2011 IL App (2d) 100550-U
No. 2-10-0550
Order filed December 6, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Boone County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CF-141
	)	
SETH A. SOLTOW,	)	Honorable
	)	Fernando L. Engelsma,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: Where the State proved beyond a reasonable doubt defendant's use of force, his criminal sexual assault conviction was affirmed; trial counsel was not ineffective for failing to tender a jury instruction on the issue of withdrawn consent; and the trial court did not err in sentencing defendant to a term of mandatory supervisory release of three years to natural life.

¶ 1 Following a jury trial, defendant, Seth A. Soltow, was convicted of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008) (renumbered and amended as section 11-1.20(a)(1) by Pub. Act 96-1551, Art. 2, § 5 (eff. July 1, 2011))) and sentenced to eight years' imprisonment. Defendant argues on appeal that the State failed to prove him guilty beyond a reasonable doubt, that trial counsel was ineffective for failing to tender a jury instruction on the issue of withdrawn consent, and

that the trial court erred in sentencing defendant to an indeterminate term of mandatory supervised release (MSR). For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Defendant was charged by indictment with three counts of criminal sexual assault under section 12-13(a)(1) of the Criminal Code of 1961 (Code), alleging that he committed acts of sexual penetration with T.M. in that, by the use of force, he placed his penis in T.M.'s vagina (count I), he placed his penis in T.M.'s anus (count II), and he placed his penis in T.M.'s mouth (count III). The charges stemmed from an incident at defendant's apartment on the afternoon of May 16, 2009.

¶ 4 Defendant was tried by a jury in January 2010. The evidence adduced at trial established the following undisputed facts regarding the events leading up to the May 16, 2009, incident. At the time of the incident, T.M. was 17 years old and defendant was 18 years old. T.M. was 5'2" tall and petite; defendant was 5'8" and weighed 180 pounds. About three weeks prior to May 16, defendant briefly met T.M. when she and her friend, Katie, went to defendant's apartment at a mutual friend's suggestion. Several people were there, including the mutual friend and defendant's roommate. T.M. and Katie stayed only a short time. Following their initial meeting, defendant and T.M. exchanged text messages, some of which were of a flirtatious nature.

¶ 5 Several days before the May 16, 2009, incident, T.M. texted defendant to ask if she could spend the night at his apartment because she had nowhere to sleep. Defendant agreed and picked her up in a pick-up truck that belonged to his father. Defendant's roommate was home. Defendant and T.M. watched a movie together, and then slept together, in defendant's bed. According to T.M., they kissed for about 30 seconds but engaged in no other sexual conduct. Defendant claims that T.M. performed oral sex on him, but that she declined to have intercourse because she was

menstruating. The next morning, defendant drove T.M. back to the apartment in which she had been living.

¶ 6 Either that day or the next, T.M. realized that she left her cell phone charger at defendant's apartment, and she began texting him about picking it up. Defendant did not respond for a few days. On May 16, 2009, he texted T.M. and told her that she could get her charger. T.M. went to defendant's apartment at about 2 p.m. that day. When she arrived, she and defendant sat on his couch and talked. According to defendant, he told T.M. that he had been in the hospital the night before because he overdosed on a friend's prescription medication in an attempt to get high and that he was required to talk to someone from "psych" before the hospital would discharge him. T.M. claimed that defendant told her he had tried to kill himself. Defendant mentioned to T.M. that, although he had broken up with his girlfriend, Char, they were still communicating. After defendant and T.M. talked for about 30 to 45 minutes, the incident at issue occurred.

¶ 7 While the details of the incident were disputed by defendant and T.M. and will be narrated later, what happened after the incident is largely undisputed. T.M. left defendant's apartment and drove to a Shell gas station about one block from defendant's apartment. She called her friend, Katie, who testified that T.M. sounded scared and "was definitely shaken up." Katie met T.M. at the gas station and found T.M. sitting in her van, upset. T.M. told Katie that defendant forced her "to suck his dick" and raped her anally and vaginally. Katie accompanied T.M. to the restroom in the gas station. Katie elaborated, "When we were in the bathroom, she said that her butt hurt after everything that happened. And when she wiped, there was a little bit of blood on the toilet paper." Katie said that it was not menstrual blood. T.M. was not sure if she wanted to call the police, so Katie called the police for T.M. because T.M. was "just scared and *** really nervous and [she] couldn't believe what just happened to [her]."

¶ 8 Michelle Wilgus, a patrol officer with the Belvidere police department, responded to Katie's call at 4:02 p.m. and arrived at the Shell gas station about five minutes later. Wilgus said that T.M.'s eyes were red and puffy, as if she had been crying. Wilgus saw no bruising, ripped clothing, or any other sign of a struggle. T.M. told Wilgus about the bleeding, but said that she could not determine if the blood was from the sexual conduct or from her recent menstruation. Wilgus drove T.M. and Katie to the police station to be interviewed by Detective Shane Woody, who took T.M.'s written statement. He drove T.M. and Katie back to the gas station to retrieve T.M.'s van and then followed them to Swedish American Hospital in Belvidere.

¶ 9 At the hospital, Tonya Reese, a nurse practitioner, took the following statement from T.M.:

> " 'I was sexually assaulted. I went and stayed the night with him a few nights ago and I left my charger over there. I went to get it back. When I went to leave he threw me on the couch, he took off my clothes and made me give him oral sex. He put his penis inside of me and ejaculated. Then he did anal sex and then went back into my vagina. I think he only ejaculated once and was not wearing a condom. After I left to get my phone and I called my friend.' "

Reese testified that the statement accurately reflected T.M.'s words to her. T.M. told Reese that defendant threw her on the couch, not that defendant pulled her toward him on the couch. Reese also completed a sexual assault kit. The physician's summary of findings indicated a "[n]ormal exam[,] no signs of trauma." The parties stipulated that two forensic scientists would testify that, from the evidence collected in the sexual assault kit, they determined that semen was present in T.M.'s vagina and anus, and that DNA testing of the semen revealed a match to defendant.

¶ 10 While T.M. was being examined at the hospital, Katie held her cell phone and keys for her. At approximately 7:44 p.m., Katie discovered a text message from defendant on T.M.'s phone that

read, "Fuck u y would u say i did this ur fuckn crazy bitch get fuckd." Katie texted defendant from T.M.'s phone, asking him how he could have done something like this. At 7:50 p.m., Katie received a second message on T.M.'s cell phone from defendant that read, " N i did i did force u 2 do shit if i get lockd up 4 this ur fuckd."

¶ 11 While T.M. was at the hospital, Detective Woody and another officer, Thomas Jones, went to defendant's apartment. Defendant's roommate admitted them to the apartment, where they took photographs. Woody and Jones then went to defendant's parents' house, where they found defendant in the driveway. Woody told defendant that they needed to speak to him about T.M. Defendant responded, " 'T[] who[?]' " Woody answered, "the girl you had sex with this afternoon." Defendant denied having sex with anyone that afternoon. Defendant's father came outside within a few minutes and invited the officers inside. When defendant's father asked about a rape kit, defendant admitted that he had had sexual relations with T.M.

¶ 12 Defendant then went with Woody and Jones to the police station where they interviewed him. Defendant agreed to submit to DNA testing. At approximately 7:50 p.m., while Woody was completing paperwork, defendant was texting on his cell phone. The officers drove defendant back to his apartment, where he gave them the clothes he was wearing during the incident and the towel he had used to shower after T.M. left. Upon defendant's request, the officers then drove defendant to his parents' house, where they left him at about 10:35 p.m. Defendant retrieved his father's pick-up truck and drove back to his apartment.

¶ 13 Meanwhile, T.M. was discharged from the hospital between 9 and 10 p.m. She wanted Katie to spend the night with her because she did not want to be alone. T.M. and Katie drove around for awhile as they tried to decide where to spend the night. T.M. testified that they drove by defendant's apartment twice; according to defendant, they passed it four times. At some point, Katie noticed

defendant following them "really closely" in his truck. Defendant was yelling at them and throwing things at T.M.'s van. Katie called 911. According to Katie and T.M., while Katie was on the phone, defendant pulled up beside them, rolled down his window, and yelled, " 'I'm going to fucking kill you.' " Defendant denied yelling at them. Pursuant to direction from the 911 dispatcher, T.M. and Katie drove to a location where Woody and Jones met them. Woody followed T.M. and Katie to Katie's parents' house where Katie showed Woody the second text message from defendant. By that time, defendant had abandoned the truck at another location and run to his apartment.

¶ 14 Just before midnight, Woody and Jones went to defendant's apartment to execute a warrant for his arrest. They were again admitted by defendant's roommate. Defendant was in the shower and did not respond to the officers' knocking on the bathroom door. Woody opened the door and told defendant they had an arrest warrant. Defendant asked if it was about his " 'chasing that bitch.' " Defendant became irate, and the officers had to physically carry him out of the apartment. Until his arrest, defendant had been cooperative with the officers throughout the evening.

¶ 15 We now examine the disputed facts regarding the events at defendant's apartment on May 16, 2009, beginning with T.M.'s testimony. T.M. testified that she stood up to leave after she and defendant finished talking. Defendant told her that he was going to take a shower and started kissing and hugging her. T.M. pushed him away and told him that she "didn't want it to lead to anything." Defendant grabbed the front of her sweatshirt and pulled her "close to the couch while he was trying to sit on the couch." She explained that she landed on top of defendant, straddling him. He pushed her to the side and removed his pajama pants. T.M. told defendant that she did not want to do anything. Defendant asked her to "give him head," which T.M. understood to mean to "suck his penis." T.M. told defendant that she did not want to do anything with him and that she wanted to go home. Defendant then grabbed the back of T.M.'s head by her pony tail and told her to open her

mouth and "made [her] suck his penis." T.M. opened her mouth because she "was afraid not to because he was trying to kill himself the night before so [she] didn't know what he would have done to [her]." T.M. could not describe how much force defendant used.

¶ 16 T.M. continued describing the incident. After about 30 seconds, defendant asked if she had a condom. T.M. told him that she did not and that she "didn't want to do anything with him any way." Defendant "pushed—like pulled [her] to the edge of the couch and kneeled on the ground and stuck his penis in [her] in [her] vagina." Defendant had pulled her clothes off. She told him to stop and that she did not want to do anything. Defendant's penis was in her vagina for about two minutes; then, he put two fingers in her vagina, saying he did not want to "bust" in her.

¶ 17 T.M. further testified that defendant next told her to turn around. He grabbed her and made her face the other way so that her back was off the couch and her hands were on it. Defendant was behind her, and he put his penis in her "butt," "[i]nside of [her] body" for a couple minutes. T.M. began crying when he inserted his penis. T.M. turned and twisted her body to try to push him away. She told him to stop and that she "didn't want to do anything with him." Defendant removed his penis from her anus and put it back in her vagina while she was in the same position. T.M. kept repeating to him to stop, that she did not want to do anything, and that she wanted to go home. Defendant ejaculated in T.M.'s vagina.

¶ 18 T.M. testified that, after defendant ejaculated, he sat back down on the couch and asked her to "give him head" again. She said she just wanted to go home. He grabbed her head as he had earlier and "put it on his penis." He did that for about one minute, then said that he could not " 'cum any more' so he kind of just pushed [her] up." T.M. put her clothes on right away.

¶ 19 T.M. explained, "Well, after the rape he told me because he thought I wanted to have sex with him, he told me that maybe tonight we can get together, but I'm staying inside." T.M. told him

that if he wanted to get together later he should contact her. When asked why she would say that to someone who just raped her, T.M. replied, "Because I didn't want to lead him on and think that I was going to call the cops so he could run." T.M. left; it was about 3:30 p.m.

¶ 20 On cross-examination, T.M. testified that when defendant was forcing her head down on his penis, she tried to push herself up, but defendant resisted her. Finally, she was able to push herself up. T.M. agreed that she did not tell Woody that defendant resisted her efforts to push herself up. Defense counsel continued cross-examining T.M. as follows:

"Q. And so then you pushed yourself up and you got up and he didn't stop you and you sat back down next to him on the couch?

A. Because I was going to get my shoes on so I could leave.

Q. You didn't think maybe you should withdraw from the couch or go to the other couch or go to a chair or something or pick up the shoes and run out; is that right?

A. Right.

Q. You've just been raped. What kind of shoes are we talking about?

A. I don't remember.

Q. Are they flip flops?

A. Yes, they were flip flops.

Q. You don't think gee, maybe I'll just leave without the flip flops because this guy is raping me here, I should go?

A. I didn't want to leave right away thinking so he knew I was going to do something about it.

Q. So you figured I'll stay and let him rape me some more?

A. No, I figured that—I was getting on my shoes right away and I was going to tell him I'm leaving but then something else came up.

Q. So you had the presence of mind then to figure I'm going to stick around here long enough to let him think there is nothing going wrong so that when I leave here and go get the cops and they come back to get him, he won't have fled. Is that what you're telling us?

A. Yes."

After T.M. reiterated that defendant asked if she had a condom and she told him that she did not, that she did not want to do anything with him anyway, and that she just wanted to go home, the cross-examination by defense counsel continued:

"Q. Okay, so he starts to pull your sweatshirt over your head at that point in time?

A. Yes.

Q. And you don't do anything to resist?

A. I was afraid to do anything when he talked about an overdose the night before, trying to kill himself, what is he going to do to me?

Q. And you didn't think—when did you become afraid of him?

A. Like right when he started doing stuff. If someone tells you not to do it I don't see why they're going to keep doing it.

Q. So you became afraid of him when you first pushed him back onto the couch?

A. Yes.

Q. But not so afraid that you didn't want to stay and make sure that he didn't have any reason to believe that there was a reason for him to flee; is that right?

A. Yes.

Q. So then when he starts taking your clothes off, at this point you are not thinking I should get out of here regardless of whether he has reason to think that he should run away?

A. I was going to try to get away but I didn't know what he was going to do.

Q. But when he got his shirt off you still had pants on; right?

A. Right.

Q. At that point in time you didn't—you said you didn't resist the shirt coming off. You didn't at that point think I better back away from the couch and at least go to the other side of the room and try to get away from this?

A. I was trying to but—

Q. So you did resist him talking [*sic*] the pants off then; is that right?

A. What do you mean by that?

Q. I think you just told me you were then trying to pull away and get to the other side of the room so that your clothes wouldn't come off; is that right?

A. No. I told him that I didn't want to do anything so I thought he would just stop.

Q. And when he didn't you made no effort to pull away or to go to the other side of the room or to reclaim your shirt so you could put that on and leave?

A. No because I said I was scared."

¶ 21 T.M. further testified on cross-examination regarding the anal penetration as follows:

"Q. Okay, now you indicated that at sometime after the vaginal intercourse had began [*sic*] that he made [you] turn around so [your] back was toward him. That is what you testified to on direct examination; is that right?

A. Yes.

Q. Now, you said he physically grabbed you and turned you; is that right?

A. Yes.

Q. But you didn't resist him so he didn't have to use any particular force at that point; right?

[The court overruled the State's objection to the use of the word force.]

A. He did, he grabbed like my waist and turned me.

Q. And it was a strong forceful grab?

A. Sort of.

Q. It wasn't just sort of trying to reposition you and then you moved because you are not resisting?

A. No.

Q. Now you said that is the point in time where you said that he stuck his penis in your butt?

A. Yes.

Q. And he didn't tell you, 'Hey, I'm going to stick my penis in your butt,' right?

A. No.

Q. There was no discussion of the penis going in the butt before it actually occurred; right?

A. Right.

Q. Then you said at that point that that hurt; right?

A. Yes.

Q. And that you then informed him that it hurt, you kind of twisted around and told him that it hurt; right?

A. Yes.

Q. And he stopped that immediately didn't he?

A. Sort of when I kind of turned my body and pushed him.

Q. So he made no effort to continue that—the anal stuff—after you informed him that that hurt and you didn't want him to continue; is that right?

A. Right.

Q. So when you indicated on direct when the State asked you about the sticking of the penis in the butt and how long that went on, you said a couple minutes; right?

A. About a minute.

Q. It would have actually been less than that because you told him immediately that it—

A. Well, he didn't like stick it in and pull out right away. It was—when I turned my body and tried to push him away he was still doing it.

Q. So when you told me a minute ago that he immediately discontinued that, you are now saying that he didn't, he went on for awhile?

A. Well, when I was pushing him he kept doing it but then when I was trying to tell him to stop and he stopped that part.

Q. I think I asked you a minute ago whether or not he immediately stopped when you told him it was hurting you and I think you said yes; is that right?

A. He did.

Q. So you are saying there was some twisting before you actually said anything and that it's at that point in time that he was still in there; is that right?

A. Yes.

Q. And at that point in time you began crying when you felt the pain or what?

A. Yes.

Q. And so then you tell him that it hurts, you are crying as you tell him or you started crying after you told him that it hurt?

A. After I told him.

Q. So by the time that you actually started crying he had discontinued that particular act; is that right?

A. Yes.

Q. So when you told the State on direct examination that you were crying when he put it in [your] butt, essentially what you meant to say was that you cried after that but you didn't begin crying until after you told him that it hurt and he stopped doing it; is that right?

A. Yes.

Q. And did you continue crying at that point in time when he stopped or—I'm sorry—did you continue crying for any length of time?

A. Yes.

Q. Do you know how long you were crying?

A. Pretty much the rest of the whole time."

T.M. admitted that she had not told Woody that she cried at all during the incident. T.M. agreed that her plan to not let defendant know anything was wrong so that he would not try to flee went "out the window" because she could not stop crying.

¶ 22 Defendant related his version of the events in the following testimony. After they finished talking, T.M. got up to leave. Defendant stood up to give her a hug goodbye, and she started kissing him. He kissed her back. After the kissing, they engaged in oral sex; T.M. did not object. They engaged in vaginal sex during which T.M. was on the couch facing him; she did not object. Then he suggested that she lean over the arm rest and kneel on all fours on the couch. She did, and they

resumed vaginal intercourse. Defendant ejaculated in her vagina. Defendant testified that they did not engage in anal sex. T.M. never told defendant that she wanted to go home.

¶ 23 Defendant elaborated on what happened after he ejaculated in T.M.'s vagina: "Well, first I sat down on the couch and she was still leaning over the arm rest and when she got the hint that I was done she sat back down and she gave me head and she asked if I came yet and I told her yes and she said whatever and started giving me head again." After a couple of minutes at most, defendant realized that he "wasn't going to be able to cum any more and she said that she had to go any way so she stopped." Defendant explained, "While we were having sex after I came I didn't want to be just all right I'm done, you can leave now. I wasn't rude to her so I got up and acted like I thought somebody was there. And when I sat back down I told her I thought Char was there." Defendant gave T.M. a hug goodbye and told her he was going to take a shower. He might have told her that they could hang out later that night if she wanted to but that he "wasn't going anywhere because of what happened the night before."

¶ 24 On cross-examination, defendant explained that when he was in his parents' driveway and Detective Woody asked him about T.M., he responded, "T[] who[?]" because he did not know her last name, and it did not immediately register in his head who T.M. was. Defendant agreed that he did not acknowledge having had sexual relations until his father brought up the possible use of a rape kit. He explained that he did not want to tell his father, who was going to be a minister and wanted defendant to wait until marriage to have sex. At the police station, while Woody was occupied with paperwork, defendant texted his father and then sent two texts to T.M. Defendant said that the beginning of the second text message was a "huge mistake" because he was texting too fast, entered the wrong words, and did not read over the message before he sent it. He meant to say, "I didn't force you to do shit and if I get locked up for this you are fucked." When he said "you are

fucked," he did not intend to hurt T.M., but meant that she would suffer repercussions if she lied in court. Regarding chasing T.M. and Katie in his father's truck, defendant explained, "Sometimes I don't think. Sometimes I don't think things through before I do them."

¶ 25 The jury found defendant guilty of count II (forced sexual penetration—penis to anus) and not guilty of counts I and III (forced sexual penetration—penis to vagina, and penis to mouth, respectively). The court thereafter denied defendant's motion for judgment of acquittal or for a new trial, and sentenced him to eight years' imprisonment. Following the court's denial of his motion to reconsider sentence, defendant timely appealed.

¶ 26 ANALYSIS

¶ 27 Defendant argues that the State failed to prove him guilty beyond a reasonable doubt. A defendant's conviction will not be set aside "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not the function of the reviewing court to retry the defendant. *Collins*, 106 Ill. 2d at 261. Rather, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). This court will not substitute its judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001); *People v. Martin*, 408 Ill. App. 3d 891, 894 (2011).

¶ 28 Defendant was convicted under section 12-13(a)(1) of the Code, which required the State to prove, for count II, that defendant anally penetrated T.M. by the use of force or threat of force.

Defendant's sole challenge to the sufficiency of the evidence is that the State failed to prove beyond a reasonable doubt that he used force or threat of force. Section 12-12(d) of the Code defines force or threat of force as "the use of force or violence, or the threat of force or violence" including but not limited to:

> "(1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat; or
>
> (2) when the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement." 720 ILCS 5/12-12(d)(1), (d)(2) (West 2008) (repealed by Pub. Act 96-1551, Art. 2, § 6 (eff. July 1, 2011), added as section 11-0.1 by Pub. Act 96-1551, Art. 2, § 5 (eff. July 1, 2011)).

The law does not specify a standard for how much force is required to prove a defendant's guilt. *People v. Le*, 346 Ill. App. 3d 41, 50 (2004).

¶ 29 Additionally, section 12-17(a) of the Code provides that consent is a defense to certain offenses, including the criminal sexual assault involved here, which require proof of force. 720 ILCS 12-17(a) (West 2008) (renumbered and amended as § 11-1.70(a) by Pub. Act 96-1551, Art. 2, § 5 (eff. July 1, 2011)). Consent is defined as "a freely given agreement to the act of sexual penetration or sexual conduct in question." 720 ILCS 12-17(a) (West 2008). Where a defendant raises consent as a defense, the State bears the burden of proving the victim's lack of consent beyond a reasonable doubt. *People v. Haywood*, 118 Ill. 2d 263, 274 (1987).

¶ 30 In common understanding, if a victim is forced to engage in an act, it may be said that she did not consent to the act; conversely, if a victim consented to an act, it may be said that she was not forced. See *Haywood*, 118 Ill. 2d at 274. Consent and force are related by the presence or absence,

and amount, of resistance. See *People v. Bowen*, 241 Ill. App. 3d 608, 617-18 (1993) (affirming the defendant's criminal sexual assault convictions where evidence of the victim's resistance was sufficient to prove the element of force and a lack of consent). If the victim had the "use of her faculties and physical powers, the evidence must show resistance that will demonstrate that the act was against her will." *People v. Carlson*, 278 Ill. App. 3d 515, 520 (1996). However, futile acts of resistance are not required. *People v. Bolton*, 207 Ill. App. 3d 681, 686 (1990). Whether lack of resistance constitutes consent depends upon the circumstances of each case which are to be weighed by the trier of fact. *Bowen*, 241 Ill. App. 3d at 620. Lack of resistance due to threat of force, fear of harm, being overcome by superior strength, or being paralyzed by fear is not indicative of consent. *Bowen*, 241 Ill. App. 3d at 620; 720 ILCS 5/12-17(a) (West 2008) ("Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent.").

¶ 31 We conclude that the evidence of force presented here was sufficient to support defendant's conviction. We note the significant difference in size between 5'2", petite T.M. and 5'8", 180-pound defendant. With respect to defendant's acts, T.M. testified that defendant pulled her down on the couch, grabbed her head and forced it down on his penis, pulled her to the edge of the couch so that he could vaginally penetrate her, and grabbed her by the waist "sort of" forcefully, to turn her over to anally penetrate her. Moreover, T.M. testified that she was afraid of defendant because "he was trying to kill himself the night before so [she] didn't know what he would have done to [her]" and that she did not attempt to escape because she was scared.

¶ 32 Despite T.M.'s fear and the significant difference in size and strength between T.M. and defendant, T.M. made several attempts at resistance throughout the incident. She testified that she repeatedly protested verbally to the sexual contact, all the while telling defendant that she did not

want to do anything with him and that she wanted to go home. Her verbal protests went unheeded. Although T.M.'s physical resistance to the oral penetration eventually proved successful, the success was short lived as defendant undressed her and penetrated her vaginally. Moreover, after defendant forcefully turned T.M. and penetrated her anus, T.M. continued to physically and verbally resist by twisting and turning her body, pushing at defendant, telling him that it hurt, and crying. Further, although defendant ceased the anal penetration, he continued to sexually penetrate both T.M.'s vagina and mouth as she continued to cry and protest. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that T.M. was overcome by defendant's superior size and strength, that she was in fear of harm, and that her acts of resistance were commensurate with the circumstances. See *Bowen*, 241 Ill. App. 3d at 620 (explaining that "[m]erely because a victim does not cry out for help or try to escape at the slightest opportunity is not determinative on the issues of whether she was being forced to have sexual intercourse, or whether she consented to having sexual intercourse, especially if she was *** in fear of being harmed"); *Vasquez*, 233 Ill. App. 3d at 528 (stating that futile acts of resistance are not required to establish force or lack of consent). Accordingly, the State presented sufficient evidence to support the finding that defendant used force to effect anal penetration. See *Bowen*, 241 Ill. App. 3d at 619 (concluding there was sufficient evidence to sustain the defendant's sexual assault convictions where the victim gave a detailed account of the assaults, testified that she verbally protested and tried to push the defendant away, and was extensively cross-examined).

¶ 33 Defendant contends that, because the jury found him not guilty of the vaginal and oral penetration, it must have found that he did not use force to effect those acts of penetration. According to defendant, because the evidence of force was the same with respect to all three types of penetration, the evidence of force was insufficient to convict him of anal penetration. We

disagree. With respect to the force used to effect anal penetration, T.M. testified that defendant grabbed her waist sort of forcefully and turned her entire body over. A rational trier of fact could have found that this force was qualitatively different from defendant's pulling on T.M.'s head to effect oral penetration or pulling her toward the edge of the couch to effect vaginal penetration.

¶ 34 Defendant's argument seems to focus on the fact that the jury acquitted him of counts I and III (vaginal and oral penetration) and convicted him of count II (anal penetration). Suffice it to say that, based on the qualitative difference in the force defendant used to effect anal penetration, the jury could have found that T.M. did not consent to any sexual penetration, but also that defendant used force with respect to only anal penetration. See *State v. Chapman*, 54 A.D.3d 507, 509, 862 N.Y.S.2d 660, 662 (N.Y. App. 2008) (holding that the victim's testimony that the defendant acted "despite her verbal protest" was sufficient to prove her lack of consent, but insufficient to prove that the defendant used physical force). Moreover, "a jury may acquit a defendant on one or more counts on a multicount indictment in the belief that the count on which it convicted the defendant will provide sufficient punishment." *People v. Sandy*, 188 Ill. App. 3d 833, 845 (1989). In any event, we decline to speculate on the jury's rationale in rendering its verdicts.

¶ 35 Defendant further argues that the evidence of force was insufficient because T.M. testified that defendant terminated the anal penetration as soon as she communicated that it hurt. Defendant's position is that T.M. "was an eager participant in a series of sexual acts"; in other words, she consented to oral and vaginal penetration, but withdrew her consent for the anal penetration. According to defendant, because he immediately ceased the anal penetration when T.M. withdrew her consent, a rational trier of fact could not have found that he used force.

¶ 36 Defendant's argument necessarily fails because, based on T.M.'s testimony that she repeatedly told defendant from the very beginning of his advances that she did not want to do

anything with him and that she wanted to go home, it was clear that she did not consent to any sexual activity. See *Carlson*, 278 Ill. App. 3d at 521 (concluding that the victim did not consent to sexual conduct where she testified that "she begged him over and over from the very beginning of his sexual advancements to stop, and pleaded with him that she 'didn't want this to happen,' repeatedly saying, 'no, no, no' "). T.M. also testified that she physically resisted defendant by pushing him away and trying to push her head away from his penis. This testimony belies defendant's assertion that T.M. was an "eager participant" in any sexual conduct. Moreover, T.M. testified that, as she resisted defendant's efforts to anally penetrate her, she told defendant that she did not want to do "*anything* with him" (emphasis added) and cried for the remainder of the encounter as defendant proceeded to penetrate T.M. both vaginally and orally, again. This testimony is fatal to defendant's position that it was only anal penetration to which T.M. objected.

¶ 37 In support of his withdrawn-consent theory, defendant cites section 12-17(c) of the Code and *People v. Denbo*, 372 Ill. App. 3d 994 (2007). Section 12-17(c) provides:

> "A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct." 720 ILCS 5/12-17(c) (West 2008) (renumbered and amended as § 11-1.70(c) by Pub. Act 96-1551, Art. 2, § 5 (eff. July 1, 2011)).

In *Denbo*, the court considered the issue of withdrawn consent as enunciated in section 12-17(c). The defendant was convicted of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2004) (renumbered and amended as § 11-1.30(a)(2) by Pub. Act 96-1551, Art. 2, § 5 (eff. July 1, 2011))) "in that she persisted in an act of vaginal penetration after the victim withdrew her consent." *Denbo*, 372 Ill. App. 3d at 995. The defendant and the victim were lovers involved in a romantic

relationship for about two months. *Denbo*, 372 Ill. App. 3d at 995, 1002. On the evening of the incident at issue, the defendant "set the scene" in her bedroom by lighting candles, turning off the lights, and putting on some music. The victim, who had spent the day with the defendant, entered the bedroom and lay down on the defendant's bed. The defendant entered the room wearing a "silky negligee" and lay down next to the victim. They began kissing and touching, and the defendant helped the victim undress. *Denbo*, 372 Ill. App. 3d at 1002. According to the victim, the defendant was between the victim's legs and pushed her hand into the victim's vagina. *Denbo*, 372 Ill. App. 3d at 996. The victim pushed the defendant, but the defendant continued the penetration. The victim pushed the defendant a second time, and the defendant withdrew. *Denbo*, 372 Ill. App. 3d at 996, 1008. The jury found the defendant guilty of aggravated criminal sexual assault. *Denbo*, 372 Ill. App. 3d at 1004.

¶ 38 On appeal, the State conceded that the victim " 'implicitly consented to some sort of penetration.' " *Denbo*, 372 Ill. App. 3d at 1006. The court accepted the concession and noted that, when the victim first pushed the defendant, the victim no longer subjectively consented, but held that "her withdrawal of consent was ineffective until she communicated it to defendant in some objective manner." *Denbo*, 372 Ill. App. 3d at 1008. The court reversed the defendant's conviction, concluding that no rational trier of fact could have found, beyond a reasonable doubt, that a reasonable person in the defendant's circumstances would have understood the victim's initial push as a withdrawal of consent. *Denbo*, 372 Ill. App. 3d at 1008.

¶ 39 *Denbo* is inapposite. In *Denbo*, it was undisputed that the defendant and the victim had been involved in a romantic relationship for about two months. Because the evidence showed that the defendant and the victim shared a sexual relationship, the victim's consent to sexual activity in general was not at issue. In contrast, here, defendant and T.M. had met only a few weeks prior to

the incident at issue and were not even dating.[1] In *Denbo*, because the victim's consent was not disputed, the State had to prove that the victim withdrew her consent. In the instant case, however, the State had to prove that T.M. did not consent in order to rebut defendant's consent defense. Moreover, in *Denbo*, the defendant immediately ceased *all* sexual conduct when the victim objectively communicated her withdrawal of consent when she pushed the defendant a second time. The issue in *Denbo*—whether the victim's first effort at pushing the defendant away constituted an objective withdrawal of consent—has no bearing on the present case.

¶ 40 Defendant also points out that he "asked" for oral sex and that he and T.M. "had an exchange that implied a concern about conception" (when defendant asked T.M. if she had a condom) before he vaginally penetrated her. Defendant then asserts that the lack of advance discussion between the two regarding anal sex did not make it nonconsensual. The facts that defendant "asked" for oral sex and inquired about a condom prior to vaginal penetration, in light of all of the evidence, do not support the conclusion that T.M. consented to vaginal and oral penetration. As we noted, defendant's conclusion that T.M. consented to those acts is belied by T.M.'s testimony about her verbal protests and physical acts of resistance. Moreover, our conclusion that T.M. did not consent to anal penetration is not based on the lack of advance discussion regarding that act. Accordingly, defendant's argument is unavailing.

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[1]We note the conflicting testimony regarding previous sexual activity between the two: defendant testified that T.M. performed oral sex on him when she spent the night at his apartment; T.M. testified that they only kissed for about 30 seconds. In either case, there was no evidence indicating that the two were involved in a romantic relationship.

¶ 41 Defendant further comments on the lack of medical evidence of trauma. It is well established in Illinois that medical evidence is not necessary to sustain a criminal sexual assault conviction. *People v. Shum*, 117 Ill. 2d 317, 356 (1987); *Bowen*, 241 Ill. App. 3d at 620. Neither are we persuaded by defendant's intermittent aspersions on T.M.'s credibility throughout his brief. As was within its province, the jury determined that T.M. was credible, and we will not substitute our judgment for that of the jury. See *Ortiz*, 196 Ill. 2d at 259; *Bowen*, 241 Ill. App. 3d at 619 (stating that the trier of fact is free to disbelieve all or part of a defendant's testimony). Moreover, while the testimony of the victim alone is sufficient to convict, here, T.M.'s testimony was corroborated by that of Katie and Officer Wilgus about T.M.'s demeanor, as well as her prompt outcry, following the incident. See *Carlson*, 278 Ill. App. 3d at 521-22.

¶ 42 Defendant next contends that he was denied the effective assistance of counsel, and "fundamental fairness," because his attorney failed to tender a jury instruction that "it would be a defense to the charge that the complainant's consent is valid until revoked." Ineffective assistance of counsel claims are governed by the familiar standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Under the two-prong *Strickland* test, "a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 226 Ill. 2d 135, 144 (2007). "Failure to request a particular jury instruction may be grounds for finding ineffective assistance of counsel only if the instruction was so 'critical' to the defense that its omission 'den[ied] the right of the accused to a fair trial.' " *People v. Rodriguez*, 387 Ill. App. 3d 812, 828 (2008) (quoting *People v. Pegram*, 124 Ill. 2d 166, 174 (1988)). Failure to satisfy either prong is fatal to the claim. *Strickland*, 466 U.S. at 697.

¶ 43 Even if counsel's failure to offer a withdrawn-consent instruction were somehow objectively deficient, defendant does not establish that, had the jury been instructed on the issue of withdrawn consent, there was a reasonable probability that the result of the proceeding would have been different, or that the proceeding was rendered fundamentally unfair. Initially, we note that subsection (c) of section 12-17 of the Code operates to limit the defense of consent expressed in subsection (a) "by making the consent effective only up to the withdrawal of consent" (*Denbo*, 372 Ill. App. 3d at 1006); thus, when the legislature enacted subsection (c), it did not create a new defense.

¶ 44 In the present case, the trial court properly instructed the jury on the elements that the State was required to prove beyond a reasonable doubt under section 12-13(a)(1) of the Code—penetration and use of force. See 720 ILCS 5/12-13(a)(1) (West 2008). Because defendant raised the defense of consent, the court further instructed the jury that the State bore the burden of proving T.M.'s lack of consent beyond a reasonable doubt. The jury instructions also included the definitions of force and consent. Thus, the jury had all of the instructions it needed to apply the law to the facts.

¶ 45 Nonetheless, defendant asserts that, without a withdrawn-consent instruction, T.M.'s "essentially exculpatory testimony could not be given any effect," and "the jury would not have focused on the issues of what [T.M.] did to manifest her withdrawal of consent, what the defendant's perception was of this conduct, and how prompt the defendant's response was." In his reply brief, defendant elaborates:

> "[I]t is not enough to say that there could not be consent here because the jury's verdict constitutes a finding of force. This is because the jury could have convicted the defendant on the premise that once [T.M.] voiced her non-consent, the defendant was guilty. In this

> view, no matter how swiftly the defendant complied with [T.M.'s] wishes, he was employing 'force' to effectuate sexual penetration."

We disagree.

¶ 46 The issues of consent and force were squarely before the jury. It was faced with two contrasting versions of what happened in defendant's apartment—T.M.'s and defendant's. The jury was free to believe defendant's testimony that no anal penetration occurred at all. It was also free to find that T.M. initially consented to sexual activity (based on defendant's testimony) but later withdrew her consent for anal penetration, and that, because defendant promptly ceased anal penetration (based on T.M.'s testimony), there was no criminal sexual assault. See *People v. Billups*, 318 Ill. App. 3d 948, 954 (2001) ("A jury need not accept or reject all of a witness'[s] testimony but may attribute different weight to different portions of it."). Indeed, defense counsel suggested such a conclusion in his closing argument at trial, when he stated:

> "And by the way, if a guy really—let's indulge for just a second—the idea that there was this anal penetration. And I'm only indulging that just for purposes of making this limited point because I really don't think there is evidence of it, but if there was this anal penetration and she said that she moved to try to move away and then said ow, this hurts, and then he stopped, rapists don't stop. If you are going to rape somebody and they say ow this hurts, are you going to stop? No, you are not. You don't care how they feel if you are raping them. It's all about control. Somebody says ow this hurts and he stops. It is not what you would expect somebody trying to rape somebody to do."

Notwithstanding defendant's argument to the contrary, had the jury believed defendant's testimony, it did not have to find that a sexual assault occurred. In other words, the lack of a withdrawn-consent instruction did not foreclose the jury from acquitting defendant of count II.

¶ 47 However, the jury did find that a sexual assault occurred with respect to anal penetration. In order to do so, in addition to penetration, the jury had to find that defendant used force and that T.M. did not consent. A rational trier of fact could have made those findings based on T.M.'s testimony. As discussed above, there was sufficient evidence of defendant's use of force to effect anal penetration. And, "[t]o prove the element of force is implicitly to show nonconsent." *Haywood*, 118 Ill. 2d at 274. The nonconsent existed at the time of the use of force—*prior* to penetration. Yet, the applicability of the issue of withdrawn consent requires that there was consent in the first place—prior to penetration. Thus, having chosen to believe T.M.'s testimony, the jury could not possibly have found withdrawn consent, because there was no consent to be withdrawn. On this record, we cannot say that defendant was prejudiced by the lack of an additional instruction. See *People v. Mims*, 403 Ill. App. 3d 884, 894-95 (2010) (holding that the defendant failed to establish any prejudice from his counsel's failure to request a consent instruction at his trial for aggravated criminal sexual assault because the jury was properly instructed on the elements of the offense and the jury was able to assess the credibility of the defendant and the victim); *People v. Rollins*, 211 Ill. App. 3d 86, 91 (1991) (holding that the trial court's error in failing to instruct the jury on the State's burden of proving the victim's lack of consent did not deprive the defendant of a fair trial where the jury was instructed on the elements of criminal sexual assault and where the prosecutor argued in closing that the State had to prove the use of force, stating, " '[i]n a nutshell, this is the issue of consent' "). Accordingly, defendant's ineffective assistance of counsel claim fails under both prongs of *Strickland*.

¶ 48 In support of his ineffective-assistance-of-counsel argument, defendant relies on *Pegram*. There, our supreme court affirmed the appellate court's reversal of the defendant's conviction of armed robbery, holding that the defendant received ineffective assistance of counsel. *Pegram*, 124

Ill. 2d at 174. At trial, the defendant testified that, although he was present during an armed robbery, he was not a willing participant and had acted under duress and in fear for his life. *Pegram*, 124 Ill. 2d at 171. By this testimony, defendant raised the affirmative defense of compulsion, thereby placing a burden of proof on the State as to compulsion, in addition to the elements of armed robbery. *Pegram*, 124 Ill. 2d at 172-73. Although the affirmative defense of compulsion became the "principal contested issue," defense counsel failed to tender an instruction on either the compulsion defense or the State's burden of proof once the defense was raised. *Pegram*, 124 Ill. 2d at 173. The supreme court held that the lack of those jury instructions " 'removed from the jury's consideration a disputed issue essential to the determination of defendant's guilt or innocence.' " *Pegram*, 124 Ill. 2d at 174 (quoting *People v. Ogunsola*, 87 Ill. 2d 216, 223 (1981)).

¶ 49 *Pegram* is inapposite. Unlike the jury in *Pegram*, the jury in the present case was instructed on defendant's consent defense and the State's burden of proving T.M.'s lack of consent beyond a reasonable doubt. Withdrawn consent, if applicable at all, simply would have been one means by which the State could have proven a lack of consent. Thus, unlike the jury the *Pegram*, the jury here was free to consider all issues essential to the determination of defendant's guilt or innocence. Accordingly, defendant's trial was not fundamentally unfair, and his reliance on *Pegram* is misplaced.

¶ 50 In his reply brief, defendant cites *State v. Baby*, 404 Md. 220, 263-64, 946 A.2d 463, 488-89 (2008), a rape case, where the state high court held that the trial court erred in not directly addressing the jury's questions as to the applicable law when the defendant ceased penetration after consent was withdrawn. *Baby* is not persuasive. While the jury's notes to the trial court in *Baby* indicated that the jury was struggling with the issue of withdrawn consent (*Baby*, 404 Md. at 263, 946 A.2d at 488-89), no such notes exist in the present case. Moreover, in *Baby*, the victim testified that she

consented to sexual intercourse with the defendant "as long as he stops when I tell him to." *Baby*, 404 Md. at 227, 946 A.2d at 467. Here, in contrast, T.M. testified that she did not consent to anything.

¶ 51 Finally, defendant contends that the trial court erred in sentencing him to an indeterminate term of MSR of three years to natural life. MSR is statutorily required by section 5-8-1(d) of the Unified Code of Corrections. 730 ILCS 5/5-8-1(d) (West 2008). Subsection (d)(4) provides an MSR term from "a minimum of 3 years to a maximum of the natural life of the defendant" for those convicted of criminal sexual assault, among other offenses. 730 ILCS 5/5-8-1(d)(4) (West 2008). Statutory construction is a question of law that we review *de novo*. *People v. Schneider*, 403 Ill. App. 3d 301, 306 (2010). In *Schneider*, this court construed section 5-8-1(d)(4) to "require[] an indeterminate MSR term," and affirmed the MSR term of three years to life imposed on the defendant there. *Schneider*, 403 Ill. App. 3d at 309. We are aware that the Fourth District disagreed with us and concluded that, under section 5-8-1(d)(4), the trial court must set a determinate MSR term between three years and the defendant's natural life. *People v. Rinehart*, 406 Ill. App. 3d 272, 281-82 (2010), *pet. for leave to appeal allowed*, No. 111719 (May 25, 2011). However, we decline defendant's invitation to depart from our holding in *Schneider*. See *People v. McCurry*, 2011 IL App (1st) 093411, ¶ 23 (noting the disagreement between the courts in *Schneider* and *Rinehart* and, after extensive analysis, deciding to follow *Schneider*). Accordingly, the trial court did not err in imposing an MSR term of three years to natural life on defendant here.

¶ 52 For the foregoing reasons, we affirm the judgment of the circuit court of Boone County.

¶ 53 Affirmed.