FIRST DIVISION
March 5, 2012

No. 1-10-1909

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 2977
	)	
JAMAL BENNETT,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ 1 ***HELD:*** Defendant's convictions and sentences affirmed, where: (1) defendant's pretrial motion to quash his arrest and suppress evidence was properly denied; (2) victim's identification of defendant had a sufficient independent basis to support its admissibility, (3) trial court properly limited defendant's cross-examination of victim regarding her history of prostitution; (4) defendant was proven guilty beyond a reasonable doubt; and (5) defendant's term of imprisonment was not improperly increased upon resentencing.

¶ 2 Following a bench trial, defendant, Jamal Bennett, was convicted of aggravated criminal-sexual assault, armed robbery, and aggravated kidnaping. He was originally sentenced to a total of 42 years' imprisonment, but the trial court reduced defendant's sentence to a total of 18 years' imprisonment after finding that certain sentencing enhancements should not have been applied. On

appeal, defendant asserts that the trial court improperly denied both his motion to quash and suppress evidence, and his motion to suppress the victim's identification, and the trial court also improperly excluded evidence of the victim's prior record of prostitution. Defendant further contends he was not proven guilty beyond a reasonable doubt and that the trial court improperly increased his term of imprisonment upon resentencing. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant and his codefendant, Darius Burnett, were charged by indictment with the January 21, 2007, kidnaping, rape, and robbery of B.M. Specifically, defendant and Mr. Burnett were each charged with–among other offenses–multiple counts of aggravated criminal-sexual assault, armed robbery, and aggravated kidnaping. The charges against defendant ultimately proceeded to a bench trial in early 2010. A motion to sever the trials of defendant and Mr. Burnett was granted by the trial court, and Mr. Burnett is not a party to this appeal.

¶ 5 The trial court ruled on a number of motions before defendant's bench trial began. First, defendant filed a motion to quash his arrest and suppress evidence on the basis that he was arrested without either a warrant or probable cause. At a hearing on that motion, defendant's first witness was Chicago Police Detective Michael Hughes who testified, on direct examination, that he arrested defendant around 5:20 a.m. on January 21, 2007. Detective Hughes had not obtained either an arrest or search warrant prior to defendant's arrest, nor had he observed defendant committing a crime.

¶ 6 On cross-examination, Detective Hughes testified that around 4:00 a.m. that morning, he was assigned to investigate the sexual assault of B.M., which had occurred a few hours earlier, near the intersection of 60th Street and Honore Street in Chicago. Shortly thereafter, Detective Hughes

interviewed B.M. while she was being treated in the emergency room of Holy Cross Hospital. Detective Hughes had previously learned from other officers and police radio broadcasts that B.M. described her attackers as two black males around 18 years of age. One was described as 6 feet tall, weighing around 300 pounds, and wearing grey sweat pants and a sweat shirt. The other was described as wearing a black jacket and hat, about the same height, and weighing around 250 pounds. B.M. informed Detective Hughes that her attackers were driving a car, and she also provided him with the license plate number of that vehicle. That license plate number belonged to a 1999 Chevrolet registered to an address near the location of the attack on B.M.

¶ 7 Detective Hughes then drove to the registered address, where he was met by two other Chicago police officers. After knocking on the door, Detective Hughes and the other officers were greeted by Beverly Bennett, defendant's mother. She stated the 1999 Chevrolet was "their" vehicle, that it should be in the garage, and that her son had been driving the vehicle. Ms. Bennett then called her son into the living room, and Detective Hughes observed that defendant matched B.M.'s description of the first attacker. Defendant was then placed under arrest, and Detective Hughes subsequently found the 1999 Chevrolet parked in Ms. Bennett's garage.

¶ 8 Ms. Bennett also testified at the hearing, indicating the vehicle was actually owned by her mother, who also lived at the same address. It was the only vehicle they owned, and defendant was the only male resident of the home. Ms. Bennett further testified that Detective Hughes never specifically asked her if her son had been using the vehicle earlier that morning, nor did she actually know whether or not he had done so.

¶ 9 The trial court denied defendant's motion to quash arrest and suppress evidence. The trial

court found both witnesses to be credible, and further found Detective Hughes had probable cause to arrest defendant in light of all the testimony presented.

¶ 10 Defendant next filed a motion to suppress B.M.'s identification of defendant as one of her attackers. In his written motion, defendant contended that on the day of his arrest, B.M. was "allowed to view the Defendant in [a] one-on-one lineup under circumstances that were unnecessarily suggestive of the identity of the Defendant in that she was shown the defendant alone and not at lineup at the police station." Defendant's motion was initially granted after the State conceded that the one-on-one identification of defendant, was unduly suggestive. However, the trial court also granted the State a hearing on its petition contending B.M. should be allowed to identify defendant in open court because an independent basis existed for her identification.

¶ 11 At that hearing, B.M. testified she was currently incarcerated on a charge of retail theft. She also had four prior retail-theft convictions, and a conviction for delivery of a controlled substance. B.M. then testified regarding the circumstances of her attack.

¶ 12 Specifically, B.M. testified that around midnight on January 21, 2007, she was walking along a sidewalk on 67th Street near Ashland Avenue, when she heard a car blowing its horn and observed the car contained two occupants. Shortly thereafter, she was cut off by the same car, when it pulled into an alley in front of her. Defendant was driving the vehicle and the passenger got out with a gun in his hand. The passenger then instructed B.M. to get into the car, which she did. Defendant drove around for some time, ultimately, pulling into another alley. Some other people were in that alley, and defendant then drove the vehicle to an alley near 60th Street and Honore Street. At that time, B.M. was instructed to take off her clothes and the two men raped her. She was then instructed to

exit the vehicle without her clothes and the two men drove off. B.M. testified she was in close proximity to the men for a total of 30 to 45 minutes, she was able to observe the defendant the whole time, and she was able to see his face.

¶ 13 B.M., subsequently, called the police and gave a description of the two men in the car. Both were black males between 17 and 18 years old. The driver was further described as just over 6 feet tall and weighing between 200 and 300 pounds. The passenger was described as between 5 feet 4 inches and 5 feet 5 inches tall, weighing 250 pounds. Later that day, B.M. identified defendant at a police station, where he was sitting alone at a table.

¶ 14 The State also presented two stipulations at the hearing. First, it was stipulated that Chicago Police Officer Guante would testify that shortly after the attack, B.M. gave a similar description of her attackers. Furthermore, it was stipulated that–at the time of his arrest–defendant indicated he was 6 foot 4 inches tall and weighed 290 pounds. After hearing this evidence, the trial court found there was a sufficient independent basis for B.M.'s in-court identification of defendant, and that she would be permitted to offer that testimony at trial.

¶ 15 The final pretrial motion was brought by the State, and sought to bar defendant from introducing any evidence of any prior misdemeanor convictions for prostitution B.M. may have. The trial court found that, while these misdemeanor prostitution convictions would not be admissible for general impeachment purposes under *People v Montgomery*, 47 Ill. 2d 510 (1971), it would hold in abeyance any further ruling on the applicability of the rape shield statute (725 ILCS 5/115-7 (West 2008)) until trial.

¶ 16 At trial, the State first presented testimony from B.M. regarding her criminal history. B.M.

testified she had six felony convictions and six misdemeanor convictions for charges ranging from retail theft, to possession of a controlled substance with the intent to deliver. She had also recently had a charge of escape dismissed, though B.M. specifically indicated no promises had been made to her in exchange for her testimony in the present case. Finally, B.M. acknowledged that in prior interactions with police unrelated to this case, she had provided several different aliases and incorrect dates of birth.

¶ 17 With respect to the present case, B.M. testified to the circumstances surrounding her kidnaping, robbery, and rape. In general, her trial testimony mirrored her pretrial testimony. She did, however, provide additional details. Specifically, she testified the gun originally held by the passenger, was a .38-caliber revolver with a black handle. She also testified she initially thought the two men wanted money, so she gave them $55. When she and the two men finally parked in the second alley, the passenger ordered her to take her clothes off. She did so and the driver, whom B.M. identified in court as defendant, got into the back seat of the car with her. Defendant wanted B.M. to perform oral sex, but she was unable to do so because "he had an awful smell and [she] just started gagging." Defendant then ordered her to turn around and he raped her vaginally from behind. The passenger then handed the gun to defendant, defendant got back into the driver's seat of the vehicle, and the passenger also raped B.M. vaginally. Thereafter, the passenger retrieved the gun from defendant and said, "I should kill this bitch." Defendant disagreed, and ordered B.M. out of the car. Without her clothes, B.M. exited the vehicle and the two men dove away. When they did so, B.M. observed the license plate number on the vehicle.

¶ 18 B.M., naked and cold, knocked on the door of a nearby home, seeking help. An older

woman, named Ms. Shaw, and a younger women, let her in. They gave her a blanket and some clothes, as well as a pencil to write down the license plate number. B.M. called the police, and when they arrived, she told them what happened, described the two men, and gave them the license plate number. She was then taken to Holy Cross Hospital, where she was treated, and rape kits were prepared. At trial, B.M. identified pictures of the vehicle located at defendant's home as being the car involved in the incident.

¶ 19 On cross-examination, the trial court refused to allow defense counsel to ask B.M. if she had ever worked as a prostitute on the basis that such testimony would violate the rape shield statute. However, defense counsel did elicit testimony from B.M., in which she denied telling the police the two men actually took $50 from her and that the gun was only "possibly" a revolver. She also testified that while she usually carries a knife, she did not have one on the night of the incident.

¶ 20 Mildred Shaw testified that on January 21, 2007, she lived in an apartment on the 6000 block of South Honore Street. Shortly after midnight, her upstairs neighbor called her to say there was someone at the front door of the building. When she looked, Ms. Shaw observed B.M. standing naked at her doorstep. Ms. Shaw let B.M. inside, and B.M. told her she had been raped by two men at gunpoint. B.M. also said one of the men wanted to shoot her, while the other said they should just take B.M.'s clothes. Ms. Shaw gave B.M. some clothes, and B.M. asked for a pencil to write down the license plate number of the vehicle driven by the two men. The police were called to the scene, and B.M. soon left with them.

¶ 21 The State then presented testimony from Megan Neff, a forensic scientist employed by the Illinois State Police crime lab. Ms. Neff testified as an expert–without objection–that she examined

the vaginal DNA samples produced from B.M.'s rape kits, a blood sample from B.M., and buccal swabs obtained from defendant and codefendant, Mr. Burnett. From these materials, Ms. Neff was able to develop DNA profiles of B.M., defendant, and Mr. Burnett.

¶ 22 Additionally, Ms Neff testified that two profiles were obtained from semen contained in B.M.'s vaginal rape kit. The first major profile matched Mr. Burnett and did not match defendant. The second minor profile did not match either B.M. or Mr. Burnett. However, defendant could not be excluded as the donor of the minor DNA profile, and this profile would be expected to occur in only 1 in 1.1 billion black, 1 in 11 billion white, and 1 in 1.1 billion Hispanic individuals that were not related.

¶ 23 The trial court, thereafter, indicated it had reconsidered its prior ruling with respect to the admissibility of evidence of several of B.M.'s prior arrests and convictions, indicating they might be admissible because they were relevant to B.M.'s possible bias, interest, or motive. The State, therefore, recalled B.M. to the stand to review portions of her criminal history. This history included evidence B.M. had served three days of jail time on a charge of prostitution. This charge had occurred after the incident involved in this case, but before B.M.'s initial trial testimony. B.M. further testified nothing had been promised to her with respect to any of her prior arrests or convictions. Defense counsel did not cross-examine B.M. regarding any of this additional evidence.

¶ 24 The State's final two witnesses were Detectives Luis Otero and Peter Schumacher. Detective Otero testified that on January 21, 2007, defendant identified a picture of B.M. as being "the woman that he was with earlier that evening." Detective Schumacher testified he was present when defendant was arrested, and estimated defendant was 6 foot 4 inches tall and weighed 220 pounds

at the time. Furthermore, he testified that a vehicle matching the description provided by B.M.–including the license plate number–was located at the residence where defendant was arrested.

¶ 25 The parties thereafter stipulated that–if called–Dr. Jeharngir Meer would testify he treated B.M. in the emergency room at Holy Cross Hospital on January 21, 2007, for an alleged sexual assault. Dr. Meer completed a vaginal rape kit and found no evidence of trauma. While treating her, B.M. stated she was raped by two men and that her "assailant used a condom." The parties also entered into a number of stipulations regarding the proper chain of custody for the rape kits and buccal swabs.

¶ 26 Following these stipulations, the State rested. Defendant's motion for a directed finding was denied, and the defense called defendant to the stand.

¶ 27 Defendant testified he and Mr. Burnett were driving in his grandmother's 1999 Chevrolet Malibu on the evening of January 20 to January 21, 2007. Defendant was driving and Mr. Burnett was in the front-passenger seat, when they noticed B.M. walking down the street. The two men tried to get B.M.'s attention, because she appeared to be a prostitute and Mr. Burnett wanted to "pick her up." At first B.M. ignored them, but she got into the vehicle after defendant subsequently pulled around a second time, and Mr. Burnett asked her if she wanted to make some money.

¶ 28 Defendant then drove to an alley, but when it was occupied with other people, he continued driving and, ultimately, parked the vehicle in another alley near 61st Street and Honore Street. Mr. Burnett asked defendant if he wanted to go first, and defendant said yes "just to get it out of the way." Defendant then joined B.M. in the back seat of the car and gave her $10 for oral sex. However, after just a few seconds, he told her to stop because she was "biting" him. Defendant

testified he never had vaginal intercourse with B.M. and never ejaculated. Defendant then returned to the driver's seat of the car, turned up the music, and sent a text message to his girlfriend, while Mr. Burnett had sex with B.M. in the back seat.

¶ 29 Defendant testified that shortly thereafter, B.M. began complaining and asking for more money, which the two men did not have. Defendant then told her to get out of the car, but B.M. began swinging a "box cutter" around. Defendant was ultimately able to pull B.M. out of the car, and at that time, the box cutter and a hat containing the money he had given B.M., fell on the ground. Defendant saw Mr. Burnett take the money from the hat, and the two men drove away. Defendant stated neither he nor Mr. Burnett was armed with a gun that night, and he never heard Mr. Burnett say B.M. should be shot.

¶ 30 On cross-examination, defendant stated he did not know how much money Mr. Burnett paid B.M.–if anything–and did not know how much he took from B.M.'s hat. He also acknowledged he had previously told the police B.M. was carrying a knife, not a box cutter, and that she dropped the knife when Mr. Burnett slapped her. He also now stated B.M. had cut him with the box cutter, though he never previously told police this had happened.

¶ 31 Defendant then entered a number of stipulations into the record reflecting B.M.'s prior interviews with the police. It was stipulated that when police initially arrived at Ms. Shaw's apartment, B.M. did not specifically identify the gun used by the defendant and Mr. Burnett as a .38-caliber revolver. Furthermore, at that time B.M., stated the two men had taken $50 from her, not $55. Finally, it was stipulated that two police officers would testify B.M. had indicated she was told to lie on her back when defendant raped her, while two other officers would testify she told them she

was on her hands and knees during the rape. The defendant then entered certified copies of B.M.'s convictions and rested his case.

¶ 32 In rebuttal, the State introduced a stipulation that Detective Hughes would testify to a conversation he had with defendant, in which defendant stated he and Mr. Burnett decided to take back all their money from B.M. after she asked them for more money. Following the entry of this stipulation, the State rested.

¶ 33 The trial court found defendant guilty of all the pending charges against him, with those charges merging into convictions of one count each of aggravated criminal-sexual assault, armed robbery, and aggravated kidnaping. In pronouncing its ruling, the trial court specifically noted–after considering all of the evidence and testimony–including the evidence of B.M.'s criminal history–it found B.M. to be a credible witness and defendant's testimony to be incredible.

¶ 34 Defendant's posttrial motion for a new trial was denied, and he was originally sentenced to a total of 42 years' imprisonment. This sentence included: (1) a six-year sentence for aggravated criminal-sexual assault enhanced, by an additional 15-years due to the use of a firearm; (2) a six-year sentence for armed robbery, enhanced by 15-years due to the use of a firearm, and to be served consecutively to the sentence for aggravated criminal-sexual assault; and (3) a six-year sentence for aggravated kidnaping, to be served consecutively to the aggravated criminal-sexual assault sentence, and concurrently with the armed robbery sentence. Defendant filed a motion to reconsider, asserting that both of the 15-year sentencing enhancements were unconstitutional under the proportionate penalties clause of the Illinois constitution. The trial court agreed, and resentenced defendant to a total of 18 years' imprisonment, which included: (1) a nine-year sentence for aggravated criminal-

sexual assault; (2) a nine-year sentence for armed robbery, to be served consecutively to the sentence for criminal-sexual assault; and (3) the same six-year sentence for aggravated kidnaping, to be served consecutively to the new aggravated criminal-sexual assault sentence, and concurrently with the new armed-robbery sentence. Defendant now appeals.

¶ 35 II. ANALYSIS

¶ 36 As noted above, defendant raises five total issues on appeal. We address each argument in turn.

¶ 37 A. Motion to Quash Arrest and Suppress Evidence

¶ 38 We first consider the argument that the trial court improperly denied defendant's pretrial motion to quash his arrest and suppress evidence.

¶ 39 The ruling of a trial court on a motion to quash an arrest and suppress evidence frequently presents mixed questions of fact and law. While we review *de novo* the ultimate legal ruling, we accord great deference to the trial court's factual findings and will reverse such findings only if they are manifestly erroneous. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). In ruling on a motion to quash or suppress, it is the trial court's role to determine the credibility of witnesses and the weight to be given their testimony. *People v. Sutton*, 260 Ill. App. 3d 949, 956 (1994).

¶ 40 A warrantless arrest will be deemed lawful only when probable cause to arrest has been proven. *People v. Jackson*, 232 Ill. 2d 246, 274-75 (2009). Probable cause exists when the facts known to the officer, at the time of the arrest, are sufficient to lead a reasonably cautious person to believe the person arrested has committed a crime. *Id*. at 275. The existence of probable cause to arrest depends upon the totality of the circumstances at the time of the arrest. *Id*. As our supreme

court has stressed:

> " ' "In dealing with probable cause, *** we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ' [Citations.] Thus, whether probable cause exists is governed by commonsense considerations, and the calculation concerns the probability of criminal activity, rather than proof beyond a reasonable doubt. [Citation.] 'Indeed, probable cause does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false.' [Citation.]" *Id*.

¶ 41 In denying defendant's motion, the trial court relied heavily upon this court's decision in *People v. Pearson*, 331 Ill. App. 3d 312 (2002), which the trial court described as having a "near glove-like match" of underlying facts. In *Pearson*, the defendant filed a motion to quash arrest and suppress evidence prior to his trial on charges of robbery and aggravated battery. *Id*. at 314-15. The victim in *Pearson* testified that she was knocked to the ground in an alley behind her home. *Id*. at 314. The man who knocked her down then took her purse and drove away in a white car. The victim was able to provide the police with the license plate number of the car and a description of the suspect. Additionally, the victim's husband and son were also able to provide a description of the suspect after they were able to follow the white car for a short period of time. *Id*.

¶ 42 Police investigating the incident subsequently interviewed the owner of the car, and learned it had been loaned by the owner's husband to a man nicknamed "Manard." *Id*. After obtaining a phone number where Manard could be reached, the police traced that number to a specific address. *Id*. at 315. Ten days after the initial incident, police went to that location and were greeted by a

woman. After the police indicated they were looking for Manard, the woman let them inside and called out Manard's name. Shortly thereafter, the defendant appeared. As he matched the description that had been provided to the police, the defendant was immediately placed under arrest. *Id*. On the basis of this testimony, the trial court denied the defendant's motion to quash arrest and suppress evidence. *Id*. at 317-18. This court affirmed that decision, finding the totality of the circumstances established the police had probable cause to arrest the defendant in light of the information available at the time of the arrest. *Id*.

¶ 43 Similarly, in this case, B.M. provided the police with a description of defendant's height, weight, and clothing, as well as a complete license plate number of the vehicle used during the incident. The police immediately traced the vehicle to a residence located nearby that was occupied by defendant, his mother, and his grandmother. Upon inquiring at the residence, the police were greeted by defendant's mother, who indicated the vehicle in question was indeed theirs, and that defendant–the only male resident–had access to that vehicle. When defendant was called into the living room, Detective Hughes recognized that he matched the description that had been provided by B.M., and placed him under arrest.

¶ 44 In light of the striking factual similarities between the *Pearson* case and the present matter, we come to a similar conclusion and affirm the trial court's denial of defendant's motion to quash and suppress. Indeed, the facts in this case even more strongly support our conclusion that defendant's arrest was supported by probable cause. Here, defendant was arrested within hours of the incident, not days. He was arrested at his residence, which was located near where the incident took place. Moreover, the license plate of the vehicle involved in the incident was traced *directly* to that

residence, and the vehicle was owned by defendant's grandmother, who also lived at that address. The totality of all the circumstances fully support the decision to place defendant under arrest at that time, and we, therefore, reject defendant's argument to the contrary.

¶ 45 We also reject defendant's contention that the existence of probable cause was improperly based upon information that Detective Hughes did not obtain directly from B.M. Generally, "when officers are working in concert, reasonable suspicion or probable cause can be established from all the information collectively received by the officers even if that information is not specifically known to the officer who makes the arrest." *People v. Maxey*, 2011 IL App (1st) 100011, ¶ 54. More specifically, arresting officers may rely upon police radio transmissions to make an arrest, even if they are unaware of the specific facts that established probable cause to make that arrest. *Id.* Here, Detective Hughes specifically testified he relied upon his conversations with B.M. and fellow officers, as well as what he heard on police radio broadcasts, to guide his investigation prior to defendant's arrest. We find it was proper for him to do so.

¶ 46 B. Independent Basis for Identification

¶ 47 We next consider whether the trial court properly found B.M.'s in-court identification of defendant had a sufficient independent basis to support its admissibility.

¶ 48 As this court had previously recognized that "[t]he question of whether an in-court identification has an independent basis 'arises when an unconstitutional pretrial identification intervenes between the crime and the in-court testimony.' [Citation.] In such cases, unless the State proves by clear and convincing evidence based upon the totality of the circumstances 'that the witness is identifying defendant based solely on his memory of the events at the time of the crime,'

the witness' in-court identification is inadmissible because of the taint of the earlier identification. [Citation.]" *People v. Jackson*, 348 Ill. App. 3d 719, 737 (2004). The factors considered in determining whether the in-court identification is sufficiently independent from the tainted identification to justify its admission include: "(1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of any prior descriptions of the suspect by the witness, (4) the level of certainty by the witness at the time of the confrontation, (5) the length of time between the crime and the confrontation, and (6) any acquaintance with the suspect prior to the crime." *People v. Lacy*, 407 Ill. App. 3d 442, 459 (2011). Courts also consider whether there was any pressure on the witness to make a certain identification. *People v. Brooks*, 187 Ill. 2d 91, 130 (1999). We review the trial court's resolution of this issue for manifest error. *People v. Moore*, 266 Ill. App. 3d 791, 796 (1994).

¶ 49 After considering the relevant factors, we find the trial court properly concluded that B.M.'s identification was sufficiently independent of the admittedly suggestive one-on-one showup to allow her testimony against defendant at trial. First, B.M. had a more than sufficient opportunity to view defendant at the time of the incident. B.M. testified she was in defendant's presence for anywhere from 30 to 45 minutes, for much of this time, within just a few feet of him. She had the opportunity to view him both from behind and face-to-face. She also testified the lighting was sufficient for her to observe defendant, and there was no testimony defendant attempted to conceal his identity in any way. B.M.'s testimony also established her high degree of attention. She was able to provide the police with a range of details about the incident, including locations, descriptions of her attackers, and a description of the vehicle involved, which, notably, included a full license plate number.

¶ 50 Moreover, B.M.'s description of defendant's age, height, and weight, shortly after the incident, was accurate, and closely matched the description of defendant, at the time of his arrest, provided by the police. While on appeal, defendant faults B.M. for not providing even more specific details, our supreme court recognized that "a witness is not expected or required to distinguish individual and separate features of a suspect in making an identification. Instead, a witness' positive identification can be sufficient even though the witness gives only a general description based on the total impression the accused's appearance made." *People v. Slim*, 127 Ill. 2d 302, 308-09 (1989). Furthermore, we also note B.M. never wavered in her description of defendant, that she initially identified defendant as her attacker within hours of the incident, and there was no evidence B.M. was pressured, in any way, to make any particular identification.

¶ 51 Defendant is certainly correct to note B.M. had no acquaintance with defendant prior to the incident. However, we find this factor is far outweighed by the other factors. When all of the relevant factors are evaluated and balanced, we find the trial court properly found B.M.'s in-court identification was based on her observations of defendant at the time of the incident. As such, her identification was properly admitted at trial.

¶ 52 C. Evidence of Prior Acts of Prostitution

¶ 53 Defendant also challenges the trial court's refusal to allow him to cross-examine B.M. regarding any prior history of prostitution. We review the trial court's evidentiary ruling for an abuse of discretion. *People v. Santos*, 211 Ill. 2d 395, 401 (2004).

¶ 54 The trial court's ruling relied upon what is commonly referred to as the "rape shield" statute, which provides in relevant part:

> "In prosecutions for *** aggravated criminal sexual abuse, *** the prior sexual activity or the reputation of the alleged victim *** is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim *** with the accused when this evidence is offered by the accused upon the issue of whether the alleged victim *** consented to the sexual conduct with respect to which the offense is alleged; or (2) when constitutionally required to be admitted." 725 ILCS 5/115-7(a) (West 2008).

Thus, "the statute absolutely bars evidence of the alleged victim's prior sexual activity or reputation, subject to two exceptions: (1) evidence of past sexual activities with the accused, offered as evidence of consent; and (2) where the admission of such evidence is constitutionally required." *Santos*, 211 Ill. 2d at 402. Courts have long recognized that this statute typically precludes the introduction of a victim's alleged prior history of prostitution. *People v. Hughes*, 121 Ill. App. 3d 992, 997-98 (1984); *People v. Newman*, 123 Ill. App. 3d 43, 44-45 (1984); *People v. Ivory*, 139 Ill. App. 3d 448, 453 (1985).

¶ 55 Nevertheless, defendant asserts he was entitled to cross-examine B.M. about her prior history as a prostitute because his right to confrontation mandated that such evidence was "constitutionally required to be admitted." Indeed, our supreme court has recognized that in some "extraordinary circumstances," a defendant's constitutional right of confrontation through cross-examination will supersede the protections of the rape shield statute. *People v. Sandoval*, 135 Ill. 2d 159, 185 (1990). In *Sandoval*, our supreme court indicated that evidence of a sexual assault victim's prior sexual history could be relevant and admissible to preserve a defendant's constitutional rights where: (1) it could show bias, interest, or ulterior motive for making a false charge; (2) it could explain physical

facts in evidence such as semen, pregnancy, or a physical condition indicative of sexual intercourse; or (3) the victim has engaged in a prior pattern of behavior clearly similar to the conduct immediately in issue. *Id.*

¶ 56 On appeal, defendant asserts all three of these circumstances apply in this case. However, it is quite clear that the only argument defendant raised in the trial court with respect to this issue, concerned the second circumstance; *i.e.*, a contention that B.M.'s prior experience as a prostitute might explain the minor DNA profile obtained from B.M.'s rape kit. Arguments made for the first time on appeal are waived. *People v. Magallanes*, 409 Ill. App. 3d 720, 725-26 (2011) (citing *Brooks*, 187 Ill. 2d at 128). We will not permit defendant to assert that the trial court's evidentiary ruling was an abuse of discretion on the basis of arguments he never presented to the trial court for its consideration, and we, therefore, limit our discussion to the argument that was properly preserved. See *People v. Grant*, 232 Ill. App. 3d 93, 105 (1992) (recognizing that a theory supporting the admissibility of evidence that was not first offered at trial may not be argued on appeal).

¶ 57 When we consider the argument defendant actually did present below, however, we find it to be flawed. Again, in support of his contention that he should be able to cross-examine B.M. regarding her prior history of prostitution, defendant asserted such evidence might be able to provide an alternative explanation for the presence of the minor DNA profile in her rape kit–a profile which the State otherwise attributed to defendant. However, evidence to be elicited on cross-examination must be relevant to be admissible. *People v. Gil*, 240 Ill. App. 3d 151, 162 (1992). While evidence is considered relevant, if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence,

evidence may be rejected as irrelevant if it is remote, uncertain, or speculative. *People v. Ursery*, 364 Ill. App. 3d 680, 686 (2006).

¶ 58 Here, defendant sought to introduce evidence through cross-examination of a possible misdemeanor conviction B.M. previously received for prostitution. He also sought to "ask in general" whether she had "ever worked as a prostitute." At no time, did defendant cite to any other information about when B.M. committed any specific prior act of prostitution, nor has he indicated what period of time he wished to ask about "in general." Furthermore, defendant never provided any explanation as to how any evidence about B.M.'s prior participation in prostitution–either a day, week, month, or year, prior to the incident in question here–was relevant in determining who might have provided the minor DNA profile obtained shortly after the incident. We, therefore, find defendant's proposed questioning was irrelevant, as it involved matters and issues that were remote, uncertain, or speculative. The trial court, thus, properly limited defendant's cross-examination of B.M. at trial.

¶ 59 D. Reasonable Doubt

¶ 60 We next address defendant's challenge to the sufficiency of the evidence supporting his convictions.

¶ 61 When presented with such a challenge, it is not the function of this court to retry defendant, and we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). The trier of fact's findings are entitled to great weight, given it is in the best position to judge the credibility and demeanor of the witnesses. *People v. Wheeler*,

226 Ill. 2d 92, 114-15 (2007). As such, a reviewing court will not substitute its judgment for that of a trier of fact on issues involving the weight of evidence or the credibility of witnesses. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). A reversal is warranted only if the evidence is so improbable or unsatisfactory, it leaves a reasonable doubt regarding the defendant's guilt. *Evans*, 209 Ill. 2d at 209.

¶ 62 Here, defendant's arguments on this issue consist entirely of attacks on the credibility of B.M.'s trial testimony. Defendant cites to the evidence of her numerous prior convictions, the arrests and criminal charges that had accrued since the incident, and B.M.'s admission she had previously provided police with false names and birth dates. He also cites to inconsistences between B.M.'s trial testimony and her previous statements, including *inter alia*: (1) whether or not her attackers wore condoms; (2) whether her attackers stole $50 or $55; (3) whether she specifically observed that her attackers used a .38-caliber revolver or could only recall that it was possibly a revolver; and (4) her description of the relative positions between her and her attackers during the sexual assaults. Defendant's argument on appeal never addresses any of the evidence produced at trial favoring the State's case, including the testimony of Ms. Shaw, police officers, and detectives, as well as the DNA evidence. Nor does he address any of the inconsistences in his own testimony, or the fact that the trial court specifically found B.M. to be a credible witness and defendant's testimony to be incredible.

¶ 63 We simply cannot accept defendant's challenge to his convictions on this basis. Our supreme court had made it clear, "in a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom,

and to resolve any conflicts in the evidence. [Citations.] A reviewing court will not reverse a conviction simply because the evidence is contradictory [citation] or because the defendant claims that a witness was not credible [citation]." *Id*. at 228. Furthermore, the trier of fact is entitled to disbelieve a defendant's explanation of the facts of the case, and, as such, it is not required to accept any explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt. *Id*. at 229. After reviewing the entire record in the light most favorable to the State, we find the evidence was not so improbable or unsatisfactory that no rational trier of fact could have found defendant guilty beyond a reasonable doubt. Accordingly, we affirm defendant's convictions.

¶ 64 E. Sentencing

¶ 65 Finally, we consider defendant's challenge to the sentences imposed by the trial court upon resentencing. On appeal, defendant asserts the trial court erred by increasing his sentence after it found the enhancements originally imposed were unconstitutional.

¶ 66 Here, defendant was found guilty of all pending charges against him, with those findings of guilt merged by the trial court into convictions of one count each of aggravated criminal-sexual assault, armed robbery, and aggravated kidnaping. Because he was armed with a firearm, defendant's aggravated criminal-sexual assault conviction was treated as a Class X felony, with a possible sentencing range of six to 30 years' imprisonment and for which 15 years would be added to the term of imprisonment imposed by the court. 720 ILCS 5/12-14(a)(8), (d)(1) (West 2008); 730 ILCS 5/5-8-1(a)(3) (West 2008). Defendant's armed robbery conviction was similarly treated as a Class X felony, which was similarly punishable by a possible sentencing range of six to 30 years' imprisonment, and for which an additional 15-year sentencing enhancement applied. 720 ILCS 5/18-

2(a)(2), (b) (West 2008); 730 ILCS 5/5-8-1(a)(3) (West 2008). Finally, defendant's aggravated kidnaping conviction was also a Class X felony, carrying a possible sentencing range of six to 30 years' imprisonment. 720 ILCS 5/10-2(a)(3), (b) (West 2008).

¶ 67 Pursuant to these statutes, defendant was originally sentenced to a total of 42 years' imprisonment. His overall sentence included: (1) a six-year sentence for aggravated criminal-sexual assault, increased by the 15-year firearm enhancement; (2) a six-year sentence for armed robbery, increased by the 15-year firearm enhancement and to be served consecutively to the sentence for aggravated criminal-sexual assault; and (3) a six-year sentence for aggravated kidnaping, to be served consecutively to the aggravated criminal-sexual assault sentence and concurrently with the armed robbery sentence. However, the trial court properly granted defendant's motion to reconsider his sentences for aggravated criminal-sexual assault and armed robbery, noting that the 15-year firearm enhancements applicable thereto had been found unconstitutionally disproportionate. See *People v. Hauschild*, 226 Ill. 2d 63, 86-87 (2007) (mandatory 15-year firearm enhancement to sentence for armed robbery held unconstitutional); *People v. Hampton*, 406 Ill. App. 3d 925, 942 (2010) (same finding with respect to mandatory 15-year firearm enactment to sentence for aggravated criminal-sexual assault).

¶ 68 The trial court, thereafter, resentenced defendant to a total of 18 years' imprisonment, which included: (1) a nine-year sentence for aggravated criminal-sexual assault; (2) a nine-year sentence for armed robbery, to be served consecutively to the sentence for criminal-sexual assault; and (3) the same six-year sentence for aggravated kidnaping, to be served consecutively to the new aggravated criminal-sexual assault sentence and concurrently with the new armed robbery sentence.

¶ 69 On appeal, defendant contends the trial court did not have the authority to resentence him to anything other than the base six-year sentences originally imposed for aggravated criminal-sexual assault and armed robbery. Defendant contends, any higher sentence for those convictions, would run afoul of the proscription that "the court may not increase a sentence once it is imposed." 730 ILCS 5/5-8-1(c) (West 2008).

¶ 70 We initially note defendant's very argument was at least implicitly rejected by our supreme court in *Hauschild*. In that case, after finding the mandatory enhancement was unconstitutional, our supreme court remanded the matter to the trial court with explicit instructions to resentence the defendant to within the applicable sentencing range and without consideration of the improper mandatory sentencing enhancement. *Hauschild*, 226 Ill. 2d at 89. There would be no reason to do so if the trial court was only permitted to impose the original sentence, subtracting only the improper 15-year enhancement.

¶ 71 Moreover, similar arguments have been specifically rejected twice by the appellate court. See *People v. Barnes*, 364 Ill. App. 3d 888, 897-898 (2006); *People v. Ridley*, 345 Ill. App. 3d 1091, 1093-94 (2004), *vacated on other grounds*, 217 Ill. 2d 586 (2005). In *Barnes*, we recognized that the imposition of an original sentence within a given range, increased by a mandatory enhancement, results is a single sentence and not "distinct, independent prison terms ***." *Barnes*, 364 Ill. App. 3d at 897. Moreover, we recognized that the use of an unconstitutional sentencing enhancement, renders the original sentence invalid, and "our supreme court has held that only valid sentences may serve as the baseline for assessment of compliance with prohibitions against increase." *Id*. at 898. We, therefore, found the imposition of a 17-year prison term on resentencing, following an original

40-year sentence that included an improper 15-year enhancement, was proper. We reasoned: (1) the new sentence was actually shorter than the total original sentence; and (2) the original sentence was not a proper basis of comparison because it was invalid. *Id.*

¶ 72 We come to a similar conclusion here, where defendant's present nine-year sentences for aggravated criminal-sexual assault and armed robbery are both shorter than the original (and invalid) 21-year sentences imposed for those convictions. Moreover, our recognition that defendant now faces a shorter term of imprisonment for each of these convictions also vitiates his alternative contention that the trial court, upon resentencing, improperly increased his sentence for vindictive reasons. We therefore reject defendant's contentions on this issue, and we affirm his sentences.

¶ 73 III. CONCLUSION

¶ 74 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 75 Affirmed.