2014 IL App (1st) 121211-U

FIFTH DIVISION
Order filed February 14, 2014
Modified upon denial of rehearing May 2, 2014

No. 1-12-1211

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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. 10 CR 5411
	)	
ROOSEVELT IRVING,	)	Honorable
	)	Rosemary Grant Higgins,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

¶1 *Held*: Defendant was proven guilty of criminal sexual assault where the evidence was such that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Defendant did not receive ineffective assistance of counsel when his counsel did not object to certain items of clothing being admitted into evidence and or being sent back with the jury during deliberations.

¶2 Following a jury trial, defendant Roosevelt Irving was found guilty of criminal sexual assault. The trial court sentenced defendant to 10 years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt and that he received

ineffective assistance of counsel. For the reasons that follow, we affirm.

¶3 Defendant was arrested and charged by indictment with aggravated criminal sexual assault, criminal sexual assault and the unlawful restraint of the victim, J.S. Count I of the indictment (aggravated criminal sexual assault) alleged that defendant intentionally or knowingly committed an act of sexual violence upon J.S., "to wit: [defendant's] penis and [J.S.'s] vagina, an act separate from the acts set forth in the other counts, by use of force or threat of force, and he caused bodily harm to [J.S.], to wit: a bite mark." Count II (criminal sexual assault) alleged that defendant "knowingly committed an act of sexual penetration upon [J.S.], to wit: contact between [defendant's] penis and [J.S.'s] vagina, by the use of force or threat of force." Count III (unlawful restraint) alleged that defendant knowingly and without legal authority detained J.S.

¶4 The following evidence was presented at defendant's trial.

¶5 The victim, J.S., was 16 years old at the time of the incident. J.S. testified that she first met defendant at a bus stop approximately three weeks before the incident. J.S. was standing at the bus stop when defendant, who was 21 years old at the time, drove up in a tan Buick LaSabre. Defendant told J.S. that she was pretty and that he wanted to be friends. They exchanged phone numbers and defendant said that his name was "Tony" but that people called him "Ro-Ro." J.S. lied and said that her name was Brittany because she had just met defendant and did not want him to know her real name.

¶6 J.S. testified that she and defendant exchanged multiple text messages during the next three weeks. Those messages consisted primarily of a "what are you doing kind of conversation." Defendant asked J.S. if she had a boyfriend, which she did not, and always told J.S. that she was beautiful. J.S. did not give defendant any compliments but did tell him she would like to go out on a date with him. Defendant responded that they could go out one day.

¶7 On the day of the incident, November 9, 2009, J.S. was taking public transportation to school when she realized she would not be able to arrive there on time. J.S. would have had to spend the day in detention if she was late, so she decided to skip school and go to her friend L's house. J.S. arrived at L's house around 10 a.m. and she and L ate and watched television. It was boring at L's house so J.S. sent a text message to defendant asking what he was doing, to which defendant responded "nothing." J.S. told defendant that she did not go to school that day and that she was at a friend's house. They discussed going to defendant's house, and J.S. asked defendant what they would do at his house that she was not already doing at her friend's place. Defendant responded that they could make a movie. J.S. understood that to mean that they were going to have sex and that it was going to be recorded. J.S. quickly responded that they could watch a movie, and defendant did not respond to that suggestion. J.S. ultimately agreed to meet defendant at the corner of Chicago and Austin streets and then go to defendant's apartment. J.S. explained that she did not ask defendant to meet her at L's house because she did not want defendant to know where her friend lived. J.S. testified that she knew defendant was interested in having sex before she went to his apartment.

¶8 At approximately 4 p.m., J.S. was waiting at the designated intersection when defendant and another person pulled up in the same tan Buick LaSabre that defendant was driving when they first met. Defendant was in the passenger seat and the other person was driving. J.S. did not know this person and defendant did not introduce her to him. Instead, J.S. entered the back seat of the vehicle and they drove away. They drove to the west side of the city to an apartment building secured by a gate. J.S. and defendant exited the car and defendant told the other person he would call him later. This person then drove away. J.S. and defendant walked to the top floor of the building and entered an apartment. J.S. did not know whose apartment it was and she

observed a woman's shoe but no evidence that a man lived there. J.S. sat in the kitchen while defendant locked the door and then said "come on" and walked to the bedroom. J.S. followed defendant to the bedroom. J.S. took her scarf off and laid at the foot of the bed. Defendant put in a movie and took his pants off, revealing a pair of blue boxer shorts. J.S. was wearing her school uniform, which consisted of a pencil skirt, a white polo shirt, a green scarf and a blue sweatshirt. J.S. was sitting on the bed watching television. She explained that she did not think "anything bad" was going to happen and that she was just getting "comfortable." J.S. remembered looking out the window and then "turning back around and there [defendant] was." Defendant pinned J.S. to the bed, got on top her and held her hands down near her shoulders.[1] J.S. immediately yelled "stop" and started kicking with her feet. Defendant was on his knees on top of J.S.'s waist. While defendant had J.S. pinned down, he kissed and bit her neck. Defendant then used one hand to hold J.S.'s hands together above her head. Defendant was squeezing hard and it hurt. While J.S. was struggling, defendant pulled up her skirt with his other hand and moved her underwear to the side. Defendant then put his fingers inside of J.S.'s vagina for a few minutes. Defendant then put his penis inside J.S.'s vagina and J.S. continued to kick and tell defendant to stop while he did so. J.S testified that she felt pain when defendant penetrated her with his penis because she was a virgin. Defendant did not use a condom. J.S. did not consent to defendant putting his fingers or his penis inside of her.

¶9 Afterwards, defendant went to the restroom. J.S. immediately adjusted her skirt and went to the kitchen door. She turned one of the locks on the door but there were other locks on the door that required keys she did not have and so she could not leave the apartment. Defendant came out of the bathroom and said "get back in here. It's time for round two." At this point, J.S.

[1] Although there was no testimony as to defendant's height and weight, both his arrest report and presentence investigation report list his height as 6 feet and his weight as 240 pounds. Defendant of course was present before the jury and his stature could therefore be observed.

felt "lifeless, scared" and "didn't know what to do but to do what [defendant] said." J.S. did what defendant said and walked back into the bedroom. Defendant pushed her onto the bed and again held J.S.'s hands down across her chest so that she could not move them. Defendant was "pushing down just trying to keep [J.S.'s] hands from moving." J.S. did not fight back while this was taking place. Defendant then put his penis inside J.S.'s vagina for approximately a minute and a half. J.S. did not consent to this and defendant did not use a condom. Defendant then got up and went to the restroom. He was on the phone when he came out and said "I'm done" and told J.S. to "get out." J.S. left the apartment and walked down the stairs while defendant closed the door behind her.

¶10 J.S. further testified that she waited at the bottom of the stairs. She explained that she felt "lifeless, scared" and that she "was in a neighborhood that [she] didn't know, and this had just happened to me." J.S. called her long-time friend and told him "I just did something that I didn't want to do." She did not tell D that she had been raped because she didn't want to go into detail and she was embarrassed. Defendant came down the stairs and propped the gate open and told J.S. to come out. The Buick LaSabre had pulled up while J.S. was standing at the bottom of the stairs and it was being driven the same person as before. J.S. followed defendant to the car and entered the back seat while defendant entered the front passenger seat. While J.S. was in the car, she heard laughing but could not hear anything else because of the music being played in the car. During the drive, J.S. did not say anything to defendant or the man driving the car and they did not say anything to her. J.S. was dropped off at Chicago and Austin streets and neither defendant nor the other man said anything to her when she exited the car. J.S. did not know why she did not tell the man driving the car that defendant had just raped her.

¶11 After defendant drove away, J.S. called her father and told him she had just been raped.

Her dad told her to take a bus and meet him so that he could take her to the hospital. He also told her not to wash herself. J.S. explained that her dad was legally blind in both eyes and could not drive. J.S. then went back to her friend L's house to retrieve her purse and other belongings. L asked J.S. about what happened but J.S. did not tell her because she was still in shock about what had happened. J.S. took a bus and a train and met her parents at the designated location and J.S.'s mother drove them to the emergency room.

¶12 J.S. spoke to a nurse and a doctor at the hospital and told them what had happened. J.S. was given an exam, including an exam of her hair, nails and vagina. Samples were also taken from J.S.'s vagina. Hospital staff also took J.S.'s clothes, including her underwear. While at the hospital, J.S. noticed a bite mark on the right side of her neck, which she pointed out to a nurse. The nurse swabbed the bite mark. J.S. testified that the mark was not on her neck earlier in the day and that defendant was the only person that had touched her neck that day. J.S. also spoke to police officers at the hospital and told them what happened. At some point after that day, defendant tried to telephone J.S. She did not answer defendant's calls and she never again spoke to him. They also never again exchanged text messages.

¶13 On cross-examination, J.S. testified that she did not suffer any bleeding or injuries to her vagina as a result of the incident. She also testified that defendant did not verbally threaten her or use a weapon during the incident. J.S. did not scratch or attack defendant with her hands, and she acknowledged that one of her hands were free for at least some period of time. J.S. did not use her cell phone to call police when she left the apartment and she did not knock on any other doors in the apartment building to let anyone know she had just been raped because she felt "lifeless" and "scared." Finally, J.S. testified that none of her clothing was torn during the incident.

¶14 Before the State called J.S.'s father, L.S., as a witness, the trial court ruled that L.S. could not testify that his daughter called him and said that she had been raped. The court that the statement was inadmissible as an excited utterance because J.S. had time to reflect before she called her father and therefore her statement was unreliable, particularly given that she had called her friend D between the time of the incident and the phone call to her father and made a different statement to him.

¶15 J.S.'s father, L.S., testified that his daughter called him on November 9, that she said something had happened and that she sounded distressed. He confirmed that he and his wife picked J.S. up after the call and took her to the hospital. L.S. testified that when he saw J.S., she "didn't look too good" and that she "looked very distressed and was crying." He also testified that J.S. remained upset over what had happened while she was at the hospital.

¶16 The State introduced into evidence, as People's Exhibit 10, a stipulation between the parties as to the testimony of Holly Ann King, the registered nurse at the hospital who performed the sexual assault kit on J.S. According to the stipulation, J.S. described her attacker to King, told her he went by the name of Tony and detailed how he penetrated her. J.S. stated that defendant forced her down on the bed and held her hands above her head. Defendant pulled J.S.'s underwear down and penetrated her vagina with his penis. After a few minutes, defendant went to the restroom and then sexually assaulted her again after he returned by penetrating her vagina with his penis and his fingers. At some point during the assault, defendant bit, kissed and sucked on J.S.'s neck. As part of the sexual assault kit, King took swabs from J.S.'s vagina and her neck. King noted no trauma to J.S.'s body parts and did not detect any lesions or tears to her vagina. The evidence subsequently showed that there was male DNA detected on both swabs that matched defendant's DNA.

¶17 The parties further stipulated that King would identify People's Exhibit 9 as the clothing J.S. was wearing when she arrived at the hospital and testify that the clothing was in substantially the same condition as when she last saw them. The parties stipulated that the clothing was locked in a secure area before being sent to the Chicago police department and that a proper chain of custody was maintained over the clothing at all times.

¶18 Chicago police officer John Gorman testified that on November 9, 2009, he and his partner were assigned to investigate a criminal sexual assault complaint at Little Company of Mary Hospital. Officer Gorman and his partner arrived at the hospital at approximately 9 p.m. and met with the victim, J.S. She appeared "a little bit upset, kind of withdrawn." The officer noticed a bruise or a "bruise/abrasion" on J.S.'s neck.

¶19 Chicago police detective Ronald Schmuch testified that he spoke to J.S. at the hospital the presence of her mother and father. The detective explained that J.S. was about to be examined by a doctor so he "briefly interviewed her" to obtain as much information as he could "in the short time" he had with J.S. J.S. told the detective what had happened that day and the name and nickname that defendant had given her. Detective Schmuch and J.S. agreed to meet again on a later date for a more detailed interview. After the meeting, the detective tried but was unable to locate anyone with the names J.S. had provided him. The detective testified that over the coming weeks he and J.S. were unable to coordinate a time to meet for the more detailed interview they had planned. However, several months later, the detective learned that the DNA recovered from the sexual assault kit matched defendant's DNA. Based upon this information, the detective located a picture of defendant and assembled a photo array. Detective Schmuch showed the photo array to J.S. in February of 2010 and she identified defendant as the person who sexually assaulted her. On cross-examination, the detective testified that when he initially

met with J.S. at the hospital, he did not remember if he told her to call him if she ever had contact with defendant again because his interview with J.S. was brief and he did not have much time to speak with her.

¶20 The police arrested defendant on March 3, 2010, and defendant agreed to speak with Detective Schmuch. Defendant denied the sexual assault allegations and denied that he had ever driven a tan car. The detective confronted defendant with a police "contact card" which indicated that defendant drove a gold Buick LaSabre belonging to Myvette, but defendant stated that the contact card was not true. Defendant also told the detective that he did not have sex with anyone other than his girlfriend Myvette. Detective Schmuch showed defendant a photo of J.S. Defendant said that he did not know who she was and denied that he had ever seen or met J.S. J.S. subsequently identified defendant in a lineup as the person who sexually assaulted her. An Assistant State's Attorney later interviewed defendant, and he again denied the sexual assault allegations or ever having sexual relations with J.S. After defendant was shown a photograph of J.S., he denied knowing her and denied the sexual assault or ever having sexual relations with her.

¶21 The State's exhibits, including State's Exhibit 9, J.S.'s clothing, were admitted into evidence without objection. The State then rested its case.

¶22 Defendant's mother, Sharon Irving, testified on defendant's behalf. She testified that defendant's street name was "Tony" and that he was also known as "Ro-Ro." Defendant's friend, Kenneth Murphy, testified that on November 9, 2009, he was driving defendant in a car belonging to defendant's girlfriend and that he and defendant picked J.S. up at approximately 4 p.m. Murphy dropped defendant and J.S. off at an apartment shared by defendant and his girlfriend. Murphy later returned to the apartment at defendant's direction and picked up

defendant and J.S. Murphy testified that J.S.'s appearance had not changed since when he originally picked her up at the bus stop. Murphy and defendant dropped J.S. off at the bus stop at which they originally picked her up.

¶23 Following closing arguments, the jury received several State's exhibits, including J.S.'s clothing, without objection. During its deliberations, the jury submitted several notes to the court. One note stated, "We have not reached a unanimous decision on each of the 3 charges. We are at an impass [*sic*] in agreement of evidence of a reasonable doubt. Our current tally is as follows: unlawful restraint: 4 not guilty; 8 guilty; criminal sexual assault: 4 not guilty, 8 guilty; aggravated criminal sexual assault: 6 not guilty, 6 guilty. We are unsure of next steps at this time. Please advise." The parties agreed that the jury should be instructed to continue deliberating. In another note, the jury stated, "We discovered a 3 inch tear in the back of the alleged victim's skirt. Should this tear be considered relevant to the case?" The court responded, "It is for the jury to determine the relevance of the evidence and the weight to be given to the evidence as it relates to the testimony of the witnesses and the other evidence in the case." The jury later sent a note requesting the full transcript of J.S.'s testimony.

¶24 The jury ultimately found defendant guilty of criminal sexual assault but acquitted him of the other two charges. In his motion for a new trial, defendant argued that the State failed to prove him guilty beyond a reasonable doubt because J.S.'s testimony was incredible. In denying that motion, the court observed that J.S. was "probably one of the most credible witnesses I have ever seen while I have been seated on the bench in the last nine years." The court also rejected defendant's claim that there was no evidence of force. The court noted that even if it was assumed that the first encounter was "to some extent consensual," J.S. had told defendant to stop during the first encounter and defendant could not leave the apartment after the first encounter

because the doors were locked. The court further observed that defendant came out of the bathroom after the first encounter and told J.S. that he was not done and that "this was only round one." Finally, the court observed that J.S. testified that defendant held her hands down during both encounters and that the tear in the skirt found by the jury corroborated J.S.'s testimony.

¶25 The trial court sentenced defendant as a Class X offender to a term of 10 years' imprisonment. This appeal followed.

¶26 Defendant first contends that the State failed to prove him guilty beyond a reasonable doubt. Defendant claims that J.S.'s testimony was incredible and unsupported by the evidence and that her testimony actually supported defendant's claim that he and J.S. had consensual intercourse.

¶27 When reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). Under this standard, a reviewing court resolves all reasonable inferences in favor of the State. *People v. Collins*, 106 Ill.2d 237, 261 (1985). A criminal conviction will not be set aside on appeal unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Cox*, 195 Ill. 2d 378, 387 (2001).

¶28 In this case, defendant does not dispute that he engaged in two acts of sexual penetration with J.S. The jury found defendant guilty of criminal sexual assault based upon the second act of

sexual penetration, which occurred after defendant returned from the restroom. The issue in this case is whether that act was achieved by defendant's use of force or threat of force such that it was not consensual.

¶29 An accused commits criminal sexual assault if he commits an act of sexual penetration by the use of force or threat of force. 720 ILCS 5/12-13(a)(1) (West 2008). For this offense, the Criminal Code of 1961 (the Code) defines "force or threat of force" as:

> "the use of force or violence, or the threat of force or violence, including but not limited to the following situations:
>
> (1) When the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat; or
>
> (2) When the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement." 720 ILCS 5/12-12(d)(1),(2) (West 2008).

¶30 At trial, defendant asserted that J.S. consented to having intercourse with him. Section 12-17(a) of the Code provides that consent is a defense to certain offenses, including criminal sexual assault, in which force or threat of force is an element of the offense. See 720 ILCS 5/12-17(a) (West 2008). Consent is defined as "a freely given agreement to the act of sexual penetration or sexual conduct in question." 720 ILCS 5/12-17(a) (West 2008). Additionally, and as particularly relevant to this case, "[l]ack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent." 720 ILCS 5/12-17(a) (West 2008).

¶31 Defendant asserts that J.S.'s testimony was "so fraught with internal inconsistencies and her actions so contrary to human experience [] that her testimony is not worthy of belief."

Defendant claims that J.S. testimony was not believable for a number of reasons, including that (1) J.S.'s interactions with defendant before the incident were consistent with two people who were mutually attracted to each other; (2) J.S. went to defendant's apartment despite knowing that he wanted to have sexual intercourse; (3) J.S. did not tell defendant to "stop" or resist during the second act of sexual penetration; (4) J.S.'s testimony that she felt lifeless and scared was not objectively reasonable given that defendant did not threaten her verbally or with a weapon; (5) J.S. did not use her cell phone to call 911 or scream for help; (6) rather than leave the apartment when defendant told her to do so, J.S. remained in the apartment building and called a friend; (7) J.S. did not request assistance from that friend or say that she had been raped; (8) after making this call to her friend, J.S. voluntarily entered a car with defendant and his friend; and (9) the physical examination of J.S. at the hospital revealed no evidence of trauma to her body or vaginal bleeding or tearing.

¶32 Defendant's arguments essentially amount to an attack on the credibility of J.S.'s claim of criminal sexual assault. However, as noted, the assessment of a witnesses' credibility and the resolution of factual disputes, including the issues of consent and force or threat of force, are matters for the trier of fact. See *People v. Bowen*, 241 Ill. App. 3d 608, 620 (1993) (the defendant's claim that he was not proven guilty of criminal sexual assault because the victim's testimony was improbable and contrary to human experience amounted to an attack on the credibility of the victim's claim of criminal sexual assault, the assessment of which was a matter for the trier of fact); *People v. Barbour*, 106 Ill. App. 3d 993, 998 (1982). Moreover, the issues of consent and force or threat of force are ultimately matters of credibility, questions best left to the trier of fact who heard the evidence and saw the demeanor of the witnesses. *Id.*

¶33 In this case, based upon its verdict, the jury clearly found J.S.'s testimony to be credible

and resolved any factual disputes against defendant. The jury's determinations in this regard are entitled to "great deference" and as a reviewing court we will not substitute our judgment for that of the jury's on these issues or otherwise retry the defendant. *People v. Moss*, 205 Ill. 2d 1217, 1232 (2001); *People v. Sutherland*, 155 Ill. 2d 1, 17 (1992). We note that, although it was the jury who was the trier of fact in this case, the trial judge denied defendant's posttrial claim that the State had not proven him guilty beyond a reasonable doubt and observed that J.S. was "probably one of the most credible witnesses I have ever seen while I have been seated on the bench in the last nine years."

¶34 We find that J.S.'s testimony alone was sufficient to support the jury's verdict. Although defendant points out that there was no medical evidence of vaginal tearing or bleeding that corroborated J.S.'s testimony, a criminal sexual assault conviction can be sustained on the victim's testimony alone and there is no requirement that the victim's testimony be corroborated by physical or medical evidence. *People v. Le*, 346 Ill. App. 3d 41, 50 (2004). Here, J.S. testified that she tried to leave the apartment when defendant went to the restroom after the first act of sexual penetration. However, J.S. was unable to leave because there were locks on the door that required keys. Defendant then came out of the restroom and told defendant to "get back into the [bedroom]" because it was "time for round two." J.S. explained that she felt "lifeless, scared" and that she "didn't know what to do but to do what defendant said." J.S. therefore went back to the bedroom, where defendant pushed her onto the bed and held her hands down across her chest so that she could not move them. J.S. then penetrated J.S.'s vagina with his penis. J.S. specifically testified that she did not consent to this act of sexual penetration. Defendant then went to the restroom again and, when he returned, he told J.S. to "get out."

¶35 Defendant claims that the State introduced no evidence of force and notes the lack of

physical trauma to J.S.'s body. However, "[t]here is no definite standard setting the amount of force needed to show that the parties engaged in nonconsensual intercourse, and each case must be considered on its own facts." *Le*, 346 Ill. App, 3d. at 50. It is also proper to consider the disparity in the size and strength of the parties and the conditions under which the act took place. *Barbour*, 106 Ill. App. 3d at 998. Although there is no evidence as to J.S.'s height and weight, J.S. was a 16 year old girl at the time of the incident. Defendant, on the other hand, was a 21 year old male who was approximately six feet tall and weighed 240 pounds. Here, based upon J.S.'s specific testimony that defendant pushed her onto the bed and held her hands down across her chest to keep them from moving while he penetrated her, the jury could have found that defendant accomplished the second act of penetration by the use of actual force.

¶36 The jury could have also found that the second act of penetration was accomplished by the use of force or the threat of force based upon the circumstances surrounding the first act of penetration. These circumstances are particularly relevant to defendant's claim that J.S.'s testimony was not believable because she did not suffer any physical trauma and because she did not tell defendant to stop, cry out for help or try to escape. In *Bowen*, the court rejected similar claims and observed:

> "Merely because a victim does not cry out for help or try to escape at the slightest opportunity is not determinative on the issues of whether she was being forced to have sexual intercourse, or whether she consented to having sexual intercourse, especially if she was threatened or in fear of being harmed [citation], overcome by the superior strength of the assailant, or paralyzed by fear. The significance of the failure to cry out or attempt to escape depends upon the circumstances of each case and are merely factors to be considered by the trier of fact in weighing the witnesses' testimony.

> Similarly, the lack of medical evidence of physical injury does not establish the victim consented to have sexual intercourse. Physical injury or resistance is not necessary to prove a victim was forced to have sexual intercourse [citation], and a victim need not subject herself to serious bodily harm by resisting in order to establish penetration was nonconsensual" *Bowen*, 241 Ill. App. 3d at 620.

¶37 In this case, J.S. testified that she complied with defendant's request that she "get back [in the bedroom]" and that she did not fight him when he committed the second act of penetration because she felt "lifeless" and "scared." Although defendant claims that J.S.'s fear was not objectively reasonable because defendant did not threaten her or have a weapon, this ignores the circumstances surrounding the first act of penetration. Specifically, J.S. testified that when she came to the apartment and entered the bedroom, she did not think "anything bad" was going to happen. However, defendant pinned J.S. to the bed, got on top of her and held her hands down near her shoulders. J.S. immediately yelled "stop" and tried to resist by kicking with her feet. However, defendant was on his knees of top of J.S.'s waist and she could not break free. Defendant then used one of his hands to hold J.S.'s hands together above her head. According to J.S., defendant was squeezing hard and "it hurt." While J.S. struggled to get free, defendant pushed her underwear to the side and penetrated her vagina first with his fingers and then with his penis. During this time, J.S. continued to kick, struggle and tell defendant to stop. J.S. testified that she did not consent to defendant penetrating her with his fingers or with his penis. Afterwards, defendant went to the restroom and it was at this point that J.S. tried to leave but discovered that the door was locked.

¶38 Both acts of sexual penetration occurred in close proximity in time and J.S.'s testimony regarding the first act provides a context to her testimony that she did not resist defendant during

the second act because she felt lifeless and scared. J.S. attempted to resist during the first act but she was physically overwhelmed by defendant. After the first act, she tried to leave but could not do so because the door was locked. Under these circumstances, where J.S. had already been sexually assaulted once and where she was locked inside of an apartment with defendant, the jury could have found that J.S. was reasonably "paralyzed by fear" when defendant committed the second act of penetration and that J.S. need not have cried out for help or attempted to further resist defendant in order for the second act to have been against her will. See *Bowen*, 241 Ill. App. 3d at 620; see also *People v. Bolton*, 207 Ill. App. 3d 681, 686 (1990) ("If circumstances show resistance to be futile or life endangering or if the victim is overcome by superior strength or fear, useless or foolhardy acts of resistance are not required").

¶39 Defendant makes much of the fact that the jury acquitted him of the first count of aggravated criminal sexual assault and unlawful restraint. However, this does not mean that J.S.'s testimony regarding the first act of penetration was rejected by the jury or that it cannot be considered when reviewing the jury's finding that the second act constituted criminal sexual assault. Moreover, the counts on which the jury returned a not guilty verdict contained elements that the State was not required to prove to convict defendant of criminal sexual assault. For example, the jury could have found that the bite mark did not amount to the bodily harm required to convict defendant of aggravated criminal sexual assault. Further, a jury may convict a defendant on one count of a multi-count indictment in the belief that the count on which it convicted will provide sufficient punishment. *People v. Sandy*, 188 Ill. App. 3d 833, 845 (1989). Regardless, we will not speculate as to the jury's reasoning in reaching a particular verdict. See generally *People v. Kittinger*, 261 Ill. App. 3d 1033, 1041 (1994).

¶40 We also find that J.S.'s testimony is not unbelievable merely because she did not

immediately call police after leaving the apartment or attempt to flee or knock on the door of a nearby apartment but instead waited at the bottom of the stairs for defendant and then received a ride to the bus stop from him. J.S. testified that she did not call police or try to flee at that time and that she obtained a ride from defendant because she felt "lifeless [and] scared" and because she was in a neighborhood that she did not know and "this had just happened to [her]." The jury was aware of the actions that J.S. did and did not take and it was also aware of the circumstances under which those actions and inactions occurred. Despite the various actions that J.S. did not take but that defendant claims a person who had just been raped would have taken, the jury again could have found that J.S. was reasonably paralyzed by fear and that her explanation for not taking these actions was credible.

¶41 We reject defendant's claim that J.S.'s testimony was unbelievable because she did not promptly report the incident to police. "A victim's testimony cannot be rejected merely because she did not report the incident to the police immediately. A delay in reporting incidents of sexual assault may be reasonable where the victim's silence is attributed to fear, shame, guilt and embarrassment." *Bowen*, 241 Ill. App. 3d at 608. J.S. called her friend D immediately after the incident. Although she did not tell him she had been raped, she did tell him, "I just did something that I didn't want to do." J.S. explained that she did not tell D that she had been raped because she did not want to go into detail and because she was embarrassed. The jury certainly could have found this explanation credible. Moreover, J.S. testified that after defendant dropped her off, she telephoned her father and told him that she had been raped and that she told medical personnel and police at the hospital what happened to her.

¶42 Defendant's claim that J.S.'s version of events is not credible because she was "not eager for the police to capture her rapist" is unfounded. Defendant bases this claim on his assertions

that J.S. only went to the hospital when her father told her to do so, that she did not immediately call police and that she did not give police defendant's cell phone number. However, J.S. was a 16 year old girl at the time of the incident. Immediately after defendant dropped her off at the bus station, she called her father and said she had been raped. Her father told her to meet him at a subway station and they would go to the hospital. J.S. testified that when they arrived at the hospital, she believed it was her father who initially called police and told a nurse to complete a sexual assault kit. The jury could have found it entirely reasonable for J.S. to call her father when she did and to follow his direction that they meet and go to the hospital together. The jury could have also found it reasonable that J.S.'s father, who was simply protecting his daughter, told the nurse to complete a sexual assault kit and called the police. Further, there was no testimony that J.S. was ever asked if she had defendant's telephone number when she was interviewed by police. In fact, Detective Schmuch explained that his initial interview with J.S. at the hospital J.S. was brief because J.S. was about to be examined by a doctor and that he did not remember if he told J.S. to call him if she had any more contact with defendant. The detective also explained that because of the short amount of time he had to speak with J.S., they planned to meet again later for a more detailed interview. Nevertheless, during that short initial interview, J.S. did tell the detective the first name and nickname that defendant had given her. Under these circumstances, the jury could have found it reasonable that J.S. might not have thought to provide the police with defendant's telephone number.

¶43 We further note that in his brief to this court, defendant points to other minor inconsistencies in J.S.'s testimony. As to these claims, we simply note that minor inconsistencies do not, of themselves, create a reasonable doubt as to defendant's guilt. *Bowen*, 241 Ill. App. 3d at 620; see also *People v. Lamacki*, 121 Ill.App.3d 403, 418 (1984) (quoting *People v. Rankin*,

73 Ill. App. 3d 661, 664–65 (1979)) (" '[M]inor inconsistencies in a rape complainant's testimony do not constitute grounds for reversal. * * * Minor variances in testimony may occur, and if so, such variances constitute mere discrepancies going only to credibility' ").

¶44 Finally, although corroboration is unnecessary, there was evidence presented at trial that substantiated J.S.'s testimony. As noted, J.S. reported the incident to hospital personnel and police. Further, the testimony of outcry witnesses as to J.S.'s appearance after the incident also tended to support J.S.'s claim that she did not consent. See *People v. Kemblowski*, 227 Ill. App. 3d 758, 762 (1992) (considering the testimony of an outcry witness as to the victim's appearance on the issue of consent). Here, J.S.'s father testified that J.S. called and told him something had happened and that her voice sounded distressed. When he and his wife picked J.S. up to go to the hospital, J.S. "didn't look good" and was crying and looked distressed. At the hospital, J.S. continued to appear upset about what had happened. Officer Gorman testified that when he spoke to J.S. at the hospital, she appeared "a little bit upset [and] kind of withdrawn."

¶45 In reaching its verdict, the jury could have also considered defendant's reactions when he was questioned by the police. Following his arrest, defendant denied that he had intercourse with J.S. or that he had ever even met her. After J.S. identified defendant in a lineup, defendant was interviewed by an Assistant State's Attorney and he again denied the sexual assault allegations or that he had ever had sexual relations with or even knew J.S. The jury heard the testimony about these denials and also heard defendant's theory at trial that he did knew J.S. and that he had consensual intercourse with her on the day in question. The jury could have considered defendant's past false exculpatory denials when it rejected his defense of consent and found him guilty of criminal sexual assault.

¶46 For all of these reasons, we find that J.S.'s testimony was not so unbelievable or contrary

to human experience that that jury was required to reject it. Based upon that testimony and the other evidence presented at trial, we conclude that defendant was proven guilty of criminal sexual assault beyond a reasonable doubt.

¶47 Defendant next contends that he received ineffective assistance of counsel. He specifically claims that counsel was ineffective for stipulating to the admission of J.S.'s school uniform and for failing to object to the State's request that the uniform be sent back to the jury. Defendant claims that in a case "founded solely upon the incredible testimony of the complaining witness" in which the State produced no evidence of force, the uniform did nothing to help the jury decide defendant's guilt and instead only served to prejudice defendant by inflaming the jury's sympathies. We disagree.

¶48 Claims of ineffective assistance of counsel are resolved by the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Id*. at 687. To demonstrate performance deficiency, defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 162 (2001). A "strong presumption" exists that the challenged action or inaction of counsel was a matter of sound trial strategy and a defendant can overcome that presumption only by showing that counsel's decision was "so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." *People v. Jones*, 2012 IL App (2d) 110346, ¶82. To demonstrate sufficient prejudice, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Put another way,

defendant must show that "counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶49 Defendant must satisfy both prongs of this test in order to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. If we can resolve defendant's claim on the issue of prejudice, we need not consider whether counsel's performance was deficient. *People v. Smith*, 326 Ill. App. 3d 831, 841 (2001).

¶50 We find that defendant has failed to show that he was prejudiced when counsel stipulated to the admission of the uniform and did not object to the State's request to have the uniform sent back to the jury. First, defendant has not shown that he was prejudiced because there was other evidence presented at trial which established that defendant committed criminal sexual assault by force or the threat of force. Contrary to defendant's claim that there was no evidence of force, J.S. testified that defendant committed the second act of sexual penetration when he pushed J.S. down on the bed, held her hands across her chest and pushed down to keep her from moving. As noted above, this evidence was sufficient to find that defendant used force to commit criminal sexual assault. As we also set forth above, the circumstances surrounding the first act of penetration left J.S. "lifeless [and] scared" and led to her complying with defendant's order that she return to the bedroom and to J.S.'s decision to not fight back when defendant again sexually assaulted her. This provided an independent basis upon which the jury could have found that defendant used force or the threat of force to sexually assault J.S. Accordingly, J.S.'s uniform, specifically the tear in the skirt, was cumulative on the issue of force. In light of the other evidence set forth above, defendant has not shown that the result of his trial would have been different had counsel objected to uniform being admitted into evidence and being sent back to the jury.

¶51 We also reject defendant's claim that the prejudice he suffered is evidenced by the fact that the jury sent a note during deliberations stating that it was deadlocked and asking if it could consider the tear in the skirt but later returned a guilty verdict after the court responded that it was up to the jury to determine the relevance of the evidence before it. This claim is entirely speculative and we will not reverse the jury's verdict based upon such speculation, particularly given the other evidence supporting the verdict. See *Kittinger*, 261 Ill. App. 3d at 1041.

¶52 Second, defendant was not prejudiced because the uniform would have been admitted into evidence and sent to the jury even if defense counsel had objected. The principles regarding the admission of physical evidence are well-settled:

> " 'Evidence having a natural tendency to establish the facts in controversy should be admitted. A party cannot have competent evidence excluded merely because it might arouse feelings of horror and indignation in the jury. Any testimony concerning the details of a murder or other violent crime may have such tendencies, but manifestly this could not suffice to render it incompetent. Of course, where spectacular exhibits having little probative value are offered for the principal purpose of arousing prejudicial emotions they should be promptly excluded. But questions relating to the * * * manner and extent of its presentation, are largely within the discretion of the trial judge, and the exercise of that discretion will not be interfered with unless there has been an abuse to the prejudice of the defendant.' " *People v. Blue*, 189 Ill. 2d 99, 122 (2000) (quoting *People v. Jenko*, 410 Ill. 478, 482, (1951)).

Moreover, clothing worn by a victim is admissible if it tends to prove facts material to the issues to be proved in the case and if the probative value of the evidence is not outweighed by potential prejudice. *Blue*, 189 Ill. 2d at 122; *People v. Dukett*, 56 Ill. 2d 432, 447-48 (1974). The

admission of the articles rests within the trial court's discretion. *Id*.

¶53 In this case, the clothing worn by a sexual assault victim during the assault would have been admitted because it was relevant to the issue of force. J.S. gave specific testimony about how defendant had a "hard time constantly" pulling up her skirt but that he was able to do so while he sexually assaulted her. J.S.'s uniform tended to corroborate that testimony and was material to the issue of whether defendant used force to criminally sexually assault J.S. Defendant claims that the prejudicial nature of the uniform outweighs any possible probative value because it emphasized J.S's youth. However, our review of this claim is hampered by the fact that the record does not contain the uniform or a picture of it. Moreover, the jury was already aware of J.S.'s youth. She was the primary witness at trial and the jury was able to observe her while she was on the witness stand. J.S. testified that she was 16 years old and wearing her high school uniform at the time of the incident. She even described the uniform to the jury. Even without a picture of the uniform, we have no trouble observing that it is not the same as the uniform of a murdered police officer that was bullet-marked and stained with the officer's blood and brains and that was placed on a mannequin for the jury to inspect, as was the case in a decision cited by defendant. See *Blue*, 189 Ill. 2d at 123-25. On the record before us, we cannot say that the prejudicial nature of the uniform outweighed its probative value such that it would not have been admitted into evidence had defense counsel objected.

¶54 Defendant has also not shown that he was prejudiced when defense counsel did not object to the uniform being taken into the jury room during deliberations. If tangible objects that have been admitted into evidence are relevant to any material issue, they can go into the jury room during deliberations unless they are more prejudicial than probative. *People v. Arnold*, 139 Ill. App. 3d 429, 435 (1985). If the evidence is prejudicial such that it serves only to arouse and

influence the emotions of the jury, it is error to submit it to the jury. *People v. Elwell*, 48 Ill. App. 3d 628, 630 (1977). For the same reasons discussed above, we cannot say that the potential prejudice from the uniform being sent back to the jury room outweighed the uniform's probative value such that, had defense counsel raised an objection, the uniform would not have been sent to the jury room. Similarly, because of the other evidence establishing the requisite force or threat of force, we cannot say that the verdict would have been different had the uniform not been sent back with the jury.

¶55 We conclude that defendant has not shown that his counsel's alleged mistakes rendered the result of defendant's trial unreliable or fundamentally unfair. See *Strickland*, 466 U.S. at 694. Therefore, defendant has not established a claim of ineffective assistance of counsel.

¶56 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶57 Affirmed.