trial date of September 14, 2009. On September 3, 2009, the court reset the trial for January 11, 2010. Defense counsel did not attempt to subpoena Poli until December 31, 2009, and, at that point, simply served the Chicago police department. And although defense counsel asserted that he did not learn that Poli was retired until the day of trial, the State responded that defense counsel had not informed it of the defense's intent to call Poli as a witness until the day of trial. Defense counsel did not counter the State's response.

Under these circumstances, we see no abuse of discretion in denying defendant a midtrial continuance to locate Detective Poli.

¶ 94 2. Antoine Johnson

¶ 95 Defendant next argues that the trial court erred in precluding him from introducing the testimony of M.C.'s boyfriend Antoine Johnson, who, according to the police reports, would contradict M.C.'s testimony that she had an argument with defendant three or four days before she was assaulted. According to defendant, Johnson's testimony would undermine defendant's alleged motive for raping M.C., where M.C. testified that defendant told her, "I told you I would get you."

¶ 96 At the outset, we must clarify the error that defendant is claiming the trial court committed. The court did not simply deny defendant the ability to call Johnson as a witness, as defendant never properly served Johnson with a subpoena. Thus, defendant could not secure Johnson's appearance at trial. Instead, in this appeal, defendant takes issue with the trial court's denying him a continuance so that he could locate and subpoena Johnson. According to defendant, the trial court's decision to deny him such a continuance—both before and during the trial—prevented him from presenting a complete defense. As we have already noted, we review the trial court's denial of a continuance for an abuse of discretion. *Walker*, 232 Ill. 2d at 125.

¶ 97 When defendant requested a continuance on the first day of trial, the court found that the defense had been diligent in its efforts to locate Johnson. The record supports that finding. Defendant first requested information on Johnson, who, at that time, the parties believed to be named Lamar Jones, on February 6, 2009. The State disclosed Johnson's address to defense counsel in October 2009. On January 11, 2010, the first day of trial, defense counsel said his investigator had been to Johnson's address four times and had spoken to Johnson on the

telephone. Defense counsel and the investigator had both been to Johnson's address on December 28, 2009. The investigator was also attempting to locate Johnson as the trial was beginning. But every time they tried to find Johnson, his mother told them that he was not home. Based on the record, it appears that defense counsel made diligent efforts to locate Johnson in the two to three months before trial that he knew of Johnson's whereabouts.

¶ 98 Instead of relying on a lack of diligence, the trial court denied the continuance based on the notion that Johnson's testimony could only prove up impeachment on a collateral matter. The trial court found that Johnson would simply impeach M.C. on the issue of identification, which became collateral once defendant conceded that he had sex with M.C. in his opening statement. According to the court, once defendant admitted there was no question that he had sex with M.C. on the date in question, there was no question as to his identity.

¶ 99 But even assuming that M.C.'s identification of defendant was collateral, Johnson's testimony would have been relevant to two other issues at defendant's trial: defendant's motive and M.C.'s credibility. With respect to defendant's motive, M.C. testified that, three or four days before she was sexually assaulted, defendant drove up to her on the street, said something "disrespectful" to her, and she cursed at him. In closing argument, the State argued that this evidence supported the notion that defendant "was stalking [M.C.]." According to defense counsel, Johnson would contradict M.C.'s testimony on this point—he would testify that he was with M.C. on the street when defendant allegedly pulled up in the car, but he did not see M.C. argue with anyone. Thus, Johnson's testimony would tend to negate the inference that defendant raped M.C. because he was obsessed with her and stalking her.

¶ 100 The State contends that Johnson's proposed testimony would have been immaterial because the State was not required to prove defendant's motive. We disagree. Although the State

was not required to prove defendant's motive, it was certainly free to, and did, present evidence of defendant's motive. See *People v. Johnson*, 368 Ill. App. 3d 1146, 1157 (2006) ("Although the State is not required to prove motive, it is certainly entitled to do so when evidence of motive exists." (Internal quotation marks omitted.)). Defendant should have been free to counter that evidence with his own evidence that he did not have a motive to assault M.C., *i.e.*, that he never had this previous argument with M.C. See, *e.g.*, *People v. Miller*, 327 Ill. App. 3d 594, 598-99 (2002) (trial court erred in excluding defendant's testimony that he lacked motive).

¶ 101 Johnson's prospective testimony would also undermine M.C.'s credibility. Johnson's testimony, as described by the defense, would contradict the notion that defendant ever approached M.C. and spoke to her disrespectfully, which was essentially the State's theory of the case—that defendant wanted to assault M.C. after their verbal argument a few days earlier. As defendant notes, M.C.'s and defendant's credibility were crucial to the outcome of the trial, as the jury was tasked with deciding which version of events to believe. And, more generally, the credibility of a witness is never a collateral matter on cross-examination; it is always at issue. *People v. Allison*, 236 Ill. App. 3d 175, 183 (1992); *People v. Van Zile*, 48 Ill. App. 3d 972, 977 (1977).

¶ 102 The State argues that Johnson's proposed testimony was inadmissible to attack M.C.'s credibility because it constituted impermissible specific-act impeachment. Specific-act impeachment is the use of specific acts of untruthfulness to attack a witness's believability. *People v. Santos*, 211 Ill. 2d 395, 403-04 (2004). In other words, a party may not rely on the inference that because "the witness had lied on a previous occasion, the jury would be more likely to believe that [the witness] was lying in her testimony regarding the facts at issue in the case." *Id.* at 405.

¶ 103 We disagree with the State that Johnson's testimony would constitute specific-act impeachment. Defendant did not attempt to use evidence that M.C. lied about something unrelated to the case to show that it was more likely that she would lie in this case. To the contrary, defendant attempted to show that M.C. had lied about the facts of this case. Specifically, he sought to introduce evidence that M.C. had not had an argument with defendant before the assault, an argument which, according to the State, provided M.C. with the ability to recognize defendant at the time of the offense, and established defendant's motive to attack her. Defendant was not attempting to impeach M.C. with an inference that she had a propensity to lie; he attempted to impeach her by showing that her testimony regarding defendant's motive and identity was false.

¶ 104 So we agree with defendant that the record shows due diligence on the part of defense counsel in securing Johnson's testimony, and we likewise agree that Johnson's testimony, as proffered by defendant, could have been relevant to the issue of M.C.'s credibility and to motive. But it does not automatically follow that the trial court abused its discretion in denying the continuance. There is no abuse of discretion in denying a continuance to locate a witness where there is no reasonable expectation that the witness will be available in the foreseeable future. *People v. Ruiz*, 342 Ill. App. 3d 750, 761 (2003); *People v. Scales*, 307 Ill. App. 3d 356, 358 (1999); *People v. Watts*, 195 Ill. App. 3d 899, 917 (1990); *People v. Curtis*, 141 Ill. App. 3d 827, 833 (1986).

¶ 105 For example, in *Ruiz*, 342 Ill. App. 3d at 760, the defendant sought a continuance during trial to locate the girlfriend of one of the State's witnesses. According to the defendant, the girlfriend would contradict the accounts of the State's eyewitnesses regarding the defendant's location after a shooting. *Id.* But it was "apparent from the record" that the girlfriend "did not

wish to testify and successfully avoided being served despite defense counsel's diligent efforts." *Id.* Because "it was far from certain that any additional time granted to the defendant would have resulted in successful service on" the girlfriend, this court found that the trial court did not abuse its discretion in denying the defendant a continuance. *Id.* at 761.

¶ 106 Here, as in *Ruiz*, the testimony of the prospective witness would have been relevant, and defense counsel was diligent in attempting to locate the prospective witness. But the record in this case, as in *Ruiz*, demonstrates that there was no reasonable likelihood that the witness would be available in the near future. Every time that defense counsel or his investigator attempted to locate Johnson at his mother's house, they were informed by Johnson's mother that Johnson was not present, on one occasion indicating that he had just left. Johnson had spoken to the defense investigator over the phone, showing that he was aware that the defense was looking for him. But Johnson persisted in his attempts to avoid being served with a subpoena.

¶ 107 Moreover, Johnson went so far as to give the police a false name at the time of the initial investigation in 1999, identifying himself as "Lamar Jones." It is not surprising that a man who, in 1999, was in his mid-thirties and was dating a 15-year-old girl, and who was now on probation (according to defendant), would be uninterested in participating in this trial. The record demonstrates that there was no reasonable expectation that he would have been available in the foreseeable future. See also *Curtis*, 141 Ill. App. 3d at 833-34 (no abuse of discretion in denying continuance where sheriff had been unsuccessful in serving subpoena over course of 7 days and prospective witness indicated he did not wish to be involved in trial; record indicated "that defendant had no reasonable expectation of locating [witness] in the foreseeable future.").

¶ 108 We recognize that the trial court did not explicitly rely on this basis in denying defendant a continuance. But we may affirm the trial court's decision on any basis in the record, even if the

trial court did not rely on that basis. *People v. Rajagopal*, 381 Ill. App. 3d 326, 329 (2008); *People v. Mauricio*, 249 Ill. App. 3d 904, 910 (1993).

¶ 109 We would make two additional points regarding the possibility of prejudice resulting from the denial of the continuance. First, as the State noted below, the fact that Johnson may not have witnessed an exchange between M.C. and defendant a few days prior to the sexual assault in 1999 does not necessarily mean that the exchange never occurred; several people were present and socializing together at the time this supposed conversation took place, and the fact that one person did not witness an interaction between other people may not have been dispositive one way or the other. Thus, while Johnson's testimony may have held some relevance, we are in no position to say that his testimony would have held any particular significance.

¶ 110 Second, defense counsel did argue in closing argument about the State's failure to produce Johnson to testify about that confrontation between defendant and M.C. several days before the sexual assault, clearly arguing that the jury should draw an adverse inference from the absence of his testimony:

> "And what one witness in particular? Antwon [*sic*] Johnson. She claims that he was there, at the argument three to four days earlier. She claims that he was there just minutes after [the sexual assault] happened. Officer Ugorek said, 'I never saw him.' Officer Bux, 'No, never saw this man there.'
>
> This was her boyfriend; a man—she thought he was 33 years of age back then—she spent every single day together with, who was a witness to this case, who they did not bring in to testify. Why not? They don't want you to hear the words that would come out of this man's mouth."

¶ 111 All told, we cannot say that the trial court abused its discretion in denying defendant a continuance to locate and subpoena Antoine Johnson, nor do we find that defendant suffered any significant prejudice from his absence. See *People v. Young*, 128 Ill. 2d 1, 27 (1989) ("A defendant challenging the denial of a motion for continuance must show that his rights were prejudiced or he was impeded in the preparation of his defense.").

¶ 112 3. Officer Ugorek

¶ 113 Finally, defendant argues that he was denied his right to present a complete defense when the trial court preventing his attorney from asking Officer Ugorek whether M.C. told him that her attacker said, "I told you I would get you." According to defendant, this would have impeached M.C.'s trial testimony that the offender said it.

¶ 114 But, as the State points out, defense counsel never asked M.C. whether she told Ugorek that the offender said, "I told you I would get you." Thus, defendant did not lay the proper foundation to impeach M.C. on the basis that she made a prior inconsistent statement to Ugorek. See *Burgess*, 2015 IL App (1st) 130657, ¶ 137 ("Before a witness can be impeached with a prior inconsistent statement, a proper foundation must be laid *** by presenting the place, circumstances and substance of the earlier statement to the witness and giving her an opportunity to explain the inconsistency." (Internal quotation marks omitted.)).

¶ 115 Defendant argues that counsel attempted to impeach M.C. by omission, but that does not excuse the failure to lay a proper foundation. When attempting to impeach by omission, "a proper foundation must be laid on the cross-examination of the witness" in order "to provide [the witness] an opportunity *** to explain the statement with which he is confronted." *People v. Henry*, 47 Ill. 2d 312, 321 (1970). Here, defense counsel never confronted M.C. with her statements to Ugorek in order to give her an opportunity to explain her omission of defendant's

alleged statement. Because defendant failed to lay an adequate foundation for impeaching M.C., the trial court did not err in sustaining the State's objections to that impeachment.

¶ 116 4. Cumulative Error

¶ 117 Finally, defendant contends that, taken together, the exclusion of these three pieces of evidence requires reversal. But we have already concluded that the trial court did not err in excluding any of these pieces of evidence. Because none of the pieces of evidence were erroneously excluded, there can be no cumulative error. See, *e.g.*, *People v. Hall*, 194 Ill. 2d 305, 350-51 (2000) (declining to find cumulative error where none of alleged errors were individually erroneous); see also *People v. Phillips*, 392 Ill. App. 3d 243, 276 (2009) ("[W]here *** 'the alleged errors do not amount to reversible error on any individual issue, there generally is no cumulative error.' " (quoting *People v. Moore*, 358 Ill. App. 3d 683, 695 (2005))).

¶ 118 B. Judicial Bias and Hostility

¶ 119 Defendant next claims that the trial court abandoned its role as a neutral arbiter and displayed improper hostility toward the defense. The State contends that none of the court's comments were improper, and that they did not prejudice defendant by affecting the jury's verdict.

¶ 120 While trial judges have wide discretion in presiding over trials, they may not make comments or insinuations showing their opinion on witnesses' credibility or counsel's arguments. *People v. Tatum*, 389 Ill. App. 3d 656, 662 (2009). Moreover, a hostile attitude toward a criminal defendant, his witnesses, or his attorney may improperly influence the jury in reaching its verdict, resulting in an unfair trial. *People v. Eckert*, 194 Ill. App. 3d 667, 674 (1990).

¶ 121 Defendant contends that we should apply *de novo* review to this issue because it involves a question of law. Defendant ignores the fact that this court has held that an abuse-of-discretion

standard of review applies to this issue. *People v. Jackson*, 409 Ill. App. 3d 631, 647 (2011); *People v. Murray*, 194 Ill. App. 3d 653, 658 (1990). This standard of review makes sense considering that, as we noted above, a trial court has wide discretion in the manner of conducting a trial. *Tatum,* 389 Ill. App. 3d at 662. Nor are we persuaded by defendant's authority for the application of *de novo* review. Defendant cites *People v. Krueger*, 175 Ill. 2d 60, 64 (1996), which simply states the general proposition that we review questions of law *de novo*. In fact, *Krueger* involved a ruling on a motion to suppress, not a trial court's conduct during a jury trial. *Id.* Thus, we review the trial court's statements for an abuse of discretion.

¶ 122 1. Comments Outside the Presence of the Jury

¶ 123 Defendant first contends that the trial court displayed its bias by precluding his attorney from making offers of proof and developing the record in three separate instances. Defendant concedes that these comments did not prejudice his right to a fair trial because they were not made in front of the jury, but contends that they improperly "block[ed] *** counsel's efforts to preserve the defense's positions for the record."

¶ 124 First, defendant points to the hearing on his proposed *voir dire* questionnaire, where, in response to his attorney's request to make a point for the record, the court said, "I'm sorry. I have ruled. If your client is convicted, and if he wishes to appeal, you can make that point to the Appellate Court. But at some point I've got to exercise my discretion." What defendant fails to acknowledge is that, before this comment, the trial court provided defense counsel with ample opportunity to present his argument in favor of the questionnaire, and to respond to the State's argument against it. Defense counsel's ability to make his point or preserve his argument was in no way hampered by the trial court's comment.

¶ 125 Second, defendant highlights the first day of trial, when his attorney requested a few moments to speak with defendant about whether there were additional bases on which they could request a continuance. Defendant notes that his attorney explained that he wanted to ensure that he was fully preserving the record, and the court said that defendant was "looking for [defense counsel] to defen[d] him at *** trial," not "preserving a record for review." Again, defendant has taken a myopic view of the record. Despite this statement, the trial court *granted* counsel's request to speak to defendant. And, when defense counsel had finished speaking with defendant, he had no additional bases on which to make a motion for a continuance. Thus, defendant has failed to show that the trial court's comments in any way prevented him from speaking with his attorney, or that there were matters that should have been put on the record, but were not, because of the trial court's comments.

¶ 126 Third, defendant notes that, at a sidebar during Officer Bux's cross-examination, his attorney asked to respond to an argument in order to make a record, but the court said, "I'm sorry, *** we're going to bring back in the jury, please. You don't have an absolute right. I've heard you and I've ruled." This comment came after defense counsel argued that he should be able to cross-examine Bux about the presence or absence of bruises on M.C.'s hands. Thus, the trial court did not preclude defense counsel from arguing his point or preserving that issue for appeal. The trial court was well within its discretion in ending the sidebar in order to continue the trial.

¶ 127 Nor does defendant argue that the trial court's allegedly improper comments in any way discouraged his attorney from making future objections or from preserving issues for the record. In fact, defense counsel repeatedly made objections at trial and even made sure to draw the trial court's alleged hostility to the trial court's attention. We disagree that the trial court's comments impeded counsel from preserving issues for the record.

¶ 128 Defendant also contends the trial court "displayed hostility toward the defense" when ruling on his motion to exclude evidence of his prior convictions. Specifically, defendant points to the following statement: "I just want the record to be clear that I'm only ruling now because the defendant requested. If you don't like my ruling it's because you wanted me to rule this way now." Defendant claims that this comment "implied that [the] negative ruling [on defendant's motion] was impacted by defense counsel's request" for the trial court to rule before the trial began.

¶ 129 We disagree. Defendant ignores the fact that, before making this comment, the trial court expressed its concerns with ruling on the admissibility of prior convictions before trial. The court said that it could not fully ascertain the probative value and prejudicial effect of these prior convictions before it had heard any of the evidence adduced at trial. But, recognizing that the Illinois Supreme Court has held that a trial court should rule on the admissibility of convictions before trial (*People v. Patrick*, 233 Ill. 2d 62, 73 (2009)), the court asked defendant if he wanted a ruling on his motion before trial. The court's comments on the possibility that defendant would not like its ruling were simply a reflection of the trial court's concerns that it could not fully weigh the probative value and prejudicial effect of defendant's convictions before trial. Nothing in the trial court's ruling on the motion reflects any hostility toward defendant, and defendant does not argue that the substance of the ruling was incorrect or biased. In fact, the trial court excluded one of the four convictions, which undercuts any suggestion that the trial court attempted to use defendant's convictions against him out of some animosity toward the defense.

¶ 130 Defendant cites *People v. Lewerenz*, 24 Ill. 2d 295 (1962), in support of his argument that the trial court's comments outside the presence of the jury were improper. This case is far different. In *Lewerenz*, the trial court, in the presence of the jury, characterized defense counsel's

"normal and brief objections to evidence" as " 'speeches' " 16 times and admonished defense counsel "not 'to make any speeches to me before the jury.' " *Id.* at 300-01. Unlike the trial court in *Lewerenz*, the trial court in this case gave defense counsel ample time to develop his arguments regarding admissible evidence and his reasons for requesting a continuance. The court never admonished defense counsel not to make objections or arguments. And, unlike *Lewerenz*, none of the above comments came in the presence of the jury, so they could have had no effect on the jury's verdict. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 117; *People v. Lopez*, 2012 IL App (1st) 101395, ¶¶ 70-71.

¶ 131 Defendant also cites *People v. Johnson*, 2012 IL App (1st) 091730, and *People v. Phuong*, 287 Ill. App. 3d 988 (1997), in support of his argument that a trial court's comments may still be prejudicial even when a jury is not present. We find both cases to be distinguishable. In *Johnson*, this court reversed the defendant's conviction and remanded for a new trial where the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). *Johnson*, 2012 IL App (1st) 091730, ¶¶ 51, 79. The court discussed the trial court's comments in *dicta*, emphasizing that it did not need to "determine whether the[ ] complained-of judicial comments [were], in and of themselves, sufficient to require reversal." *Id.* ¶ 79. Thus, *Johnson* does not provide persuasive support for the notion that the trial court's comments in this case constitute reversible error.

¶ 132 More importantly, the trial court's comments in *Johnson* were far harsher than anything the trial court said in this case. There, the trial judge yelled at a defense witness, criticized the witness's and defense counsel's performance as employees of the Cook County public defender, and accused both of making statements " 'border[ing] on perjury.' " *Id.* ¶ 73. In this case, the

court's comments outside the presence of the jury did not approach that level of unwarranted criticism.

¶ 133 Similarly, *Phuong* is distinguishable because, in that case, the trial judge presiding over the defendant's bench trial criticized the defendant's Chinese heritage and inability to speak English. *Phuong*, 287 Ill. App. 3d at 994. None of the trial court's comments in this case bear any resemblance to such misconduct.

¶ 134 2. Comments in the Presence of the Jury

¶ 135 Next, defendant takes issue with several comments the trial court made in the presence of the jury. First, he claims that the trial judge "lectured defense counsel about civility" during Officer Bux's cross-examination, when he told defense counsel that it was "a basic sign of civility" that he look at Bux while questioning him.

¶ 136 We disagree that the trial court's statements to defense counsel were improper. The trial court has discretion to ensure that a trial is "conducted in an orderly manner with proper decorum." *People v. Williams*, 201 Ill. App. 3d 207, 221 (1990). By instructing defense counsel to look at Officer Bux while questioning him, the court was simply ensuring that proper decorum was being observed during the trial. And the jury was instructed that the behavior of the lawyers should not affect their verdict, which alleviated any prejudice resulting from the court's brief comment.

¶ 137 Defendant cites *People v. Harris*, 123 Ill. 2d 113 (1988), and *People v. Ferguson*, 11 Ill. App. 3d 914 (1973), in support of his claim that the trial court abused its discretion by telling defense counsel to look at Bux. But *Harris* simply recites the general proposition that the court should not suggest that defense counsel is presenting the case in an improper manner. *Harris*, 123 Ill. 2d at 137. In *Harris*, the supreme court found no impropriety in the trial court's

characterizing defense counsel's cross-examination as " 'pure speculation' " when it was, in fact speculative. *Id.* at 137-38. *Harris* does not lend support to defendant's argument that the court's comments on defense counsel's lack of civility were improper.

¶ 138 Nor does *Ferguson*. In *Ferguson*, the trial court's impatience with defense counsel conveyed the impression "that defense counsel's presentation would not be important for the jury to consider." *Ferguson*, 11 Ill. App. 3d at 917. Here, the trial court conveyed no impression regarding the substance of the defense case. Instead, it simply told defense counsel to look at the witness during cross-examination, in order to ensure that the trial was being conducted with proper decorum. There was no abuse of discretion in the trial court's comment.

¶ 139 Defendant also contends that the trial court displayed improper impatience with defense counsel when, during M.C.'s recross examination, the court told counsel to "[g]et to the point" and, during Bux's cross-examination, the court told defense counsel that "time is of the essence here, too," and that he should not ask Bux about "his general impressions of what is important to investigate crime." We disagree that the comments were unreasonable. The court made these statements in order to expedite defense counsel's repetitive questioning on minor points. See, *e.g.*, *Harris*, 123 Ill. 2d at 138 (trial court's comments not an abuse of discretion where they "amounted to no more than an attempt to move the already lengthy cross-examination along").

¶ 140 Finally, defendant claims that the trial court improperly criticized defense counsel twice when it interrupted defense counsel's cross-examination in order to recount what the testimony of the witnesses had been. First, during Officer Ugorek's cross-examination, defense counsel attempted to impeach M.C. by asking Ugorek whether M.C. had told the police that defendant pointed the gun at her and pulled the trigger, and the court replied:

> "But the cross examination was not whether or not she told the police that. There were questions concerning what the police were told. And there wasn't a question about whether or not the gun was pointed at her. It was testimony that she told the police the gun was black and she didn't say a semi-automatic, she said the bullets fell out from somewhere and it hit her in the face. That's what she told the police. She told them click, that the gun went click. That's what she said she told the police."

Second, during M.C.'s cross-examination, defense counsel began to ask M.C., "On July 8, 1999, after you got in an argument with your boyfriend, isn't it true—," and the court interrupted, saying, "That's not the testimony." Defendant claims that the trial court's interjections, whether accurate or not, were inappropriate.

¶ 141 We disagree. In the first instance, defense counsel had not asked M.C. whether she told the police that defendant had pointed the gun at her face during the attack. The trial court simply relayed what M.C. had said she told the police in order to correct and clarify the cross-examination of Ugorek. The court did not criticize defense counsel's performance; it sought to ensure that the cross-examination remained accurate and explain M.C.'s testimony so that counsel would not persist in the incorrect line of questioning. See *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 77 (trial court did not err in interrupting cross-examination where its "commentary [was] limited to explanations of what the defense counsel *** was doing incorrectly").

¶ 142 And in the second instance, the trial court again attempted to clarify which date defense counsel was asking M.C. about: the day she was raped or the day she first saw defendant on the street several days earlier. The court noted that counsel's questions had been "going back and forth" between the two dates and asked counsel to "start all over again" for clarity's sake. Then,

counsel proceeded to cross-examine M.C., without interruption. We see no prejudice in the trial court's attempt to clarify the cross-examination of M.C. See *People v. Young*, 248 Ill. App. 3d 491, 502 (1993) ("[A] trial judge may act to clarify and expedite the examination of a witness without prejudicing the defendant.").

¶ 143 With respect to the trial court's interruptions of defense counsel's cross-examination, defendant cites *Ferguson* and *People v. Rothe*, 358 Ill. 52 (1934). But, as we noted above, *Ferguson* is distinguishable because, in *Ferguson*, the trial court's comments suggested that it had an opinion regarding the strength of the defense case. *Ferguson*, 11 Ill. App. 3d at 917. Here, the trial court conveyed no such impression to the jury. Moreover, it is not even clear whether the court in *Ferguson* found the trial court's comments to be reversible error, as it said that the comments "along with [other] previously mentioned errors" required a new trial. *Id.* Thus, even if the trial court had made comparable comments in this case—which, we stress, it did not—we fail to see how *Ferguson* would support the notion that such comments alone require reversal.

¶ 144 Similarly, we find *Rothe* to be distinguishable. In *Rothe*, defense counsel objected to the prosecutor's improper remarks during closing argument, but the trial court responded, " 'Sit down, sit down; you can't address the jury again.' " *Rothe*, 358 Ill. at 56. The court also engaged in an argument with defense counsel and threatened to fine defense counsel for contempt. *Id.* at 55-56. The supreme court found that it was improper for the trial judge to "hold the altercation *** with counsel," to "say, in the presence of the jury, that he was going to fine counsel for contempt of court when no contempt of court had been committed," and "to impatiently tell counsel for the defendants to sit down when counsel was making a proper objection that should have been sustained." *Id.* at 56. In this case, the trial court's comments were not improper and did

not approach the level of animosity on display in *Rothe*. Thus, *Rothe* does not support defendant's position that he is entitled to a new trial due to the trial court's comments.

¶ 145 C. Prosecutorial Misconduct

¶ 146 Next, defendant argues that the State made numerous improper remarks during its closing arguments that deprived him of a fair trial. Prosecutors have a great deal of latitude during closing argument and may comment upon and draw reasonable inferences from the evidence presented. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). But they may not argue assumptions or facts not contained in the record. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). When reviewing alleged impropriety in the State's closing arguments, we view the arguments in their entirety and consider the challenged remarks in context. *Id.*

¶ 147 Prosecutorial misconduct in closing argument warrants a new trial if the improper remarks were a material factor in the conviction. *People v. Linscott*, 142 Ill. 2d 22, 28 (1991). In other words, we will find reversible error "only if *** the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error." *People v. Runge*, 234 Ill. 2d 68, 142 (2009).

¶ 148 The parties disagree about the proper standard of review. There appears to be a conflict among Illinois Supreme Court cases regarding the correct standard for reviewing a prosecutor's remarks during argument. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32. The decisions in *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), and *People v. Sims*, 192 Ill. 2d 592, 615 (2000), suggest that we should review this issue *de novo*. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993), suggests that we should review this issue for an abuse of discretion. We need not take a position in this case, as, for the reasons stated below, defendant's claims fail under either standard.

¶ 149 Defendant has categorized the allegedly improper remarks into four categories. We address each of these categories in turn.

¶ 150 1. Inflammatory Remarks

¶ 151 Defendant first claims that the State improperly inflamed the jury's passions by attempting to demonize him, while simultaneously inspiring pity for M.C. Defendant cites several instances where the State disparaged him and praised M.C., creating "an improper theme that ran throughout the State's [argument], which was calculated to garner sympathy for M.C.'s misfortunes and portray [defendant] as a vile animal who preyed on her."

¶ 152 Defendant argues that several comments by the prosecution portrayed him as a bad person and "resorted to name-calling tactics." The prosecutor argued that defendant "said some very disgusting, disrespectful, foul-mouthed things" in the jury's presence, said that defendant "was disgusting," and said that defendant used "vulgar language." Moreover, the prosecutor argued that defendant did not comply with the rules of decorum in the courtroom, which, according to the prosecutor, suggested that defendant did not "like the rules" and would not "comply with society's rules."

¶ 153 We disagree that these comments were improper. A prosecutor may comment on a witness's credibility by drawing an inference from the witness's demeanor. *People v. Nitz*, 143 Ill. 2d 82, 120 (1991); *People v. Bratton*, 178 Ill. App. 3d 718, 725 (1989). Here, the prosecutor's reference to the manner in which defendant testified was simply a reference to defendant's demeanor. The record shows that defendant did use vulgar language while on the stand—he described M.C.'s breasts as "titties" and said that he "fingered" her, that he performed oral sex on her to "get her off," and that he had anal sex with her "doggy style." Moreover, defendant offered

to "get up and demonstrate" the sexual position he and M.C. used. Thus, the prosecutor properly commented on defendant's crude demeanor while he was testifying.

¶ 154 And the prosecutor did not rely on an inference that defendant's vulgar language, standing alone, gave rise to an inference of his guilt. Instead, the prosecutor argued that his use of those words corroborated M.C.'s testimony that, three or four days before the assault, defendant approached her and said disrespectful things to her. Thus, the prosecutor's arguments regarding defendant's vulgar testimony were based in the evidence.

¶ 155 Defendant cites *People v. Davis*, 287 Ill. App. 3d 46 (1997), and *People v. Bitakis*, 8 Ill. App. 3d 103 (1972), in support of his argument that the prosecutor's references to defendant's demeanor were improper. But in both *Davis* and *Bitakis*, the impropriety stemmed from the prosecutor offering his own opinion as to a witness's credibility or the defendant's guilt. See *Davis*, 287 Ill. App. 3d at 57 (improper for prosecutor to argue "that defense witnesses were the worst liars he had ever seen testify"); *Bitakis*, 8 Ill. App. 3d at 106-07 (improper for prosecutor to say, " 'I am not ready to jeopardize my reputation by putting a false witness on that stand. If I thought the [victim's] family put her up to testifying she would not have hit that stand because it is not worth it to me,' " and " 'I submit we learned the evidence as it came to us, and there was not one bit of fabricated evidence that went on this stand,' " and " 'Do you think the state's attorney's office—you people yourself are interested in indicting and convicting *** the wrong man (sic)?' "). Here, the prosecutor did not rely on her personal opinion to impugn defendant's credibility; she relied on defendant's demeanor while testifying and M.C.'s testimony that defendant said disrespectful things to her. We do not find those comments to be improper.

¶ 156 Defendant also argues that the prosecutor improperly called defendant "a criminal" and "a sexual predator." It is improper for the State to characterize the defendant as an evil person or to

suggest that the jury's decision is one between good and evil. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). But the prosecution may comment on the evil effects of crime so long as that comment is based on "competent and pertinent evidence." *Id.* at 121-22. And this court has found no impropriety in negative characterizations of defendants, so long as those characterizations are properly based on the evidence admitted at trial. See, *e.g.*, *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 45 (not improper to call defendant " 'rapist' " and " 'child molester' " where those characterizations were "reasonable inferences drawn from the specific acts that [he] committed"); *People v. Taylor*, 345 Ill. App. 3d 1064, 1081-82 (2004) (not improper to call defendant a " 'predator' " where evidence showed that defendant developed relationship with victim before sexually assaulting her).

¶ 157 Here, calling defendant a "criminal" and "predator" was not improper because it was supported by M.C.'s testimony. She said that defendant crept up behind her near a darkened alley, grabbed her, dragged her into the alley, and raped her. Based on that evidence, it was not improper for the prosecutor to draw the inference that defendant was a criminal and a predator.

¶ 158 Defendant cites *People v. Johnson*, 208 Ill. 2d 53 (2004), *People v. Ivory*, 333 Ill. App. 3d 505 (2002), and *People v. Williams*, 99 Ill. App. 3d 919 (1981), but the improper comments in those cases are distinguishable because, in each of those cases, the prosecutors directly analogized the defendants to animals. See, *e.g.*, *Johnson*, 208 Ill. 2d at 80 (prosecutor to referred to defendant as animal by saying, " 'If you run with the pack, you share the kill.' "); *Ivory*, 333 Ill. App. 3d at 517 (prosecutor "directly referred to defendant as an animal," saying that defendant was "just a wolf in sheep's clothing" and "was part of a pack of predators" (internal quotation marks omitted)); *Williams*, 99 Ill. App. 3d at 924 (prosecutor characterized the defendants as "liars," "rapists," "perverts," "disgusting animals," and "beasts" (internal quotation marks

omitted)). Here, the prosecution did not analogize defendant to an animal. Instead, it characterized him as a criminal and predator—a negative characterization, to be sure, but not an unwarranted one in light of M.C.'s testimony.

¶ 159 Defendant further argues that the prosecutor improperly attempted to engender sympathy for M.C. by referring to the hardships in her life and the difficulty she experienced by testifying. Specifically, defendant notes that the State spoke about M.C.'s "personal problems"—the fact that she had a baby at such a young age and that her mother was incarcerated—and that defendant added to her personal issues. Moreover, defendant notes that the prosecutor stressed that M.C. had overcome great obstacles to testify:

> "[D]o you really think that a woman like [M.C.] who came in this courtroom, who is living on her own, who has two children, who has basically gotten her life completely together so that she is self-sufficient, and she has overcome every problem she had as a teenager, that eight years later she is going to put herself *** through[ ] coming into this courtroom, to have to describe those type of disgusting acts that this defendant forced her to perform?"

And, defendant argues, the prosecutor also improperly described the steps leading to the witness stand as "the two biggest steps that [she] has had to make in her entire life" and "like Mount Everest to [her]."

¶ 160 We disagree that these comments were improper. The references to M.C.'s troubled adolescence were based on the evidence presented at trial. She testified to the fact that she had a baby while she was a minor, that the baby had been taken from her custody, and that her mother was incarcerated. And the defense used this evidence to its advantage in its own argument, arguing that M.C. had framed defendant because he refused to pay her more than $23 for sex,

which she wanted to use to buy shoes for her son, and that M.C. was sexually experienced. Just as defense counsel could refer to that evidence, the prosecution could do the same. Moreover, this court has found that the same reference to the witness stand as "Mount Everest," while hyperbolic, is not prejudicial. *Jackson*, 2012 IL App (1st) 092833, ¶ 44. We see no error in the prosecutor's references to M.C.'s background.

¶ 161 2. Referencing M.C.'s Trauma

¶ 162 Defendant also takes issue with the prosecution's references to the psychological trauma that M.C. experienced as a result of the assault. According to defendant, these comments were not based on evidence in the record and violated the trial court's ruling on defendant's motion *in limine*, which precluded the State from introducing evidence of the psychological effects of the assault on M.C.

¶ 163 During closing argument, the State may not make statements designed to elicit sympathy for the victim. *People v. Flax*, 255 Ill. App. 3d 103, 110 (1993). But, as we noted above, the State may comment on the demeanor of a witness when discussing the witness's believability (*Nitz*, 143 Ill. 2d at 120) and draw inferences from the evidence presented (*Hudson*, 157 Ill. 2d at 441).

¶ 164 At the beginning of the State's opening closing argument, the prosecutor said that defendant had "added to [M.C.'s] personal issues, the trauma, the stigma of becoming a rape victim." Defendant objected. The trial court instructed the jury that "closing arguments are to be confined to the evidence and the reasonable inferences to be drawn from the evidence" and overruled the objection. The prosecutor continued, "She now had to deal with the fact that she had been traumatized by this deviant pervert for his own sexual pleasures. And when she testified in this courtroom just yesterday and the day before, you can tell that [M.C.] still carries

that trauma with her every single day." Defendant again objected, and the court gave the same instruction to the jury and overruled the objection.

¶ 165 We disagree with defendant that this argument was not based on the evidence presented. The State based its argument regarding M.C.'s trauma on her demeanor while she testified, an area on which it was free to comment. The record demonstrates that M.C. was emotional and cried during some portion of her testimony. The State did not overstep its bounds commenting on her demeanor as a reason for the jury to believe her testimony.

¶ 166 Defendant also takes issue with the State's comment that, when M.C. arrived at the emergency room, "[s]he was still shaken" and that she "was flinging about because she had just sustained this kind of trauma." But this argument was properly based on Dr. Schmitt's testimony that M.C. appeared "extremely distraught" and "quite active in the examination room," and that she was making "a lot of arm movement." And, once again, the State's comment was not designed as an appeal to the jurors' sympathy for M.C.; it was an attempt to counter the notion that M.C. had fabricated her testimony. The State committed no error in arguing that M.C.'s testimony was credible because she appeared to have experienced some kind of trauma on the night of the incident.

¶ 167 With respect to whether these comments violated the motion *in limine*, defendant concedes that "the State did not introduce any evidence at trial pertaining to the psychological impact the assault had on M.C." We agree, as M.C.'s demeanor while testifying was not evidence that the State presented. And defendant's motion *in limine* did not seek to constrain the State's ability to argue about its witness's demeanor in closing argument. Thus, we fail to see how the

State's comments in closing argument could have run afoul of any ruling on defendant's motion *in limine*.[3]

¶ 168 3. Misstating DNA and Consent Evidence

¶ 169 Defendant next contends that the prosecution committed misconduct by misstating the DNA evidence and evidence of consent that had been presented during trial. It is well-established that a prosecutor may not misstate the evidence during closing argument. *People v. Carlson*, 92 Ill. 2d 440, 449 (1982).

¶ 170 Defendant first argues that the prosecution misstated the DNA evidence when it argued that DNA "can only be collected from semen" and that defendant "knew that [the State] had the scientific proof that proved that he was the person who penetrated and raped [M.C.]" According to defendant, the evidence actually showed that DNA can be collected from any number of sources, such as blood, saliva, hair roots, or skin. And, defendant argues, the presence of defendant's DNA in M.C.'s anal swab was not scientific proof that he "raped" M.C. because it simply showed that they had intercourse. The DNA evidence proved nothing regarding force.

¶ 171 Even if we were to assume that the State misstated the evidence when it said that DNA "can only be collected from semen," we can find no prejudice to defendant from this statement for several independent reasons. First, the statement was a brief comment made within the context of a lengthy argument. See *Runge*, 234 Ill. 2d at 142 (comments in closing argument not prejudicial where they "were brief and isolated in the context of lengthy closing arguments"). Indeed, the State was not even able to finish its sentence before defense counsel objected, and the State did not reiterate the comment after the objection was overruled. And when overruling the

[3] We also note that the trial court never actually ruled on defendant's motion, once the State agreed not to present any such evidence.

objection, the trial court further alleviated any prejudice by instructing the jury that the jury should not consider arguments that were not supported by the evidence. See *People v. Garcia*, 231 Ill. App. 3d 460, 469 (1992) (instruction that arguments are not evidence tends to cure any prejudice from improper remarks).

¶ 172 Perhaps most importantly, when read in context, the prosecutor was arguing that the jury could find defendant guilty of the vaginal-rape charges despite the absence of semen or DNA in M.C.'s vagina. But defendant was *acquitted* of the charges related to vaginal sexual assault, so we fail to see how that statement possibly could have prejudiced him.

¶ 173 With respect to the prosecutor's statement that the DNA evidence proved that defendant raped M.C., the prosecutor did not misstate the evidence. Instead, the prosecutor was simply relying on M.C.'s testimony that defendant had raped her, taken in conjunction with the DNA evidence showing that defendant's semen was found on her rectal swab. In concluding that the DNA proved that defendant was the one who raped M.C., the prosecutor merely assumed the truth of M.C.'s testimony that she had been raped, which she was entitled to do. See *Bratton*, 178 Ill. App. 3d at 725 (in closing argument, "[t]he prosecutor is *** entitled to assume the truth of the State's evidence").

¶ 174 Defendant also contends that the assertion that the DNA proved that defendant penetrated M.C. "drastically overstated the strength of the State's evidence" because the DNA profile found on M.C.'s rectal swab was incomplete, and thus could only be matched in part to defendant's profile. Defendant ignores the fact that Kelly Biggs, the State's expert in forensic DNA analysis, expressly stated that her opinion was that the male DNA profile found on M.C.'s rectal swab "matche[d] the DNA profile of [defendant]." Thus, the prosecution simply relied on its expert's opinion in arguing that the DNA came from defendant. While the fact that the profile taken from

the rectal swab was incomplete was certainly a point that could have been raised regarding the weight of the DNA evidence had defendant elected to challenge it, the State was not required to poke holes in its own evidence during closing argument.

¶ 175 Defendant cites *Linscott*, 142 Ill. 2d 22, and *People v. Giangrande*, 101 Ill. App. 3d 397 (1981), in support of his argument that the prosecution improperly overstated the value of the State's DNA evidence, but we find both cases to be distinguishable because, in those cases, the prosecution improperly recounted its expert witnesses' opinions. In *Linscott*, the prosecutor argued that its hair-comparison evidence showed that the defendant's hair " 'matched' " hair found on the victim's body. *Linscott*, 142 Ill. 2d at 34. The supreme court found this statement to be "improper in light of the refusal of the State's own expert to use the word ["match"] when testifying about the evidence. *Id.* at 35. Rather, the State's expert simply said that the hairs were " 'consistent,' " and, thus, the State's use of the of the word "match" was not supported by the evidence. *Id.* Similarly, in *Giangrande*, the State's hair comparison expert testified that three hair fragments "could have originated from [the] defendant." *Giangrande*, 101 Ill. App. 3d at 403. But, in closing argument, the prosecutor repeatedly said that it was the defendant's hair. *Id.* at 402-03. Thus, "the prosecutor overstated the evidence." *Id.* at 403. Here, the State did not misrepresent its expert's opinion like the prosecutors in *Linscott* or *Giangrande* because Biggs testified that defendant's DNA matched the DNA from the rectal swab. Thus, the prosecutor simply relied on Biggs's opinion in her closing argument.

¶ 176 4. Suggesting Defendant Fabricated Consent Defense

¶ 177 Finally, defendant claims that the prosecution improperly suggested that he had fabricated his consent defense because, in light of the DNA evidence, it was the only way he

could escape liability for M.C.'s rape. Specifically, defendant highlights the following comment in the State's opening closing argument:

> "He knew he couldn't come in here and argue that it wasn't him. He knew that we had the scientific proof that proved that he was the person who penetrated and raped [M.C.] So when it comes to the defense of consent, that's the only way he can talk his way out of this crime."

And, defendant notes, the prosecution resumed this argument in its rebuttal closing argument:

> "[T]he defendant has had a long time to consider his story and to consider how it is going to conform to the evidence here.
>
> * * *
>
> He knows the evidence against him prior to trial. He knows about that DNA association. The detective told him a long time ago about that. So he has had a long time to conform his version, his story to what the evidence would be. And only one person gets to sit here while the witnesses come in and testify, only one person, and that's [defendant].
>
> So he sat here and listened to the witnesses, and he conformed his version, but it still doesn't make sense. And he has no choice when he listens to [M.C.] and he listens to the DNA evidence, he has no choice to say but [*sic*] it is consent."

¶ 178 "Unless based on some evidence, statements made in closing arguments by the prosecution which suggest that defense counsel fabricated a defense theory, attempted to free his client through trickery or deception, or suborned perjury are improper." *People v. Emerson*, 97 Ill. 2d 487, 497 (1983). But a prosecutor may challenge the defendant's veracity if he testifies (*People v. Tenner*, 157 Ill. 2d 341, 368-69 (1993)), and " 'it is not improper to call the defendant

a "liar" if conflicts in the evidence make such an assertion a fair inference.' " *People v. Rivera*, 262 Ill. App. 3d 16, 27 (1994) (quoting *People v. Manley*, 222 Ill. App. 3d 896, 910 (1991)).

¶ 179 In this case, we do not find the prosecutor's argument to be improper because it was not directed at defense counsel. Instead, the prosecutor attacked defendant's credibility and argued that defendant had made up his consent defense in order to escape liability without having to challenge the DNA evidence. The State could draw the inference that defendant elected to do so based on the evidence at trial that defendant had submitted a buccal swab and that, before trial, he had been told that his DNA was found in M.C.'s rectal swab.

¶ 180 We find this court's analysis in *People v. Murillo*, 225 Ill. App. 3d 286 (1992), instructive. There, as in this case, the prosecution argued that the defendant had fabricated his testimony in order to avoid a conflict with physical evidence linking him to the crime. *Id.* at 296-97. Specifically, in *Murillo*, the prosecutor argued that the defendant testified that he committed the shooting in self-defense only because he learned that gunshot residue tests showed that he had fired a gun: " '[T]hat [gunshot residue] report showed that he had handled or discharged a firearm. Well, gee, alibi isn't going to work anymore. I guess I have to come up with something different. So now I'll say it was self-defense.' " *Id.* at 297. This court noted that, although the argument suggested that the defendant had fabricated his trial strategy, "it [did] not necessarily imply that the [defense] attorney had any part in its creation, or was even aware that it was false." *Id.* at 298. Rather, "[t]he prosecution's remarks were directed to the credibility of the defendant and the merits of his story." *Id.* at 299. This court found that the argument was thus proper, as it is not improper to charge a defendant with lying, so long as that inference may be drawn from the evidence. *Id.*

¶ 181 The prosecutor's argument in this case was very similar to the argument at issue in *Murillo*. In both cases, the prosecutors argued that the defendants had constructed their testimony in such a way as to exculpate themselves without taking on the fact that physical evidence tied them to the crimes. Like the court in *Murillo*, we find no impropriety in this argument in the absence of any direct accusation of fabrication leveled at defense counsel.

¶ 182 Defendant cites *State v. Williams*, 525 S.W.2d 538, 549 (Minn. 1994), and *People v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005), cases where the Minnesota Supreme Court found that arguments similar to the one in this case are improper. While we do not disagree that these cases support defendant's argument, *Murillo* constitutes relevant Illinois precedent on this issue, and we need not resort to these out-of-state cases. And we find that *Murillo* adheres to the general principle in Illinois that prosecutors should be free to attack a defendant's credibility where he or she elects to testify. *Tenner*, 157 Ill. 2d at 368-69. We decline to follow *Williams* or *MacLennan*. We find no error in the State's closing arguments.

¶ 183 D. Mandatory Supervised Release

¶ 184 Defendant next argues that the trial court improperly imposed a three-years-to-life mandatory supervised release (MSR) term as part of his sentence in violation of the constitutional prohibition of *ex post facto* laws. Defendant notes that, at the time of his offense in 1999, a sentence for aggravated criminal sexual assault required a three-year MSR term. 730 ILCS 5/5-8-1(d) (West 1998). In 2005, the MSR term was amended to be three years to natural life. Pub. Act 94-165 (eff. July 11, 2005). Defendant notes that, according to the Illinois Department of Corrections' (IDOC) website he is serving the three-year-to-life term embodied in the current statute. And, according to defendant, this retroactive imposition of the lengthier MSR term constitutes improper *ex post facto* punishment.

¶ 185 The State responds by noting that, at defendant's sentencing hearing, the trial court expressly sentenced him to "a period of [MSR] or parole for three years." Thus, the State argues, the trial court imposed the correct, 1999 MSR term. The State contends that the "administrative decision" of the IDOC to alter defendant's MSR term "should be addressed through litigation in which IDOC is a party."

¶ 186 We agree with the State. There was no error in the trial court's oral pronouncement of the sentence or on the mittimus, as both reflect a three-year MSR term. The fact that IDOC's website lists defendant's MSR term as three years to life does not show that the *trial court* committed any error. And the trial court's judgment is the judgment before us in this appeal; not any subsequent decision or clerical error by IDOC. Because the trial court made no error in imposing the MSR term, there is nothing to correct in this appeal.

¶ 187 Defendant cites *People v. Reedy*, 186 Ill. 2d 1 (1999), in support of his contention that we should address the IDOC's error. But in *Reedy*, the defendant challenged the constitutionality of a law that required the imposition of certain sentencing requirements as "a part of every sentence." *Id.* at 7. In other words, the trial court necessarily applied the statute by sentencing the defendant. But here, the trial court has not taken any allegedly erroneous action because it did not impose any allegedly unconstitutional MSR term. Instead, the trial court imposed the very MSR term that defendant asks us to impose.

¶ 188 Defendant also asks us to remand for a new mittimus that says that his "MSR term is strictly limited to three years." But the current mittimus says, "THREE YEARS MANDATORY SUPERVISE [*sic*] RELEASE." We fail to see why additional direction is necessary. We affirm the trial court's imposition of a three-year MSR term.

¶ 189 E. Presentence Credit

¶ 190 Finally, defendant contends, and the State agrees, that he is entitled to an additional 28 days' credit for time he spent in custody prior to his sentencing. A defendant is entitled to day-for-day offset of his sentence reflecting the number of days spent in custody before he was sentenced. 730 ILCS 5/5-4.5-100(b) (West 2012). Here, defendant was in custody from October 3, 2007, the date of his arrest, to April 22, 2013, the day of his sentencing, a total of 2,028 days. But his mittimus only shows that he has 2000 days' credit. Thus, defendant is entitled to a new mittimus correctly reflecting the 2,028 days he spent in custody before he was sentenced.

¶ 191 III. CONCLUSION

¶ 192 For the reasons stated, we affirm defendant's conviction and sentence. We direct the clerk of the circuit court to correct the mittimus to reflect 2,028 days of presentence custody credit.

¶ 193 Affirmed; mittimus corrected.