

Nos. 1-08-2076 and 1-09-1947 (Consolidated)

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FIRST DIVISION
FILED: March 28, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
)	Cook County
Plaintiff-Appellee,)	
)	No. 97 CR 0805
v.)	
)	
RAHMAN MUHAMMAD,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court. Presiding Justice Hall and Justice Lampkin concurred in the judgment.

ORDER

HELD: The defendant's conviction and sentence for criminal sexual assault of S.J. and the denial of his postconviction claims with regard to the convictions for aggravated criminal sexual assault of S.R. were affirmed.

Following a 1997 bench trial, the defendant, Rahman Muhammad, was convicted of two counts of aggravated criminal sexual assault of S.R. and one count of aggravated criminal sexual assault of S.J. and was sentenced to three consecutive terms of 10 years'

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imprisonment. His convictions and sentences were affirmed on direct review. *People v. Muhammad*, No. 1-97-2369 (1998) (unpublished order under Supreme Court Rule 23). The defendant subsequently sought relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)), asserting, *inter alia*, actual innocence premised on newly discovered DNA evidence. After conducting an evidentiary hearing, the circuit court denied the defendant's postconviction claims relating to his convictions for aggravated criminal sexual assault of S.R., vacated his conviction for aggravated criminal sexual assault of S.J., and ordered a new trial on that charge. The defendant was retried before a jury in 2008, found guilty of criminal sexual assault of S.J., and sentenced to a consecutive term of 12 years' imprisonment.

On appeal, the defendant challenges his conviction and sentence for criminal sexual assault of S.J., asserting that (1) the circuit court erred in denying his motion for a continuance, (2) the circuit court deprived him of a fair trial by *sua sponte* ruling that evidence of the aggravated criminal sexual assault of S.R. was admissible, (3) the circuit court erred in admitting evidence of the aggravated criminal sexual assault of S.R., in failing to verbally instruct the jury regarding the limited use of this evidence at the time of its admission, and in permitting an excessive amount of evidence regarding that offense to be admitted,

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(4) he was not proven guilty of criminal sexual assault of S.J. beyond a reasonable doubt, and (5) the circuit court acted vindictively by imposing a 12-year sentence. The defendant also appeals the denial of his postconviction claims with regard to his convictions for aggravated criminal sexual assault of S.R., and the two appeals have been consolidated. For the following reasons, we affirm the judgments of the circuit court.

To resolve the issues raised on appeal, it is necessary to consider the facts and procedural history of the defendant's prior prosecution and postconviction proceedings. The defendant was charged along with co-defendant Aaron Watkins with the aggravated criminal sexual assault of S.R. and S.J. The evidence adduced at their severed but simultaneous bench trials is summarized as follows.

At approximately 7 p.m. on December 8, 1996, S.J. and S.R., both of whom were 13 years old, went to the home of Aaron Watkins, who lived in the second-floor apartment of a two-flat building on South Champlain Avenue in Chicago. Watkins was drinking and watching television with the defendant and Dorsey Glenn. The two girls decided to leave after about 30 minutes because the defendant and Watkins were acting drunk. Watkins refused to open the exterior door so the girls could leave, and S.J. and the defendant began to argue. The defendant hit S.J. in the face, and when S.R.

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intervened, he struck her as well. The defendant then told the two girls to take their clothes off. Watkins told the defendant to let S.R. go to the bathroom, and though she did not see what was happening outside the bathroom, she could hear S.J. crying. When S.J. refused to take off her clothes, the defendant wrestled with her to remove her pants and then ripped off her underwear. He then hit her again before forcing her to have sexual intercourse. Watkins walked past during the assault, and S.J. grabbed his leg and asked him for help, but Watkins just kept walking. When the defendant was finished, he threatened S.J. with an ice pick, and she grabbed her coat and ran to a bedroom in the back of the apartment.

After S.R. had been in the bathroom for about five minutes, the defendant, who was holding the ice pick in his hand, stood by the bathroom door and told her to take her clothes off. He also told her to give him the gold necklace that she was wearing. She did so and then went into the living room with the defendant, who forced her to perform oral sex on him. During this assault, the defendant told Watkins to have intercourse with S.R. Watkins first penetrated her anally and then had vaginal intercourse with her while the defendant forced her to perform oral sex on him. When two other young men came to the house, Watkins let them in, and the two girls were able to get dressed and run to the house next door

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for help.

After the defendant's convictions and sentence were affirmed on direct review, he filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)), which was supplemented by counsel. The supplemental petition alleged, *inter alia*, that newly discovered DNA evidence established the defendant's actual innocence of the crimes against both S.R. and S.J., and the circuit court ordered an evidentiary hearing on those allegations.¹

At the evidentiary hearing, S.J. testified that the defendant beat her, took her clothes off, and forced her to have vaginal intercourse with him. When asked whether the defendant ejaculated, S.J. responded in the affirmative. After the assault, she ran to a back bedroom and asked Dorsey Glenn to help her, but he just stood there. S.J. stated that she understood Glenn's silence to mean that she would not be allowed to leave the apartment unless she had sex with him. S.J. testified that she permitted Glenn to have sexual intercourse with her because she was scared and would have done anything to get out of the apartment. After she escaped from the house, she was taken to the hospital, where samples were collected for a rape kit.

¹ The defendant also sought relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)).

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S.J. acknowledged that she did not tell the police or hospital personnel about having intercourse with Glenn. She also acknowledged that she did not tell the truth when she said she had not had sex within 72 hours of the sexual assault by the defendant. S.J. explained that she did not tell anyone about the incident with Glenn because, at the time, she thought he was a victim too. From her perspective as a 13-year-old, she did not feel that Glenn had sexually assaulted her because he did not force her to have sex by beating or threatening her.

The defendant testified that he was with Aaron Watkins and Dorsey Glenn at Watkins' home on December 8, 1996, when S.J. and S.R. came over. According to the defendant, he argued with S.J. because he believed she had taken his beeper. The defendant acknowledged that, during the argument, he hit S.J. in the face with an open hand. He also stated that he had consensual sex with S.R., but he denied having sex with S.J.

Aaron Watkins substantially corroborated the defendant's version of events, but he denied that Dorsey Glenn was at his house on the night of the incident. Watkins admitted that he gave a statement to the police after he was arrested, but he claimed that the words in the statement were written by the assistant state's attorney.

The parties stipulated that the sexual assault kits for S.J.

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and S.R. were delivered to Orchid Cellmark for DNA testing in 2005 and that the vaginal swabs obtained from S.J. revealed a mixed DNA profile consistent with that of S.J. and an unknown male. A search of that profile against a DNA index system detected an association to Dorsey Glenn, indicating that he was the donor of the semen.

The parties further stipulated that Karl A. Reich and P.W. Boonlayangoor are experts in all areas of forensic DNA analysis, and, if called as witnesses, Reich and Boonlayangoor would testify that the type of DNA analysis performed by Orchid Cellmark on S.J.'s sexual assault kit in 2006 was not available at the time of trial in 1997. Reich and Boonlayangoor would further testify that the results of that DNA testing exclude the defendant as a contributor to the tested sample and indicate that Dorsey Glenn is the source of the semen recovered from S.J.'s vaginal swab.

Following the evidentiary hearing, the circuit court denied postconviction relief with regard to the defendant's convictions for aggravated criminal sexual assault of S.R., finding that there was no showing of actual innocence. However, the court vacated the defendant's conviction for aggravated criminal sexual assault of S.J. based on its determination that the newly discovered DNA evidence raised "a concern" as to the integrity of the defendant's trial for that offense. Consequently, the court ordered that the defendant be granted a new trial on the charge involving S.J. only,

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and the defendant was retried before a jury in 2008.

At the retrial, S.J. testified that she was 13 years old and had engaged in sexual intercourse with Aaron Watkins prior to December 8, 1996. S.J. recounted that, when she and S.R. arrived at Watkins' house that night, the defendant and Dorsey Glenn were there along with Watkins, and the men were drinking and had smoked marijuana. S.J. stated that she and S.R. did not drink or smoke anything, and they just watched television until they decided to leave because the men were acting strangely and making them feel uncomfortable. S.J. testified that she and S.R. went downstairs to leave, but the front door was locked, and the defendant told them that they were not going anywhere. She argued with the defendant, who hit her in the face with a clenched fist. The fight continued as she and the defendant made their way upstairs. S.J. stated that the defendant hit her numerous times in the face and then demanded that she and S.R. take their clothes off.

S.J. further testified that the defendant hit her again because she did not get undressed. He then pulled her pants off and ripped off her underwear. When she refused the defendant's demand that she spread her legs, he forced her legs apart and put his penis in her vagina. S.J. testified that she was looking up at the ceiling during the assault and did not see any scarring on the defendant's body. When Watkins walked past, she grabbed his leg

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and begged for help, but he just kept walking. S.J. testified that she was "unsure" whether the defendant had ejaculated during the sexual assault.

When the defendant finished with her, he told her to go into the back bedroom. S.J. testified that she felt threatened and did as he directed. Moments later, Dorsey Glenn entered the room, where she was sitting on the bed naked and crying. S.J. stated that she asked Glenn for help, but he just stood there and did not respond. S.J. believed that Glenn's silence implied that she had to have sex with him in order to get out of the room. S.J. testified that she allowed Glenn to have sexual intercourse with her because she believed it was the only way she could get herself and S.R. out of the house. S.J. explained that, in her 13-year-old mind, she did not think that Glenn forced her to have sex with him because he did not threaten or hit her, and that was why she did not tell anyone that Glenn had sex with her.

S.J. testified that she and S.R. were able to get out of Watkins' house after two other people arrived and told the men to let them go. She immediately went to the house next door to get help, and S.R. arrived a few minutes later. The police were called, and she and S.R. were taken to the hospital for treatment. Later that night, S.J. went to the police station where she viewed a lineup and identified the defendant, Watkins, and Glenn.

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Philip Kizer testified that on the night of December 8, 1996, he went to Aaron Watkins' house, and Leonard Rainer arrived at about the same time. Though no one answered the doorbell, he noticed that there were lights on in the second-floor apartment, so he climbed up to a second-floor balcony and looked in the window. Kizer stated that he saw a girl on a bed performing oral sex on the defendant. He knocked on the window and asked Watkins to let him in. When Watkins let him and Rainer in, they walked into the living room. There he observed the defendant holding an ice pick to a girl's neck area and forcing her head on to his penis. Kizer stated that he realized that this was not consensual and told the defendant to back up. The defendant responded that he had not yet ejaculated. He again asked the defendant to stop, and when the defendant did so, he took the girl to the bathroom. Kizer stated that he found another girl, whose face was bleeding, in a bedroom. Kizer testified that he was able to get the two girls outside, and the girls immediately went next door.

S.R. testified that she was in seventh grade when she and S.J. went to Aaron Watkins' house on December 8, 1996. The defendant and Dorsey Glenn were also there. After about 30 minutes, she and S.J. decided to leave because the men appeared drunk, but Watkins and the defendant refused to open the door. S.J. got into an argument with the defendant, and he punched S.J. in the face

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repeatedly. S.R. stated that when she told him to stop, he hit her in the face as well. The defendant then told them to take their clothes off. Watkins asked the defendant to let him take S.R. into the bathroom. The defendant agreed, and she went into the bathroom with Watkins. Several minutes later, the defendant came to the bathroom door and told her to let him in. According to S.R., the defendant was holding an ice pick in his hand when he busted the bathroom door open. The defendant told her to take her clothes off, and she did so. S.R. stated that the defendant took the gold necklace she was wearing and then took her into the living room, where she saw Watkins but not S.J.

S.R. testified that the defendant told Watkins to perform anal sex on her while the defendant made her perform oral sex on him. While the defendant was forcing his penis into her mouth, Watkins attempted to have anal sex with her, but was unable to do so. Watkins then put his penis in her vagina as the defendant continued to force her to perform oral sex on him. While the assault was taking place, the doorbell rang, and two men climbed up to the second floor, looked in the window, and told Watkins to open the door. After Watkins let the two men into the house, she was able to put her clothes on and run outside. S.R. stated that she ran next door, and the police arrived shortly thereafter. She and S.J. then were taken to the hospital. At trial, S.R. identified the

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necklace that the defendant had taken from her on the night of the assault. She also identified a bracelet that had been in her purse prior to the attack but was missing when she fled from Watkins' house.

Karen Wilson testified that she was a nurse working in the emergency room of the University of Chicago Children's Hospital on December 8, 1996. At about 10 p.m. she was assigned to take care of S.R. and S.J., and she observed that S.J.'s face, nose, and lips were swollen. Wilson stated that she was present when a history was taken from each of the 13-year-old girls. In her history, S.J. stated that she and S.R. went to Aaron's house and that two other boys were there. S.J. also reported that Aaron was drunk and that the girls were not allowed to leave. The defendant told S.J. that she was not going anywhere and punched her in the face. S.J. said she was verbally threatened and physically assaulted many times. S.J. refused to perform oral sex on the defendant so he ripped off her clothes and underwear and had vaginal intercourse with her. S.J. reported that the defendant did not use a condom, and, when asked whether he had ejaculated, she said she was unsure. Wilson further testified regarding the contents of a document contained in S.J.'s sexual assault kit, which was consistent with the information reported by S.J. in her history. That document identified the assailants as the defendant, Aaron Watkins, and

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Dorsey Glenn, but indicated that Glenn was not involved physically or sexually. The document further reflected that S.J. answered "no" when asked if she had had sex within 72 hours of the assault.

The prosecution presented evidence that when the defendant was arrested on the night of December 8, 1996, the police recovered a large, wood-handled ice pick from his jacket pocket and a gold necklace that he had thrown to the ground just before his arrest. In addition, a gold bracelet was recovered from Watkins' bedroom, and a torn pair of women's underwear was recovered from the kitchen garbage in Watkins' apartment.

The parties stipulated that the sexual assault kits for S.R. and S.J. were delivered to Orchid Cellmark for DNA testing in 2005. Those tests revealed that no semen was identified on the vaginal and oral swabs collected from S.R.; semen was found on the rectal swab, but there was an insufficient amount of DNA to identify a DNA profile. The parties further stipulated that the vaginal swab obtained from S.J. revealed a female DNA profile that matched that of S.J. The tested sample recovered from that swab also revealed a male DNA profile. A DNA database was searched for that male profile, and the search detected an association to Dorsey Glenn.

After the prosecution had rested its case, the circuit court granted the defendant's motion for a directed verdict on the charge of aggravated criminal sexual assault based on the lack of evidence

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that the defendant had used a weapon in committing sexual assault against S.J. Accordingly, the court ruled that the trial would continue on the lesser included offense of criminal sexual assault.

The defendant called Elizabeth Graffy as an expert witness. Although the State initially objected to Graffy's qualification as an expert, the parties ultimately agreed that Graffy would testify as an expert in the field of forensic biology testing and DNA analysis. Graffy testified that she was employed by Independent Forensics and worked with Dr. Karl A. Reich and Dr. P.W. Boonlayangoor, who had reviewed and evaluated the DNA test results in this case. With regard to the DNA testing performed on the vaginal swabs taken from S.J., Graffy stated that the tested sample reflected that there were two contributors of DNA: S.J. and a male contributor whose profile matched the profile attributed to Dorsey Glenn. Graffy further testified that the test results reflected a single male contribution, and there was no evidence of a third contributor, nor was there any evidence that the tested sample of DNA had been degraded in any way. Graffy also stated that, from a statistical perspective, it was virtually impossible for the defendant and Dorsey Glenn to share the same DNA profile.

Graffy acknowledged that there are several circumstances under which a man could penetrate a vagina with his penis without leaving any DNA, such as where the male had not ejaculated or had used a

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condom, or had undergone a vasectomy or had some other physical or medical condition causing there to be no sperm in the seminal fluid. She also acknowledged that it was possible that the amount of semen deposited in the vagina was too small to discern a DNA profile. When asked whether the DNA of one contributor could "mask" that of another contributor, Graffy stated that there could be a situation in which there were two male donors, one of which deposited a large amount of semen and the other of which deposited a small amount of semen. According to Graffy, if the DNA mixture contained an extremely high ratio, the profile of the party contributing a small amount of DNA might not be seen.

The jury found the defendant guilty of criminal sexual assault of S.J. At the sentencing hearing, the State presented evidence in aggravation that, while incarcerated, the defendant had been disciplined for assaulting another inmate in 2001, possessing dangerous contraband in 2003, and threatening physical violence against a prison dietary worker in 2007. The State also presented evidence that the defendant was a member of a street gang and was part of the gang's "security threat group." In sentencing the defendant to a consecutive term of 12 years' imprisonment, the court specifically relied on the defendant's criminal history as a juvenile and his behavior while incarcerated. The defendant's subsequent motion to reduce his sentence was denied, and this

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consolidated appeal followed.

The defendant initially asserts that the circuit court erred in denying his request for a continuance to (1) perform additional DNA testing to establish that he was excluded as a contributor of the DNA recovered from S.J.'s vaginal swab, and (2) call his "preferred" expert witness. According to the defendant, the denial of a continuance resulted in unfair surprise and deprived him of a fair trial by preventing him from presenting necessary DNA-testing evidence. We do not agree.

It is firmly established that the granting or denial of a continuance is a matter resting in the sound discretion of the trial court, and a reviewing court will not interfere with that decision absent a clear abuse of discretion. *People v. Walker*, 232 Ill. 2d 113, 125, 902 N.E.2d 691 (2009). "However, '[w]here it appears that the refusal of additional time in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights, a resulting conviction will be reversed.'" *Walker*, 232 Ill. 2d at 125, quoting *People v. Lewis*, 165 Ill. 2d 305, 327, 651 N.E.2d 72 (1995).

Whether there has been an abuse of discretion depends upon the facts and circumstances in each case. *Walker*, 232 Ill. 2d at 125. No mechanical test exists for deciding the point at which the denial of a continuance violates the right of the accused to

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properly defend, but the factors that may be considered include the movant's diligence, the defendant's right to a speedy, fair and impartial trial and the interests of justice. *Walker*, 232 Ill. 2d at 125. In addition, a court may consider the history of the case, the complexity of the matter, the seriousness of the charges, docket management, judicial economy, and inconvenience to the parties and witnesses. *Walker*, 232 Ill. 2d at 125-26.

In this case, the record demonstrates that the defendant was in custody on January 22, 2008, when the circuit court granted his request for a new trial on the charge of aggravated criminal sexual assault of S.J. The defendant demanded trial on February 14, 2008, and the State requested a one-week continuance, which the court granted with the admonishment that the "[d]emand is running."

On February 21, 2008, the prosecutor informed the court that, after speaking with defense counsel, a stipulation as to the testimony of Dr. Karl Reich regarding the DNA evidence would not be possible. Defense counsel stated at that time that she would need to present an expert witness to explain the meaning of the DNA test results. The following day, the State requested a trial date of April 29, 2008, and the defendant again demanded trial after the court denied his initial request to extend the date proposed by the State.

On March 13, 2008, the parties and the court discussed the

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potential need for a confirmatory test to establish that the newly discovered DNA evidence identified Dorsey Glenn and not the defendant as the donor of the semen found on S.J.'s vaginal swab. At that time, the court specifically cautioned the defendant that the need for additional DNA testing may impact his demand for trial, but defense counsel stated that the defendant remained firm in his demand for trial.

When the case was called for trial on April 29, 2008, defense counsel advised the court that the additional DNA testing was not complete and that she was not satisfied with the stipulation proposed by the prosecutor. The proposed stipulation reflected that a previously tested sample of DNA established that the semen recovered from the vaginal swab of S.J. had "an association" with Dorsey Glenn. The defendant sought a stipulation similar to that admitted at the postconviction evidentiary hearing, indicating that the tested DNA "matched" the DNA profile of Dorsey Glenn and that the defendant was "excluded" as a possible contributor of that DNA. Counsel asserted that the defense was, "[t]o some degree *** taken by unfair surprise" regarding the DNA evidence. In response to this assertion, the circuit court specifically stated that there would not be any question in the minds of the jury members that the defendant's DNA was not recovered from S.J. Yet, defense counsel further explained that she desired to perform additional DNA

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testing to rebut a possible argument by the State concerning the phenomena in which a first contributor's DNA is "masked" by a second contributor. The court reminded counsel that the defendant had been adamant in demanding trial and that much of the statutory time period for a speedy trial had elapsed while the defendant persisted in his demand. The court denied the defendant's request to continue the trial date and also denied his request for a continuance during the trial after the State's witnesses had testified.

The defendant's claim of unfair surprise is unpersuasive where the record reflects that the defendant was aware as early as February 21, 2008, that the prosecution was not willing to enter into a stipulation regarding Dr. Reich's report and testimony. Also, as the defendant acknowledged in his post-trial motion, the State's position with regard to the newly discovered DNA evidence had been consistent throughout the postconviction proceedings: the State did not contest the DNA test results, and the prosecution's position was that the absence of the defendant's DNA on the vaginal swab taken from S.J. was not determinative because there may not have been ejaculation or for other reasons. Thus, concerns over the DNA evidence and the possible need for additional testing were raised well before trial, and the court repeatedly cautioned the defendant about persisting in his demand for trial in light of

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these circumstances. Then on the day of trial, near the end of the speedy-trial statutory term and while the prosecution witnesses were present pursuant to subpoena, the defendant requested a continuance to complete DNA testing and to call Dr. Reich as an expert witness. Contrary to the defendant's argument, we believe the majority of the *Walker* factors, including the defendant's diligence, the history of the case, docket management, judicial economy, inconvenience to the parties and witnesses, and the defendant's right to a speedy trial, support the circuit court's denial of the continuance requested on the day of trial.

In reaching this conclusion, we do not agree with the defendant's contention that the trial court's remarks were openly hostile to the defense and indicate an abuse of discretion. Rather, the record demonstrates that the court was determined not to have the trial derailed by evidentiary issues that could have been addressed previously.

Moreover, we find that any possible error is harmless where the defendant's expert witness, Elizabeth Graffy, stated at least seven times that the tested sample of DNA recovered from S.J.'s vaginal swab "matched" the DNA profile attributed to Dorsey Glenn. In addition, Ms. Graffy effectively informed the jury that the defendant was excluded as a possible contributor of that DNA by repeatedly stating that only two DNA profiles were found in the DNA

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sample, those of S.J. and Dorsey Glenn, and that there was no evidence of a second male contributor. In addition, Graffy further testified that, from a statistical perspective, it was virtually impossible for the defendant and Glenn to have the same DNA profile. For all of the reasons set forth above, we find no abuse of discretion in the denial of the defendant's request for a continuance on the day of trial.

The defendant next contends that he was deprived of a fair trial by the circuit court's ruling, without a request by the State, that evidence of the aggravated criminal sexual assault of S.R. would be admissible on retrial of the charge involving S.J. The defendant claims that this *sua sponte* ruling demonstrates that the circuit court had abdicated its judicial role and become an advocate for the prosecution. This argument is without merit.

The determination as to whether evidence of other crimes is admissible is a decision to be made by the trial court. See *People v. Wilson*, 214 Ill. 2d 127, 136, 824 N.E.2d 191 (2005) (holding that decision as to admissibility of evidence rests within the sound discretion of the trial court). In performing its duty to see that justice is done, a trial court is permitted to make rulings without objections from counsel. See *People v. Jackson*, 250 Ill. App. 3d 192, 204, 620 N.E.2d 1239 (1993).

Here, the record reflects that, prior to the commencement of

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the retrial, defense counsel informed the court that she intended to present a motion *in limine* requesting that the State be precluded from introducing evidence of other crimes, including the aggravated criminal sexual assaults committed against S.R. on the same day as the offense being tried. In response, the trial court stated that the events involving S.J. and S.R. on December 8, 1996, were "part of one incident" and that evidence as to what happened to S.R. was more probative than prejudicial and would be admissible to put the offense against S.J. in context. Thus, the court did not *sua sponte* assume the mantle of the prosecution but, instead, responded to defense counsel's statement that she intended to request that evidence of the sexual assault on S.R. be excluded. Also, because the trial court was well aware of the nature of the evidence sought to be excluded, the court was capable of determining the admissibility of that evidence without input from the State.

We note that the cases cited by the defendant in support of this argument involve situations where the trial court actively advanced the cause of the prosecution by making suggestions regarding trial strategy and presentation of additional evidence (*People v. Kuntz*, 239 Ill. App. 3d 587, 592, 607 N.E.2d 313 (1993); *In re R.S.*, 117 Ill. App. 3d 698, 704-05, 453 N.E.2d 139 (1983)), and independently considering evidence of other crimes without

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allowing defense counsel to respond to the admissibility of such evidence (*Village of Kildeer v. Munyer*, 384 Ill. App. 3d 251, 260-61, 891 N.E.2d 1005 (2008)). Because these cases are factually distinguishable from the case at bar, they are not controlling. Based on the record presented, we cannot say that the circuit court abandoned its judicial role and assumed the function of an advocate for the prosecution.

We are also unpersuaded by the defendant's assertion that the circuit court committed reversible error by admitting evidence of the aggravated criminal sexual assault of S.R., failing to issue a contemporaneous instruction regarding the limited use of this evidence, and permitting an excessive amount of evidence regarding that offense to be admitted.

The admissibility of other-crimes evidence rests within the sound discretion of the trial court, and its decision on the matter will not be disturbed absent a clear abuse of discretion. *Wilson*, 214 Ill. 2d at 136. Section 115-7.3 of the Code of Criminal Procedure (the Code) provides that when a defendant is accused of aggravated criminal sexual assault, evidence of the defendant's commission of another such offense is admissible and may be considered for its bearing on any matter to which it is relevant. 725 ILCS 5/115-7.3(a)(1), (b) (West 2008). In this case, the defendant was charged with aggravated criminal sexual assault

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against S.J. and had previously been convicted of committing that offense against S.R. Therefore, pursuant to section 115-7.3 of the Code, evidence of the aggravated sexual assault of S.R. was admissible at the defendant's retrial on the charge involving S.J.

Also, evidence of a crime for which a defendant is not on trial is admissible when it " 'constitutes a continuing narrative of the circumstances attending the entire transaction.' " *People v. Evans*, 373 Ill. App. 3d 948, 958, 869 N.E.2d 920 (2007), quoting *People v. Carter*, 362 Ill. App. 3d 1180, 1189, 841 N.E.2d 1052 (2005). In this case, the circuit court specifically and correctly noted that the events involving S.J. and S.R. on December 8, 1996, constituted a single incident. Consequently, the evidence of the defendant's aggravated criminal sexual assault against S.R. was admissible as part of "a continuing narrative of the circumstances attending the entire transaction." See *Evans*, 373 Ill. App. 3d at 958; *Carter*, 362 Ill. App. 3d at 1189. We also cannot say that the court abused its discretion by admitting an excessive amount of S.R.'s testimony where the details of the assault on her were relevant to establish the circumstances surrounding the attack on S.J.

The defendant also contends that he was deprived of a fair trial due to the court's failure to instruct the jury, at the time S.R.'s testimony was admitted, that evidence of other offenses

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could only be considered for a limited purpose. The Illinois Supreme Court has held that the failure to issue a limiting instruction at the time the evidence of other crimes is admitted is not reversible error. *People v. Heard*, 187 Ill.2d 36, 61, 718 N.E.2d 58 (1999). Moreover, we observe that the trial court properly instructed the jury after closing arguments that the evidence of other crimes had been admitted to establish the defendant's presence and intent and may be considered only for those purposes. The court further instructed the jury that any evidence that was received for a limited purpose should not be considered for any other purpose. These instructions adequately informed the jury of the restricted purpose for which it could consider the evidence of the assault on S.R. See *Heard*, 187 Ill. 2d at 61.

The defendant next claims that he was not proven guilty of criminal sexual assault beyond a reasonable doubt because S.J.'s testimony was not credible and her version of events was improbable. We disagree.

When a defendant challenges the sufficiency of the evidence, the appellate court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443

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U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304 (2004). A criminal conviction will not be set aside on the grounds of insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Brown*, 169 Ill. 2d 132, 152, 661 N.E.2d 287 (1996). The determination of the weight to be given the witnesses' testimony, their credibility, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178 (2006). The testimony of a single witness is sufficient to convict if the testimony is positive and the witness is credible (*People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365 (1999)), and eyewitness testimony may be found insufficient "only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." (*Cunningham*, 212 Ill. 2d at 280).

In this case, the direct evidence against the defendant consisted primarily of the testimony of S.J., who testified in detail regarding the sexual assault committed by the defendant, as well as the circumstances preceding and following the assault. S.J. explicitly related how the defendant forcibly removed her

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clothes and then had intercourse with her after forcing her legs apart. She stated that she was unsure whether the defendant had ejaculated during the assault, and she explained the circumstances under which she allowed Glenn to have sex with her after the defendant assaulted her. She also explained why she did not report the sexual encounter with Glenn to either the police or to hospital personnel. S.J.'s testimony alone was sufficient to sustain the defendant's conviction of criminal sexual assault, which may be proven by evidence that the accused committed an act of sexual penetration by the use or threat of force. See 720 ILCS 5/12-13(a) (West 1996). In addition, S.J.'s testimony was corroborated by the testimony of Karen Wilson, the emergency room nurse who cared for S.J., and the records documenting her medical treatment. Moreover, Graffy's testimony established that it is possible for a person to engage in sexual intercourse without ejaculating or depositing any DNA in the victim, or that DNA may be undetected due to masking by a secondary contributor.

As stated earlier, it was the right and obligation of the jury to determine the weight and credibility to be given the witnesses' testimony, to resolve any inconsistencies and conflicts in the evidence, and to decide the reasonable inferences to be drawn from the testimony. *Sutherland*, 223 Ill. 2d at 242. Here, the jury was well aware of the fact that S.J.'s testimony as to whether the

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defendant had ejaculated was inconsistent with her statements at the postconviction hearing and also that she had failed to report her sexual contact with Dorsey Glenn on the night of the incident. As the finder of fact, the jury was entitled to believe the trial testimony of S.J., despite the defendant's argument that it was not credible. In reviewing all of the evidence in accord with the standard set forth above, we find that a rational trier of fact could have found the defendant's guilt beyond a reasonable doubt.

The defendant also argues that the circuit court acted vindictively by sentencing him to a harsher prison term based on his decision to go to trial a second time. In support of this argument, the defendant relies on the fact that, after the first trial, he received a 10-year term of imprisonment for aggravated criminal sexual assault, a Class X offense, which is more serious than criminal sexual assault, a Class 1 offense, for which the court imposed a sentence of 12 years' imprisonment.

Increased sentences imposed after retrial are not barred by the double jeopardy or equal protection clauses unless such harsher sentences are motivated by vindictive retaliation by the trial judge. *North Carolina v. Pearce*, 395 U.S. 711, 723-24, 89 S. Ct. 2072, 2079-80, 23 L. Ed. 2d 656, 668-70 (1969); see also *People v. Baze*, 43 Ill. 2d 298, 302, 253 N.E.2d 392 (1969). "A trial judge is not constitutionally precluded *** from imposing a new sentence,

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whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' " *Pearce*, 395 U.S. at 723, 89 S. Ct. at 2079, 23 L. Ed. 2d at 668, quoting *Williams v. New York*, 337 U.S. 241, 245, 69 S. Ct. 1079, 1082, 93 L. Ed. 1337. This new information may be brought to the court's attention from evidence presented at the second trial, from a new presentence investigation, from the defendant's prison record, or from other sources. *Pearce*, 395 U.S. at 723, 89 S. Ct. at 2079, 23 L. Ed. 2d at 668.

Here, the record reflects that the circuit court's sentencing decision was premised on the defendant's criminal background as a juvenile, as well as the evidence of his disciplinary infractions while incarcerated. The court stated that the defendant has a mean and violent streak in him and that his conduct since the time of the offense warranted a sentence of 12 years' imprisonment. The trial judge specifically stated that he would not penalize the defendant for undergoing a second trial. Also, in denying the motion to reconsider the sentence, the court stated that the sentencing decision was based on the information that the defendant had a difficult record in prison and was a gang leader who was involved in all kinds of violent activity. These comments demonstrate that the defendant's sentence was based on his behavior

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since his prior conviction, and they refute the assertion that the trial judge acted vindictively in imposing a sentence of 12 years.

Finally, the defendant challenges the denial of his claims for postconviction relief with regard to his two convictions for aggravated criminal sexual assault of S.R., arguing that the newly discovered DNA evidence constituted a sufficient basis for granting a new trial on those charges. This argument is without merit.

Postconviction petitions generally are adjudicated in three stages. 725 ILCS 5/122-1 *et seq.* (West 2008); *People v. English*, 403 Ill. App. 3d 121, 129, 933 N.E.2d 366 (2010). Where, as here, the circuit court has conducted a third-stage evidentiary hearing and resolution of the issues involves fact-finding and credibility determinations, a court of review will disturb the decision of the trial court only if it is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999 (2006). Manifest error is error that is clearly evident, plain, and indisputable. *People v. Morgan*, 212 Ill. 2d 148, 155, 817 N.E.2d 524 (2004).

In order to establish a postconviction claim of actual innocence based on newly discovered evidence, the defendant must present evidence that was not available at the time of his original trial and that could not have been discovered sooner through diligence. *Morgan*, 212 Ill. 2d at 154. In addition, the evidence must be material, noncumulative and of such conclusive character

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that it would probably change the result on retrial. *Morgan*, 212 Ill. 2d at 154.

In ruling on the defendant's supplemental postconviction petition, the trial court determined that the newly discovered DNA evidence could not have been discovered at the time of the defendant's original trial. The court also found that the DNA evidence did not establish the defendant's actual innocence of the crimes for which he had been convicted. In reaching this conclusion, the court specifically found that the defendant and Watkins were not credible in testifying at the postconviction hearing. However, the court concluded that the newly discovered DNA evidence raised "a concern" as to the integrity of the defendant's trial on the charge of aggravated criminal assault against S.J. On this basis, the circuit court ordered that the defendant be granted a new trial solely on the charge involving S.J.

The defendant argues that the circuit court's ruling granting postconviction relief on the charge involving S.J. but denying such relief on the charges involving S.R. was "inexplicable" because the incidents involving S.J. and S.R. were "closely related" and the two victims testified to similar events. We do not find the circuit court's decision to be "inexplicable" or manifestly erroneous. The record affirmatively demonstrates that the court

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found the testimony of the defendant and Watkins to be incredible and that actual innocence had not been established. The court granted postconviction relief on the charge involving S.J. because the newly discovered DNA evidence "may have factored into how the lawyers handled the case and how the judge at the time looked at the case." Evidence of the presence of Glenn's DNA and the absence of the defendant's DNA on the vaginal swab taken from S.J. was not material to either prove or disprove that the defendant forced S.R. to perform oral copulation on him and to have vaginal intercourse with Watkins. Based on the record before us, it is clear that the newly discovered DNA evidence related only to the charge involving S.J. Consequently, the denial of postconviction relief on the convictions relating to S.R. was not manifestly erroneous.

For the foregoing reasons, we affirm the defendant's conviction and sentence for criminal sexual assault of S.J. and the denial of his postconviction claims with regard to the convictions for aggravated criminal sexual assault of S.R.

Affirmed.