THIRD DIVISION
May 11, 2011

No. 1-09-2791

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	No. 95 CR 6687
	)	
ABEL COLIN,	)	Honorable
	)	John J. Fleming,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Murphy and Steele concurred in the judgment.

MODIFIED UPON REHEARING

Held: Where DNA evidence played no significant role in defendant's conviction and the evidence of defendant's guilt of sexually assaulting the child victim over a period of two years is overwhelming, any DNA testing would not produce new, noncumulative evidence that is materially relevant to defendant's assertion of actual innocence. Therefore, the order of the circuit court denying defendant's section 116-3 motion for DNA testing is affirmed.

Defendant appeals from the circuit court's denial of his request for DNA testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2008)). For the following reasons, we affirm.

I. BACKGROUND

Defendant's conviction stems from his involvement in the aggravated criminal sexual assault of a minor female, S.F., from 1993 to 1995. During this time frame, S.F. was six to eight years old and a neighbor of defendant. Defendant and his wife, Stephanie, babysat for S.F. before and after S.F. went to school. Defendant orally assaulted and vaginally raped, sodomized and tortured S.F. on a daily basis with the aid and abatement of Stephanie. Defendant also procured from S.F. a videotape in which defendant told S.F. to state that she went out late at night to see "gangbangers," who had sex with her.

At defendant's jury trial, S.F. testified that prior to the sexual assaults, Stephanie would wash S.F.'s vagina then bring S.F. naked to defendant. S.F. testified that during the sexual assaults, Stephanie would watch or hold S.F.'s legs open. S.F. also testified that, occasionally, defendant would bring her into the bedroom of his teenage son, who would also sexually assault her.

Defendant sexually assaulted S.F. for the last time on February 6, 1995. Two days later, S.F. went to the hospital accompanied by her mother and Stephanie, with defendant driving them. Stephanie brought a pair of S.F.'s underwear in a bag and gave them to a nurse. Stephanie told the nurse that a "gangbanger" had sexually assaulted S.F. and cut her vagina with a knife. S.F. was examined by a physician, to whom Stephanie also told the fabricated story. S.F's underwear

were subsequently inventoried by the Chicago Police Department Crime Laboratory.

When S.F. and her mother were subsequently in the privacy of their own home, S.F. told her mother that it was defendant who had sexually assaulted her. Defendant and Stephanie were charged with multiple counts of aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, kidnaping and unlawful restraint. Stephanie provided a written statement to an Assistant State's Attorney (ASA) detailing her involvement in the sexual assault of S.F. over the two-year period. Stephanie subsequently pled guilty to aggravated criminal sexual assault for her participation in the assaults of S.F. and was sentenced to 23 years in prison.

At defendant's trial, Stephanie denied ever seeing defendant sexually assault S.F., and the State introduced Stephanie's written statement. The parties stipulated that Joanna Doute, employed by the forensic biology unit of the Chicago Police Department Crime Laboratory division, would testify that the laboratory received two vaginal swabs, one vaginal smear, two rectal swabs, one rectal smear, and one pair of the victim's underwear that was brought to the hospital by codefendant Stephanie, defendant's wife. Chemical testing and microscopic examination of the vaginal and rectal swabs and smears yielded negative results for the presence of semen. Chemical testing for the presence of semen on the pair of underwear yielded negative results. A microscopic exam of the underwear revealed the presence of sperm fragments, and chemical and erological tests revealed the presence of human blood. Further testing was precluded due to an insufficient amount of sample. The parties stipulated that swatches of underwear fabric as well as reference samples from defendant and the victim were sent to Dr.

Alan Leo Friedman, owner of Helix Biotech laboratory.

Dr. Friedman testified as defendant's expert in the field of DNA analysis, and the State did not object to his being tendered as an expert. Dr. Friedman testified that he evaluated DNA profiles of the genetic material recovered from the underwear of the victim, that the genetic material contained DNA profiles of "three or more" individuals, and that none of the profiles were "consistent with the DNA profile for [defendant]." Dr. Friedman testified that the quantity of the genetic material recovered from the victim's underwear was limited and while "there was human DNA present" there was "very little of it," "the concentration was very, very low," and "both the concentration and the absolute quantity was very, very small."

Defendant argued that S.F. had suffered her sexual trauma and injuries during consensual sexual encounters with "gangbangers" in the neighborhood. Defendant argued that Dr. Friedman's exclusion of defendant as a source of DNA on the victim's underwear, brought to the hospital by defendant's wife and codefendant Stephanie, supported his defense that S.F.'s injuries were caused by other individuals.

During cross-examination by the State, Dr. Friedman acknowledged that the limited amount of genetic material could have affected the results of the testing. Dr. Friedman acknowledged that defendant's DNA could have been present but not have been seen on the victim's underwear. Dr. Friedman testified that the sample from the underwear matched defendant's DNA in 10 out of 11 alleles that were tested, with two alleles being off because defendant "varied at two genetic systems." Dr. Friedman acknowledged that the very little amount of DNA and the low concentration could have affected the intensity of the alleles in the

amplification process. Dr. Friedman also acknowledged that given that the intensity of the amplification of the alleles could have been affected by the concentration and weakness of the DNA, "it is possible" that the two alleles failed to show in this case. While Dr. Freidman admitted that the DNA could have been there and not seen, he stood by his conclusion that defendant was excluded as a contributor of DNA on the victim's underwear.

The jury found defendant guilty of two counts of aggravated criminal sexual assault and sentenced him to two consecutive 60-year terms of imprisonment. This court affirmed the judgment on direct appeal. *People v. Colin*, 344 Ill. App. 3d 119 (2003), *appeal denied* 207 Ill. 2d 609 (2004).

On direct appeal, defendant's appellate counsel argued that the circuit court erred in admitting evidence that Colin had committed prior sexual assaults on another minor, H.R., and that defendant's extended-term sentence was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348. This court held that the evidence of defendant's prior sexual assaults on H.R. was admissible to establish defendant's *modus operandi*. *Colin*, 344 Ill. App. 3d at 129. This court explained the similarities between both cases where defendant selected both victims, H.R. and S.F., using virtually identical criteria including the victims' vulnerability and their families' friendship with defendant and his wife. In both cases, defendant acted in concert with his wife to procure the victims and assaulted the victims with his wife's participation that included "preparing" the victims and physically aiding defendant by holding the victims down or spreading their legs open during the sexual assaults. *Colin*, 344 Ill. App. 3d at 129. This court also held that defendant waived his *Apprendi* claim and that the plain-error

doctrine did not apply where defendant's extended-term sentences were based on the circuit court's finding as to the exceptionally brutal or heinous nature of defendant's behavior and there was no doubt that the jury would have made the same finding. *Colin*, 344 Ill. App. 3d at 133-34. This court explained, "[N]o doubt the jury would have found that defendant's ongoing two-year sexual ravaging of an infant such as S.F. was brutal and heinous." *Colin*, 344 Ill. App. 3d at 134.

During the pendency of his direct appeal, defendant filed a *pro se* post-conviction petition pursuant to the Illinois Postconviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)), alleging, *inter alia*, that the circuit court allowed improper statements by the prosecutor during closing and rebuttal arguments, and that trial and appellate counsel were both ineffective. Specifically, defendant argued that the prosecutor's closing arguments were improper where the prosecutor attacked witnesses, made disparaging remarks about defense counsel and defendant's expert, Dr. Friedman, and the prosecutor made an inaccurate summary of the DNA evidence presented at trial. On November 26, 2003, the circuit court summarily dismissed defendant's *pro se* post-conviction petition as frivolous and patently without merit. On appeal, this court reversed the summary dismissal of defendant's *pro se* post-conviction petition and remanded for the appointment of counsel and second-stage proceedings under the Act. *People v. Colin*, No. 1-04-0718 (November 3, 2006) (unpublished order pursuant to Supreme Court Rule 23). On remand, appointed counsel filed a supplemental post-conviction petition and, following a hearing, the circuit court granted the State's motion to dismiss the supplemental petition.

On appeal, this court affirmed the circuit court's dismissal of defendant's supplemental post-conviction petition during the second stage of proceedings under the Act. *People v. Colin*,

No. 1-09-1321 (February 9, 2011) (unpublished order pursuant to Supreme Court Rule 23). In doing so, this court held that defendant failed to show a substantial violation of his constitutional rights with respect to his representation by trial and appellate counsel, and defendant was unable to show he was prejudiced where the evidence against him was overwhelming. With respect to defendant's claim that the prosecutor misstated the DNA evidence presented at trial by defendant's expert Dr. Friedman, this court noted that there was evidence other than the DNA material recovered from a pair of S.F.'s underwear linking defendant to the repeated sexual assault of S.F. over the course of a two-year period. The evidence included testimony from S.F. and H.R. Both of these witnesses testified to being sexually assaulted by defendant and there were striking similarities between the attacks on S.F. and H.R. In addition, Stephanie, defendant's wife and codefendant, testified for the State. Stephanie admitted that she plead guilty to aggravated criminal sexual assault for her participation in the assaults of S.F. At trial, Stephanie denied ever witnessing defendant assault S.F. However, on February 10, 1995, Stephanie provided a statement to ASA Laura Forrester that detailed her participation and observation of defendant's repeated sexual assaults of S.F. Defendant's 11-year old daughter, Sandy, testified that she saw defendant take S.F. down to the basement on numerous occasions. Sandy testified that she was not allowed to go into the basement when defendant and S.F. were down there. Sandy testified that on one occasion, she heard S.F. tell defendant, "Get off me." and defendant reply, "No." Sandy testified that on another occasion, she went to the basement and saw defendant and S.F. on a bed. Defendant was "trying to get [S.F.'s] clothes off" and trying to take his own clothing off.

The State also presented testimony from a licensed clinical social worker, who conducted a Victim Sensitive Interview (VSI). The social worker testified regarding S.F.'s description of being sexually assaulted by defendant with the assistance of his wife, Stephanie. Further, the State presented testimony from Dr. Emily Flaherty, an expert in the area of child sexual abuse, who examined S.F. on February 14, 1995. Dr. Flaherty testified that S.F.'s injuries indicated that she had suffered repeated sexual trauma. Dr. Flaherty testified that S.F. did not have any recent cuts or bleeding and that her trauma was unlikely to have been caused by a knife. In her medical opinion, S.F. had been sexually abused and her injuries were consistent with long-term repeated penetration by an adult penis.

Based on this evidence, this court concluded: "[W]e do not believe that the DNA evidence and the prosecutor's closing argument regarding the DNA evidence was a material factor in his conviction. The lack of DNA evidence on one pair of the victim's underwear, where defendant was charged with multiple counts of aggravated sexual assault of S.F. over a two-year period, does not exculpate defendant. This is especially true where it was defendant's wife and codefendant, Stephanie, who brought the pair of underwear to the hospital to turn over to authorities." *People v. Colin*, No. 1-09-1321, slip op. at 17.

While defendant's post-conviction proceedings were pending, defendant filed a *pro se* motion for further DNA testing of the victim's underwear pursuant to section 116-3 of the Code. In that motion, defendant acknowledged that the underwear had been subjected to PCR DNA testing and that the results of the DNA testing were presented at trial by his own expert, who testified that the DNA "was not consistent with the DNA profile of [defendant]." However,

defendant argued that the underwear should be subjected to further mitochondrial DNA analysis that was not scientifically available at trial and that this testing had the potential to produce new, noncumulative evidence to support his claim of actual innocence. Defendant asserted that identity was an issue at trial and that the underwear in question had been subject to a sufficient chain of custody. Defendant attached laboratory reports from the Chicago Police Department Crime Laboratory indicating that one pair of the victim's underwear had been submitted to the lab for testing then forwarded to the Evidence and Recovered Property Section under Inventory Number 1442053-014.

The State filed a motion to dismiss defendant's section 116-3 motion for DNA testing. The circuit court subsequently denied defendant's motion for additional DNA testing. In doing so, the court found that identity was not at issue and that new DNA testing could not advance an actual innocence claim where the DNA evidence presented at trial included evidence that defendant was excluded from the relevant samples tested and obtained from the victim's underwear. Defendant now appeals.

II. ANALYSIS

On appeal, defendant argues that the circuit court erred in denying his motion for further DNA testing where such testing would support his claim of actual innocence. Defendant claims that he satisfied all the requirements for additional testing.

We review *de novo* the circuit court's denial of a motion for DNA testing under section 116-3 of the Code. *People v. O'Connell*, 227 Ill. 2d 31, 35 (2007). Section 116-3 provides in

pertinent part:

> "(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of *** forensic DNA testing, including comparison analysis of genetic marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5-4-3 of the Unified Code of Corrections [(730 ILCS 5/5-4-3)], on evidence that was secured in relation to the trial which resulted in his or her conviction, and:
>
> (1) was not subject to the testing which is now requested at the time of trial; or
>
> (2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results.
>
> * * *.
>
> (b) The defendant must present a prima facie case that:
>
> (1) identity was the issue in the trial which resulted in his or her conviction;
>
> and
>
> (2) the evidence to be tested has been subject to a chain of custody

> sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.
>
> (c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:
>
> (1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant;
>
> (2) the testing requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3 (West 2008).

Accordingly, section 116-3(a)(2) allows a defendant to have physical evidence subjected to scientific testing that was not available at the time of trial if certain requirements are met. "To obtain testing, a defendant must present a *prima facie* case that identity was the issue at his trial and that the evidence tested has been under a secure chain of custody." *People v. Savory*, 197 Ill. 2d 203, 208 (2001). If a defendant can establish a *prima facie* case for section 116-3 testing, a defendant must then establish that the evidence can be subjected to "additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results." 725 ILCS 5/116-3(a)(2) (West 2008).

Here, the State concedes that defendant has established a *prima facie* case that identity

was at issue in defendant's trial as it formed the basis of his defense and that the evidence which defendant seeks to test was subject to a secure chain of custody. Defendant argues that although the victim's underwear was previously subjected to PCR testing, the relatively new method of Y-STR testing has the potential to produce more probative results.

The State responds that defendant's section 116-3 motion failed to request Y-STR testing and, therefore, his request for such testing should be forfeited. We agree. In this case, the circuit court denied defendant's motion with respect to mitochondrial DNA testing and did not rule on Y-STR testing because defendant did not raise the issue before the circuit court. Therefore, the issue is forfeited on review. See *Barker*, 403 Ill. App. 3d at 525 (defendant's section 116-3 motion merely requested STR, PCR and RFLP testing, while failing to request Y-STR or mitochondrial DNA testing, and therefore his request for Y-STR or mitochondrial DNA testing was forfeited).

In a petition for rehearing, defendant argues that he is entitled to additional mitochondrial DNA testing under section 116-3(a)(1), where it is undisputed that mitochondrial DNA analysis was not performed on the evidence. Defendant correctly notes that section 116-3(a)(1) allows a defendant to have physical evidence subjected to DNA testing that "was not subject to the testing which is now requested at the time of trial." 725 ILCS 5/116-3(a)(1) (West 2008). Defendant maintains that mitochondrial DNA testing has the potential to produce more probative results.

However, while the evidence was not subject to mitochondrial DNA testing at the time of

trial, we nevertheless find that the results of such testing would not have the potential to produce "new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence." 725 ILCS 5/116-3(c)(1) (West 2008). "[E]vidence which is 'materially relevant' to a defendant's claim of actual innocence is simply evidence which tends to significantly advance that claim." *Savory*, 197 Ill. 2d at 213. Whether DNA testing will provide materially relevant evidence of actual innocence "requires a consideration of the evidence introduced at trial, as well as an assessment of the evidence defendant is seeking to test." *Savory*, 197 Ill. 2d at 214. DNA evidence that plays a minor role and is a collateral issue is not materially relevant because it does not significantly advance a claim of actual innocence. *Gecht*, 386 Ill. App. 3d at 582.

Here, defendant's motion requested additional DNA testing of a pair of the victim's underwear, which had been brought to the hospital by defendant's wife and codefendant, Stephanie. Defendant acknowledges that the only DNA testimony at his trial came from defendant's expert, Dr. Friedman, who testified that he excluded defendant as a contributor of DNA on the victim's underwear. Defendant argues that the State was able to successfully attack Dr. Friedman's exclusion of defendant and that the requested additional DNA testing could conclusively exclude defendant as a source of DNA on the victim's underwear, which would advance his claim of actual innocence.

A review of the record reflects that defendant's convictions were based on overwhelming evidence that did not include DNA evidence. As previously noted, in our Rule 23 order, the evidence was overwhelming that during a two-year period, defendant orally assaulted and vaginally raped, sodomized and tortured S.F., who was six to eight years of age, on a daily basis

with the aid and abatement of Stephanie. *People v. Colin*, No. 1-09-1321, slip op. at 16-17. We further held that the DNA evidence from one pair of the victim's underwear was not a material factor in defendant's conviction. This court explained, "The lack of DNA evidence on one pair of the victim's underwear, where defendant was charged with multiple counts of aggravated sexual assault of S.F. over a two-year period, does not exculpate defendant. This is especially true where it was defendant's wife and codefendant, Stephanie, who brought the pair of underwear to the hospital to turn over to authorities." *People v. Colin*, No. 1-09-1321, slip op. at 17.

We, therefore, conclude that the evidence at issue in defendant's DNA motion is not materially relevant where DNA evidence played no significant role in the evidence presented at defendant's trial and the evidence of defendant's guilt was overwhelming. Accordingly, any additional DNA testing of the victim's underwear would not significantly advance defendant's claim of actual innocence or produce evidence materially relevant to defendant's assertion of actual innocence.

For the above reasons, we affirm the order of the circuit court denying defendant's section 116-3 motion for DNA testing.

Affirmed.