2013 IL App (1st) 102694-U

FOURTH DIVISION
August 8, 2013

No. 1-10-2694

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 24061
	)	
AUSTIN ONWUAMAEGBU,	)	Honorable
	)	James M. Obbish
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by allowing the State to admit other-crimes evidence pertaining to defendant's pending felony. The trial court did not err in denying defendant's motion *in limine* to introduce evidence pertaining to a witness's sexual activity. Defendant did not receive ineffective assistance of counsel. The State did prove defendant guilty beyond a reasonable doubt. The trial court did not err in enhancing defendant's sentence.

¶ 2 After a bench trial, defendant Austin Onwuamaegbu was convicted of one count of aggravated criminal sexual assault and one count of aggravated kidnaping. He was sentenced to

consecutive sentences of eighteen years' imprisonment for aggravated criminal sexual assault and ten years' imprisonment for aggravated kidnaping. On appeal, defendant raises the following arguments: (1) trial court erred by allowing the State to admit other-crimes evidence to show propensity to commit sexual assault and *modus operandi* because the prejudicial effect of such evidence outweighed any probative value; (2) the trial court erred in denying his motion *in limine* to introduce evidence of a witness's sexual activity; (3) the State failed to prove him guilty beyond a reasonable doubt; (4) defendant was denied his Sixth Amendment right to effective counsel; (5) and the trial court erred in enhancing his sentence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 C.M., an African-American female, testified that on May 10, 2005, between 4 p.m. and 4:30 p.m., she was walking home after completing a drivers' education class at South Shore High School, located on the south side of Chicago. C.M. said that she noticed a small four-door car behind her. A "tall" and "skinny" African-American man exited the front passenger side of the car, approached C.M., grabbed her arm and told her to walk to the car. C.M. stated that she saw him holding a knife. A shorter, heavier-set African-American man, whom C.M. described as having an "African or Nigerian" accent, exited the driver's side of the car. C.M. later identified defendant as the driver. The other man was never identified. C.M. testified that she had never seen these men before.

¶ 5 Defendant and the unidentified man instructed C.M. to enter the car. She testified that she did not see anyone nor did she scream for help or fight her attackers. C.M. testified that she did not recall telling detectives that she was kicking and screaming when the unidentified man

grabbed her.

¶ 6 Once in the car, defendant drove and eventually headed north on Lake Shore Drive. The unidentified man referred to defendant as "Austin" while the three were in the car. C.M. stated that they exited Lake Shore Drive, headed west for a short distance, and then parked in front of an apartment building.

¶ 7 She stated that they went to the apartment building and took the elevator to an apartment, which was later identified as defendant's apartment. C.M. testified that the unidentified man held a knife and covered her eyes as they approached the building. Once inside, they took an elevator upstairs to an apartment. She saw defendant open the door with a set of keys. When in defendant's apartment, the unidentified man instructed C.M. to remove her clothes. Defendant and the unidentified man took turns restraining C.M. as the other sexually assaulted her. C.M. testified that each man inserted his penis into her vagina. C.M. stated that defendant kissed her breasts. C.M. said that she did not know if either man wore a condom or if either man ejaculated.

¶ 8 After the assault, C.M. was instructed to get dressed. The three left the apartment. C.M. testified that the unidentified man held her at knife point as they left the building and returned to the car.

¶ 9 C.M. testified that as they were driving, the car came to stop, she noticed the car door was open, and jumped out. She ran to the nearest Red Line train station, called her mother and then went to the nearby Jewel Osco grocery store to wait for her aunt to pick her up. The parties stipulated that the Jewel was located on Broadway Avenue near the Berwyn Red Line train

station, which was 1.3 miles from defendant's apartment. When her aunt arrived, they drove to her aunt's house, where they waited for C.M.'s mother. After her mother arrived, C.M. was taken to Illinois Masonic Hospital, where she was examined. C.M. testified that the hospital notified the police.

¶ 10 Detective Michael Hurley testified that he met with C.M. at Illinois Masonic Hospital the night of her sexual assault. He said that C.M. told him that the man who abducted and assaulted her had a knife. Detective Hurley also stated that C.M. gave him information describing the vehicle that she was forced into. She told him that she believed the vehicle was a four-door Toyota from approximately 1990-1995. The State later introduced evidence of a certified vehicle record from the Secretary of State establishing that a 1990 Toyota four-door vehicle was registered to defendant.

¶ 11 Julia Busta, the nurse who examined C.M. and administered her sexual assault kit, testified that C.M. told her that two men sexually assaulted her. Busta stated the examination revealed that C.M. had a small cut on her posterior forcette, the area between the opening of the vagina and the rectum. Busta testified that this cut was consistent with the sexual assault describe by C.M. but was also consistent with consensual sex. During cross-examination, Busta admitted that she did not observe any physical injuries on C.M.'s body.

¶ 12 Amy Winters, the DNA analyst from Orchid Mark Laboratories, which was the company that conducted the DNA analysis for the samples taken from C.M.'s sexual assault kit testified to the presence of only one male DNA profile in C.M.'s sexual assault kit. She stated that this did not necessarily mean that C.M. had sexual intercourse with only one individual.

¶ 13 Nicholas Richert, a forensic scientist employed by Illinois State Police, testified as an expert in forensic biology and DNA. He testified that he had compared the male DNA profile found in C.M.'s sexual assault kit with defendant's DNA. In his opinion, the male DNA found in C.M. matched defendant's DNA.

¶ 14 Detective Karen La Palermo testified that on September 28, 2006, she and her partner met with C.M. at C.M.'s home to show her an array of photographs. C.M. identified defendant's photograph as a picture of one of her assailants.

¶ 15 Detective La Palermo further testified that on October 6, 2006, C.M. went to the police station to view a lineup. She stated that T.W., another victim of sexual assault who testified at defendant's trial, was also present at the police station to separately view the lineup. Both C.M. and T.W. identified defendant as their attacker. Detective La Palermo stated that T.W. and C.M. did not communicate with each other. The State also presented evidence that T.W. and C.M. did not communicate anytime after that date. Detective La Palermo also testified that C.M. said that a knife was used during her sexual assault.

¶ 16 C.M.'s second attacker was never identified.

¶ 17 The State presented T.W. as a witness. Defendant had been charged separately with sexually assaulting and kidnaping T.W. Prior to trial, the trial court had granted the State's motion *in limine* to introduce other-crimes evidence, pursuant to section 5/115-7.3 of the Illinois Code of Criminal Procedure, regarding T.W.'s sexual assault to show *modus operandi*, lack of consent, identity and propensity to commit sexual crimes. The trial court granted the State's motion, noting that there were similarities between the two cases and that the probative value of

the other-crimes evidence outweighed any prejudicial effect it would have on defendant's trial.

¶ 18 Defendant's motion *in limine* to introduce evidence of T.W.'s sexual activity was denied. During arguments on defendant's motion *in limine,* defense counsel noted that T.W. had admitted to medical personnel that she was sexually active prior to her attack and her sexual assault kit showed the DNA profile of one other man.[1] The trial court ruled that the results of T.W.'s sexual assault kit were not relevant to the issue in C.M.'s case nor did such information relate to any motive or bias on the part of T.W. nor did they explain sources of any evidentiary material.

¶ 19 T.W., like C.M., an African-American female, testified that around noon on December 11, 2004, she was walking to a friend's house on the south side of Chicago in the vicinity of 55th and Indiana, when she noticed a car following her. T.W. was fifteen-years old at the time. She testified that an African-American man, whom she later identified as defendant, got out of the car, held a knife to her neck, forced her into the car and drove off heading north.

¶ 20 T.W. stated that defendant answered a phone call, revealing that his name was Austin. She also testified that he spoke with an accent, which she believed to be either African or Jamaican. She said that she did not pay attention to where defendant was taking her and was unfamiliar with the north side of Chicago. She testified that defendant drove her to an alley where he sexually assaulted her by inserting his penis in her vagina and anus. T.W. testified that

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[1] Defendant's brief asserts that T.W.'s sexual assault kit revealed the DNA profile of three men, suggesting that she was sexually active with two other men besides defendant. This assertion is incorrect. The kit revealed the DNA profile of three people: T.W., defendant, and one other male. T.W. admitted that she had had consensual sex with another man, but not defendant.

she did not know if defendant used a condom or if he ejaculated. She testified that defendant then drove to a Jewel parking lot, located across the street from a Red Line stop, and told her to get out of the car. T.W. testified that she took the Red Line south to her friend's house and told her friend's brother and mother about the assault. They contacted the police and T.W. was taken to the University of Chicago Hospital.

¶ 21 Detective Venus Rodriguez later testified that she interviewed T.W. the day of her assault and that T.W. never mentioned that her attacker had a knife. Following T.W.'s testimony, the State rested its case.

¶ 22 Defendant testified in his defense. Defendant admitted that he had sex with both C.M. and T.W. but claimed that the sex was consensual. He stated that he was thirty-three-years old at the time of the incident with C.M. He was born in Nigeria and moved to the United States in 2000. Defendant testified that he worked at Jewel Osco, located at 5516 North Clark Street until 2005. Defendant said he had become a registered nurse and had been working at Mercy Hospital since 2007.

¶ 23 Defendant claimed that he "scammed" both C.M. and T.W. into having sex with him. Defendant testified that on May 10, 2005, he was in the area of 73rd and Dorchester taking his friend, Iesha, and her daughter home at approximately 5:00 p.m. Defendant later testified that he had lost touch with Iesha. Defendant testified that he saw C.M., approached her and struck up a conversation. He stated that he made some flattering remarks about her appearance and asked if he could call her. C.M. told him that she did not have a phone and defendant told her that he worked at U.S. Cellular, which was located on the North side of Chicago, and could get her a

phone for a good price. Defendant testified that he lied to C.M. about working at a cell phone store. Defendant said that she voluntarily entered his car and they had a friendly conversation as they drove to the North side. Defendant stated that when they arrived at a U.S. Cellular store, he went into the store alone, set an alarm on his phone, and went back to the car. He testified that he told C.M. that it would take about an hour for the phone to be activated.

¶ 24 Defendant testified that when the alarm went off in the car, he pretended to have a conversation with someone from the cell phone store to convince C.M. that he was making an effort to get her a phone. Defendant said that C.M. accepted his invitation to go to his apartment to wait while the phone was being activated and voluntarily went with him. He testified that they engaged in consensual sexual intercourse at his apartment and that he did not use a condom. After they had sex, he told C.M. that he would drive her back to the cell phone store. Defendant testified that they stopped at a Jewel and he told C.M. that he had to go inside and get something from his cousin who worked there. He said that he lied to C.M. and that his cousin did not work at Jewel. Defendant stated that he gave C.M. money, directed her to the cosmetic aisle and left her in the store. Defendant claimed that he was never with a "tall," "skinny" African-American man and he did not have a knife.

¶ 25 Defendant also testified that on December 11, 2004, he was in the area of 55th and Indiana looking for an apartment when he saw T.W. He approached her, made some flattering remarks, and asked for her telephone number. She responded that she did not have a cell phone. Defendant testified that he "scammed" T.W. just like he had C.M. Defendant said that he promised T.W. that he could get her a cell phone for a good price because he worked at U.S.

Cellular and offered to take her there. He claimed that she voluntarily entered his car and they drove to North side. He testified that he had a similar conversation with T.W. about going back to his apartment to wait for the phone to be activated. Defendant claimed that he had consensual sex with T.W. at his apartment. He testified that he used a condom but it broke. Defendant testified that he told T.W. the same story about going into Jewel to talk to his cousin and then left her in Jewel. Defendant claimed that he never had a knife nor forced T.W. into his car or forced her have sex with him. He also claimed that T.W. and C.M. told him that they were eighteen-years old. Defendant testified that he had pulled this scam on a total of three women and admitted that he was a convincing liar.

¶ 26 The defense also presented witnesses who testified to the character of defendant, all of whom stated that defendant was a peaceful, non-violent person.

¶ 27 The court found defendant guilty. The court stated that the case rested on the credibility of defendant and C.M. and rejected defendant's claim that he and C.M. had engaged in consensual sexual intercourse. The court stated that the small cut that C.M. sustained from her sexual assault, the presence of defendant's semen, and T.W.'s testimony corroborated C.M.'s testimony. The court denied defendant's motion for a new trial.

¶ 28 During the sentencing hearing, the trial court considered the statutory factors in aggravation and mitigation, sentencing defendant to consecutive sentences of 18 and 10 years for aggravated criminal sexual assault and aggravated kidnaping, respectively. Defendant's sentence was enhanced by ten-years pursuant to section 5/12-1.30(d)(1) of the Illinois Code of Criminal Procedure. Defendant filed a post-trial motion for acquittal or, in the alternative, a new trial. In

his post-trial motion, defendant asserted that the trial court erred in excluding evidence regarding T.W.'s sexual history. His post-trial motion was denied. Defendant's motion to reconsider his sentence was also denied. Defendant now brings this appeal.

¶ 29 ANALYSIS

¶ 30 A. ADMISSION OF OTHER-CRIMES EVIDENCE

¶ 31 Defendant argues that the trial court abused its discretion in granting the State's *motion in limine*, and allowing T.W. to testify at trial. Defendant contends that the trial court erred in admitting T.W.'s testimony because of dissimilarities between the cases and that the admission of T.W.'s testimony created a "mini-trial" within the trial.

¶ 32 A trial court's decision to admit other-crimes evidence will not be reversed absent an abuse of discretion. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). A trial court abuses its discretion if the court's determination is unreasonable, arbitrary, or fanciful, or if no reasonable person would adopt the trial court's view. *Id.*

¶ 33 If a defendant is accused of aggravated criminal sexual assault, evidence of the defendant's commission of another such offense "may be admissible (if that evidence is otherwise admissible under the rules of evidence) 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 2002). The trial court allowed the State to admit T.W.'s testimony to show *modus operandi*, lack of consent, identity and defendant's propensity to commit sexual assault. In general, other-crimes evidence is admissible to prove intent, *modus operandi*, identity, notice, absence of mistake and any other material fact other than propensity to commit crime. *People v. Wilson*, 214 Ill. 2d 127, 135-36

(2005); *People v. Illgen,* 145 Ill. 2d 353, 364-65 (1991). The Illinois Supreme Court has held that section 5/115-7.3 of the Code of Criminal Procedure provides an exception to the common law rule regarding other-crimes evidence: when a defendant has been charged with a sex-offense crime, other-crimes evidence may also be introduced to show propensity to commit sexual assault. *Donoho,* 204 Ill. 2d at 176. Despite this exception, other-crimes evidence may only be admitted if the prejudicial effect does not outweigh its probative value. *Illgen*, 145 Ill. 2d at 365. According to section 5/115-7.3:

> "In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider: (1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; or (3) other relevant facts and circumstances." 725 ILCS 5/115-7.3(c) (1)(2)(3).

¶ 34 Defendant argues that the prejudicial effect of T.W.'s testimony outweighs the probative value of the evidence, contending that the degree of factual similarity between C.M.'s and T.W.'s case is insufficient under section 5/115-7.3. We disagree.

¶ 35 "To be admissible, the other-crimes evidence must have *'some threshold similarity to the crime charge.'* " *Donoho,* 204 Ill. 2d at 184 (emphasis added) (quoting *People v. Bartall,* 98 Ill. 2d 294, 310 (1983). The trial court ruled reasonably in finding that the degree of factual similarity between T.W.'s and C.M.'s case was sufficient under section 5/115-7.3. Both C.M. and T.W. were kidnaped at knife point while walking alone on the South side of Chicago. Both were forced into defendant's car. Both were African-American females and teenagers at the time of their sexual assaults. Both identified defendant's first name as Austin and noted that he spoke

with an accent. Defendant assaulted and vaginally penetrated both C.M. and T.W. In addition, these sexual assaults occurred within a close time period: within six months of each other.

¶ 36 Defendant contends that the similarities between C.M.'s and T.W.'s sexual assault are "generic" and are not sufficient to establish *modus operandi*. *Modus operandi* is shown by demonstrating that the offenses share similarities that are so peculiar and distinct as to earmark them as the handiwork of one person. *People v. Kimbrough,* 138 Ill. App. 3d 481, 486 (1985). "If evidence of other crimes is offered to prove *modus operandi*, there must be some clear connection between the other crime and the crime charged which creates a logical inference that if defendant committed one of the acts, he may have committed the other act." *Id.* at 486.
The similarities between the two cases are sufficient to show *modus operandi*. Defendant approached both T.W. and C.M. on the South side of Chicago, forced them into his car, drove to the North side and sexually assaulted them. The only significant factual difference between these two cases is the presence of a second assailant in C.M.'s case, which is not sufficient to establish that the trial court was unreasonable in allowing T.W.'s testimony to be submitted as evidence in C.M.'s trial.

¶ 37 Defendant argues, in the alternative, that even if the admission of T.W.'s testimony met the standards of section 5/115-7.3, admitting T.W.'s testimony created a "mini-trial" within a trial. To avoid a mini-trial, the other-crimes evidence admitted must be sufficiently tailored to show only what is necessary to "illuminate the issue for which the other crime was introduced." *People v. Boyd*, 366 Ill. App. 3d 84, 94 (2006); *People v. Nunley*, 271 Ill. App. 3d 427, 432 (1995). Though the Illinois Supreme Court held that other-crimes evidence may be admitted in

sexual-offense cases to show propensity, it "urge[d] trial judges to be cautious in considering the admissibility of other-crimes evidence to show propensity by engaging in a meaningful assessment of the probative value versus the prejudicial impact of the evidence." *People v. Donoho,* 204 Ill. 2d 159, 186 (2003). Yet, "actual limits on the trial court's decisions on the quantity of propensity evidence to be admitted under section 115–7.3 are relatively modest, especially when combined with the highly deferential abuse-of-discretion standard." *People v. Walston*, 386 Ill. App. 3d 598, 621 (2008). In *Donoho*, the court noted that the trial court reduced the potential prejudicial effect of the other-crimes evidence admitted by refusing to allow the State to quote the defendant's statement regarding the prior conviction or submitting a two-page document to the jury. *Donoho*, 204 Ill. 2d at 186.

¶ 38 Defendant cites *People v. Nunley*, 271 Ill. App. 3d 427 (1995) to support his claim. However, *Nunley* is distinguishable from the present case. In *Nunley*, the defendant was convicted of armed robbery and murder. *Id.* at 433. The defendant had confessed to stabbing his mother and to stabbing his mother's dog to death. *Id.* at 430. The confession was introduced as other-crimes evidence. *Id.* at 431. The court overturned the defendant's conviction holding that the "detail and repetitive manner" in which the other-crimes evidence was presented "greatly exceeded" what was required to establish the voluntariness of the defendant's confession and subjected defendant to a "mini-trial over conduct far more grotesque than that for which he was on trial." Id. at 432. In contrast to *Nunley,* the other-crimes evidence admitted in this case, T.W.'s testimony, was not more grotesque than C.M.'s sexual assault. The details of T.W.'s sexual assault were similar to C.M.'s sexual assault. Neither did the State unduly belabor the

evidence.

¶ 39 The quantity of other-crimes evidence was addressed in *People v. Cardamone,* where the court ruled that the prejudicial effect of introducing other-crimes evidence outweighed its probative value. *Cardamone,* 381 Ill. App. 3d 462, 497 (2008). The defendant in *Cardamone* was a gymnastics coach charged with sexually abusing his students, and the State introduced evidence of at least 158 instances of uncharged conduct against 15 alleged victims. *Id.* at 491-93. The court noted that the large quantity of propensity evidence caused an unfair prejudice against the defendant. *Id.* at 493-97. Here, however, the quantity of other-crimes evidence admitted was modest. Unlike in *Cardamone*, in which the State presented the testimony from 158 other individuals, only T.W.'s testimony and the testimony of the detectives—which corroborated T.W.'s testimony—were presented at trial. Admitting other-crimes evidence regarding defendant's other pending felony was sufficiently tailored for the State's purpose of establishing *modus operandi* and propensity.

¶ 40 B. DENIAL OF DEFENDANT'S MOTION *IN LIMINE*

¶ 41 Defendant next argues that the trial court erred in denying his motion *in limine* to introduce evidence of T.W.'s sexual activity. "Generally, evidentiary motions, such as motions *in limine,* are directed to the trial court's discretion, and reviewing courts will not disturb a trial court's evidentiary ruling absent an abuse of discretion." *People v. Patrick,* 233 Ill. 2d 62, 68 (2009) (quoting *People v. Harvey*, 211 Ill. 2d 368, 392 (2004)). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Id.* (quoting *People v. Hall*,

195 Ill. 2d 1, 20 (2000)).

¶ 42 The State alleges that defendant has forfeited review of this issue. Citing *People v. Pantoja,* the State argues that "the law is clear that denial of a motion *in limine* does not preserve an objection to disputed evidence presented later at trial." *Pantoja,* 231 Ill. App. 3d 351, 353 (1992) (the denial of the defendant's motion *in limine* to suppress his statement regarding his gang affiliation absence an objection at trial was insufficient to preserve the issue for review); *See also, People v. Rodriguez,* 275 Ill. App. 3d 274, 286 (1995) (since the defendant failed to object to evidence presented at trial after his motion *in limine* was denied, he failed to preserve the issue for review).

¶ 43 It is well established that both a trial objection and a written post-trial motion raising the issue are necessary to preserved alleged error for review. *People v. Enoch,* 122 Ill. 2d 176, 186 (1988). However the Illinois Supreme Court, in *Hudson*, has held that an issue can also be preserved if a defendant "rais[es] it a motion *in limine* and in his post-trial motions." *People v. Hudson*, 157 Ill. 2d 401, 435-35 (1993); *People v. Boclair,* 129 Ill. 2d 458, 476 (1989).

¶ 44 Contrary to the cases cited by the State, here, defendant's motion *in limine* sought to introduce evidence, not to suppress evidence. Thus, the opportunity to raise an objection at trial did not exist and defendant has preserved this issue for review.

¶ 45 Defendant claims that the denial of his motion *in limine* to introduce T.W.'s sexual activity violated his Sixth Amendment right to confront and cross-examine a witness. A defendant has a right, pursuant to the confrontation clause in the Sixth Amendment, to cross-examine a witness in order to show motive or bias or other factors that will influence testimony.

Odlen v. Kentucky, 488 U.S. 227, 231 (1988); *People v. Sandoval*, 135 Ill. 2d 159, 173 (1990); *People v. Gorney*, 107 Ill. 2d 53, 59 (1985); *People v. Davis*, 337 Ill. App. 3d 977, 984 (2003). The State argues that Illinois Rape Shield Law prevented defendant from introducing such evidence. Section 5/115-7(a) of the Illinois Code of Criminal Procedure provides that:

> "The prior sexual activity or the reputation of the alleged victim or corroborating witness under Section 115-7.3 of this Code is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim or corroborating witness under Section 115-7.3 of this Code with the accused when this evidence is offered by the accused upon the issue of whether the alleged victim or corroborating witness under Section 115-7.3 of this Code 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).

¶ 46 Here, neither exception applies. T.W. did not have a prior sexual relationship with defendant. In addition, in *People v. Cornes,* the court stated:

> " [A] [d]efendant's right of confrontation necessarily includes the right to cross-examine witnesses, but that right does not extend to matters which are irrelevant and have little or no probative value. Complainant's past sexual conduct has no bearing on whether she has consented to sexual relations with defendant. The legislature recognized this fact and chose to exclude evidence of complainant's reputation for chastity as well as specific acts of sexual conduct with third persons in cases of rape and sexual deviate assault. * * * The legislature was acting well within its powers in enacting reasonable legislation intended to eliminate the cruel and abusive treatment of the victim at trial by precluding the

> admission of prejudicial and irrelevant material and to promote the lawful administration of the criminal justice system." 80 Ill. App. 3d 166, 175-76 (1980).

Cited with approval in, *People v. Sandoval*, 135 Ill. 2d 159, 177-78 (1990); *See also People v. Buford*, 110 Ill. App. 3d 46, 52 (1982); *People v. Hughes*, 121 Ill. App. 3d 992, 999 (1984).

¶ 47 Evidence regarding the presence of another male DNA profile in T.W.'s sexual assault kit and her sexual history had no bearing on whether T.W. consented to sexual intercourse with defendant. Rape shield statutes, however, do not prevent a defendant from introducing evidence of the victim past sexual conduct when it is relevant to establish bias, motive, or prejudice. *People v. Sandoval*, 135 Ill. 2d at 174-75; *People v. Davis*, 337 Ill. App. 3d 977, 985 (2003). The introduction of T.W.'s sexual activity into evidence would not have shed light on any motive or bias that T.W. might have had against defendant. The trial court's denial of defendant's motion *in limine* was not an abuse of discretion.

¶ 48 C. INEFFECTIVE ASSISTANCE OF COUNSEL

¶ 49 Defendant next argues that his defense counsel failed to present evidence that would have corroborated his testimony and thereby rendered ineffective assistance. To prevail on a claim of ineffective assistance of counsel, defendant must satisfy the two-prong test set forth in *Strickland v. Washington* and adopted by the Illinois Supreme Court in *People v Albanese,* 104 Ill. 2d 504 (1984): first, "defendant must show that counsel's performance fell below an objective standard of reasonableness," and second, defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland v. Washington*, 466 U.S. 668,

688 (1984). To establish deficient performance under the first prong, " 'the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy.' " *Id.* at 326-27 (quoting *People v. Smith*, 195 Ill. 2d 179, 188 (2000)).

¶ 50 (1) Objective Reasonableness Prong

¶ 51 *(a) Failure to Call Key Witnesses to Testify at Trial*

¶ 52 Defendant claims that defense counsel failed to investigate and find the "third woman" that defendant claimed to have scammed. However, defendant has failed to present any evidence indicating that he told his defense counsel about the "third women" or provide his counsel with any information that would help him locate this woman. Indeed, defendant admits in his brief that "[i]t is clear from the record that [d]efense counsel did not know that a third girl existed." Defendant also has failed to present evidence indicating that the "third woman" would have corroborated his testimony.

¶ 53 Defendant next claims that counsel failed to call his friend Iesha as a witness. Defendant testified that he was taking Iesha and her daughter home prior to approaching C.M. Again, defendant has failed to present evidence that he told defense counsel about Iesha. There is nothing in the record that indicates that he gave defense counsel any information to help locate Iesha. Furthermore, defendant has failed to present any evidence that Iesha would have corroborated his testimony.

¶ 54 *(b) Failure to Cross-examine Amy Winter*

¶ 55 Defendant also asserts that defense counsel's failure to cross-examine Amy Winter

constituted ineffective assistance. Winter, the DNA analyst for Orchid Mark Laboratories, testified that the presence of only one male DNA profile in C.M.'s sexual assault kit did not necessarily mean that C.M. had sex with only defendant. Defendant claims that his defense counsel's failure to cross-examine this witness left the court with the clear impression that two men had raped C.M. Generally, whether to cross-examine or impeach a witness is a matter of trial strategy that will not support a claim of ineffective assistance of counsel. *People v. Pecoraro,* 175 Ill. 2d 294, 326 (1997); *People v. Franklin,* 167 Ill. 2d 1, 22 (1995); *see also People v. Smith*, 249 Ill. App. 3d 460, 466-68 (1993) (counsel's decision not to cross-examine a witness was not seen as a failure to subject the State's case to meaningful adversarial testing). Here, there is no reason to suggest that the decision not to cross-examine this witness was anything other than reasonable trial strategy.

¶ 56 *(c) Failure to Develop a Theory of Defense*

¶ 57 Defendant claims that defense counsel failed to develop a possible defense. Defendant's argument is similar to the arguments previously discussed. He argues that counsel failed to develop a theory of defense because counsel did not present any evidence to corroborate defendant's testimony that he had consensual sex with C.M. Defendant states that such evidence would have come from presenting Iesha and the "third woman" as witnesses. But as previously stated, defendant has failed to show that defense counsel could have obtained such evidence to corroborate his testimony. He also states that such evidence would have come from cross-examining Amy Winter, but as previously stated, there is nothing to suggest that counsel's decision not to cross-examine Amy Winter was anything other than reasonable trial strategy.

¶ 58 Having concluded that defendant has failed to satisfy the first prong of *Strickland*, we need not inquire about the second. "[W]here defendant makes an insufficient showing regarding one component of the inquiry, there is no need to address both components." *People v. Tye,* 323 Ill. App. 3d 872, 882 (2001) (citing *Strickland*, 466 U.S. at 697). Defendant has failed to show that he received ineffective assistance of counsel.

¶ 59 D. SUFFICIENCY OF THE EVIDENCE

¶ 60 Defendant next argues that the State failed to prove him guilty beyond a reasonable doubt of aggravated sexual assault and aggravated kidnaping. "The relevant question on appeal is 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." *People v. Williams,* 383 Ill. App. 3d 596, 637 (2008). 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, draw reasonable inference therefrom, and to resolve and conflicts in the evidence. *People v. McDonald*, 168 Ill. 2d 420, 448-49 (1995); *People v. Wittenmyer,* 151 Ill. 2d 175, 191-92 (1992). The reviewing court shall only reverse a conviction "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify reasonable doubt of defendant's guilt." *People v. Evan*, 209 Ill. 2d 194, 209 (2004). In examining the evidence, the appellate court should not retry the defendant. *People v. Coleman,* 311 Ill. App. 3d 467, 473 (2000).

¶ 61 (1) Aggravated criminal sexual assault

¶ 62 To establish that a defendant has committed aggravated criminal sexual assault the State must prove that (1) "the person displays, threatens to use, or uses a dangerous weapon, other than

a firearm, or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon; or ***(4) the person commits sexual assault during the course of committing or attempting to commit any other felony." 720 ILCS 5/12-14(a)(1)(4). Defendant argues that his conviction rested largely on C.M.'s testimony, which he claims was not sufficient to prove guilt of aggravated sexual assault beyond a reasonable doubt because there were inconsistences in her story. Defendant notes that C.M. initially told detectives that she was dragged into defendant's car, kicking and screaming; yet at trial, C.M. testified she was not kicking and screaming when the unidentified man grabbed her. Defendant also argues that the absence of physical injuries and lack of evidence pertaining to the second attacker cast enough doubt on his guilt to overturn his conviction. We disagree.

¶ 63 Sexual assault can occur without leaving bruises, scratches or torn clothing. It has been established that physical evidence is not required to prove that a sexual assault occurred. *People v. Shum,* 117 Ill. 2d 317, 356 (1987). Here, T.W.'s testimony, DNA evidence, the small cut on C.M.'s posterior forcette, Amy Winter's testimony, and C.M.'s outcry all corroborated C.M.'s testimony.

¶ 64 Defendant argues, however, that the inconsistencies in her story were sufficient to deem C.M.'s testimony incredible. Defendant cites *People v. Schott,* 145 Ill. 2d 188 (1991), to support his claim. However, *Schott* is distinguishable from the present case. In *Schott*, the Illinois Supreme court reversed the conviction of defendant who was convicted of sexually abusing his daughter. *Schott,* 145 Ill. 2d at 188. The victim's testimony was replete with contradictions, and the court found that the victim was impeached. *Id*. at 206-207. In contrast to *Schott*, C.M.'s

testimony was consistent, with just a few minor discrepancies, and was strongly corroborated by other evidence. So long as minor contradictions do not detract from the victim's story as a whole, the victim's testimony is sufficient to sustain a conviction of sexual assault. *People v. Soler,* 228 Ill. App. 3d 183, 200 (1992). Testimony of a single witness is sufficient to convict. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). The trial court, as fact-finder, was aware of these discrepancies and found C.M.'s testimony to be credible.

¶ 65 The State did not provide evidence, nor did C.M. testify, that defendant, himself, displayed a knife. However, the trial court did find C.M.'s testimony to be credible, finding two men sexually abducted and assaulted C.M. and the second man did have a knife. The testimony of Amy Winters also supported C.M.'s testimony that another man besides defendant assaulted C.M. Though defendant did not personally wield the knife, he is still criminally liable for the actions of his co-defender. *See People v. Rodriguez,* 229 Ill. 2d 285, 289 (2008). Thus, the evidence presented by the State was sufficient to establish the elements of aggravated sexual assault.

¶ 66 (2) Aggravated Kidnaping

¶ 67 Defendant also argues that he was not proven guilty beyond a reasonable doubt of aggravated kidnaping. A defendant has committed aggravated kidnaping if a defendant "commits kidnaping and***(3) inflicts great bodily harm, other than by discharging a firearm or commits another felony upon his victim or (5) commits the offense of kidnaping while armed with a dangerous weapon, other than a firearm." 720 ILCS 5/10-2 (a)(3)(5). Kidnaping occurs when "a person knowingly: (1) and secretly confines another against his will; [or] (2) by force or

threat of imminent force carries another from one place to another with intent secretly to confine him against his will." 720 ILCS 5/10-1 (a)(1)(2).

¶ 68 Defendant claims C.M. was not secreted in a place of confinement. "Secret" has been defined, for the purpose of kidnaping, as concealed, hidden, or not made public. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 227 (2009); *People v. Phelps*, 211 Ill. 2d 1, 8 (2004). "Confinement includes, but is not limited to, enclosure within something, most commonly structured or an automobile." *Siguenza-Brito*, 235 Ill. 2d at 227. "Confinement" is defined as the act of imprisoning or restraining someone. *Phelps,* 211 Ill. 2d at 8. Secret confinement can be shown through evidence that a defendant isolated the victim from meaningful contact with the public. *People v. Gonzalez,* 239 Ill. 2d 471, 480 (2011).

¶ 69 The present case is similar to *Siguenza-Brito.* In *Siguenza-Brito,* the Illinois Supreme Court affirmed the defendant's conviction of aggravated kidnaping. *Siguenza-Brito*, 235 Ill. 2d. at 223. The defendant and his co-defendants sexually assaulted a girl after grabbing her, forcing her into a car, and pushing her into a garage. *Id.* at 217. The Illinois Supreme Court noted the victim was enclosed in the garage and her confinement was secret. *Id.* at 227. The court further stated that a rational trier of fact could have found the offense of kidnaping under the confinement theory. *Id.*

¶ 70 Similar to the victim in *Siguenza-Brito,* C.M. was forced into defendant's car and subsequently forced into his apartment, away from the public. In addition, defendant and the unidentified man took turns physically restraining C.M. to a bed as the other man sexually assaulted her in defendant's apartment. The fact that C.M. was forced into defendant's car by

knife point and that defendant physically restrained C.M. in his apartment is sufficient to establish aggravated kidnaping.

¶ 71 We conclude that it was reasonable for the trial court to find C.M.'s testimony credible, and the State proved defendant guilty beyond a reasonable doubt of aggravated kidnaping.

¶ 72 E. SENTENCING ENHANCEMENT

¶ 73 Defendant contends that the State failed to prove that he used, displayed, or threatened to use a dangerous weapon and the ten-year enhancement of his sentence was therefore improper. Although defendant frames this as a sentencing issue, it is essentially a reiteration of the sufficiency of the evidence issue that we previously addressed.

¶ 74 Defendant was charged and found guilty of aggravated criminal sexual assault, for which the finding of a weapon is necessary. As previously discussed, the State presented sufficient evidence to prove its case beyond a reasonable. The trial court expressly found that a knife was used in the commission of C.M.'s sexual assault. Accordingly we reject defendant's contention.

¶ 75 In addition, defendant has forfeited his right to raise this issue on appeal. Defendant must raise the issue in a motion to reconsider sentence to preserve it for appellate review. *People v. Heider*, 231 Ill. 2d 1, 14 (2008); Ill. Sup. Ct. R. 605(a)(3)(A) "***[A]ny issue or claim of error regarding the sentence imposed or any aspect of the sentencing hearing not raised in the written motion shall be deemed waived." Ill. Sup. Ct. R. 605(a)(3)(C). In his motion to reconsider sentence, defendant argued that his sentence was improper because "the court did not fully consider the defendant's rehabilitative potential." Here, defendant presents a different issue and thus has forfeited appellate review on this issue.

¶ 76 Had he not forfeited his right to bring this issue on appeal, defendant's sentence would still be proper. Aggravated criminal sexual assault is a Class X offense that carries a prison term of six to thirty years. *See* 730 ILCS 5/5-8-1 (a)(3). Illinois law mandates an enhancement of ten years when a defendant convicted of aggravated sexual assault displayed, threatened to use, or used a dangerous weapon. *See* 720 ILCS 5/12-14(d)(1). As previously discussed, the trial court, sitting as a fact-finder, determined that a knife was used in commission of C.M.'s sexual assault. On appeal, the reviewing court gives the trial court great deference and weight in regards to sentencing decision. *People v. Striet*, 142 Ill. 2d 13, 153 (1991). We conclude that defendant's sentence was proper.

¶ 77 III. CONCLUSION

¶ 78 For the foregoing reasons, we conclude that the trial court did not err in granting the State's motion *in limine* to introduce other-crimes evidence nor did it err in denying defendant's motion *in limine* to introduce T.W.'s sexual activity. We also conclude that the State did prove its case beyond a reasonable doubt, defendant did not receive ineffective assistance of counsel, and defendant's sentence was proper. We affirm defendant's convictions and sentences.

¶ 79 Affirmed.