

No. 1-12-0094

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 10 CR 16484
)	
SAMUEL SLEDGE,)	Honorable
)	Joseph G. Kazmierski,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Liu concurred in the judgment.

ORDER

Held: We hold defendant was not denied effective assistance of counsel in this matter. Defendant is procedurally defaulted from bringing his claims that the police unlawfully entered his property and that the circuit court improperly prohibited him from eliciting testimony concerning alleged inconsistent statements by the victim because he has not shown plain error. We further hold defendant's sentence does not violate the proportionate penalties clause of the Illinois Constitution.

¶ 1 Defendant, Samuel Sledge, was charged by indictment with nine counts of aggravated criminal sexual assault, criminal sexual assault, and aggravated unlawful restraint. After a bench trial, he was found guilty of aggravated criminal sexual assault. He was sentenced on 3 of the counts to consecutive terms of 6 years, plus an additional 10 year enhancement for each charge because defendant threatened the victim with a weapon other than a firearm, for a total of 48 years in prison. Defendant raises four issues for our review: (1) whether he was denied the effective assistance of counsel based on his counsel's failure to file a motion to suppress statements he made to the police; (2) whether evidence obtained from his garage should have been suppressed due to alleged unlawful entry onto his property; (3) whether the circuit court improperly prohibited him from eliciting testimony regarding alleged inconsistent statements made by the victim to police and hospital personnel; (4) and whether his sentence violates the proportionate penalties clause of the Illinois Constitution. We hold defendant was not denied the effective assistance of counsel. Defendant is procedurally defaulted from bringing his claims that the police unlawfully entered his property and that the circuit court improperly prohibited him from eliciting testimony concerning alleged inconsistent statements by the victim because he has not shown plain error. We further hold defendant's sentence does not violate the proportionate penalties clause of the Illinois Constitution.

¶ 2 JURISDICTION

¶ 3 The circuit court sentenced defendant on November 15, 2011. Defendant timely filed his notice of appeal on November 18, 2011. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); R. 606 (eff. Feb. 6, 2013).

¶ 4

BACKGROUND

¶ 5 On May 23, 2011, defendant filed a written motion to quash arrest and suppress evidence arguing his arrest was made without the authority of a valid search or arrest warrant or probable cause. He asked that evidence discovered both directly and indirectly as a result of the arrest be suppressed. At the hearing on defendant's motion, however, defense counsel asked only that defendant's cell phone, which was seized from his house, be suppressed.

¶ 6 At the suppression hearing, defendant first called Officer Michael Chatham of the Chicago police department as a witness. Officer Chatham testified that around 3:05 p.m. on August 19, 2010, he was in the vicinity of 907 North Lawyer Avenue, in Chicago, Illinois. He heard a "flash message over the radio that a criminal sexual assault had occurred" nearby. He testified that the description given over the flash message was "a male black, six-foot tall, short hair, buck teeth, and he had a white tank top and blue denim shorts with a square cut design style on the shorts." Approximately ten minutes after receiving the flash message, Officer Chatham saw defendant, an individual matching the description, standing in his yard at 907 North Lawler. The yard was enclosed by a fence with a closed gate. He could not recall if the gate was locked or not. Officer Chatham explained what happened next in the following colloquy with defense counsel:

"Q. when you saw [defendant], what did you do?

A. My partner and I proceeded to question him. My partner asked him if he cut hair, and he answered yes. Then we entered his yard, and my partner asked him if he could open the garage door, if he could look inside. He agreed and he opened

the door. We went in, and we saw a barber chair inside of the garage.

Q. Now, initially when you walked onto that property, did you have permission to go onto that property? Did [defendant] give you permission to come onto the property?

A. No. I don't recall asking him. I don't recall if my partner asked him for permission or not.

Q. So he opened the garage voluntarily you said?

A. He did, yes.

Q. And you saw a barber's chair?

A. Yes.

Q. Then what occurred?

A. And then we exited the garage and we stepped into the yard and he was Mirandized and placed into custody at that time."

Officer Chatham admitted he did not possess a search or arrest warrant for the premises or defendant at the time of defendant's arrest.

¶ 7 On cross-examination, Officer Chatham testified that his partner that day was Officer Joe Berlage. Officer Chatham clarified that when they got to the general area, the officers "toured the area looking around for anyone around garages." They did so on foot. While walking in an alley, a citizen approached the officers. Officer Chatham asked the citizen if anybody cut hair out of their garage because "that's what specifically came over the air on the call." There was also specific information regarding a barber chair in a garage. The citizen directed them to defendant's yard. Officer Chatham testified that as they approached defendant, he began talking

to defendant. Neither of their service weapons were drawn. Officer Chatham estimated that the conversation with defendant at this point in time, prior to entering defendant's back yard, was "less than a minute or so." The officers' service weapons were also not drawn when they entered defendant's back yard. After conversing with defendant for "about a minute or so," Officer Berlage asked defendant if he could look in the garage. Defendant opened the door to the detached garage. Defendant was placed into custody after Officer Chatham saw the barber chair.

¶ 8 On redirect-examination, Officer Chatham testified that when he first came into contact with defendant, although he did not have his weapon drawn, he was in uniform with his police badge visible. Officer Chatham testified that upon initially approaching defendant, he was positioned "side by side in the alley" to defendant. When asked by defense counsel "then at some point it changed from side to side to what," Officer Chatham answered that he "went around the garage," while Officer Berlage "went directly over the gate that was just in front of" defendant. Officer Chatham agreed that defendant consented to allow the officers to enter the garage. Officer Chatham clarified that although the garage is not attached to the house at 907 North Lawler, it is on the property.

¶ 9 Defendant next called Georgia Daniel. Daniel testified that she knows defendant's father and that defendant cuts her hair. When she arrived at defendant's house on the day of the incident, she observed defendant "[s]tanding there" with three police officers. The officers were asking defendant questions. She could not hear the conversation. She then observed the officers place defendant under arrest. On cross-examination, Daniel testified that when she first pulled up to defendant's yard, in the back alley, she saw "the police officers jumping the gate." She saw two officers go over the fence.

¶ 10 Barbara Arttaway testified on behalf of defendant that she lives at 907 North Lawler with her brother, sister, and defendant, who is her nephew. Arttaway testified regarding the police's entry into defendant's house and subsequent seizure of defendant's cell phone.

¶ 11 The State called Officer Pachnik on its behalf to testify regarding his seizure of defendant's cell phone from his house. On August 19, 2010, Officer Pachnik and his partner were assigned to 907 North Lawler to guard the crime scene. After seizing the cell phone, he gave it to Detective Susan Ruck.

¶ 12 Detective Ruck testified that she had been assigned to investigate a criminal sexual assault with her partner, Detective Perostianis. She had already met with the complaining witness when she went to 907 North Lawler. She estimated that she arrived at the property at 4:30 in the afternoon. Detective Ruck testified that the complaining witness had told her that the offender had used a cell phone "to videotape him and her having sex." Detective Ruck testified that when she arrived on the scene, she explained the facts concerning the gray cell phone to the officers present. Detective Ruck took custody of the gray cell phone from Officer Pachnik, who had initially recovered the phone, but did not look at any of the electronic files at that point in time. The assistant State's Attorney (ASA) conducting direct examination then asked Detective Ruck about the phone, and the following colloquy occurred.

"MS. EBERSOLE [ASA]: At some point in time did you and Detective Perostianis begin talking to defendant about this gray cell phone?"

DETECTIVE RUCK: Yes.

MS. DONALD [Defense Counsel]: *** objection, relevance.

THE COURT: Sustained.

MS. EBERSOLE: At some point did you discuss with the defendant whether or not you could have consent to search the cell phone?

MS. DONALD: *** same objection, relevance.

THE COURT: Aren't we talking about the seizure of the phone from the house?

MS. EBERSOLE: Well, your Honor, if I may, she is asking that the phone be suppressed.

THE COURT: Right.

MS. EBERSOLE: The theory is that we have two separate issues here. One is the seizure of the phone, which is separate and apart from the actual search of the phone, and I believe that if I am allowed to inquire from the detective, the evidence would show that this defendant gave permission to search the cell phone.

THE COURT: I will hear it."

Detective Ruck went on to testify that at approximately 6:05 in the evening on August 19, 2010, they asked defendant if they could search the phone. Defendant responded that "he didn't do anything wrong and he would allow us to search the phone as long as we only looked at the video from the 19th of August." She had defendant sign a written consent to search form. Detective Ruck testified that prior to defendant giving his consent, she had not looked at any of the contents of his phone. On cross-examination, Detective Ruck testified that she did not know how Officer Pachnik entered the residence. She did not see whether the door was ajar or locked.

¶ 13 On July 28, 2011, the circuit court issued its findings on the motion to quash arrest and suppress evidence. The circuit court found a warrantless entry into the house led to the improper recovery of defendant's phone. The circuit court noted that police officers were on the scene for around an hour prior to entry and that "[t]here was no exigencies shown for entering the house." The circuit court reasoned that "[b]ased upon what the police had to do to initially view where the phone was, I can't say there was a proper plain view seizure made of that item." Accordingly, because the circuit court found the entry to be without a warrant or exigency, it granted the motion to suppress. The circuit court found, however, that defendant was arrested with probable cause. Upon the circuit court issuing its findings, the State inquired:

"MS. EBERSOLE [ASA]: Your Honor, was the Court going to address the issue of whether or not the subsequently-signed consent cured the warrantless entry in the sense that although the phone was seized, it was not searched until after the consent was signed?"

THE COURT: Unless the parties can show me differently, I'm saying that the consent did not act as an attenuation based upon the facts that I've been told in this hearing."

¶ 14 On October 12, 2011, just before the trial was set to begin, the State asked the court to clarify its earlier ruling. The following exchange occurred:

"MS. EBERSOLE [ASA]: If I may just ask for a point of clarification. On a prior court date, you heard a motion to suppress evidence and granted that motion. The evidence to suppress was a telephone. I would like to inquire, if the

defendant chooses to testify, would the contents of that telephone be admissible for impeachment purposes only?

I understand we cannot admit it in our case in chief because the Court ruled that it was illegally seized; however, we do believe that we should be able to impeach the defendant with it if he, in fact, gets up there and testifies to something different than what is on the telephone.

THE COURT: I have to hear what he says, if anything, before I make that determination.

MS. DONALD-KYEI [Defense Counsel]: If I may, your Honor, *** I actually brought it as well, because that video was suppressed, whatever was on that video was suppressed, I would ask that any statements that the State seeks to elicit from the police officers that my client allegedly made after that video was viewed, I would ask that they be barred from asking questions regarding any information that came from that video, because your Honor found that it was illegally seized and therefore, poisonous.

Anything that comes from it, whether its questions regarding after the officers watched the video, that's also poisonous. We would ask that they be barred from asking questions. Anything prior to them watching the video, is fine. We don't have a problem with that, but after they watched that video, any questions they asked my client should be - -

THE COURT: This is something that should have been addressed prior to the date of trial from both sides as far as I'm concerned. I'm not going to make that ruling, at this point in time. If the statement - - depending on how the evidence comes in with regards to a statement, if it's offered, I have to see if there's anything that could either officiate whatever information was found in the video and make that determination at a later time.

MS. DONALD-KYEI: No problem sir. Thank you."

¶ 15

Trial

¶ 16 At trial, the State first called the victim, D.S., to testify. D.S. testified that she had met defendant a couple of months prior to the incident. They exchanged phone numbers. D.S. testified that the first time she met defendant, they spent "[n]o more than *** an hour" together in his basement. In the basement they "[w]atched movies and smoked weed." On August 19, 2010, at around 9:30 in the morning, she ran into defendant who was in a green truck. Defendant honked his horn at D.S., who recognized defendant, but had forgotten his name. She talked with him for a few minutes before getting into his car with him. They then drove to his house. D.S. saw people on the porch, who she described as "older." D.S. and defendant went down into the basement, where defendant put on some music, and discussed how "he was selling pills." D.S. testified that defendant asked her whether she wanted "him to give [her] head," to which she responded "No." D.S. testified that she stayed in the basement "no more than*** five minutes" after defendant asked her this question. They then went out the back door to the garage. There was no one else in the garage. D.S. testified that she sat down "on a little flower chair" and defendant was pacing the floor and took a pole out. She described the pole as

a "car jack." After looking through the pole or car jack, D.S. testified that defendant then "came towards [her] in full rage" and accused her of stealing \$75 from him. She did not know what defendant was talking about. Defendant told her that she stole it from him the last time she was at his house. D.S. testified that defendant "checked [her] pockets," but did not find any money. D.S. stated that "he asked me to take my clothes off." D.S. was still sitting in the chair at this point in time, "scared and shocked," while defendant was standing over her with the pole in his hand. D.S. testified that she asked defendant not to hurt her. She removed her pants and underwear. Defendant directed her, while still holding the pole, to get in the flower chair. D.S. testified that defendant became angered because she was too short for the chair, so he "held the pole up against [her] head and he put [her] back upon the black chair, the barber chair." She then got on the barber chair, where defendant then put his penis into her vagina for approximately 15 minutes. She testified she did not want to have sex with defendant.

¶ 17 Defendant next ordered her to perform oral sex on him. She did so out of fear because defendant was holding the pole in his hand and up to her head. She testified she performed oral sex on defendant for five minutes. She cried while this was going on. Defendant then ordered her to turn around whereupon he again inserted his penis into her vagina. Defendant ejaculated inside of her vagina. She testified there were two incidents where defendant forced her to put her mouth on his penis and two incidents where defendant placed his penis inside her vagina. Defendant additionally penetrated D.S.'s anus with his penis and her vagina with his finger. Defendant did not allow D.S. to stop performing the sexual acts until he ejaculated inside her vagina.

¶ 18 Defendant then made D.S. put her clothes back on. He warned her to stop crying or he would not let her out. He gave her a cigarette and told her to leave. She left the garage, went

out through the gangway, out the front and around the corner. She approached an individual selling snow cones on the street and told him that she had just gotten raped and asked if she could use his phone. She called the police and then went home. D.S. testified she went home, instead of staying at the scene, because it was near defendant's house and she was scared. She took the bus home and told her mother what happened. Her mother called the police. The police took her to Loretto Hospital.

¶ 19 On cross-examination, D.S. clarified that she first met defendant at a bus stop. She did not go to defendant's residence the first day she met him. One week later, defendant called her. A week after that, she spent an hour with him in his basement where she smoked marijuana with him. Regarding the events of August 19, 2010, D.S. testified that defendant did not drag her into the garage or use a tire iron or iron pole to coerce her into the garage. D.S. also testified that after being sexually assaulted, she walked down the street to the snow cone vendor crying. D.S. testified that she told her mother that she forgot the name of the man who raped her. She denied telling her mother that defendant used a tire iron to drag her into the garage. D.S. denied ever telling the police that she was dragged into a garage by an unknown man.¹ The following exchange then occurred between counsels and D.S.:

"MS. DONALD-KYEI [Defense Counsel]: Did you tell the police that person that you say sexually assaulted you, followed you from a bus stop?

D.S: No. I told them that I saw somebody previous while I was by my grandma's bus stop. I heard somebody blow the horn, but I didn't know quite who it was.

¹ The circuit court allowed D.S. to answer this question over the State's foundation objection.

MS. DONALD-KYEI: So, you didn't say that the person who followed you from the bus stop, to the police, followed you with a tire iron and dragged you into the garage. You didn't tell the police that?

MS. EBERSOLE [ASA]: Objection.

THE COURT: Sustained.

D.S.: No.

MS. DONALD-KYEI: Did you ever tell the hospital personnel at Loretto Hospital?

D.S.: Ma'am, I don't remember.

MS. EBERSOLE: Objection.

THE COURT: Sustained."

¶ 20 The State next called Terry Myrick to testify. Myrick testified that on August 19, 2010, he was selling snow cones on the corner of Laverne and Iowa in Chicago when "a young lady came up to [him] crying saying she wanted to use [his] phone." When asked for a time frame of when the young lady approached him, Myrick estimated that "it might have been from 1:00 to 2:00, maybe even 3:00, but it was in the afternoon." Myrick described the young lady as "kind of crying, like she was nervous or something." She told Myrick that "someone had raped her." The young lady made a phone call to the police. She spoke with the police two or three minutes before passing the phone back to Myrick. The young lady then walked away and said she was going to see her mother. On cross-examination, Myrick testified that the police showed up 15 or 20 minutes later.

¶ 21 Officer James Berlage testified on behalf of the State. On August 19, 2010, Officer Berlage worked with his partner Officer Chatham. At approximately 3 in the afternoon, they received a flash message regarding a sexual assault. The message described the offender as "a male black in the area of Iowa and Laverne. This individual was wearing blue colored shorts with a box design on the back." Additionally, the message indicated "that the sexual assault had allegedly occurred in a garage in a barber chair." Officer Berlage testified that he and Officer Chatham proceeded on foot in the area indicated once they received the message. Officer Berlage "spoke to individuals, asked if they knew anyone that cut hair out of his garage." Officer Berlage stated that:

"At one point, a citizen had noted that he believed someone cut hair out of his garage which he pointed out through - - north through the alley, which we were able to look down. He was able to give a physical description of that - - by number, which garage [] that it was."

As Officers Berlage and Chatham were walking towards that garage, they saw defendant, who was wearing blue shorts with a box design, "standing on the south side of that garage matching the physical description." They engaged defendant in a conversation while they were standing in the alley next to his garage. This conversation lasted approximately 3 to 5 minutes. Officer Berlage described their entrance onto defendant's property as follows:

"After we learned that he matched the physical description, we spoke with him, asked him if he cut hair, and if he had a barber chair in the garage, which he stated, 'yes,' to both.

At that point, we asked if we could through his gate that led from the alley into the gangway of his garage.

Q. What happened then?

A. [Defendant] discovered he didn't have a key on him to open the lock that would have opened the gate.

Q. So, what did you and your partner do?

A. So, we proceeded - - there was a - - maybe a three to four foot fence. We were able to hop over to the other side of that fence."

They asked if they could look into the garage. Defendant then opened the door and Officer Berlage was able to see a barber chair. They then placed defendant into custody and "Mirandized him." On cross-examination, Officer Berlage described defendant's demeanor as "cooperative," but also "nervous too." Defendant did not hesitate to allow Officer Berlage into the garage. Officer Berlage stated a name was not given in the flash message describing the offense.

¶ 22 ASA Koula Fournier, an attorney with the sex crimes felony review unit of the Cook County state's attorney's office; testified next. On August 19, 2010, she responded to a call a little after 9 in the evening regarding an aggravated criminal sexual assault. She had a 15 minute conversation with detectives Ruck and Perostianis. She then "reviewed the reports that were available" before speaking to D.S., the victim. She also spoke with D.S.'s mother and defendant. ASA Fournier spoke with defendant at approximately 12:10 in the morning on August 20, 2010. She advised him of his Miranda rights and told him that she was a prosecutor

for the State. Defendant indicated that he wished to speak with her. Defendant spoke with ASA Fournier for approximately 40 minutes.

¶ 23 ASA Fournier testified regarding that conversation as follows. Defendant knew the victim from a couple of prior occasions when he saw her on the street on August 19. Defendant was driving at the time and he asked her to come over to his basement, where they "hung out, *** listened to music, and *** smoked cigarettes." Defendant and the victim then went out to the garage, a place they had sex on a prior occasion. Defendant began talking to the victim about \$75 she owed him. The more defendant thought about the money, the angrier he became. ASA Fournier testified that defendant told her:

"they smoked some more cigarettes. The victim got undressed. [Defendant] indicated that they had vaginal intercourse. Again, he indicated how he kept on mentioning the money that the victim owed him, the \$75. He said that he felt that the victim should have sex with him because the victim owed him the money.

He then made the victim open - - spread open her legs, and that he demanded the victim perform several sex acts."

Defendant additionally told ASA Fournier that "he had threatened to smack the victim, and that he may have threatened to hurt the victim with a metal pole that was located on the garage floor." Defendant told ASA Fournier "that he had taken ecstasy a few hours prior, and that that made him crazy, and he just lost it." Defendant indicated to ASA Fournier that the victim cried when he demanded the sexual acts from her. Defendant refused to memorialize his statements in writing.

¶ 24 On cross-examination, ASA Fournier testified defendant never told her that he paid the victim. Defendant also never told her that he asked the victim for the \$75. Defendant did not indicate to ASA Fournier that he forced the victim to get undressed, nor did he tell her that he held a metal pole on the victim. ASA Fournier testified that defendant also did not tell her that the victim asked defendant to stop. ASA Fournier described defendant's demeanor as "calm."

¶ 25 Juan Davis, a former cellmate of defendant's, testified on behalf of the State. Davis testified defendant would talk to him about his case while they were cellmates and that defendant "bragged about what he did to her." Davis testified defendant told him the following information regarding his case. The "young lady" had stolen "80 something pills and *** money" from defendant which angered defendant. Defendant told Davis that "' whenever I see that bitch again, I'm goin to fuck her up.' " Defendant stated that when he saw her again, he went with the young lady to his house. His dad and aunt were sitting on the porch. Defendant and the young lady went to the basement. Defendant "rolled up some weed. He had popped some pills already. He popped a couple of more pills while he was down there." They then went out to the garage because his aunt was upstairs. In the garage, defendant reminded the young lady that she stole from him. Davis testified that the young lady "got scared and [defendant] picked up a jack." Davis stated defendant told him that he held the jack "up to her and said, ' I'll bust your motherfuckin head, bitch. You remember me.' " Davis testified "[h]e told her, 'hoe, now take off everything. You gon make up for that motherfuckin day.' " At this time, the young lady was crying and removed her pants. Davis testified that defendant "said the young lady was so scared, she took off her pants then." Defendant told Davis the young lady was on a barber chair when he began to have intercourse, both orally and vaginally, with her. Defendant indicated to Davis that he did not use a condom. He told Davis that he "got that

bitch back" and that he "should have killed that motherfuckin bitch that day." Defendant let the young lady out when she calmed down. Defendant told Davis that he saw her leave and use a man's phone. Defendant assumed the young lady was calling the police. Defendant told Davis that "' I went up there, I washed up, took a quick wash up, took my clothes off, threw it in the hamper. I put the phone over there on the charger.'" Defendant was smoking a cigarette in his backyard when the police arrived.

¶ 26 Davis admitted that he had gotten into a fight with defendant while they were cellmates. Davis testified that he was sick of defendant bragging "about what he did." Defendant told the police, and Davis was moved to Kankakee jail. Eventually, Davis and defendant were "on the same deck again" where defendant "came at" Davis in the dayroom. Davis stressed that he was not offered anything in return for his testimony. When asked whether he was testifying because he was "mad at [defendant] and you want to get back at him," Davis answered, "No." On cross-examination, Davis denied that he ever went through defendant's mail. Davis testified that the first time he fought with defendant, he had to spend one or two weeks in solitary before being moved to Kankakee.

¶ 27 On October 12, 2011, the circuit court entered several stipulations agreed to by the parties. First, the parties agreed that Christine Weathers, an expert in forensic biology, would have testified that she received the criminal sexual assault kit from this matter. The kit contained a blood standard, vaginal swabs, oral swabs, and anal swabs from D.S., and was received in a sealed condition with a proper chain of custody maintained at all times. She would have testified that she identified semen on the anal and vaginal swabs, and preserved D.S.'s blood standard for future analysis. Weathers would have also testified that she received a buccal swab standard collected from defendant, which she preserved for future DNA analysis.

M. Plaxico, an investigator for the Cook County state's attorney's office would have testified that he collected a buccal swab from defendant on October 6, 2010. Plaxico sealed the buccal swab kit and maintained a proper chain of custody at all times.

¶ 28 The parties further stipulated that Ryan Paulsen, an expert in forensic DNA analysis, would have testified that he conducted DNA analysis on D.S.'s blood standard, vaginal swab, and anal swab from the sexual assault evidence kit. Paulsen would have testified that the female DNA profile from the vaginal and anal swabs matched D.S.'s DNA profile. He also would have testified that he conducted DNA analysis on defendant's buccal swab. Paulsen would have testified that in his opinion, with a reasonable degree of scientific certainty, that the male DNA profile identified from the vaginal swabs matches defendant's DNA profile. Paulsen would have also opined that the male DNA profile identified from the anal swabs cannot exclude defendant.

¶ 29 The parties stipulated that Dr. Carrie Wilson, an emergency room physician at Loretto Hospital in Chicago, would have testified that she collected biological evidence from D.S., which was placed in a criminal sexual assault evidence collection kit. The kit included oral, vaginal, and anal swabs as well as a blood standard. Officer James McDonough, an evidence technician with the Chicago police department, would have testified that he retrieved the kit from Loretto Hospital and that a proper chain of custody was maintained at all times. Investigator J. Walsh would have testified regarding how he transported the buccal swab to the Chicago police department division of forensic services.

¶ 30 The State then rested their case in chief. Defendant made a motion for a directed finding, which the circuit court denied.

¶ 31 Defendant called Officer Vita Zadura of the Chicago police department on his behalf. Officer Zadura testified that at approximately 2:10 in the afternoon on August 19, 2010, she and her partner received an assignment to go to D.S.'s house. Defense counsel asked Officer Zadura whether she had a conversation with D.S., to which Officer Zadura answered, "Yes." The following exchange occurred:

"MS. DONALD-KYEI [Defense Counsel]: And do you remember what that conversation was?

OFFICER ZADURA: Yes.

MS. DONALD-KYEI: Can you tell the Court?

MS. EBERSOLE [ASA]: Objection, your Honor.

THE COURT: Sustained."

Defense counsel continued on with her direct examination of Officer Zadura. Officer Zadura testified that she knew that a sexual assault had occurred and that D.S. was the victim. The following exchange occurred:

"MS. DONALD-KYEI [Defense Counsel]: Did [D.S.] relate to you what had occurred?

OFFICER ZADURA: Yes.

MS. DONALD-KYEI: Did you write a report stating what she told you occurred:

A. Yes

Q. Did she tell you that she had been sexually assaulted?

MS. EBERSOLE [ASA]: Objection, your Honor.

THE COURT: Sustained.

MS. DONALD-KYEI: Your Honor, may I ask the basis?

THE COURT: The basis is you haven't - - I'm not hearing any questions relating to a foundation that you've already laid with the complaining witness in this case. So, if that's not done, any question is hearsay. That's the basis for the objection.

MS. DONALD-KYEI: Your Honor, if I may.

THE COURT: Yes

MS. DONALD-KYEI: When I cross-examined [D.S.], I did ask her about whether she had informed the police that she had been dragged by tire iron into a garage and eventually assaulted.

THE COURT: That's the question you should ask, not just did you make a statement or what did she say.

MS. DONALD-KYEI: Okay. Did [D.S.] tell you that she had been, by force, taken into a garage and sexually assaulted?

MS. EBERSOLE: Objection.

THE COURT: What's that?

MS. EBERSOLE: The objection is that there's no good faith basis, because I don't believe that impeaching question appears in the officer's report.

THE COURT: Does it?

MS. DONALD-KYEI: It states that the victim stated that he had a tire jack and told her to go into his garage.

THE COURT: Objection sustained."

¶ 32 Defense counsel then stopped questioning the witness any further. The State did not cross-examine Officer Zadura.

¶ 33 Defendant next called Detective Susan Ruck of the Chicago police department. Detective Ruck testified that on August 19, 2010, she spoke with defendant. Defendant was read his Miranda rights prior to their discussion. After the hearsay objection put forth by the State was sustained, defense counsel explained that the reason she called Detective Ruck was because ASA "Fournier stated that she never heard my client say that he had offered money to this person." According to defense counsel, Detective Ruck was present at the conversation between defendant and ASA Fournier. Following another objection from the State, which it sustained, the circuit court judge asked Detective Ruck whether she had at least one other conversation with the defendant outside the presence of ASA Fournier, to which Detective Ruck answered "Yes." Detective Ruck testified that she had more than one conversation with defendant in the lock up, one of which ASA Fournier was present.

¶ 34 Defendant next called Barbara Arrtaway on his behalf. Arrtaway testified that she lives with defendant, her nephew, and her brother and sister at 907 North Lawler Avenue. On August 19, 2010, while she was in the backyard, she saw defendant and a young lady going to the garage. The young lady was following defendant. Arrtaway described defendant as having "a pleasant expression, like everyday." He did not appear angry. She did not see defendant mistreat or mishandle the young lady in any way. She stayed in the yard "about three or four minutes." During that time, she did not hear anything unusual coming from the garage. She then returned to the house. On cross-examination, Arrtaway testified she had never seen the young lady before.

¶ 35 Defendant testified on his own behalf. He testified that on August 19, 2010, he was driving his father's truck near the intersection of Madison and Cicero in Chicago, Illinois. He saw D.S. "walking around the part of Madison where you can pick up a prostitute." Defendant pulled over and asked D.S. whether she wanted to make some money. D.S. agreed and got in to the car with defendant. Defendant took D.S. to his house. They first went to the basement, where they drank and smoked marijuana before going to the garage to have sex. Defendant testified he had sexual intercourse with D.S. on two chairs in the garage, one of which was a barber chair. D.S. agreed to have sex with him. Defendant testified he had two other encounters with D.S., in September of 2009 and May of 2010. Defendant testified that on both prior encounters, he and D.S. drank, smoked, and had sexual intercourse for which he paid her \$50. On August 19, 2010, he smoked marijuana with D.S. and had sex with her in the garage. He gave her \$15. He denied threatening D.S. with a pole. Defendant testified he only gave D.S. \$15 because D.S. had stolen some money from him the last time he saw her. Defendant testified D.S. "got extremely upset and she told me that if I didn't give her her money that she was going to call the police *** to tell them that I raped her." Defendant did not believe her because he "didn't think she had a reason to do that." Defendant testified D.S. started to cry.

¶ 36 Defendant testified he was Juan Davis's cellmate for approximately seven months. He denied ever talking to Davis about the facts of his case. He got into an altercation with Davis because Davis was going through defendant's mail and personal effects. Defendant knew Davis was doing so because Davis "was talking to other inmates about my case, stuff that he shouldn't even have known." Defendant testified that when he confronted Davis, Davis hit him in the mouth. Davis was put "in the hole." When Davis returned from Kankakee, Davis both "took a swing" at defendant and tried to stab defendant with a sharpened spoon.

¶ 37 On cross-examination, defendant testified he met D.S. on the street and that he believed she was a prostitute. Defendant did not actually see D.S. steal from him, but he knew that she did. He agreed he was mad and angry that D.S. stole money from him. Defendant testified that he and D.S. "never agreed on a price" but that he usually gave her \$50. On the day in question, defendant did not talk about the money owed until after they had sex. Defendant gave her the \$15, and D.S. asked where the rest of the money was. Defendant admitted to taking ecstasy prior to going into the garage. When asked whether he was "actually high on ecstasy" when he was in the garage, defendant answered "[a] little, yes." He denied working out of his garage. Defendant testified that despite his knowledge that D.S. was a prostitute, he "never used a condom with her." Defendant testified his father mailed him the police reports to his cell. Defendant could not specify what legal document he saw Davis looking at.

¶ 38 Defendant agreed he spoke with Detectives Ruck and Perostianis on August 19, 2010, at approximately 6:05 p.m., but he could not recall what he told them. Defendant denied telling ASA Fournier that he made D.S. spread her legs, demanded sexual acts, threatened to smack the victim, threatened the victim with a metal pole, gave the victim \$25, or that he was on ecstasy. Defendant remembered having a second conversation with the detectives at approximately 7:15 that evening. He denied that he told the detectives that he threatened the victim, forced her to perform sex acts, or that he lost control, snapped, or went too far.

¶ 39 Defendant rested. Prior to the State offering rebuttal, however, defense counsel indicated to the court that D.S.'s testimony may be impeached by a portion of her medical records. The parties agreed to the following stipulation regarding D.S.'s medical records, as read into the record by defense counsel:

"It says, Patient says she was walking from a friend's house on her way home when she was grabbed by assailant with a pipe as a weapon. He then led her to a garage nearby and started assaulting her, inserting his penis into her vagina. Patient victim says she was not able to fight the assailant. He had a weapon. Victim states that she did - - she *** did everything assailant wanted her to do. After patient had been assaulted, assailant gave her a cigarette and smoked and threatened her not to tell anyone. That would be the testimony if Dr. Carrie Wilson was brought to the stand to testify."

¶ 40 In rebuttal, the State called Detective Ruck. Detective Ruck testified that on August 19, 2010, at approximately 6:05 p.m., she spoke with defendant in the lockup. Defendant told her he had had sex with D.S. three previous times, that he had given D.S. \$25 on that day, and that he had taken ecstasy. Detective Ruck testified she also spoke with defendant at approximately 7:15 that evening. During the conversation, defendant told her that he threatened to slap the victim because they were role playing. Defendant told her he demanded sex acts and that he may have threatened D.S. with a pole. Detective Ruck testified defendant told her that he snapped and lost control. Defendant also indicated during the course of that conversation that he may have gone too far. Detective Ruck testified that a third conversation occurred, on August 20, 2010 at approximately 12:10 in the morning. In addition to defendant and Detective Ruck, Detective Perostianis and ASA Fournier were present. Detective Ruck testified that during that conversation, defendant stated he threatened to "smack" the victim, that he may have

threatened to hurt the victim with a metal pole found on the garage floor, and that he took ecstasy that day. The State then rested in rebuttal.

¶ 41 The circuit court found defendant guilty in the manner and form as charged in the indictment. The circuit court noted it found D.S.'s testimony corroborated by both Myrick's and Davis's testimony. The circuit court further noted that "one of the telling factors *** is the fact that [defendant]'s statement to the officers, he said he lost it."

¶ 42 On November 8, 2011, defendant filed a motion for a new trial arguing the State failed to prove him guilty beyond a reasonable doubt; the finding was against the manifest weight of the evidence; he was denied due process; he was denied equal protection; the State failed to prove every material allegation of the offense beyond a reasonable doubt; the circuit court erred when it gave instructions; he did not receive a fair trial; the circuit court erred when it denied his motion for a directed verdict; and that "[t]he finding is based upon evidentiary facts which do not exclude every reasonable hypothesis consistent with" his innocence. At the hearing on the motion for a new trial, the State argued that the motion was "vague" and that they were "unable to specifically respond to it." The circuit court denied the motion. On November 18, 2011, defendant filed his notice of appeal.

¶ 43

ANALYSIS

¶ 44 Defendant first argues his trial counsel was ineffective for failing to litigate a motion to suppress the statements he made to the police after he was confronted with evidence obtained from his cell phone. His counsel had previously successfully suppressed the cell phone. According to defendant, he made two inculpatory statements to the police only after being confronted with information from his cell phone.

¶ 45 In response, the State argues defendant was not denied the effective assistance of counsel. The State characterizes defense counsel's actions as not a failure to file a motion to suppress, but rather, a failure to object to testimony. The State points out that the complained of testimony came from two witnesses: Detective Ruck and ASA Fournier. Regarding Detective Ruck, her testimony was offered in rebuttal to impeach defendant's testimony. Therefore, defense counsel's failure to object could not be considered incompetent. Regarding ASA Fournier's testimony, the State points out that although it was brought out during the State's case in chief, there is nothing in the record to indicate that ASA Fournier watched the video or was aware of its existence. As such, there was nothing for defense counsel to object to. Accordingly, the State maintains defendant received the effective assistance of counsel.

¶ 46 The right to the effective assistance of counsel is guaranteed under both the federal and Illinois Constitutions. *People v. Domagala*, 2013 IL 113688, ¶ 36 (citing U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8). Ineffective assistance claims are analyzed under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), as adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). *Id.* To prove he was denied the effective assistance of counsel, defendant "must show both that his counsel was deficient and that his deficiency prejudiced defendant." *People v. Givens*, 237 Ill. 2d 311, 330-331 (2010); *People v. Easley*, 192 Ill. 2d 307, 317 (2000) ("The test is composed of two prongs: deficiency and prejudice.").

¶ 47 In order to establish deficient performance, a defendant "must prove that counsel's performance, as judged by an objective standard of competence under prevailing professional norms, was so deficient that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." *People v. Bew*, 228 Ill. 2d 122, 127-28 (2008). In doing so, the "defendant must

overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010). Counsel's performance is measured under "an objective standard of competence under prevailing professional norms." *Easley*, 192 Ill. 2d at 317.

¶ 48 To establish prejudice, a "defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* Therefore, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* As such, the results of the proceedings must be shown to be fundamentally unfair or unreliable. *Id.* If prejudice is not shown, a court can dispose of an ineffective assistance of counsel claim without first determining whether counsel's performance was deficient. *Givens*, 237 Ill. 2d at 331. Defendant has the burden of proving that he did not receive the effective assistance of counsel. *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2004).

¶ 49 Typically, defense counsel's decision concerning whether to object or not is considered a matter of trial strategy. *People v. Pecoraro*, 144 Ill. 2d 1, 13 (1991). Our supreme court has held that counsel's failure to object to testimony does not, by itself, establish incompetent representation. *Id.* Similarly, great deference is given to the decision of whether to file a motion to suppress because it is typically a matter of trial strategy. *Bew*, 228 Ill. 2d at 128. If the motion would have been futile, then the failure to file a motion to suppress does not establish incompetent representation. *Givens*, 237 Ill. 2d at 332. To establish prejudice in the context of a claim that counsel was ineffective for failing to file a motion to suppress, "the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *People v. Henderson*, 2013 IL 114040, ¶ 15.

¶ 50 We hold defendant has not satisfied his burden of proving he did not receive the effective assistance of counsel. Initially, we agree with the State that the issue should be framed as whether defense counsel was ineffective for failing to object to testimony, as opposed to failing to file a motion to suppress. Our review of the record shows that prior to trial, both defense counsel and the State made motions regarding testimony concerning defendant's statements to the police after being confronted with the cell phone. The circuit court deferred its ruling, noting that a determination would be made at a later time "depending on how the evidence comes in with regard to a statement, if its offered[.]" Based on our review of the record, we agree with the State that defendant's argument should be framed as whether his counsel was ineffective for failing to object to testimony, as opposed to failing to file a motion to suppress. As discussed *infra*, however, even framing the issue as a failure of defense counsel to file a motion to suppress; we are still not persuaded that defendant satisfied his burden of proving ineffective assistance of counsel.

¶ 51 Defendant argues his counsel was ineffective based on the testimony of ASA Fournier and Detective Ruck in which they testified regarding inculpatory statements defendant made to them. According to defendant, he did not make the inculpatory statements until after he was confronted by the contents of his cell phone. That phone was subsequently successfully quashed by defendant. At approximately 6:05 on the evening of August 19, 2010, defendant signed a consent form allowing the police to search the contents of his phone. Detective Ruck testified in rebuttal while ASA Fournier testified during the State's case-in-chief. In regard to Detective Ruck, it is well established that an exception to the exclusionary rule allows "prosecutors to introduce illegally obtained evidence for the limited purpose of impeaching the credibility of the defendant's own testimony." *James v. Illinois*, 493 U.S. 307, 312 (1990). At

trial, defendant denied telling Detective Ruck that he threatened the victim, forced her to perform sex acts, or that he lost control, snapped, and went too far. Detective Ruck was called in rebuttal to refute this testimony. Accordingly, we cannot say that had defense counsel objected to Detective Ruck's testimony, such an objection would have been sustained since it was offered to impeach the credibility of defendant's testimony. *Id.* Defense counsel's failure to object to Detective Ruck's testimony does not constitute ineffective assistance of counsel. Even if we look at the issue as a failure to file a motion to suppress, the motion would have been futile as the evidence was offered to impeach defendant's testimony. *Givens*, 237 Ill. 2d at 332 (holding that if a motion to suppress would have been futile, the failure to file such a motion does not constitute incompetent representation.)

¶ 52 Concerning ASA Fournier's testimony, offered during the State's case-in-chief, our supreme court has held that defense "counsel's failure *** to object to testimony *** does not establish incompetent representation." *Pecoraro*, 144 Ill. 2d at 13. Defense counsel did not object to ASA Fournier's testimony, but that does not establish incompetent representation. *Id.* As such, we hold defendant has not overcome the strong presumption that his counsel's failure to object to the testimony was trial strategy and not incompetence. *Clendenin*, 238 Ill. 2d at 317. Furthermore, even if we viewed the issue as a failure to file a motion to suppress, as defendant urges us to do, we still do not find that defendant received ineffective assistance of counsel. In order to establish prejudice, defendant must show "that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Henderson*, 2013 IL 114040, ¶ 15. After reviewing the evidence in this case, without ASA Fournier's testimony, we cannot say that the result of defendant's trial would change. Defendant's contention that this is a "he said, she said" situation is not convincing. Both defendant and the victim, D.S.,

reasonable opportunity to correct it." *People v. Coleman*, 391 Ill. App. 3d 963, 971 (2009). Our supreme court has warned that "the mere fact that an alleged error affects a constitutional right does not provide a separate ground for review, for 'even constitutional errors can be forfeited.'" *People v. Cosby*, 231 Ill. 2d 262, 272-73 (2008) (citing *People v. Allen*, 222 Ill. 2d 340, 352 (2006)). In this matter, defendant did not properly raise the issue before trial or in a posttrial motion. Defendant initially filed a written motion to suppress where he argued that his entire arrest and any evidence from the arrest be quashed. However, at the hearing on the motion, defense counsel, after being asked by the court, only asked that defendant's cell phone be suppressed. After trial, defendant's posttrial motion did not specify this objection which he now brings before this court, i.e., that the tire iron and barber chair should have been suppressed. Accordingly, defendant failed to preserve this issue for our review.

¶ 57 Under the plain error doctrine, we may review alleged errors that are not properly preserved for appellate review. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). However, before determining whether we may review the alleged error under either prong of the plain error doctrine, "a defendant must first show that a clear or obvious error occurred." *Id.*, see also *People v. Johnson*, 218 Ill. 2d 125, 139 (2005) ("Clearly, there can be no plain error if there is no error."). We hold defendant has not shown that a clear or obvious error has occurred such that we may review his claim of error under either prong of the plain error doctrine. *Hillier*, 237 Ill. 2d at 545.

¶ 58 Initially, we point out that defendant's claim of error relies on two assumptions: first, that defendant, at the time Officers Chatham and Berlage initially spoke with him, was in the curtilage of his home; and second, that Officers Chatham and Berlage did not have permission to enter defendant's property. See *People v. McNeal*, 175 Ill. 2d 335, 344 (1997) ("The curtilage,

that is, the land immediately surrounding and associated with the home, has been considered part of the home itself for fourth amendment purposes, and courts have extended fourth amendment protection to it"); *People v. White*, 117 Ill. 2d 194, 220-21 (1987) ("It is true that voluntary consent to entry will justify a warrantless at-home arrest even in the absence of exigent circumstances."). We agree with defendant that there are many facts in the record to support the notion that defendant was standing in the curtilage of his home. The circuit court, however, never made a factual finding regarding curtilage. Similarly, Officers Chatham and Berlage testified regarding their initial entry on to the property. At the suppression hearing, when asked by defense counsel whether he had permission to go onto the property, Officer Chatham answered "No. I don't recall asking him. I don't recall if my partner asked him for permission or not." At trial, however, Officer Berlage testified that he did ask defendant if he could come in through the gate, to which defendant told them he did not have a key. In response to the question, "what did you and your partner do," Officer Berlage testified "we proceeded - - there was a- - maybe a three to four foot fence. We were able to hop over to the other side of that fence." Based on Officer Chatham's testimony, it would appear both officers entered the property without asking permission. Officer Berlage testified that permission to enter the property was at least asked. Officer Berlage did not, however, testify whether defendant actually replied to his request and whether consent to enter was granted. Either way, the circuit court never made a factual finding addressing whether defendant consented to Officers Chatham and Berlage's entry onto his yard. We assume the circuit court did not make those findings because defendant only argued for the suppression of his cell phone at the hearing. The lack of factual findings in the record here highlights the importance of first raising issues in the circuit court, something defendant did not do here. Notwithstanding the lack of an express factual

finding, we will begin our analysis of the issue assuming defendant was on the curtilage of his yard and that he did not consent to the police's initial entry.

¶ 59 Warrantless searches and seizures inside a home are presumed unreasonable. *McNeal*, 175 Ill. 2d at 344. Accordingly, law enforcement officers generally may not enter, much less search, a person's home without a warrant absent exigent circumstances. *Id.* (citing *Payton v. New York*, 445 U.S. 573, 590 (1980)). Consent is an exception to the warrant requirement. *Id.* The totality of the circumstances at the time of entry must be analyzed to determine whether the police acted reasonably. *People v. Wimbley*, 314 Ill. App. 3d 18, 24 (2000). Factors to consider in determining whether the police acted reasonably include: "whether: (1) the crime under investigation was recently committed; (2) there was any deliberate or unjustified delay by the police during which time a warrant could have been obtained; (3) a grave offense was involved, particularly a crime of violence; (4) there was a reasonable belief that the suspect was armed; (5) the police officers were acting on a clear showing of probable cause; (6) there was a likelihood that the suspect would escape if he was not swiftly apprehended; (7) there was a strong reason to believe the suspect was in the premises; and (8) the police entry was made peaceably, albeit nonconsensually." *McNeal*, 175 Ill. 2d at 345. Our supreme court has cautioned that this list of factors is not "exhaustive," and the factors "are merely guidelines rather than cardinal maxims to be applied rigidly in each case." *Id.* The State has the burden of proving that exigent circumstances existed to justify warrantless entry. *Id.*

¶ 60 In this case, after reviewing the totality of the circumstances, we are of the opinion that exigent circumstances existed to justify Officers Chatham and Berlage's entry onto defendant's property in this case. The record establishes that the following events occurred. D.S. testified she saw defendant driving at approximately 9:30 in the morning. After a brief conversation,

she went with defendant to his house. Terry Myrick estimated that D.S. ran to him crying in the early afternoon, approximately anywhere from 1 to 3 in the afternoon. Officer Zadura testified she visited D.S.'s house to discuss the crime at approximately 2:10 in the afternoon. Officers Chatham and Berlage testified they received a flash message at approximately 3 in the afternoon indicating that a sexual assault occurred in the area of defendant's home. The flash message described defendant and indicated that the sexual assault occurred in a garage in a barber chair. Officers Chatham and Berlage began asking citizens in the area whether anyone cut hair out of their garage. One of those citizens pointed the officers to defendant's garage. Defendant, who was standing in his yard at the time, matched the description on the flash message. Officer Chatham estimated that the time frame from when they received the flash message until they approached defendant was approximately 10 minutes. Officers Chatham and Berlage walked toward him. Officer Berlage testified that defendant was asked whether he cut hair and if he had a barber chair in his garage, to which defendant responded "yes" to both questions. Officer Berlage asked defendant whether they could enter the property. Defendant did not have a key, so the officers entered over the fence. Officers Chatham and Berlage asked defendant if they could look into the garage, and defendant agreed. Upon seeing the barber chair, defendant was arrested.

¶ 61 Viewing the facts in light of the factors courts rely on to determine whether exigent circumstances existed to justify a warrantless entry, show the police acted reasonably here. There is no question that the crime itself, aggravated criminal sexual assault, is a crime of violence. The record shows the crime had recently been committed, either in the morning or early afternoon. We cannot say there was any deliberate or unjustified delay by the police to obtain a warrant because after the police received the flash message, they found defendant ten

minutes later. There was a clear showing of probable cause because the flash message described defendant and stated the crime took place in a barber chair in a garage. Prior to the police entering defendant's property, defendant admitted to the police that he cut hair and had a barber chair in his garage. Defendant's admissions to the police that he cut hair and had a barber chair in his garage, combined with the fact that defendant matched the physical description given on the flash message, gave the police the strong belief that defendant was the suspect, and was thus on the premises. Additionally, the officers' entry onto the premises was made peaceably, exhibited by the fact that the officers asked defendant whether they could come into the property, asked to view the garage, and they did not have their service weapons drawn. Out of the factors courts generally consider to determine whether the police acted reasonably, the only two factors that weigh in defendant's favor are that he was not armed and there was no apparent probability that defendant would escape. All of the other factors lead us to conclude the police acted reasonably.

¶ 62 After the police entered the property, the record is clear that the police asked defendant whether they could see into his garage and he consented. Consent is an exception to the warrant requirement. *McNeal*, 175 Ill. 2d at 344. It follows that defendant's contention to suppress the contents of his garage is meritless based on defendant's consent. Defendant has not shown that a clear or obvious error occurred to justify plain error review. Similarly, defendant's claim of ineffective assistance of counsel also fails because a motion to suppress would have been futile. *Givens*, 237 Ill. 2d at 332. Therefore, defendant is procedurally defaulted from raising this claim and has not shown that his representation was incompetent.

¶ 63

Cross-Examination

¶ 64 Defendant argues the circuit court denied him the right to cross-examine D.S. with her allegedly inconsistent statements. Specifically, whether D.S. told police or hospital personnel that a person had followed her with a tire iron from the bus stop and dragged her into the garage. Defendant admits he did not properly preserve this issue for our review, but asks that we review it under the plain error doctrine. Alternatively, he asks that we review his contention as an ineffective assistance of counsel claim.

¶ 65 In response, the State agrees defendant has forfeited his claim, but adds that defendant also failed to make an accurate offer of proof. According to the State, the offer of proof given by defense counsel did not match the arrest report in this case. The State maintains a review of the entire record shows defendant was not denied his right to cross-examine D.S. with the allegedly inconsistent statements.

¶ 66 The right to conduct a reasonable cross-examination and the right to confront the witnesses against him is a fundamental constitutional right of a criminal defendant. *People v. Davis*, 185 Ill. 2d 317, 337 (1998). Therefore, defendant has "[t]he right to cross-examine a witness as to his biases, prejudices, or ulterior motives." *People v. Gonzalez*, 104 Ill. 2d 332, 337 (1984). The trial judge, however, "retains wide latitude insofar as the confrontation clause is concerned to impose reasonable limits on such cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or of little relevance." *People v. Harris*, 123 Ill. 2d 113, 144 (1988), *People v. Price*, 404 Ill. App. 3d 324, 330 (2010) ("The right to cross-examination is not absolute, and the trial court is given broad discretion to determine the extent of cross-examination at trial."). In reviewing whether the circuit court improperly limited cross-examination of a witness, we must

review the whole record, as opposed to isolated incidents in the record. *Harris*, 123 Ill. 2d at 144-45. A trial judge may properly limit the scope of cross-examination if the defendant's inquiry is based on an uncertain or remote theory. *People v. Tabb*, 374 Ill. App. 3d 680, 689 (2007). "When a line of questioning is objected to or denied by the trial court, the defendant must set forth an offer of proof either to convince the trial court to allow the testimony or to establish on the record that the evidence was directly related and positively related to the issue of bias or motive to testify falsely." *Id.* We will not reverse the circuit court's decision to limit the cross-examination absent an abuse of discretion. *Price*, 404 Ill. App. 3d at 330; *Tabb*, 374 Ill. App. 3d 689.

¶ 67 Defendant first argues the circuit court improperly limited his cross-examination of D.S. regarding a statement D.S. made to hospital personnel. According to defendant, he attempted to impeach D.S. by asking her whether she told hospital personnel that a person had followed her with a tire iron from the bus stop and dragged her into a garage. We hold defendant's argument is meritless because defendant and the State later stipulated that Dr. Carrie Wilson would have testified that "Patient says she was walking from a friend's house on her way home when she was grabbed by assailant with a pipe as a weapon. He then led her to a garage nearby and started assaulting her." Evidence that is rejected "is not prejudicial error where the same or substantially the same evidence is admitted at some stage of the trial." *People v. Moretti*, 6 Ill. 2d 494, 529 (1955); *People v. Driver*, 62 Ill. App. 3d 847, 854 (1978) ("It is well established that rejection of evidence is not prejudicial in a criminal case where substantially the same evidence is admitted at some subsequent stage of the trial."). Accordingly, even if the circuit court erred, the parties later stipulated to substantially the same evidence.

¶ 68 Defendant's second contention, similar to his first, is that he called Officer Zadura to testify regarding alleged inconsistent statements D.S. made to the police. The following exchange then occurred:

MS. DONALD-KYEI: Okay. Did [D.S.] tell you that she had been, by force, taken into a garage and sexually assaulted?

MS. EBERSOLE: Objection.

THE COURT: What's that?

MS. EBERSOLE: The objection is that there's no good faith basis, because I don't believe that impeaching question appears in the officer's report.

THE COURT: Does it?

MS. DONALD-KYEI: It states that the victim stated that he had a tire jack and told her to go into his garage.

THE COURT: Objection sustained."

The police report referred to in the above exchange states that the "victim related that she was forced into a garage with a barber chair inside *** where she was forced to have sex with an offender by the threat of force by a tire jack."

¶ 69 We hold the circuit court did not abuse its discretion because the offer of proof did not match the alleged statement in the police report. Accordingly, the police report defendant relies upon is not inconsistent with D.S.'s testimony that defendant did not threaten her with the tire jack until they were in the garage. The police report does not mention the tire jack until D.S. was inside of the garage. The circuit court did not abuse its discretion when it sustained the State's objection during Officer Zadura's testimony. Defendant has not shown that plain error

occurred. Defendant is procedurally defaulted from raising this claim. Similarly, defendant's ineffective assistance claim also fails because he cannot show that he was prejudiced. Assuming Officer Zadura had testified to the statement in the police report, it would not have changed the result of the trial. See *Easley*, 192 Ill. 2d at 317 (to establish prejudice, a "defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.") The police report doesn't mention the tire jack until defendant and D.S. are inside the garage.

¶ 70

Sentence

¶ 71 Defendant's final contention is that the 10-year sentence enhancements violated the proportionate penalties clause of the Illinois Constitution. In response, the State urges that the recent supreme court decision *People v. Blair*, 2013 IL 114122, holds that an amendment to the armed violence statute, which became effective in 2007, eliminated the proportionate penalties problem that had rendered previous enhancement provisions unconstitutional. In reply, defendant elected to stand on his opening brief, but pointed out that *Blair* was decided after his opening brief had been filed.

¶ 72 In *Blair* our supreme court addressed whether Public Act 95-688 (eff. Oct. 23, 2007), which amended the armed violence statute, revived the sentencing enhancements previously held unconstitutional as they pertained to the armed robbery statute. *Id.* ¶1. Our supreme court explained the identical elements test to determine a proportionate penalties violation, stating:

"A proportionate penalties violation, under the identical elements test, occurs when 'two offenses have identical elements but disparate sentences.' [Citations.] Thus, unlike other constitutional violations which are based on the manner in which a

single statute operates, an identical elements proportionality violation arises out of the relationship between two statutes – the challenged statute, and the comparison statute with which the challenged statute is out of proportion. [Citations.] Although only the statute with the greater penalty will be found to violate the proportionate penalties clause [citation], that violation is entirely dependent upon the existence of the comparison statute, *i.e.*, the statute with identical elements but a lesser penalty. In light of this peculiar feature of an identical elements proportionality violation, the legislature has more options available to it should it wish to remedy the constitutional violation and revive the statute. The legislature may amend the challenged statute held unconstitutional, amend the comparison statute, or amend both statutes." *Id.* ¶32.

¶ 73 Our supreme court held the amended armed violence statute *i.e.*, the comparison statute, revived the sentencing enhancement in the armed robbery statute that had previously been held unconstitutional. *Id.* ¶35.

¶ 74 In the case at bar, the amended armed violence statute reads, in relevant part:

"A person commits armed violence when while armed with a dangerous weapon, he commits any felony defined by Illinois law, except *** any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, **or a mandatory**

sentencing factor that increases the sentencing range."

(Emphasis added.) 720 ILCS 5/33A-2(a) (West 2010).

¶ 75 Defendant was convicted of aggravated criminal sexual assault, which is defined, in relevant part, as the commission of a criminal sexual assault in which "(1) the accused displayed, threatened to use, or used a dangerous weapon, other than a firearm***." 720 ILCS 5/12-14(a)(1)(West 2010).² The statute has its own sentencing provisions. Relevant here, defendant's sentencing provision for his conviction provided, in relevant part, "10 years shall be added to the terms of imprisonment imposed by the court." 720 ILCS 5/12-14(d)(1) (West 2010). Accordingly, defendant's proportional penalties argument fails due to the amended armed violence statute not being available to him to compare with his conviction for aggravated criminal sexual assault. Therefore, the defendant's sentence does not violate the proportionate penalties clause of the Illinois Constitution.

¶ 76

CONCLUSION

¶ 77 The judgment of the circuit court of Cook County is affirmed.

¶ 78 Affirmed.

² The aggravated criminal sexual assault statute has been renumbered since defendant was sentenced. See 720 ILCS 5/11-1.30 (West 2012).