FOURTH DIVISION
March 23, 2017

No. 1-14-3635

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. 12 CR 11307
	)	
TAUREAN LEWIS,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court of Cook County convicting defendant of two counts of aggravated criminal sexual assault; there is no reasonable probability defendant would have been acquitted if the testimony of the state's expert witness that defendant's DNA matched DNA collected from the victim's clothing had not been admitted at defendant's trial, therefore, we do not reach the question of whether the admission of the testimony was error.

¶ 2 The State charged defendant, Taurean Lewis, with aggravated criminal sexual assault against minors M.K. and B.L. After a bench trial, the trial court found defendant guilty. The court merged the charges against defendant into one conviction for aggravated criminal sexual

assault against M.K. and one conviction for aggravated criminal sexual assault against B.L. and sentenced him to consecutive 14-year terms of imprisonment. Defendant appeals on the ground the trial court erroneously admitted testimony defendant's DNA was found on the victim's clothing because the State failed to establish a chain of custody for a DNA sample collected from defendant, which was tested against the DNA sample collected from M.K.'s clothing following the assault. Defendant did not object to the testimony at trial but asks this court to review the admission of the testimony for plain error. For the following reasons, we hold any error in the admission of the evidence did not prejudice defendant. We therefore decline to reach the issue of the admission of the testimony and, accordingly, affirm.

¶ 3 BACKGROUND

¶ 4 M.K. testified that on the evening of November 10, 2007, she and B.L. were going to a party in the area of Cicero and Augusta in Chicago. At the time, M.K. was 14-years old and B.L. was 15-years old. Both minors testified at the trial, however, there were some inconsistencies in their accounts of the incident. M.K. testified that they were walking northbound on Cicero when a car approached them. Defendant drove the car and he had two passengers. M.K. and B.L. accepted a ride to the party in defendant's car. Defendant dropped M.K. and B.L. off at the location of the party. The three men did not go in with them. M.K. testified that after approximately one hour, M.K. and B.L. left the party and walked to a nearby park. At the park, M.K. noticed defendant drive around the block approximately three times. M.K. testified the same two men were also in the car as it circled the block. B.L. testified defendant's car was outside when they exited the party, and M.K. walked straight to the car. B.L. also testified there were only two men in the car. Eventually, M.K. and B.L. voluntarily entered the car a second time and defendant drove first to a liquor store and then to an apartment in the area of Central Park and Franklin. M.K. testified that all three men went into the building while she and B.L.

waited in the car for about a half hour. B.L. testified they waited for about ten minutes before defendant and the other men returned. M.K. testified she talked to defendant and one of the other men for a short time then all four got back into the vehicle. Defendant and M.K. sat in the front seat while a male passenger and B.L. sat in the back seat. M.K. and B.L. asked to be driven home to Oak Park but defendant protested that was too far. B.L. then asked defendant to take them to B.L.'s parents' home on Augusta and defendant said that he would.

¶ 5 Defendant started driving in the direction of B.L.'s parents' home but he pulled the car into an alley. M.K. testified that defendant pulled the car next to a wall close enough to prevent her from opening the passenger-side door. Defendant then produced a handgun and pointed it at M.K. Defendant demanded M.K. perform oral sex on him. M.K. argued briefly then placed her mouth on defendant's penis. M.K. also testified that defendant inserted his finger into her vagina. B.L. testified that defendant asked her (B.L.) why she was not also performing oral sex. B.L. testified that she asked the back-seat passenger if she had to and he said yes. B.L. then performed oral sex on the back-seat passenger for approximately ten minutes. M.K. testified that after about ten minutes defendant ejaculated. M.K. noticed ejaculate on the car's console and used her shirt to wipe the console. M.K. testified defendant drove to another street where he ordered her and B.L. out of the car and warned them not to look at the car or its license plate before he drove away. B.L. testified defendant ordered them from the car at the end of the alley. M.K. and B.L. walked to M.K.'s boyfriend's house, where M.K. immediately told her boyfriend what happened. Police arrived and M.K. was taken to a hospital where M.K. told detectives, nurses, and doctors about the incident. B.L. left and went to her sister's house and told her sister what happened. B.L.'s sister told B.L.'s father, and police were called. B.L. also went to the hospital. The hospital performed sexual assault kits on both victims and collected M.K.'s clothing.

¶ 6 The parties stipulated that at the hospital M.K. told a detective that she and B.L. were walking down the street when a car approached them. M.K. told the detective that the driver waved them over and when they got to the car, the driver took her phone and told M.K. that she would have to get into the car to get the phone back. She stated they got into the car and the driver drove into the alley. At trial, B.L. admitted that she lied at the hospital, saying that she and M.K. were forced into the car at gunpoint.

¶ 7 Chicago Police Detective Patricia Dwyer testified that in investigating the sexual assault of M.K. and B.L., she identified a suspect with the assistance of the crime lab. Detective Dwyer arranged for the victims to view a photo array. B.L. testified that on September 12, 2009, she identified defendant as the perpetrator from a photo array. Detective Patricia Dwyer testified that M.K.'s mother had arranged to meet Dwyer but did not show up for the meeting. M.K. testified that on June 4, 2012, she identified defendant in a physical lineup. M.K. identified defendant based on his facial structure and height. M.K. stated she was only 95% sure defendant was the perpetrator because defendant appeared heavier than he did in 2007. B.L. separately identified defendant at a physical lineup on June 4, 2012.

¶ 8 The parties stipulated that an evidence technician would testify that she collected a buccal swab standard from defendant in 2008, which she inventoried under number 11194531, and submitted it to the Illinois State Police (ISP) crime lab for analysis. The parties further stipulated that a forensic biologist for the ISP would testify that she received a buccal swab standard under inventory number 11194531 and preserved the cotton portion of the swab for future analysis. Finally, the parties stipulated that a forensic scientist for the ISP would testify that in 2008 she received a DNA standard inventoried under number 11194531, identified a DNA profile suitable for comparison purposes, and summarized her results for the DNA profile in a laboratory report that was available for future comparison.

¶ 9 Heather Wright, a different forensic scientist for the ISP, testified at defendant's trial. Wright testified she conducted a DNA analysis on a blood standard collected from M.K. and on semen stains found on M.K.'s shirt and pants. Wright testified that she identified a DNA profile from the stain on M.K.'s clothing and that the DNA profile she obtained matched the DNA profile of defendant. Later, the State asked Wright if a male DNA profile she identified from M.K.'s clothing "matched the profile generated from the buccal swab that [Wright] had for Taurean Lewis," and Wright responded "That's correct." Defense counsel did not object to Wright's testimony regarding the DNA match.

¶ 10 The State also elicited testimony from K.M. regarding a February 2012 incident involving defendant. K.M. testified that defendant invited her to his apartment. While watching a movie defendant began kissing the woman and removing her clothes. K.M. asked defendant to stop, but he did not. K.M. testified that defendant removed her pants and underpants and performed vaginal intercourse with her without consent.

¶ 11 The trial court found defendant guilty of sexually assaulting M.K. and found that defendant was accountable for the sexual assault of B.L. The court noted that it had observed the victims' testimony and acknowledged inconsistencies in their testimony. The court found, in pertinent part:

> "The common theme that ran through their testimony was the explanation between the first story and the real story. Their fears when they got into a motor vehicle, with people they didn't know. After admonishments by their parents, both parents, as to appropriate behavior of a young lady, what it should be.
>
> That indicates that did make sense to this court. I know one thing for a hundred percent. I know Mr. Lewis had contact in some manner, directly or indirectly, with the shirt that [M.K.] was wearing. His DNA is on her shirt. If

you look at the diagram, she indicated she's in the front passenger seat. The console is to the left of her. If one were to turn her body, that's where the items would be in question.

As to the issue of consent, I had the ability to observe those young ladies. I am convinced beyond a reasonable doubt there is no consent. The sexual act took place. There is no consent."

¶ 12 The trial court went on to discuss the issue of accountability. The court found defendant guilty of aggravated criminal sexual assault but found defendant not guilty of those counts involving a firearm. The court sentenced defendant to two consecutive 14-year terms of imprisonment.

¶ 13 This appeal followed.

¶ 14 ANALYSIS

¶ 15 Defendant argues the admission of Wright's testimony that DNA identified from stains on M.K.'s clothing matched DNA identified from a buccal swab standard collected from defendant was plain error because "there was a complete breakdown in the chain of custody for the buccal swab from which [defendant's] profile was purportedly developed." Defendant notes that when Wright testified, "she said nothing that linked the profile she used for comparison to the one generated from the 2008 buccal swab." Specifically, defendant argues Wright "did not testify that the DNA data she used was associated with inventory number 11194531," provided no identifying features that would permit an inference she used the 2008 buccal swab, and did not testify how she knew the DNA standard had been identified from a buccal swab standard taken from defendant. Defendant argues this error prejudiced him because the trial court relied on Wright's testimony, and it allowed the trial court as trier of fact to overlook serious

inconsistencies in the victims' testimony and their prior statements to police and medical personnel.

¶ 16 A defendant forfeits an issue on appeal when no timely objection at trial is raised and the alleged error was not included in a posttrial motion. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). Forfeiture is important not only because a timely objection allows a trial court to promptly correct error, but also to prevent a party from strategically obtaining a reversal by their failure to act. *People v. Roberts*, 75 Ill. 2d 1, 11 (1979). Defendant concedes this issue is forfeited for review but asks this court to review the alleged error for plain error. "We will apply the plain-error doctrine when: (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. [Citation.]" *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 17 In this case, defendant argues "the failure of the State to produce evidence linking the comparison profile used by Wright to the 2008 buccal swab taken from Lewis is reviewable under the closely-balanced-evidence prong of the plain error doctrine." Defendant asserts Wright's testimony "threatened to tip the scales of justice against" defendant because it "masked the deficiencies in the State's case." Specifically, defendant points to inconsistencies in the victims' testimony between each other's testimony and their prior statements concerning the incident, the amount of time that passed before the victims identified defendant, the strength of M.K.'s identification and that she was allegedly not cooperative, and that "the [victims'] inconsistencies supported [defendant's] trial theory which was that they made up a story about being sexually assaulted to avoid getting in trouble." Defendant argues that the trial court,

"[n]ow certain that the [victims'] identification *** was accurate and that a sexual act had indeed taken place *** could comfortably credit the remainder of the *** testimony." Plain-error review under the closely-balanced-evidence prong requires the defendant to show "that the verdict may have resulted from the error and not the evidence properly adduced at trial [citation]; or that there was a reasonable probability of a different result had the evidence in question been excluded [citation]." (Internal quotation marks omitted.) *People v. White*, 2011 IL 109689, ¶ 133. Where, as in this case, the only basis proffered for plain-error review is a claim that the evidence is closely balanced, "an assessment of the impact of an alleged evidentiary error is readily made after reading the record. When it is clear that the alleged error would not have affected the outcome of the case, a court of review need not engage in the meaningless endeavor of determining whether error occurred." *White*, 2011 IL 109689, ¶ 148. The evidence in this case was not so closely balanced that the verdict may have resulted from the admission of Wright's testimony or that there was a reasonable probability of a different result had the evidence been excluded. Therefore, we have no need to address the question of whether error occurred in the admission of Wright's testimony.

¶ 18 Defendant argues Wright's testimony threatened to tip the scales because "the forensic DNA analyst's testimony was critical in proving identity *and* penetration." (Emphasis added.) We disagree. It is clear from the trial court's ruling that the trial court relied on the DNA evidence only on the issue of identification. The court stated: "I know one thing for a hundred percent. I know Mr. Lewis had contact in some manner, directly or indirectly, with the shirt that [M.K.] was wearing. His DNA is on her shirt." Further, we find that the use of the DNA evidence to establish identity did not prejudice defendant. The victims both identified defendant as the perpetrator. The trial court was aware that M.K. was only "95% certain" of her lineup identification because defendant looked heavier at the time of the identification. It is the

responsibility of the trier of fact to weigh the evidence. *People v. Booker*, 2015 IL App (1st) 131872, ¶ 68. However, B.L. did not similarly equivocate her identification of defendant at the lineup. B.L. also positively identified defendant from a photo array. Regarding her identification from the photo array B.L. testified "I recognized him really instantly because you know who hurt you; you know who did something to you. It was instantly." B.L. was certain about her identifications despite the passage of time, a fact of which the trial court was aware. "A single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. [Citation.]" *People v. Anderson*, 2017 IL App (1st) 122640, ¶ 40. The trial court could credit both the identifications. Viewing the totality of the identification evidence (*White*, 2011 IL 109689, ¶ 139), we cannot say there was a reasonable probability of a different result had Wright's testimony been excluded from defendant's trial.

¶ 19 If the trial court relied on the presence of defendant's DNA on M.K.'s clothing as evidence that a sexual act occurred, that fact alone did not tip the scales against defendant. The State elicited testimony that defendant placed his finger inside M.K.'s vagina, which would be sufficient to convict defendant of the offense charged absent the DNA evidence. 720 ILCS 5/12-13 (West 2006). See also *People v. Baugh*, 2011 IL App (1st) 092834, ¶ 29 (finding sufficient corroboration to support the defendant's conviction for criminal sexual assault based on digital penetration). Moreover, ejaculation is not an element of the offense. See *People v. Gholston*, 297 Ill. App. 3d 415, 420 (1998) ("Ejaculation is not an element of the sexual assault offenses of which defendant was convicted. [Citation.] Consequently, the absence of defendant's DNA from the Vitullo kit could establish that defendant did not ejaculate during the sexual assault, but could not conclusively establish that defendant did not sexually assault the victim."). In this case, conversely, the presence of defendant's DNA on M.K.'s clothing could establish that

defendant ejaculated but could not conclusively establish that defendant committed the offense charged. Although the trier of fact might reasonably infer that an act of sexual penetration occurred, the DNA evidence is not conclusive of sexual penetration, and the State elicited independent sufficient evidence of defendant's guilt of the offense. Therefore, we do not find that the admission of the DNA evidence alone threatened to tip the scales against defendant or that "the verdict may have resulted from the [alleged] error." See *White*, 2011 IL 109689, ¶ 133.-

¶ 20 The victims also testified as to acts of sexual penetration. Although there were inconsistencies in the victims' testimony, "[i]t is within the province of the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. [Citation.] The trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt. [Citation.] A reviewing court will not substitute its judgment for that of the trier of fact. [Citation.]" (Internal quotation marks omitted.) *People v. Faulkner*, 2017 IL App (1st) 132884, ¶ 35. We find in this case the trial court expressly resolved the inconsistencies in the victims' statements in favor of the State. Regarding inconsistencies in her testimony and prior statements, M.K. testified, in part, as follows:

> "Q. Do you remember ever misleading people as to whether or not you got into that car voluntarily?
>
> * * *
>
> THE WITNESS: Probably.
>
> Q. And again, why did you do that?
>
> A. Just I was young and immature. I wasn't sure of what my consequences would be for getting into that car."

The State also asked B.L. about inconsistencies in her statements after the incident and her testimony. B.L. testified, in part, as follows:

> "Q. Did you tell the entire truth of what happened to you that night at the hospital?
>
> A. No.
>
> Q. Can you tell us why not?
>
> A. Because I was scared my parents were going to be upset that I got in the car with strangers, and I wasn't taught that. We weren't supposed to get in the car with strangers.
>
> Q. So what did you originally tell the police and the doctors?
>
> A. I told them that we were forced to get in with the gun.
>
> Q. Was that the truth?
>
> A. No.
>
> Q. Later on that night after you left the hospital, you spoke with another detective, correct?
>
> A. Yes.
>
> Q. And did you tell her the truth about what happened?
>
> A. No. I just kept sticking to my first story that I said because I didn't want to get in trouble.
>
> Q. Did you tell the truth here today when you testified?
>
> A. Yes."

¶ 21 Even if the trial court partially relied on the fact the DNA evidence corroborates the victims' identification of defendant to bolster its credibility determination as to the victims, the court expressed an independent basis for crediting their testimony. The court stated: "The court

had the ability to observe the witnesses, their interest, their bias as they testified in this case. *** They did have some inconsistencies in their testimony. The common theme that ran through their testimony was the explanation between the first story and the real story. *** That indicates that did make sense to this Court." The trial court's credibility determination was based on the victims' testimony as to the reasons for the inconsistencies in their statements, which "made sense" to the court. Additionally, the trial court admitted other-crimes evidence against defendant. "[O]ther-crimes evidence is admissible to show *modus operandi*, intent, identity, motive or absence of mistake. [Citations.] Other-crimes evidence may also be permissibly used to show, by similar acts or incidents, that the act in question was not performed inadvertently, accidently, involuntarily, or without guilty knowledge. [Citation.]" *People v. Wilson*, 214 Ill. 2d 127, 136 (2005).

¶ 22 Because the trial court resolved the inconsistencies in the victims' statements in favor of the State and credited their testimony for reasons unrelated to the DNA evidence, we cannot say the verdict resulted from the admission of Wright's testimony or that there is a reasonable probability of a different result had the evidence been excluded. Defendant had the burden of persuasion to show the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). "The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant." *Id.* The foregoing discussion demonstrates that the evidence was in fact "strongly weighted against defendant." Even if we were to assume, *arguendo*, there was error in the admission of Wright's testimony, the evidence against defendant is such that he cannot show prejudice for purposes of the closely balanced prong of the plain error analysis. *White*, 2011 IL 109689, ¶ 134. "[W]e need not resolve whether there was

error here because, under a closely balanced analysis, defendant cannot establish prejudice." *Id.* Accordingly, defendant's conviction is affirmed.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 25 Affirmed.