FOURTH DIVISION
April 30, 2015

No. 1-12-3238

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEVIN BARKER, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois. No. 02CR30054 The Honorable Arthur F. Hill, Jr., Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Cobbs concurred in the judgment.

ORDER

Held: Trial court affirmed where requested Y-STR testing lacks the potential to produce new, noncumulative evidence in support of defendant's assertion of actual innocence.

¶ 1 Defendant-appellant Kevin Barker, who was convicted of the 2001 murder and aggravated criminal sexual assault of victim Latrina Rice,[1] appeals from the dismissal of his

[1] Defendant was initially convicted of first degree murder, two counts of aggravated criminal sexual assault, and home invasion. On direct appeal, this court affirmed the first degree murder and aggravated

motion pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/116-3 (West 2010)) in which he requested Y-STR DNA testing on four pieces of evidence. On appeal, defendant contends the circuit court erred in dismissing his motion where Y-STR testing has the potential to conclusively exclude him as a contributor to the DNA evidence collected at the crime scene. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Many of the facts of this case have previously been recited in defendant's previous appeals. *People v. Barker*, No. 1-05-3483 (2008) (unpublished order under Supreme Court Rule 23); *People v. Barker (Barker II)*, 403 Ill. App. 3d 515 (2010). We include here the facts relevant to the instant appeal.

¶ 4 Following a jury trial, defendant was convicted of first degree murder, home invasion, and two counts of aggravated criminal sexual assault. The trial court sentenced defendant to 60 years' incarceration for murder, a concurrent 20 years' incarceration for home invasion, and two consecutive 20-year terms for aggravated criminal sexual assault. On direct appeal, this court vacated defendant's conviction and sentence for home invasion, but affirmed all other convictions and sentences. *People v. Barker*, No. 1-05-3483 (2008) (unpublished order under Supreme Court Rule 23).

¶ 5 At trial, Kimberly Walton testified that Latrina spent nights at her house beginning on Monday, April 9, 2001. Walton applied artificial fingernails to Latrina's nails. The two women briefly returned to Latrina's apartment on Thursday morning. While there, Latrina visited next-door neighbor Joy McGill to ask for a cigarette. Walton testified that Latrina was "upset" with Joy when she returned. Walton and Latrina then returned to Walton's

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criminal sexual assault convictions, but reversed defendant's conviction for home invasion. *People v. Barker*, No. 1-05-3483 (2008) (unpublished order under Supreme Court Rule 23).

house, where the victim stayed until Saturday. At approximately 8 p.m. on Saturday evening, Walton drove Latrina home. They made plans to see one another the next day, Easter Sunday, April 15, 2001. The next day, Walton telephoned Latrina several times, but Latrina did not answer the telephone. Walton testified that, although Latrina told her about men she dated, Latrina never mentioned defendant.

¶ 6 Evelean Hampton testified that she lived down the hall from Latrina. She saw Latrina enter her apartment alone around 7 p.m. on Saturday, April 14, 2001. On April 16, Latrina's mother told Evelean that Latrina was dead. Evelean went to Latrina's apartment where she found the victim, lifeless, on the floor. Evelean did not hear anything unusual coming from the victim's apartment between April 14 and April 16.

¶ 7 Nancy Massie, Latrina's mother, testified she was unable to reach Latrina by telephone on April 14 and 15. She expected Latrina to come to her house for Easter dinner, but Latrina did not. Massie went to Latrina's apartment on Monday, April 16, opened the unlocked door, and found Latrina dead on the floor. She ran to Evelean's apartment, and Evelean called 911.

¶ 8 Investigators with the Chicago Police Department soon arrived at Latrina's apartment. They found Latrina lying on her back on the living room floor next to a sofa, wearing only a blood stained t-shirt, which had been rolled up to her breast line. She had been stabbed approximately 60 times. Her fingernails were broken off, and her body exhibited multiple stab wounds. Investigators found six artificial fingernail tips in different locations around Latrina's apartment: the first nail was on the floor next to Latrina's left foot; the second nail was by the east wall in the living room, the third nail was near the front door to the apartment; the fourth nail was just inside the front door on the living room floor; the fifth nail

was behind the sofa next to Latrina's body; and the sixth was on the floor next to Latrina's left hand.

¶ 9 Chicago Police forensic investigator Gerald Ostafin testified he found "quite a lot of blood" where Latrina was lying, and blood spattered in various places inside the living room area, including the floor, walls, a mirror, and a "blood smear" on the inside front door frame by the lock. Investigators did not find any underwear or pants in the apartment that were related to the scene. Investigators did not find a likely murder weapon, but they recovered various items from the apartment, including an empty condom wrapper, cigarette butts from an ashtray, two butter knives, and a wooden-handled fork.

¶ 10 Illinois State Police forensic scientist Karen Heard testified as an expert in latent print examination that she did not find any suitable fingerprints on objects she tested from the crime scene.

¶ 11 While a forensics officer collected evidence in the apartment, Chicago Police detective James De La Font and his partner Detective Daniel Jacobs separately canvassed the apartment building, questioning residents about Latrina's death. Detective De La Font went to apartment 301, at the end of Latrina's hallway, where he met and spoke to two men, one of which was defendant. Detective De La Font did not notice any scratches or bruises on defendant. Defendant explained to Detective De La Font that he lived in apartment 307 with his girlfriend, Joy McGill. Defendant told Detective De La Font that he, Joy, and Latrina were friends, and that he had known Latrina for three years. For the past two weeks, however, he had not seen Latrina because she had been in and out of the building. Defendant also told Detective De La Font that Joy had unexpectedly moved out on April 12, and he did

not know where she had gone. Detective De La Font then questioned other residents of the building.

¶ 12 Detective De La Font returned to Latrina's building on April 18, 2001, and again spoke with defendant. On April 25, he returned to Latrina's apartment and recovered two more artificial fingernail fragments.

¶ 13 Detective De La Font testified that, on June 5, 2001, he and his partner went to defendant's aunt and uncle, Shirley and James Ballard's house, where defendant then lived. Defendant agreed to go with the detectives to the police station. At the police station, defendant stated that he was friends with Latrina and Joy. He said that, in April 2001, he and Joy lived next door to Latrina. Defendant claimed he last saw Latrina on April 11, 2001, when she came to his door to ask Joy for a cigarette. He stated that he "got upset" when she asked for the cigarette, because she did so regularly. Defendant told Detective De La Font that, on Thursday, April 12, he discovered that Joy had moved out of their apartment. He then knocked on Latrina's door to ask if she knew where Joy had gone, but Latrina did not answer the door. He returned to his apartment, where he stayed for the remainder of the night. After work on Friday, April 13, he went out with a friend overnight, then went to the Ballard residence at 9 a.m. on Saturday morning. He stated he stayed the entire day at the Ballard residence, and slept overnight on a couch in the Ballard's living room with wife Karin Barker. Karin left Sunday morning, and defendant stayed all day and night Sunday at the Ballard's house. He returned to his apartment on Monday, April 16, where he learned that Latrina had been killed. Defendant denied killing Latrina.

¶ 14 After Detective De La Font interviewed James and Shirley Ballard, defendant admitted that he "was not completely truthful" before. He explained he did not sleep on the Ballard's

couch Saturday night with Karin, or in the Ballard residence on Sunday night, but instead slept alone in the garage. Defendant explained that his uncle did not allow him to sleep in the house, but his aunt sometimes secretly allowed him to sleep in the garage. Detective De La Font then spoke again with the aunt and did not pursue further questioning regarding this. Defendant agreed to have a buccal swab performed.

¶ 15 Deputy Medical Examiner Dr. Aldo Fusaro testified that he performed an autopsy on the victim and determined the cause of death was homicide by multiple stab wounds. He noted a white substance coming from the victim's vagina. He swabbed the victim's vagina and anus. He noted that no anal or vaginal tears were identified. He further noted that the victim's fingernails contained a clear polish or artificial nail adhesive, and one finger had a loosely adherent artificial fingernail. The victim had been stabbed approximately 60 times, including a series of wounds to the victim's airway which, Dr. Fusaro testified, could have affected her ability to scream.

¶ 16 On cross-examination, Dr. Fusaro testified that "intact spermatozoa can be found in the vaginal area 72 hours after coitus." He also noted that the victim did not have the vaginal and anal tears associated with "rough sex." On re-direct examination, Dr. Fusaro testified that he would expect to find intact spermatozoa in a person who was murdered at the time she was sexually assaulted. Dr. Fusaro further testified that the lack of vaginal and anal tears does not rule out sexual assault. On re-cross examination, Dr. Fusaro admitted that non-consensual anal sex would "more likely" result in tears than non-consensual vaginal intercourse. Dr. Fusaro also admitted he did not know how long before her death the victim had intercourse.

¶ 17 Between April and July 2001, detectives learned the names of four men with whom Latrina may recently have had a sexual relationship. The men included Edward Knight, Lonnie Jolly, Gregory Dockery, and Marcus Dawson. Each of these men consented to a buccal swab so their DNA could be compared to evidence collected at the crime scene. Additionally, forensic experts analyzed the evidence submitted by the detectives. Fingerprint analysis revealed no suitable latent prints on the items collected from inside Latrina's apartment. However, the vaginal and anal swabs from Latrina's autopsy tested positive for semen. The vaginal swabs, anal swabs, and the artificial fingernail tips were sent for DNA analysis.

¶ 18 The Illinois State Police Crime Lab tested the buccal swabs from five men in connection with Latrina's death: defendant, Knight, Jolly, Dockery, and Dawson. Forensic scientist Tanis Wildhaber Pfoser, who testified as an expert in DNA analysis and serology at trial, analyzed the DNA profiles on each swab, as well as the profile obtained from Latrina's blood standard, using a process known as polymerase chain reaction analysis, or PCR, where a small amount of DNA is amplified, or copied, in order to create a DNA profile. PCR-based testing, Pfoser testified, is generally accepted in the scientific community.

¶ 19 Pfoser compared the DNA profiles of defendant, Knight, Jolly, Dockery, and Dawson with the DNA found in the semen swabbed from Latrina's vagina (Exhibit 4A1). Based on her analysis, the vaginal swab contained a male semen fraction and female non-semen fraction. The female component was consistent with Latrina's DNA profile. The four other swabbed men, Knight, Jolly, Dockery, and Dawson, were excluded as possible contributors of the semen. The male fraction was consistent with defendant's DNA to a statistical significance of 1 in 1.1 billion black individuals. Defendant is African-American.

¶ 20 Pfoser also typed and compared the DNA profile in the semen swabbed from Latrina's rectum (Exhibit 4C1), and determined that it was also consistent with the DNA of defendant to a statistical significance of 1 in 2,000 black individuals. The other four men were conclusively excluded.

¶ 21 Pfoser testified that she also tested and compared the DNA profile from seven artificial fingernails recovered from Latrina's apartment. Three of the fingernails contained insufficient amounts of DNA material to analyze. A fourth fingernail, which was collected in pieces, showed no signs of blood on it, but did contain DNA material consistent with a female profile other than the victim. A fifth tip had reddish-brown stains similar to blood and contained DNA consistent with only the victim's DNA profile.

¶ 22 Two additional fingernail tips (Exhibits 11A and 14A) also exhibited reddish brown stains consistent with blood. The stains on the first tip (Exhibit 11A), which was recovered directly inside the victim's front door, were present both under and on top of the nail. Pfoser testified that her analysis revealed that the nail contained two DNA profiles, one consistent with defendant and the other with the victim. Specifically, Pfoser testified that defendant could not be excluded from the male profile, which occurs at a frequency of 1 in 80 black males, 1 in 380 white males, and 1 in 320 Hispanic males. The second fingernail tip (Exhibit 14A), which was recovered from behind the victim's sofa, also had reddish brown stains and contained a DNA profile consistent with defendant's profile. The occurrence rate on that profile was 1 in 9,800 black individuals. Each of the other four swabbed men was excluded from the profiles found on these two nails.

¶ 23 After receiving DNA analysis results from the Illinois State Police Crime Lab regarding both the semen collected from the victim and the artificial fingernails collected at

the scene, Detective De La Font re-interviewed defendant on October 5, 2002. In that interview, according to Detective De La Font, defendant said he was just an acquaintance of the victim, rather than a friend, and "became adamant, got very loud, that he did not have sex or any contact at all with [Latrina]." He again denied killing her. Later that day, defendant spoke with an Assistant State's Attorney and again denied having intercourse with Latrina, stated that he had not seen her for "a couple of weeks" before she died, that he had no contact with her, that he was not really a friend of hers, and denied any participation in her murder.

¶ 24 Defendant did not testify at trial nor put on any witnesses.

¶ 25 The jury found defendant guilty of first degree murder, two counts of aggravated criminal sexual assault, and home invasion. The trial court sentenced defendant to 60 years' incarceration for murder, a concurrent 20 years' incarceration for home invasion, and two consecutive 20-year terms for aggravated criminal sexual assault.

¶ 26 Defendant appealed, contending that: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the State elicited improper testimony; (3) the State drew improper inferences during closing arguments; and (4) the trial court erred where it denied defendant's motion to quash arrest and suppress evidence. *People v. Barker*, No. 1-05-3483 (2008) (unpublished order under Supreme Court Rule 23). This court vacated defendant's conviction and sentence for home invasion, but affirmed all other convictions and sentences. *People v. Barker*, No. 1-05-3483 (2008) (unpublished order under Supreme Court Rule 23).

¶ 27 In August 2008, defendant filed a motion entitled "Petition for Fingerprint or Forensic Testing Not Available at Trial Regarding Actual Innocence" requesting additional forensic testing, pursuant to section 116-3 of the Code. *Barker II*, 403 Ill. App. 3d at 521. Specifically, defendant requested DNA testing on Exhibits 11A (the underside of the victim's

artificial fingernail), Exhibit 4A1 (the vaginal swab), and Exhibit 4C1 (the rectal swab). *Barker II*, 403 Ill. App. 3d at 521. Defendant requested short tandem repeats testing (STR), polymerase chain reaction testing (PCR), and restriction fragment length polymorphism testing (RFLP). *Barker II*, 403 Ill. App. 3d at 522. The circuit court denied the motion, finding that a similar section 116-3 motion was previously filed and had been denied in 2006, and that the evidence defendant wanted tested had already been subjected to forensic DNA analysis, which results were presented at defendant's trial. *Barker II*, 403 Ill. App. 3d at 522.

¶ 28 On appeal from the denial of his section 116-3 motion, defendant requested two more forms of DNA analysis: Y-STR and mitochondrial (mtDNA) testing. Defendant argued, in pertinent part, that the denial was error because new DNA technology, including Y-STR, had the potential to reveal additional alleles from the profiles derived from mixed samples. *Barker II*, 403 Ill. App. 3d at 522. This court upheld the dismissal, finding that defendant's request for Y-STR testing was waived because it was not included in the *pro se* motion, which merely requested STR, PCR, and RFLP testing. *Barker II*, 403 Ill. App. 3d at 524. We stated:

> "[T]he only issue on appeal is whether it was proper for the trial court to deny defendant's request for STR, PCR, and RFLP testing. We cannot say how the trial court would have ruled if defendant had asked for Y-STR or mtDNA testing, because that issue has not yet appeared before the trial court." *Barker II*, 403 Ill. App. 3d at 525.

¶ 29 Additionally, we noted that Y-STR testing was scientifically available at the time of defendant's 2005 trial and, even if the request for Y-STR testing was not waived, we would

still find that Y-STR testing would not advance defendant's claim of innocence. *Barker II*, 403 Ill. App. 3d at 527-28.

¶ 30 In 2011, defendant filed a new, *pro se* section 116-3 motion requesting additional forensic testing to establish his actual innocence. Appointed counsel for defendant later filed an amended section 116-3 motion also requesting Y-STR analysis, the denial of which is at issue here. Through that motion, defendant requested Y-STR testing on evidence collected from the crime scene.

¶ 31 At the time he filed the section 116-3 motion, defendant also had a second-stage postconviction petition pending. See 725 ILCS 5/1223-1, *et seq.* (West 2010). Defendant agreed to dismiss the postconviction petition and pursue the section 116-3 motion.

¶ 32 The State moved to dismiss the section 116-3 motion. After hearing arguments from the parties, the court granted the motion to dismiss, finding that Y-STR testing could not advance defendant's claim of innocence.[2]

¶ 33 Defendant appeals.

¶ 34 II. ANALYSIS

¶ 35 On appeal, defendant argues he has satisfied the requirements of section 116-3 and is therefore entitled to have evidence collected in relation to this case subjected to further

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[22] This court is disturbed by the State's characterization of the trial court's decision. In its brief on appeal, the State represents: "The circuit court granted dismissal, finding that the issues raised in defendant's *pro se* and counseled motion for Y-STR testing had already been decided by defendant's prior appeal in *People v. Barker*, 403 Ill. App. 3d 515, 521 (1st Dist. 2010)." In actual fact, the record on appeal includes a transcript from the hearing on the motion in which the court ruled as follows:

> "THE COURT: I'm going to grant the State's motion to dismiss in this case. I find that the results are - - the Y-STR testing would not have a potential to produce new noncumulative evidence materially relevant to the defendant's assertion of actual innocence."

We remind counsel of an attorney's duty of candor to the court. See, *e.g.*, Ill. Rs. Prof. Conduct 3.3(a)(1) (eff. Jan. 1, 2010).

forensic testing. Specifically, defendant requests Y-STR testing on exhibits 4A1 (vaginal swab), 4C1 (rectal swab), 11A (fingernail tip), and 14A (fingernail tip). Defendant contends the trial court erroneously dismissed his motion for Y-STR DNA testing where this technology is better suited to the mixed profiles found at the crime scene, can reveal a larger portion of the male profile, and has the power to conclusively exclude defendant as a contributor to the evidence. We review a court's ruling on a section 116-3 motion for forensic testing *de novo*. *People v. Stoecker*, 2014 IL 115756, ¶ 21; *People v. Shum*, 207 Ill. 2d 47, 65 (2003).

¶ 36 1. *Res Judicata*

¶ 37 Our appellate courts have held concluded that the statutory language of section 116-3 does not limit the number of motions a defendant may bring. *People v. Bailey*, 386 Ill. App. 3d 68, 72 (2008). However, although successive section 116-3 motions are not impermissible, *res judicata* will bar a successive motion if the exact same issue is raised in both motions. *Barker II*, 403 Ill. App. 3d at 522; *People v. Luczak*, 374 Ill. App. 3d 172, 178 (2007) (appellate court affirmed trial court determination that successive section 116-3 motion was barred where same issue had previously been raised and ruled upon, because "the doctrine of *res judicata* bars consideration of issues that have been previously raised and adjudicated").

¶ 38 Here, defendant filed a section 116-3 motion in 2008, requesting STR, PCR, and RFLP testing. The circuit court denied that motion. On appeal to this court, defendant requested, in addition to the testing already requested, Y-STR and mtDNA testing. This court upheld the dismissal, finding in pertinent part that defendant's request for Y-STR testing was waived

because it was not included in the motion below. *Barker II*, 403 Ill. App. 3d at 525. We stated:

> "[T]he only issue on appeal is whether it was proper for the trial court to deny defendant's request for STR, PCR, and RFLP testing. We cannot say how the trial court would have ruled if defendant had asked for Y-STR or mtDNA testing, because that issue has not yet appeared before the trial court." *Barker II*, 403 Ill. App. 3d at 525.

¶ 39 Accordingly, where this issue has not previously been raised and adjudicated, it is not barred by *res judicata*. See *Luczak*, 374 Ill. App. 3d at 178.

¶ 40 2. Section 116-3 of the Code

¶ 41 Pursuant to section 116-3 of the Code, following a trial resulting in a defendant's conviction, the defendant may make a motion before the trial court for forensic DNA testing on evidence secured in relation to the trial that:

> "(1) was not subject to the testing which is now requested at the time of trial; or
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> (2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results." 725 ILCS 5/116-3(a)(1), (2) (West 2010).

¶ 42 Under subsection (a)(2), then, "defendants seeking additional testing of evidence which has already been subjected to testing have a greater burden to establish their case than those defendants whose evidence has not been tested," as they "must show that the additional

testing is likely to produce more probative results than the previous tests." *Stoecker*, 2014 IL 11575, ¶ 26.

¶ 43 The defendant must then present a *prima facie* case that identity was an issue at his trial and that the evidence to be tested has been subject to a chain of custody sufficient to establish that is has not been substituted, tampered with, replaced, or altered in any material respect. 725 ILCS 5/116-3(b) (West 2010).

¶ 44 Here, the State concedes that defendant has established a *prima facie* case that identity was an issue at his trial, as defendant put on an identity defense at trial. The State also concedes that the exhibits at issue have been subject to a secure chain of custody.

¶ 45 Once, as here, a defendant has established a *prima facie* case, section 116-3 provides that the court shall allow the requested testing, provided it determines that: (1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to defendant's assertion of actual innocence even though the results may not completely exonerate him; and (2) the requested testing is generally accepted in the scientific community. 725 ILCS 5/116-3(c) (West 2010); *Stoecker*, 2014 IL 11575, ¶ 26; *People v. Smith*, 2014 IL App (1st) 113265, ¶ 22. Under subsection (c)(1), then, the court must evaluate both the trial evidence and the evidence the defendant seeks to test in order to determine whether the new testing would tend to " 'significantly advance' " his actual innocence claim. *Stoecker*, 2014 IL 11575, ¶¶ 26, 33 (quoting *People v. Savory*, 197 Ill. 2d 203, 213 (2001)). Evidence need not have the potential to completely exonerate a defendant to be materially relevant, but rather, evidence is materially relevant when it tends to significantly advance a defendant's claim of actual innocence. *Savory*, 197 Ill. 2d at 213.

¶ 46 Here, the State properly concedes that subsection (c)(2) is satisfied where, citing *People v. Zapata*, 2014 IL App (2d) 120825, ¶¶ 14-16, "Y-STR testing has been recognized as a scientific method generally accepted within the scientific community."

¶ 47 Accordingly, argues the State, only subsections (a)(2) and (c)(1) are at issue here. Defendant, on the other hand, believes that only subsection (c)(1) is at issue. Defendant believes it is improper for the State to argue the merits of subsection (a)(2) on appeal where it neither raised nor argued that subsection in the court below. Due to our disposition as to subsection (c)(1), which issue was raised, briefed, argued, and ruled upon in the court below, we need not address subsection (a)(2).

¶ 48 Even if defendant's motion were sufficient to establish subsection (a)(2), the record does not support a finding that Y-STR testing "has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant." See 725 ILCS 5/116-3(c)(1) (West 2010). The circuit court properly denied defendant's motion where defendant failed to establish subsection (c)(1).

¶ 49 As noted above, under subsection (c)(1), "[t]he determination of whether forensic evidence significantly advances the defendant's actual innocence claim requires an evaluation of the evidence introduced at trial, as well as the evidence the defendant seeks to test." *Stoecker*, 2014 IL 115756, ¶ 33 (citing *Savory*, 197 Ill. 2d at 213). Here, defendant wishes to re-test four items: the vaginal swab (Exhibit 4A1), the rectal swab (Exhibit 4C1); and two fingernail tips (Exhibits 11A and 14A).

¶ 50 In *Barker II*, we described Y-STR testing:

"A cursory review of the widely accepted and commonly understood theory and technology of DNA profiling is appropriate here. In its earliest form, DNA forensic technology focused on those parts of the DNA molecule where there is a significant variation of base pair patterns. [Citation.] Over the years, the technology evolved and now focuses on a class of polymorphisms in DNA called 'short tandem repeats' (STRs), which are shorter in base pair length. STRs are readily amplified by a process known as 'polymerase chain reaction' (PCR) technology. The number of repeats in STR markers can be highly variable among individuals, which make them particularly desirable for identification determinations. [Citation.] The current technology of STRs focuses on the small noncoding regions of the DNA molecule. The number of repeats of a specific STR sequence present at a given locus, combined over a designated number of loci, creates a unique DNA 'profile' of an individual. [Citation.]" *Barker II*, 403 Ill. App. 3d at 527.

¶ 51 We then described Pfoser's testimony that she examined the DNA evidence using two testing kits, the ProFiler and the Cofiler, both of which are commercial PCR/STR typing kits. *Barker II*, 403 Ill. App. 3d at 527. Pfoser testified that she entered the DNA profile she garnered from the vaginal swab into the Combined DNA Indexing System, known as CODIS, which registers only STR-based profiles. *Barker II*, 403 Ill. App. 3d at 527. We then explained:

"Y-STR testing examines the Y chromosome that passed from father to son. Y-STRs are short repeats found solely in the male-specific Y chromosome that code for male sex determination, spermatogenesis, and other male-related

> functions. 'The technique was developed in part to identify a male contributor or contributors in cases of sexual assault, where DNA from both the female and male [] is present in a vaginal swab.' [Citation.] The technique may also be used in cases with fingernail scrapings comprised of cells from the female victim and cells from the perpetrator." *Barker II*, 403 Ill. App. 3d at 528.

¶ 52 We noted, however, that Y-STR typing gives limited results, as it "cannot establish who the singular contributor of a crime scene source is, as the male chromosome traits may be found across people in a population as well as within a family." *Barker II*, 403 Ill. App. 3d at 528. In fact, "all individuals in a paternal line will have the same Y-STR DNA profile. [Citation.] A match between a suspect and the evidence using the Y-STR procedure means only that the suspect could have contributed the DNA in the forensic stain, as could his brother, father, son, uncle, paternal cousin, or a distant cousin from his paternal lineage." *Stoecker*, 2014 IL 115756, ¶ 29 (citing John M. Butler, Fundamentals of Forensic DNA Typing 366 (2010)). Therefore, "autosomal DNA testing, *i.e.*, testing performed on chromosomes other than the sex chromosomes, is preferable to Y-STR testing since it is more effective and 'provides a higher power of discrimination.' " *Stoecker*, 2014 IL 115756, ¶ 29 (quoting John M. Butler, Fundamentals of Forensic DNA Typing at 341, 366).

¶ 53 We have carefully reviewed the transcript of defendant's trial, which resulted in the convictions he now challenges, and his subsequent appeals, as well as all information contained in the appellate record. Our examination of the record shows that the most probative piece of evidence linking defendant to the crime, the vaginal swab, reflects that the male fraction DNA profile was consistent with defendant's DNA to a statistical significance of 1 in 1.1 billion black males. On direct appeal, defendant attempted to explain away this

most conclusive DNA evidence by arguing that perhaps he and the victim had consensual intercourse, but someone else killed her afterward, thus creating the appearance that Latrina was raped and murdered contemporaneously with defendant as the culprit. *People v. Barker*, No. 1-05-3483 (2008) (unpublished order under Supreme Court Rule 23). We rejected this argument, finding that "the *corpus delicti* of aggravated criminal sexual assault [is] sufficiently established here. Specifically, the condition of the victim's body when found establishes that harm was inflicted upon her contemporaneously with her sexual assault: she was found naked from the waist down, wearing only a bloodied t-shirt which had been pulled up to her breasts, and semen was leaking from her vagina and rectum." *People v. Barker*, No. 1-05-3483 (2008) (unpublished order under Supreme Court Rule 23). The State argued at trial that the victim was sexually assaulted and murdered contemporaneously, and the jury returned a conviction for aggravated criminal sexual assault and first degree murder. *People v. Barker*, No. 1-05-3483 (2008) (unpublished order under Supreme Court Rule 23). Moreover, we specifically addressed defendant's argument on appeal that he was not properly proved guilty of aggravated criminal sexual assault and first degree murder where the intercourse he engaged in with the victim was consensual and somebody else killed her afterward, stating:

> "Here, the victim was found dead on the floor of her apartment, wearing nothing but a bloodied t-shirt which had been pulled up to her breasts. She had been stabbed over 60 times. Defendant's semen was leaking from her vagina and rectum. Her false fingernails were strewn throughout her apartment. Defendant repeatedly lied to the police throughout the investigation: initially, he told them he had known the victim for three years, and that the victim and his girlfriend,

> Joy, were friends. Later, he told Detective De La Font that he was just an acquaintance of the victim, rather than a friend, and denied having sex 'or any contact at all' with the victim.
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> ***
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> Defendant also misled police regarding his whereabouts during the weekend of the murder. Specifically, he told Detective De La Font that, on Saturday night, he and Karin slept together on the Ballard's couch, that Karin left Sunday morning, and defendant remained Sunday night at the Ballard's house. After Detective De La Font informed defendant that he had spoken with the Ballards, defendant admitted that he had not been 'completely truthful' with the detectives. He changed his story, stating that he slept alone in the Ballard's garage what weekend. Viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have found defendant guilty of aggravated criminal sexual assault and first degree murder beyond a reasonable doubt." *People v. Barker*, No. 1-05-3483 (2008) (unpublished order under Supreme Court Rule 23).

¶ 54 Defendant argues that "[w]here a non-match on any of the four pieces of evidence would undoubtedly advance [defendant's] claim of innocence by both removing the State's only evidence against [defendant] and by directing blame elsewhere." We disagree. The four pieces of evidence at issue here are the vaginal swab, the rectal swab, and the two fingernails. Defendant was linked to the DNA on the vaginal swab to a statistical significance of 1 in 1.1 billion black individuals. He was linked to the DNA on the rectal swab to a statistical significance of 1 in 2,000 black individuals. He was linked to the DNA

on one of the fingernails by a statistical significance of 1 in 9,800 black individuals, and to the other fingernail by a statistical significance of 1 in 80 black males.

¶ 55 Considering the strength of the consistency between the crime scene vaginal swab sample and defendant's DNA profile, that is, the male fraction that was consistent with defendant's DNA to a statistical significance of 1 in 1.1 billion black individuals, in conjunction with the compelling circumstantial evidence of defendant's guilt, as well as the fact that this court has previously affirmed defendant's conviction on appeal, affirming the trier of fact's determination that the murder occurred contemporaneously with the sexual assault, we conclude that Y-STR testing, which is less precise than the autosomal DNA testing already performed in this case, lacks the potential to produce new, noncumulative evidence in support of defendant's assertion of actual innocence. 725 ILCS 5/116-3(c)(1) (West 2010).

¶ 56 Defendant's insistence that we should find the DNA evidence admitted against him unreliable, as the results presented at trial were not based on a 13-loci match, is unpersuasive. Specifically, he argues that the vaginal swab, which Pfoser testified was consistent with defendant's DNA to a statistical significance of 1 in 1.1 billion black individuals, only actually "matched" defendant at 6 of 13 loci; and the other DNA evidence revealed even fewer actual loci matches. In support of this argument, defendant steers us to *People v. Wright*, 2012 IL App (1st) 073106, in which a different division of this court discussed the merits of DNA analysis in court procedures. In *Wright*, the cold-case DNA evidence constituted essentially the sole evidence used to identify the defendant from a felony database as the perpetrator of a sexual assault where the victim could not identify her attacker. *Wright*, 2012 IL App (1st) 073106, ¶ 2. *Wright* addressed the trial court's error in

failing to order, pursuant to a section 116-5 motion, a pretrial nine-loci analysis between his DNA and a male DNA profile obtained from the victim's rectal swabs. *Wright*, 2012 IL App (1st) 073106, ¶ 76.

¶ 57 In *Wright*, the majority acknowledged the fact that they were not asked to determine whether the expert's conclusion of a "match" based on only nine loci was correct but, instead, they had been asked to determine whether the trial court abused its discretion in denying the defense the ability to investigate and impeach that conclusion. *Wright*, 2012 IL App (1st) 073106, ¶ 86.

¶ 58 We are cognizant that "there is an exponential difference between a conclusion that someone could not be excluded based on a consideration of some loci, and a certain identification based on a full 13-loci match." *People v. Williams*, 2013 IL App. (1st) 111116, ¶ 72 (citing *Wright*, 2012 IL App (1st) 073106, ¶¶ 82-84). Nonetheless, in the case at bar, we are not being asked to determine whether the expert's statistical conclusions regarding the DNA evidence collected from the crime scene were correct. Rather, we have been tasked with evaluating whether the trial court properly dismissed defendant's section 116-3 motion, finding that Y-STR testing would not have the potential to produce new noncumulative evidence materially relevant to defendant's assertion of actual innocence. Based on the above reasoning, including the DNA evidentiary testimony, the circumstantial evidence in the case, and the subsequent appellate analyses, we affirm the decision of the trial court.

III. CONCLUSION

¶ 59 For all of the foregoing reasons, the decision of the Circuit Court of Cook County is affirmed.

¶ 60 Affirmed.