2016 IL App (1st) 140592-U

FOURTH DIVISION
September 8, 2016

No. 1-14-0592

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. 12CR11332
	)	
LEVERTIS WESTFIELD,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

Held: The jury's verdict is affirmed where there was sufficient evidence to support defendant's convictions; the trial court did not abuse its discretion in ruling on the admissibility of prior sexual conduct of the victim under Illinois' rape shield statute; and, although hearsay testimony was erroneously admitted, defendant failed to establish plain error requiring reversal or ineffective assistance of counsel.

¶ 1 Defendant Levertis Westfield appeals following his jury-trial convictions of aggravated criminal sexual assault and aggravated battery causing great bodily harm. He argues that (1) the evidence was insufficient to sustain his convictions beyond a reasonable doubt, (2) the trial court

erroneously prohibited inquiry into details regarding prior sexual encounters between defendant and the victim, (3) the trial court erroneously allowed the emergency room physician who treated the victim to testify to hearsay statements of identification, and (4) his trial counsel rendered constitutionally ineffective assistance in failing to object to the hearsay evidence. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged with numerous offenses stemming from the sexual assault and beating of the victim, C.V., on March 26 to 27, 2012, including aggravated criminal sexual assault, home invasion, residential burglary, aggravated battery, and unlawful restraint. The State ultimately proceeded to trial on one count of aggravated criminal sexual assault (knowingly penetrating the victim through contact of his penis and her vagina by the use of force or threat of force and struck her causing bodily harm) and one count of aggravated battery (knowingly causing great bodily harm to the victim during the course of a battery).

¶ 4 Defendant filed a motion *in limine* before trial to allow under Illinois's rape shield statute (725 ILCS 5/115-7(a) (West 2012)) testimony regarding six alleged instances of prior sexual conduct by the victim. In particular, defendant alleged that the following four instances of sexual conduct occurred between February and April 2012: (1) defendant and a transvestite named Tootsie Roll went to the victim's house and the three of them engaged in consensual sexual acts; (2) defendant and a transvestite named Lala went to the victim's home and defendant and the victim engaged in consensual sexual acts while Lala and C.V.'s friend engaged in sexual acts; (3) defendant went to the victim's home and showered with her and engaged in role-play; and (4) defendant went to the victim's house and watched movies and engaged in consensual sexual conduct.

¶ 5 In his motion, defendant also argued for the admission of two incidents of sexual activity in 2004 and 2007 when defendant and the victim allegedly engaged in prostitution together. Defendant alleged that in 2004, he encountered the victim at a "trap house," which he indicated was a term for describing a residence where individuals buy and sell drugs, near 53rd and Bishop in Chicago, and they "shared two 'dates' (a common term used for clients of prostitutes)." Defendant also alleged that in December 2007, he encountered the victim "on a 'whore stroll' (a term used to describe an area frequented by prostitutes)" near 55th and Ashland in Chicago, and he "went with the alleged victim to a house near Garfield and Laflin in Chicago, Illinois where they both engaged in prostitution." Defendant also argued that prohibiting introduction of this evidence would violate his right to confront the witnesses against him.

¶ 6 The trial court addressed defendant's motion at a hearing before trial and again during trial before defendant testified. With respect to the 2004 and 2007 allegations, defense counsel argued that the evidence would show that "there was some sort of sexual conduct *** [b]etween Mr. Westfield and the complaining witness and another person," the "date," and that defendant and C.V. "shared dates. So basically they both engaged in sexual acts with this particular person." The trial court found defendant did not allege that he engaged in any sexual conduct with C.V., but, rather, that he and C.V. engaged in sexual conduct with a third party, and therefore the proffered evidence did not fall within the parameters of the rape shield statute, which permitted incidents of consensual sex "between each other, not between the victim allegedly and allegedly a third person." Further, the trial court indicated that prostitution was a crime, which would possibly be admissible if it were between defendant and C.V., but it was "not admissible to show they had sex with a third person ***." The trial court also held that the 2004 and 2007 alleged incidents were "remote in time as well."

¶ 7 Regarding the four allegations occurring in 2012, the trial court ruled that defendant could testify about, and question the victim about, previously having consensual sex with the victim "on those occasions," but not the "lurid details" regarding the fact that there was a transvestite involved or that they had a "threesome" because this violated the rape shield statute as it was evidence of sexual conduct with someone other than the defendant and because it was "prejudicial to show that maybe according to [defendant] at least her tastes were somewhat on the unusual side." The trial court held that defendant could "testify they had consensual sex, he and the alleged victim, between February and April 2012 and [he can set] forth where the sex took place, but leave out, when he testifies, about Tootsie Roll and Lala on those two occasions."

¶ 8 At trial, C.V. testified that she met defendant in 2004 when she used to live in her "old neighborhood" near 53rd Street and Justine in Chicago. She testified that they never had a dating relationship, they "exchanged small talk," she knew that his nickname was "Cuckoo," and she later learned his full name. She occasionally saw him "hanging around the liquor store" in the neighborhood. She testified that she never had a sexual relationship with him prior to March 2012.

¶ 9 In March 2012, she moved to a new neighborhood and was living in the Altgeld Murray Homes on 133rd Street in Chicago. On March 24, 2012, she saw defendant at a laundromat on 131st Street. They had a conversation and exchanged telephone numbers. C.V. testified that she "suggested that we hang out sometime that weekend because I didn't know anyone ***." C.V. testified that she later spoke with defendant over the telephone on March 26, 2012, and they made plans to get together that evening.

¶ 10 C.V. testified that defendant came to her home on March 26, 2012, between 3:30 and 4 p.m. Her 12-year-old son, who has autism, was in the living room playing video games at the

time. C.V. testified that defendant did not have any bags or anything with him and he appeared "very nervous and jittery." C.V. testified that they watched television and defendant seemed restless, so she suggested they get something to drink. She gave defendant money to purchase vodka. He returned with two pints of vodka, and she and defendant drank the vodka while listening to music and making small talk. They eventually moved into the kitchen and C.V. made dinner, which defendant ate with her and her son at the kitchen table. They then returned to the living room and watched television, listened to music, and talked.

¶ 11 C.V. testified that her son has "a set schedule since he has autism" and normally gets ready for bed at 9:30 p.m., and her son went upstairs to his room at that time. She went upstairs at 10 p.m. and changed into a T-shirt and sweatpants in her bedroom. She testified that she planned to return downstairs and "send Mr. Westfield home." However, while she was upstairs, she "felt a presence behind" her and turned around to find defendant. C.V. testified that defendant grabbed her by the neck, pinned her against the wall, and stated, "Bitch, you gonna die tonight." He then pushed her onto her bed and repeatedly punched her in the chest and face. At some point, defendant unzipped his pants and "his penis was out" and he pulled down C.V.'s sweatpants. She testified that defendant spread her legs open, inserted his penis into her vagina, and proceeded to "have sex with me and I'm trying to scream for help and he choked me. He had one arm around my neck, the other one on the bed, and he [*sic*] just thrusting me." C.V. testified that defendant squeezed her neck so tightly that at some point, she blacked out momentarily. When she regained consciousness, he was finished, and she "immediately rolled over" onto her side trying to shield her face. C.V. testified that defendant maneuvered her onto her stomach, straddled her back, repeatedly punched her in the back, and pulled her hair "so forcefully until I

felt my neck snap." She believed she "was dead at that point" and she "just lost control of my bladder."

¶ 12 C.V. testified that at some point that night, defendant got up to leave and she closed her door and locked it. She indicated that defendant had shown her a steak or paring knife earlier that day that he kept in his pocket. She testified that he took the knife and stabbed the door and broke the lock off the door. He reentered the room and pushed her down and again began punching her on the bed. C.V. testified that there "was no way to escape. I just laid on my bed taking the punches, the several punches. And I know I lost consciousness at least three times that night." The windows in her bedroom only opened three inches, so she knew she could not escape through them. She testified that she "worried about my son's safety. I didn't want to bring any attention to anything. I just laid there froze the whole night in shock."

¶ 13 C.V. testified that around 6:45 a.m., she told defendant that she needed to help her son get ready for school, but defendant punched her and went downstairs. C.V. woke up her son and instructed him to get ready for school and go to his room and lock the door until she came to get him. C.V. went downstairs and found defendant in the living room. She testified that he was "a bit nervous" but she could not see well because of swelling around her eyes. Defendant asked her "What the f*** you doing down here" and followed her back up the stairs, punching her. He pulled her hair and dragged her upstairs to her bedroom. C.V. testified that she felt hair ripping from her scalp, and defendant actually removed a clump of hair. Defendant punched her one last time and left; C.V. heard the distinctive "click" sound from the front or back door closing.

¶ 14 C.V. testified that she collected her son and went downstairs. She discovered several items were missing: her laptop, a toy laptop for her son, her cellular telephone, her house keys, a nonfunctioning Blackberry phone, and an emergency government cellular telephone. C.V.

testified that she tried "being normal" for her son's sake until his bus arrived to take him to school. Once he left, she put on a coat with a long hood to conceal her face and walked to the property management office to inform them about the stolen keys in case defendant tried to return. She testified that the woman in the office, Simonita Hyde, was "horrified" when C.V. removed her hood and revealed her face. C.V. told Hyde that she needed help and to "please call someone."

¶ 15 An ambulance took C.V. to the hospital, where a sexual assault evidence collection examination was performed. She was then sent to a different hospital because it had a trauma center. There, surgery was performed on her right eye. C.V. testified that a metal plate was placed near her eye because the bone had been broken. She was at the hospital from March 27 to March 30, 2012. She spoke to the police while hospitalized. On May 27, 2012, she viewed a lineup at the police station and identified defendant.

¶ 16 At trial, C.V. identified photographs the police took of her while at the hospital and photographs of her home. She identified photographs of injuries and bruising to her shoulders, chest, side, back, arm, cheek, and eyes from defendant punching her. There was also a picture of the incision near her right eye from the surgery. Another photograph showed the bruising from when defendant "was strangling me on my bed and punching me." She noted that the photograph of bruising on her lower arm was from the hospital IV, not defendant. She indicated that one photograph showed the mattress cover of her bed was torn during the attack, another photograph showed the lock broken off her bedroom door, and another photograph showed the clump of hair pulled from her scalp laying on the floor of her bedroom. She also identified surveillance video

footage of defendant leaving her home on the morning of March 27, 2012.[1] She testified that in the video, defendant is carrying her son's black Jansport backpack over his shoulder. C.V. testified that she suffers residual effects from the eye surgery and continues to see floaters in her eyes.

¶ 17 C.V. testified on cross-examination that she considered defendant an acquaintance and he had never been to her home before. She denied that she had sex with defendant between February and April 2012. She testified that he began the assault after 10 p.m., and he punched and choked her until midnight, and she lost consciousness three times over the course of the night. She testified that he left the room on only one occasion, and for no longer than five minutes. He was in her bedroom from approximately 10:15 p.m. until 6:45 a.m. the next morning, and he left her home between 7 and 7:30 a.m.

¶ 18 In addition, she testified that when she woke her son up, he "was horrified" when he observed her face, but he "didn't know how to express it." She testified that the school bus typically arrives at 8 a.m. She usually looks out of the door and waives to the bus driver, but she did not do so on this particular morning because she "didn't want them to see me like that." She testified that she was "figuring out my next steps what I should do" because the property management office did not open until 8:30 a.m. She also explained that she "didn't know my neighbors that well, so I didn't go to my neighbors for help." Defendant had her cellular telephone and her keys, and she worried he would return, so she "figured the only place I could go was the property management office and tell them to change my locks because he had my keys." She denied telling Hyde that her boyfriend had beaten her. She testified that she did not tell Hyde about the sexual assault because she was embarrassed.

[1] The parties stipulated that Synetta Brown would testify that she was the property manager of Altgeld Murray Homes and that there was a video surveillance camera recording of the property from March 27, 2012, which was working properly, and she made a copy at the police's request and provided it to the police.

¶ 19 C.V. denied telling the police officer who responded to the 911 call, Officer Clarence Williams, that her boyfriend beat her. She conceded that the police detectives she spoke to on March 27, informed her that there was a telephone number available for victims of domestic violence. She never informed them that the individual responsible was not her boyfriend. She conceded that she had previously told one of the detectives that defendant walked back and forth and took hourly breaks between the beatings, but he did not leave the bedroom.

¶ 20 Hyde testified that she was a receptionist at the Altgeld property management office at the time of the incident and knew C.V. was one of the residents. Hyde started work at 8 a.m. on March 27, 2012, and C.V. came into her office approximately 10 minutes later. Hyde observed that C.V. was "badly beaten up" and her face "was bruised and purplish and also when she cried *** she was crying at the time and her tears weren't regular tears, they were blood." C.V.'s eyes were swollen and C.V. was "sad, upset, crying." C.V. told Hyde that she "needed help, she had been robbed and beaten." Hyde asked if C.V. knew who did it and she called 911. C.V. told her that she knew the person and "it was a friend from a [*sic*] old neighborhood." Hyde denied that C.V. stated her boyfriend had beaten her up. Hyde denied telling the 911 operator that the victim had been beaten up by her boyfriend.

¶ 21 Dr. Philip Kouchoukos, an emergency room physician, treated C.V. in the emergency room of Roseland Community Hospital on March 27, 2012. He observed she had "a lot of swelling around the face, around the eyes, along with the cheekbones and around the jaw." C.V. complained "of pain almost everywhere on her body." Dr. Kouchoukos asked C.V. what happened, and C.V. "said a known assailant, Levertis Westfield, struck her repeatedly and forcibly had vaginal intercourse." C.V. also reported losing consciousness during the incident. Dr. Kouchoukos ordered a battery of tests including CT scans and blood tests. He testified that

her spine was normal and there were no intercranial lesions, but she had "lots of scalp contusions. She had fractures of both the medial orbits, that's the bone between the nose and the eye socket, and she also had a fracture of the floor of the right orbit, which is the bone between *** the sinus and the eye socket. And that was depressed and it had entrapped one of the muscles that keeps the—makes the eye move down so that she couldn't move her eye up." Roseland Community Hospital was not equipped to deal with this type of injury, so she was transferred to another hospital. Based on C.V.'s report of sexual assault, Dr. Kouchoukos and a nurse collected evidence for a sexual assault evidence collection kit, including vaginal specimens. According to Illinois state police forensic scientist Meredith Misker, the human male DNA profile present in the semen on the vaginal swabs matched defendant's DNA profile.[2]

¶ 22 Dr. Ramasamy Kalimuthu, a plastic and hand surgery specialist, testified that he treated the victim at the trauma center of Christ Advocate Hospital on March 28, 2012. C.V. told him she had been "assaulted and beaten." Dr. Kalimuthu observed C.V. had injuries and swelling around her eyes and a broken bone on each side of her face, although the fracture on the right side was bigger. Dr. Kalimuthu testified that he waited a few days before performing surgery on the right side of her face due to the excessive swelling. The muscle near the right side fracture was stuck on the bone and had to be released, and he inserted a titanium plate in order to hold her eyeball at the right level.

¶ 23 Defendant testified that he had prior convictions for a drug offense and attempted robbery. He testified that he has known C.V. since 2004 from going to parties, clubs, and from the neighborhood. In describing his past relationship with C.V., he testified that he would "come over and kick it at her friend's house or she'll kick it at my friend's house and we'll have sex and,

[2] The parties entered a stipulation regarding the collection of and chain of custody of the sexual assault kit. The parties stipulated that defendant was arrested on May 26, 2012.

you know, drink, like I say, barbeques. You know, just hang out basically. It was more of a hang-out relationship than anything." He testified that he and C.V. had sex four times between February and April 2012 and the incidents "all took place in the comfort of her home."

¶ 24 Regarding the incident at issue, defendant affirmed that he saw C.V. at the laundromat on March 24, 2012. He had not seen her since the summer of 2008. They made plans to meet up. Defendant testified that C.V. called him within the next day and he came over to her house on March 26 in the afternoon. He testified that he greeted her at the door and gave her a hug. He used her bathroom upstairs, returned downstairs, and she asked him, "What's your plans?" In response, defendant asked her what her plans were. He explained that he was asking "like how do we do it" in reference to "role playing." He testified that they were the only ones home during his entire visit. He denied that they ever ate dinner that evening. He testified that they began drinking vodka around 4 or 5 p.m.; defendant brought a fifth of vodka with him and he poured them glasses of it. He denied that she gave him money to purchase alcohol. He testified that they were "like fondling each other, playing around, touchy-touchy, sitting on my lap ***" and being flirtatious. He testified that he rubbed her toes and then they started taking shots off of each other's bodies. Defendant testified that C.V. massaged his toes and back and then "flipped me over, and that's when she gave me oral sex on the couch." Defendant testified that he performed oral sex on C.V. and they then decided to go upstairs to C.V.'s bedroom, where they had sexual intercourse on her bed.

¶ 25 Defendant testified that he slept over that night and he had brought a bag with him containing a change of clothes and a toothbrush. He testified that he left around 6 or 7 a.m. the next morning, March 27, 2012. Defendant indicated that he woke C.V. up to inform her that he was leaving, and she told him that he had "to hurry up and leave *** he's on his way back." She

explained that her boyfriend was on his way home and would arrive soon. Defendant testified that he collected his belongings and went downstairs and C.V. instructed him to leave by the back door because she has "nosey neighbors." Defendant testified that she asked him if he was going to come back and he told her to "just call me on my phone, you know, I'll be over here." Defendant testified that he asked C.V. if he could borrow her videogame. She let him borrow the X-Box and she took a bookbag from the closet, emptied it, and put the X-Box in it. Defendant then left through the back door and went to his mother's house.

¶ 26 Defendant testified that he was arrested on May 26, 2012. He denied that he punched C.V., pulled her by the hair, kept her in the bedroom, or had forcible sexual intercourse with her. He testified that the bedroom door lock was not broken and the mattress pad was not ripped when he was at her home. He testified that when he left that morning, C.V. was "satisfied with me being there and me leaving. She was in good health, good spirit, still a God-fearing woman. She was still good, ma'am." She did not give him her house keys, cellular telephone, or a computer.

¶ 27 Defendant testified that after his arrest, he did not know if he was interviewed by a female detective, Jennifer Ghoston. He denied that he was informed that he was being arrested for the rape and beating of C.V. or that he was asked if he knew of anyone named C.V. He denied stating that he did not know of anyone by that name. He denied that he told the detective that he was never in the Altgeld Homes area in March 2012. He testified that "[n]o woman ever came to me from CPD[.]"

¶ 28 The defense entered the stipulation that Officer Williams would testify that he responded to "a call of a domestic-related incident on March 27, 2012" and spoke with C.V., and he subsequently prepared a report "in which he wrote that [C.V.] was the girlfriend of Levertis

Westfield." Further, the parties stipulated that Aaron Hansen, keeper of records for the Office of Emergency Management and Communication, would testified that an event query was run for "Simonita Hyde" and the remarks section of the event query related to Hyde's 911 call indicated, "See [C.V.] in the office. She was beat up [*sic*] by a BF no longer on scene."

¶ 29 As a rebuttal witness for the State, Detective Ghoston testified that she interviewed defendant on May 26, 2012, at the police station, and informed him of her name and that she was investigating an aggravated criminal sexual assault and the victim's name was C.V. Defendant was read his rights and agreed to waive them and speak with her. Ghoston testified that she asked defendant if he knew anything about Altgeld Gardens and he responded, "yes." He denied being there in March. He denied knowing a person by the name of C.V.

¶ 30 The State asserted that the photographs and the victim's injuries corroborated her testimony that a forcible rape occurred and caused great bodily harm. The defense argued that nothing connected defendant to C.V.'s injuries, that she told others that her boyfriend had beaten her, that there was no physical evidence of forcible rape, and that someone else came to her home and inflicted the beating during the 90 minutes between when defendant left and when C.V. went to the property management office. In rebuttal, the State asserted that C.V. told Hyde that she was beaten by a friend from her old neighborhood and she told the emergency room doctor that "Levertis Westfield did this, he beat me, and he sexually assaulted me." The State further argued that "there is no testimony that the victim told anybody that her boyfriend beat her up. The testimony that you heard is that she told Ms. Hyde, someone she knew from the old neighborhood, she told the doctors it was Levertis Westfield."

¶ 31 During deliberations, the jury sent a note asking if there was a time stamp on the video and if there was "any evidence from the fingernail scrape test in the medical report?" The court

responded to the questions by informing the jury that it had "heard all the evidence, have all the exhibits, please continue your deliberations." The jury found defendant guilty of aggravated criminal sexual assault and aggravated battery.

¶ 32 Defendant filed a motion for a new trial, and an amended motion, asserting in part that the State failed to prove him guilty beyond a reasonable doubt and that the trial court erred in denying his motion *in limine* to introduce rape shield evidence. The trial court denied the motion. The trial court sentenced him to consecutive terms of 15 years of imprisonment for the criminal sexual assault conviction and 5 years of imprisonment for the aggravated battery conviction. The trial court denied defendant's motion to reconsider sentence. This appeal followed.

¶ 33 I. ANALYSIS

¶ 34 A. Sufficiency of the Evidence

¶ 35 In his first claim on appeal, defendant attacks the sufficiency of the evidence supporting his convictions.

¶ 36 "[T]he State carries the burden of proving beyond a reasonable doubt each element of an offense." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979)). "Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *Id.* (citing *Jackson*, 443 U.S. 318-19). It is the jury's role as the trier of fact to resolve any conflicts in the testimony, weigh the evidence, and draw reasonable inferences therefrom. *Id.* On review, this court "will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of witnesses." *Id.* at 224-25. "A criminal conviction will not be set aside unless the

evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *Id.* at 225.

¶ 37 Defendant argues that C.V.'s account was implausible and contradictory, and that he presented a more credible account that he and C.V. engaged in consensual sexual intercourse and that, after defendant left, C.V.'s boyfriend came home and beat her and she fabricated her claims against defendant to protect her boyfriend.

¶ 38 Viewing the evidence in the light most favorable to the State, C.V.'s testimony established that defendant extensively beat her, inflicting severe injuries over the course of several hours, and forcibly engaged in sexual intercourse with her. C.V. testified that she went upstairs to her bedroom to change, and defendant appeared, uninvited, and stated, “B***, you gonna [*sic*] die tonight.” He then began physically attacking her and sexually assaulted her. She testified that this continued for several hours overnight and she lost consciousness on three occasions during the prolonged beating. When she attempted to lock her bedroom door, defendant pried the lock off. He also dragged her upstairs by her hair, removing a section of her hair in the process. After defendant left the next morning, and once C.V. had her son safely on the bus to school, she sought help in the property management office and informed Hyde that a friend from her old neighborhood had beaten her. The jury observed and heard the witnesses testify, including C.V. and defendant, and the jury was "in a much better position than are we to determine their credibility and the weight to be accorded their testimony." *Siguenza-Brito*, 235 Ill. 2d at 229.

¶ 39 Moreover, C.V.'s testimony was supported by the physical evidence, *i.e.*, her broken door lock, ripped mattress cover, a clump of hair from C.V.'s scalp, the surveillance video showing defendant leaving her apartment with her son's backpack, and the fact that defendant's semen was

identified on the swabs taken from C.V.'s vagina. C.V.'s testimony was also supported by the extensive physical injuries and bruising to her face and body, and the testimony of Simonita Hyde and C.V.'s treating physicians regarding the nature and extent of her injuries and treatment.

¶ 40 Defendant emphasizes what he views as several weaknesses in C.V.'s version of the events. He argues that C.V.'s level of intoxication impaired her ability to recall the incident. Although there was testimony regarding how much alcohol C.V. consumed, there was no testimony regarding her actual level of intoxication. Significantly, C.V. never testified that she was too intoxicated to perceive events that night. Rather, she was able to recall and testify about the attack in detail.

¶ 41 Defendant argues that C.V. is not credible because she maintained she barely knew defendant, but nevertheless invited him to her home. However, C.V. testified that she knew defendant from a prior neighborhood, but she moved to a new neighborhood where she did not know anyone, so she invited him over after she happened to encounter him at the laundromat. According to the testimony of C.V., the two enjoyed an innocuous evening of listening to music, playing cards, making and eating dinner, talking, and drinking, until defendant assaulted her later that night.

¶ 42 Defendant also asserts that C.V.'s account of the events was not credible because her son did not react to the sounds of her being beaten. C.V.'s testimony indicated that her son is autistic and almost non-verbal, he follows a strict schedule regarding going to bed and waking up, and he observed her face the next morning and was "horrified," but did not know how to express his feelings. That her 12-year-old autistic son did not react as a "typical" person his age may have does not render C.V.'s testimony so improbable as to give rise to a reasonable doubt about defendant's guilt.

¶ 43 Defendant also contends that C.V.'s account of the events should not be believed because 60 to 90 minutes elapsed between the time defendant left and when she sought assistance. C.V.'s testimony demonstrated that she wanted to maintain a normal morning routine for her autistic son and send him to school before seeking help. She testified that she did not seek help from the bus driver because her face was swollen and disfigured and she "didn't want them to see me like that" and she was embarrassed. She testified that she did not know her neighbors well, so she did not go to them for help. She left her home once her son went to school and as soon as the property management office opened. C.V. was so embarrassed by how she looked that she wore a coat with a long hood to cover her face. She explained that she went to the office because she was concerned that defendant had the keys to her house. Defendant also asserts that C.V. was not credible because she did not tell Hyde about the sexual assault. However, C.V. explained that she did not inform Hyde of the sexual assault because she was embarrassed.

¶ 44 Defendant argues that the absence of fingernail scrapings evidence throws C.V.'s account into doubt considering C.V.'s size and the absence of any evidence that C.V.'s arms were restrained. However, we fail to see any logical connection between the victim's size and the presence or absence of fingernail scraping evidence. We note that there was never any testimony from the victim that she scraped him with her fingernails during the attack. We similarly do not find it surprising that there was no evidence that C.V.'s belongings were discovered in defendant's possession, considering two months elapsed between the date of the offense and the date of his arrest.

¶ 45 Defendant relies on two pieces of evidence in arguing that his version of events was more credible: (1) the 911 event query for Hyde's call indicated that "[s]he was beat up by a BF no longer on scene," and (2) the stipulation that officer Williams "responded to a call of a domestic-

related incident" and wrote in his police report that C.V. was defendant's girlfriend. However, the first piece of evidence was directly contradicted by Hyde's own testimony. Hyde testified that C.V. informed her that her attacker was "a friend from her old neighborhood." The second piece of evidence does not necessarily support defendant's defense as the police report nevertheless identified defendant as the attacker, even if it mischaracterized C.V. as his girlfriend. Moreover, the jury had the opportunity to consider this evidence, and, as noted, we will not disturb the jury's determinations in that regard on appeal.

¶ 46 In essence, defendant's contentions ask this court to re-examine the jury's determinations regarding the credibility of witnesses and try the case anew. "[I]t is not the function of a reviewing court to retry the defendant." *Siguenza-Brito*, 235 Ill. 2d at 228. We will not substitute our judgment for that of the jury in assessing the evidence and credibility of the witnesses at trial. *Id.* at 224-25. We must view the trial evidence in the light most favorable to the State. *Id.* at 224. C.V. and defendant presented vastly different versions of what occurred on the night in question. As such, the trial presented "a question of credibility, with the complaining witness relating one version of events and the defense witnesses relating a completely different picture." *Id.* at 229. It was the province of the jury to determine whether C.V.'s testimony was "sufficiently consistent throughout the trial to support defendant's convictions." *Id.* The jury heard defendant's version of the events and arguments and it rejected his explanation in finding him guilty. "A reviewing court will not reverse a conviction simply because *** the defendant claims that a witness was not credible." *Id.* at 228.

¶ 47 Moreover, the jury was "not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt." *Siguenza-Brito*, 235 Ill. 2d at 229. Indeed, it was " 'entitled to disbelieve defendant's explanation of the incriminating

circumstances in which he was found especially in view of testimony that defendant had told a different story at the time of his arrest.' " *Id.* (quoting *People v. Morehead*, 45 Ill. 2d 326, 330 (1970)). The jury was not required to believe defendant's explanation for why he had C.V.'s son's backpack as he was leaving the premises. During cross-examination, defendant denied speaking with Detective Ghoston at the police station after his arrest, he denied telling her that he did not know C.V., and he denied telling her that he was not at the Altgeld facility in March 2012. Ghoston testified in rebuttal that she spoke with defendant and he claimed he did not know an individual named C.V. and that he was not present at the Altgeld facility in March 2012.

¶ 48 B. Prior Sexual Conduct Evidence

¶ 49 Defendant argues that the trial court erred in limiting or excluding evidence under the rape shield statute regarding prior sexual conduct involving the victim in 2004, 2007, and 2012.

¶ 50 Defendant properly preserved this issue because he raised it before trial in a motion *in limine*, at trial, and in his posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). Defendant urges that *de novo* review is appropriate here because the underlying facts are not in dispute and only questions of law remain. We disagree. It is well-settled that "[e]videntiary rulings made pursuant to the rape-shield statute are reviewed for an abuse of discretion[.]" *People v. Johnson*, 2014 IL App (2d) 121004, ¶ 42 (quoting *People v. Santos*, 211 Ill. 2d 395, 401 (2004)). Similarly, "[a] trial court's restriction of cross-examination will not be reversed absent an abuse of discretion." *People v. Price*, 404 Ill. App. 3d 324, 330 (2010) (citing *People v. Enis*, 139 Ill 2d 264, 295 (1990)). We note that the victim denied any prior sexual encounters with defendant, and the issue here is whether the trial court properly exercised is discretion in making an evidentiary ruling, *i.e.*, applying the rape shield law to the proffered evidence. An abuse of discretion " 'occurs where the trial court's decision is arbitrary, fanciful or unreasonable

[citation] or where no reasonable person would agree with the position adopted by the trial court[.]' " *Johnson*, 2014 IL App (2d) 121004, ¶ 42 (quoting *People v. Becker*, 239 Ill. 2d 215, 234 (2010)).

¶ 51 Pursuant to the Illinois' rape shield statute, in a prosecution for an enumerated sexual offense, including aggravated criminal sexual assault,

> "the prior sexual activity or the reputation of the alleged victim *** is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim *** with the accused when this evidence is offered by the accused upon the issue of whether the alleged victim *** consented to the sexual conduct with respect to which the offense is alleged; or (2) when constitutionally required to be admitted." 725 ILCS 5/115-7(a) (West 2012).

¶ 52 Accordingly, the Illinois rape shield law "absolutely bars evidence of the alleged victim's prior sexual activity or reputation, subject to two exceptions: (1) evidence of past sexual activities with the accused, offered as evidence of consent; and (2) where the admission of such evidence is constitutionally required." *Santos*, 211 Ill. 2d at 401-02.

¶ 53 The statute aims to "prevent the defendant from harassing and humiliating the complaining witness with evidence of either her reputation for chastity or specific acts of sexual conduct with persons other than [the] defendant." (Internal quotation marks omitted.) *Johnson*, 2014 IL App (2d) 121004, ¶ 42 (quoting *People v. Summers*, 353 Ill. App. 3d 367, 373 (2004)). However, "it should never be mechanically applied to obscure relevant evidence that bears directly on guilt or innocence." (Internal quotation marks omitted.) *Johnson*, 2014 IL App (2d) 121004, ¶ 42 (quoting *People v. Hill*, 289 Ill. App. 3d 859, 862 (1997)). Moreover, "the evidence must be relevant in order to supersede the protections of the statute." *People v. Davis*, 337 Ill.

App. 3d 977, 986 (2003). Evidence is relevant "if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (Internal quotation marks omitted.) *Id.* "Evidence may be rejected on the grounds of relevancy if it is of little probative value because of remoteness, uncertainty or conjectural nature. [Citation.] Whether evidence offered by a defendant is relevant is a determination within the sound discretion of the trial court." *People v. Schuldt*, 217 Ill. App. 3d 534, 540–41 (1991).

¶ 54 i. Prior Sexual Conduct in 2004 and 2007

¶ 55 We first turn to defendant's contentions surrounding the evidence of prior sexual conduct in 2004 and 2007. Defendant argues that evidence of defendant and C.V.'s "shared prostitution encounters" on two separate occasions in 2004 and 2007 was admissible because they involved "prior sexual conduct" between them, which also happened to involve a third person, and they were relevant to support defendant's consent defense.

¶ 56 Section 115-7(a) specifically provides that the evidence must be "past sexual conduct of the alleged victim *** with the accused" when offered to show consent. 725 ILCS 5/115-7(a) (West 2012). In *People v. Jones*, 264 Ill. App. 3d 556, 563 (1993), the court held that the definition of "prior sexual conduct" "plainly calls for some physical interaction between the victim and the accused." It held that "prior sexual conduct *** between the victim and the accused will be admissible only where there is a '[an] intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused *** for the purpose of sexual gratification or arousal of the victim or the accused.' Ill. Rev. Stat. 1991, ch. 38, par. 12–12(e)." In *Jones*, the alleged conduct

did not meet this definition and was properly excluded where the defendant alleged that he viewed the victim while she physically sexually interacted with another person. *Id.* at 563-64.

¶ 57 Similarly, our supreme court in *Santos* held that the rape shield statute's reference to past sexual conduct of the victim "relates only to prior sexual activity between the victim and the accused, offered for purposes of establishing a defense of consent. This exception is inapplicable in the instant case, as the prior activity revealed by the evidence in question was not between complainant and defendant." *Santos*, 211 Ill. 2d at 403. In *Santos*, the excluded evidence consisted of the complainant's inconsistent statements to the authorities, *i.e.*, she told medical personnel that she had not engaged in sexual intercourse with anyone other than defendant in the previous 72 hours, but after DNA testing subsequently revealed that the defendant could not have been the source of the semen recovered in her rape kit samples, she admitted that she had engaged in sexual intercourse with someone else on the date in question. *Id.* at 399-400. The supreme court also excluded the inconsistent statements under the second exception in the rape shield statute because specific-act impeachment is prohibited in Illinois. *Id.* at 403-04. See also *People v. Sandoval*, 135 Ill. 2d 159, 172-176 (1990) (holding that prior sexual conduct is only relevant “to a sexual assault charge [if] those activities involved the complainant and the accused,” and finding no violation of the defendant's confrontation rights in barring testimony that the complainant had engaged in anal sex with a third party).

¶ 58 Here, defendant failed to show that the conduct he wished to introduce to support his defense of consent was conduct *between him and the victim*. When questioned about the allegations by the trial court, defense counsel offered that the anticipated testimony would show "some sort of sexual conduct *** [b]etween Mr. Westfield and the complaining witness and another person, the date." Counsel clarified that defendant and C.V. "shared dates," meaning that

"they both engaged in sexual acts with this particular person" and that they "were participating in sexual conduct at the same time with the same person." The inference drawn from the defense's offer of proof is that the conduct involved defendant and the victim engaging in sexual activity with a third party, and not directly with each other. As such, the allegations did not fall within the parameters of "prior sexual conduct" under the rape shield statute, which requires "some physical interaction between the victim and the accused." *Jones*, 264 Ill. App. 3d at 563. Whether the victim engaged in prostitution with the same "client" as defendant eight or five years before the incident giving rise to the charges in this case was not relevant to whether she consented to sexual activity with defendant, alone, on the night in question, particularly as the present case involves no evidence or allegations of prostitution. As the trial court found, such evidence would be unfairly prejudicial against the victim under the circumstances.

¶ 59 Additionally, in light of the trial court's finding that the conduct fell outside the statute, defendant failed to then bring forth any further specific details that would have demonstrated that the alleged conduct was "prior sexual conduct" between him and C.V. Where a trial court denies a motion to introduce evidence pursuant to the rape shield statute, the defendant bears the burden of providing an adequate offer of proof which is "considerably detailed and specific" in order to preserve the claim for appeal. (Internal quotation marks omitted.) *People v. Patterson*, 2014 IL 115102, ¶ 118. See *People v. Grant*, 232 Ill. App. 3d 93, 103-05 (1992) (defendant waived the issue of whether prior sexual conduct by the victim was admissible to explain or rebut medical evidence because he failed to make an adequate offer of proof with specific information regarding the date, time, or location of alleged sexual contact regarding his allegation that the semen found in the victim's vagina was deposited by her boyfriend).

¶ 60 Accordingly, we hold that the trial court did not abuse its discretion in determining that the 2004 and 2007 allegations were inadmissible under the rape shield statute. *Johnson*, 2014 IL App (2d) 121004, ¶ 42. Based on the record, the trial court's decision was not "arbitrary fanciful or unreasonable," or one that no reasonable person would agree with. *Id.*

¶ 61 ii. Prior Sexual Conduct in 2012

¶ 62 We next examine the trial court's ruling on defendant's proposed evidence that he and C.V. engaged in sexual activity on four occasions between February and April 2012. The trial court held that defendant could testify that he had consensual sex with C.V. on those occasions, but details regarding involvement of a transvestite or third party were irrelevant, fell outside the parameters of the statute, and were unduly prejudicial.

¶ 63 At trial, defense counsel cross-examined C.V. about whether she engaged in sexual conduct with defendant between February and April 2012, and she denied that she had. Defendant testified that he and C.V. would "kick it" at their friends' houses "and we'll have sex and, you know, drink ***." He testified that he and C.V. had sex four times between February and April 2012 and the incidents "all took place in the comfort of her home."

¶ 64 Defendant argues on appeal that the specific details of the sexual encounters were admissible under the rape shield statute and were relevant to support defendant's credibility and show C.V.'s motive to testify untruthfully. Defendant asserts that the trial court's ruling prevented him from subjecting C.V. to a meaningful cross-examination and presenting a complete defense.

¶ 65 Initially, we note that the trial court's ruling specifically prohibited defendant from testifying about the involvement of third parties or transvestites. It did not specifically prohibit defendant from testifying regarding the other details of the alleged sexual encounters, such as

defendant's assertion that they showered together and engaged in "role play." For unknown reasons, defendant did not testify extensively about these permitted details at trial, but merely testified that they engaged in consensual sex on four occasions at C.V.'s home. Accordingly, we can find no error on the trial court's behalf in that regard.

¶ 66 With respect to the two incidents of sexual activity involving third parties, we find that the trial court did not abuse its discretion in excluding this evidence. *Johnson*, 2014 IL App (2d) 121004, ¶ 42. As stated, the rape shield statute concerns evidence of a victim's alleged prior sexual activity "with the accused ***." 725 ILCS 5/115-7(a) (West 2012); *Santos*, 211 Ill. 2d at 401-02. The trial court appropriately allowed defendant to testify that he engaged in sexual conduct with C.V. on four prior occasions in 2012 and prohibited him from disclosing that third parties or transvestites were also involved. In particular, the allegations involving the transvestite Lala show that the victim did not even engage in sexual activity with Lala. Rather, defendant alleged that he and C.V. engaged in sex while Lala and C.V's friend engaged in sex. Thus, reference to Lala's participation would have been wholly outside the parameters of the rape shield statute and irrelevant in this case. Similarly, that C.V. may have engaged in consensual sexual activity with defendant and a transvestite named Tootsie Roll was not relevant to whether C.V. consented to sexual activity with only defendant on the night in question, and there was no indication from the trial evidence that a third party or transvestite was remotely or even tangentially involved in this case.

¶ 67 Moreover, the trial court did not abuse its discretion in finding this evidence to be overly prejudicial in relation to its scant probative value. The statute directs the trial court to exclude evidence "unless it determines at the hearing that the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice." 725 ILCS 5/115-7(b) (West 2012).

The trial court's ruling struck a fair balance between "mechanical" application of the rape shield statute in excluding evidence, and preventing defendant "from harassing and humiliating the complaining witness with evidence of either her reputation for chastity or specific acts of sexual conduct with persons other than defendant." (Internal quotation marks omitted.) *Johnson*, 2014 IL App (2d) 121004, ¶ 42. The fact that C.V. may have engaged in prior consensual sexual conduct with defendant was relevant to determine whether she consented to the sexual conduct that was the subject of the charged offense. *Davis*, 337 Ill. App. 3d at 986. Whether she engaged in prior consensual sexual conduct with a transvestite had no bearing on whether she engaged in consensual sexual conduct with only defendant, alone, on the night in question. The court's limitations prevented defendant from introducing evidence that was not relevant and would have been unfairly prejudicial toward the victim. Even when admissible under the rape shield statute, "the determination of whether the details of the sexual activity were admissible remained subject to standards of relevancy." *Schuldt*, 217 Ill. App. 3d at 541.

¶ 68 Defendant argues that *Schuldt* is distinguishable from this case. However, *Schuldt* supports our decision here. In *Schuldt*, the court found no abuse of discretion in the trial court's refusal to admit evidence concerning the details of prior sexual conduct between the victim and the defendant because the prior acts did not include "the kind of sadomasochist sexual conduct described by the defendant in his testimony" at trial, and thus their introduction would serve only to emphasize "the fact that the incidents occurred and thereby unduly prejudiced the victim in the eyes of the jury." *Id.* at 541-42. As the defendant was also permitted to elicit the victim's testimony that she had sexual intercourse with him twice four years prior, further details about the incidents were irrelevant to whether she consented to sex with the defendant on the date in question. *Id.* at 542. *Schuldt* reinforces our determination that the trial court did not abuse its

discretion in excluding the irrelevant evidence regarding sexual intercourse with third parties, as the incident on trial did not involve any third parties and the evidence would have prejudiced C.V. in the eyes of the jury.

¶ 69 We also do not agree with defendant that the limitations imposed by the trial court infringed upon his Confrontation Rights. “A defendant's constitutional right to cross-examine a witness is not defeated by the statute where the evidence of a victim's past sexual conduct is relevant and tends to establish bias, motive, or prejudice.” *Davis*, 337 Ill. App. 3d 977, 985 (citing *Sandoval*, 135 Ill. 2d at 174-75). However, "[i]t is well established that a trial judge retains wide latitude insofar as the confrontation clause is concerned to impose reasonable limits on *** cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or of little relevance." *People v. Harris*, 123 Ill. 2d 113, 144 (1988) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986)).

¶ 70 Defendant was not deprived of an opportunity to fully confront the witnesses against him or the ability to present a complete defense with "descriptive richness." *Old Chief v. United States*, 519 U.S. 172, 187-90 (1997). The rape shield statute's exception allowing evidence of prior sexual activity "when constitutionally required" allows a defendant to enter evidence *"directly* relevant to matters at issue in the case ***." (Emphasis in original.) (Internal quotation marks omitted.) *Johnson*, 2014 IL App (2d) 121004, ¶ 42. A victim's sexual history "is not constitutionally required to be admitted unless it would make a meaningful contribution to the fact-finding enterprise." (Internal quotation marks omitted.) *Id.* (quoting *People v. Maxwell*, 2011 IL App (4th) 100434, ¶ 76).

¶ 71 Here, we find the excluded evidence would have provided no meaningful contribution. Defendant has not shown that the evidence of past sexual conduct with transvestites was relevant

to show consent, bias, motive, or prejudice, or would have otherwise meaningfully contributed to determining his guilt or innocence. *Davis*, 337 Ill. App. 3d at 985 (citing *Sandoval*, 135 Ill. 2d at 174-75). Additionally, we recognize the latitude a trial judge enjoys in setting reasonable limits on cross-examination "based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or of little relevance." *Harris*, 123 Ill. 2d at 144. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Emphasis in original.) *Id.* (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). Allowing such evidence would have contributed to prejudicing and harassing C.V. with irrelevant information.

¶ 72 Defendant also maintains that C.V.'s prior sexual acts with defendant and third parties at the same time were relevant because they made it more likely that a third person was involved on this occasion. However, defendant never argued that C.V.'s alleged boyfriend also participated in the sexual encounter on the date of the incident. Rather, he argued that the boyfriend came home after defendant left C.V.'s home and the boyfriend was the person who beat C.V. We fail to see the logical inference defendant urges us to make.

¶ 73 Defendant also argues that this case is similar to *Olden v. Kentucky*, 488 U.S. 227, 229-30 (1988), because curtailment of his cross-examination excluded evidence that was critical to his defense of consent. In *Olden*, U.S. at 229-30, the defense alleged that the victim concocted her rape allegation to preserve her relationship with another man with whom she was living at the time of trial and who testified that he observed her leave from a car owned by one of the defendants. Although the victim testified that she lived with her mother, the defendant was not permitted to cross-examine her about this inconsistency as the trial court found it would be

unduly prejudicial to reveal the victim's interracial relationship as it would possibly prejudice the jury against the victim. *Id.* at 228, 232. The United States Supreme Court held the defendant's right to confront witnesses was infringed upon because he consistently asserted the defense of consent and that the complainant was lying out of fear of jeopardizing her relationship with another man, and the excluded evidence related to her motivation to lie. *Id.* at 232. The court held that the victim's testimony was crucial to the prosecution's case, which was "far from overwhelming," was contradicted by the defendant and codefendant's testimony, and was corroborated only by the man with whom she was in a relationship. *Id.* at 233.

¶ 74 In contrast, in the present case, there was absolutely no testimony, not to mention an offer of proof by defendant, that C.V.'s alleged boyfriend observed any sexual conduct between the complainant and defendant, that the alleged boyfriend observed defendant leave C.V.'s home that morning, or that the alleged boyfriend otherwise observed or knew anything that would arouse a suspicion that C.V. and defendant had engaged in sexual conduct. Indeed, there was merely contradictory, weak evidence that C.V. had a boyfriend. Unlike in *Olden*, the excluded evidence would not have established C.V.'s motivation to lie or any other issue pertinent to determining defendant's guilt or innocence at trial. Thus, although consent was at issue here, the excluded evidence was barred not only by the rape shield statute, but its prejudicial value also outweighed any probative value.

¶ 75 C. Victim's Statement to Emergency Room Physician

¶ 76 Defendant asserts that the trial court erroneously allowed the emergency room treating physician, Dr. Kouchoukos, to testify that C.V. informed him that defendant was the offender. Defendant maintains that this statement identifying him as the offender was not admissible as a hearsay exception for statements made by a victim to medical personnel for purposes of

diagnosis or treatment under section 115-13 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-13 (West 2012)).

¶ 77 Defendant concedes that this issue is forfeited because no objection was made at the time of Dr. Kouchoukos's testimony and the issue was not included in a posttrial motion. *Woods*, 214 Ill. 2d at 470; *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). He contends that the error constituted plain error under either prong of plain error analysis. The State does not argue that the challenged testimony was properly admissible as a hearsay exception. Rather, it contends that defendant cannot establish plain error.

¶ 78 Under the plain error doctrine, in order to overcome forfeiture of an alleged error, a defendant must show that:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." (Internal quotation marks omitted.) *People v. Jenkins*, 2016 IL App (1st) 133656, ¶ 25 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 79 The first step is to determine whether a clear or obvious error occurred. *Jenkins*, 2016 IL App (1st) 133656, ¶ 25 (citing *People v. Herron*, 215 Ill. 2d 167, 184 (2005)). Defendant bears the burden of demonstrating that the narrow and limited exception to the general rule of forfeiture applies in this case. *Herron*, 215 Ill. 2d at 177; *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 80 Section 115-13 provides, in part, that in prosecution of certain sex offenses:

> statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of the symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule. 725 ILCS 5/115-13 (West 2012).

¶ 81 The statute generally encompasses statements regarding when, how, and where sexual acts occurred and the cause of a victim's injuries. *People v. Freeman*, 404 Ill. App. 3d 978, 986–87 (2010). However, statements identifying the offender fall "outside the scope of the exception." *Davis*, 337 Ill. App. 3d at 990.

¶ 82 Here, Dr. Kouchoukos testified on direct examination that when he treated C.V. in the emergency room, he asked C.V. what happened. He testified that she "said a known assailant, Levertis Westfield, struck her repeatedly and forcibly had vaginal intercourse." Dr. Kouchoukos's testimony identifying defendant did not fall within the medical treatment exception to the hearsay rule, as this portion of C.V.'s statement was not pertinent to the diagnosis or treatment of her injuries. *Davis*, 337 Ill. App. 3d at 990.

¶ 83 Under the first prong of plain error review, however, we do not find the evidence was closely balanced in this case. *Jenkins*, 2016 IL App (1st) 133656, ¶ 25. As we previously discussed in relation to defendant's challenge to the sufficiency of the evidence, substantial trial evidence supported defendant's convictions. Moreover, Dr. Kouchoukos's testimony regarding the identity of the offender was cumulative of other testimony properly admitted. "The admission of hearsay identification testimony constitutes plain error only where it serves as a substitute for

courtroom identification or is used to strengthen and corroborate a weak identification. Such evidence [does not rise to the level of plain] error where it is merely cumulative or is supported by a positive identification and other corroborative circumstances." *People v. Mitchell*, 200 Ill. App. 3d 969, 975 (1990).

¶ 84 Here, C.V. unequivocally identified defendant as the perpetrator. Although defendant attempted to show that C.V. initially reported that "her boyfriend" inflicted the injuries, we note that Hyde denied that she told the 911 operator that C.V. was beaten by her boyfriend and Hyde testified that C.V. informed her that someone from her old neighborhood had beaten her. Further, Williams' police report identified defendant as the offender, even if it misstated that C.V. was defendant's girlfriend. C.V.'s testimony was corroborated by her physical injuries, the surveillance camera footage, Hyde's testimony, the forensic DNA evidence, and testimony regarding her injuries and medical treatment by Drs. Kouchoukos and Dr. Kalimuthu. In addition, defendant's credibility was undermined when Ghoston's testimony contradicted his testimony that he did not speak with a female detective after his arrest and denied that he was asked if he knew anyone named C.V.

¶ 85 Under analogous circumstances, this court in *Davis* found no plain error in the erroneous admission of similar testimony by the victim's treating nurse. In *Davis*, the nurse testified that the victim described the events before the sexual assault and kidnapping and related a physical description of the offenders. *Davis*, 337 Ill. App. 3d at 982. The court found this aspect of the nurse's testimony did not fall under the hearsay exception because these details were not necessary for proper diagnosis or medical treatment. *Id.* at 990. However, the court determined that the evidence was not closely balanced and any error did not rise to the level of plain error, noting that "[t]he hearsay testimony was cumulative and corroborated by substantial other

evidence. No fact regarding the crime was introduced through hearsay testimony that was not also established by [the victim's] own testimony." *Id.* at 990-91. The *Davis* court observed that the hearsay testimony was corroborated by the victim's positive identification of the defendant in and out of court, by the physical and forensic evidence, and by other witnesses who observed the victim after the incident. *Id.* at 991. Additionally, the defendant had the opportunity to cross-examine the out-of-court-declarant, *i.e.*, the victim, regarding her statements, which further mitigated the error, as "[t]he main rationale underlying the exclusion of hearsay testimony is the opposing party's inability to test the real value of the testimony by exposing the source of the assertion to cross-examination." *Id.*

¶ 86 In the present case, Dr. Kouchoukos's testimony regarding the identity of the offender was inadmissible, but the evidence was not so closely balanced that the error alone threatened to tip the scales of justice against defendant. *Jenkins*, 2016 IL App (1st) 133656, ¶ 25. As in *Davis*, we likewise conclude that "[a]ny error in admitting the testimony" did not rise to the level of plain error and "did not prejudice defendant." *Davis*, 337 Ill. App. 3d at 991.

¶ 87 Defendant argues that the jury's note, sent after an hour of deliberations, asking if the surveillance video had a time stamp or if there was any fingernail scrape evidence indicates the jury was close to a deadlock. We disagree that the jury's note was an indication of deadlock. See *People v. Wilmington*, 2013 IL 112938, ¶ 35 (the fact that the jury sent a note to the judge during deliberations did not support the defendant's argument that the evidence was closely balanced; there was no indication that they reached an impasse and the record did not disclose the length of deliberations).

¶ 88 Next, defendant urges that under the second prong of plain error analysis, the admission of the hearsay evidence was so serious that it denied his fundamental right to a fair trial. He

emphasizes that the State referred to the hearsay testimony during its rebuttal argument. Even with that consideration in mind, defendant has not demonstrated that the error was so serious under the circumstances of this case that it affected the fairness of defendant's trial or the integrity of the judicial process, irrespective of the closeness of the evidence. *Jenkins*, 2016 IL App (1st) 133656, ¶ 25. Second-prong plain error is akin to, although not restricted to, structural errors such as a complete denial of counsel or trial before a biased judge. *People v. Clark*, 2016 IL 118845, ¶ 46. Again, the error did not rise to the level of plain error.

¶ 89 In his final claim, defendant raises the related argument that his trial counsel rendered constitutionally deficient assistance in failing to object to Dr. Kouchoukos's testimony or properly preserve this issue for appeal.

¶ 90 In order to advance a successful claim of ineffective assistance of counsel, defendant must demonstrate that his attorney's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms, and that he suffered prejudice as a result, *i.e.*, "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). A defendant's failure to show either prong—defective representation or prejudice—precludes a finding that his counsel's performance was constitutionally deficient. *People v. Enis*, 194 Ill. 2d 361, 377 (2000). Defendant must overcome the "strong presumption that counsel's performance falls within the wide range of reasonable professional assistance." *People v. Enis*, 194 Ill. 2d 361, 377 (2000).

¶ 91 Generally, constitutionally sound assistance requires counsel to "engage[] evidentiary rules to shield an accused from a decision based on unreliable evidence." *People v. Lefler*, 294 Ill. App. 3d 305, 310 (1998). However, courts have also found that "[a] defense counsel's

decision not to object to the admission of purported hearsay testimony involves a matter of trial strategy and, typically, will not support a claim of ineffective assistance of counsel. *People v. Theis*, 2011 IL App (2d) 091080, ¶ 40.

¶ 92 We note that, given the procedural posture of this case, the record does not contain any information or explanation to aid our review regarding why defense counsel did not object or raise the hearsay issue in a posttrial motion. *People v. Flores*, 231 Ill. App. 3d 813, 828 (1992). Moreover, we observe that defendant was entitled to "competent, not perfect, representation." *People v. Stewart*, 104 Ill. 2d 463, 491–92 (1984). "Mistakes in trial strategy or tactics or in judgment do not of themselves render the representation incompetent." *Id.* As noted, the admission of hearsay evidence may not be prejudicial. *Mitchell*, 200 Ill. App. 3d at 975; *Davis*, 337 Ill. App. 3d at 990-91. Defendant cannot show prejudice under the *Strickland* test here because the other evidence against him was overwhelming and because the hearsay evidence was cumulative of other, admissible evidence. See *People v. Martin*, 408 Ill. App. 3d 44, 51–52 (2011) (the defendant could not establish prejudice by counsel's failure to object to inadmissible evidence because, based on other, admissible evidence, there was no reasonable probability that the defendant would have achieved a better result without counsel's error); and *People v. Johnson*, 219 Ill. App. 3d 1291, 951-52 (1991) (counsel's failure to object to the admission of hearsay was unreasonable but there was not a reasonable probability of a different outcome absent the error in light of the other evidence presented).

¶ 93 III. CONCLUSION

¶ 94 For the reasons stated above, we affirm defendant's convictions and sentences.

¶ 95 Affirmed.