2016 IL App (2d) 130601-U
No. 2-13-0601
Modified Order filed March 17, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMIE DOCK, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 10-CF-1941 Honorable Joseph G. McGraw, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's right to a speedy trial was not violated where defense counsel failed to object to moving the trial date outside of the speedy-trial term; defendant failed to establish ineffective assistance of counsel where during opening statement, defense counsel allegedly "promised" defendant would testify; and the trial court properly added on two terms of 15 years' imprisonment for defendant's convictions of aggravated criminal sexual assault with a firearm; the trial court is affirmed in part, sentence is vacated, and case remanded for resentencing.

¶ 2 Following a jury trial, defendant, Jamie Dock, was convicted of two counts of armed robbery and four counts of aggravated criminal sexual assault. The trial court merged the counts three and four (both charging aggravated criminal sexual assault) and sentenced defendant to 75

years on each conviction to be served consecutively at 85%. On appeal, defendant argues that, (1) he received ineffective assistance of counsel because defense counsel failed to move for discharge based on speedy trial grounds; (2) he received ineffective assistance of counsel because defense counsel promised the jury during opening statement that it would hear evidence contradicting the complainants' story but then failed to offer any such evidence; and (3) this case muse be remanded for resentencing because the trial court incorrectly believed consecutive sentences were mandated for each offense for which defendant was convicted, improperly ordered defendant to serve 85% of his armed robbery sentences, and improperly imposed an aggregate prison term in excess of that that authorized by statute. We affirm the convictions, vacate the sentences, and remand for resentencing.

¶ 3 I. BACKGROUND

¶ 4 On June 28, 2010, defendant was taken into custody. On June 30, 2010, the State filed a criminal complaint against defendant. On July 19, 2010, the State filed a seven-count bill of indictment against defendant. The bill of indictment charged defendant in counts one and two with two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)), one against Neva S. and another against David C., and in counts three through seven, with five counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(8) (West 2010)), three against Neva S. and two against David C. Each count alleged that defendant was armed with a firearm at the time of the alleged offense. Counts three and four alleged that defendant forced Neva S. to place David C.'s penis in her mouth. Count five alleged that defendant placed his penis in Neva S.'s mouth, and count six alleged that defendant placed David C.'s penis in his mouth. Count seven alleged that defendant placed his penis on Neva S.'s anus. The offenses were alleged to have occurred on or about April 24, 2010.

¶ 5 On July 22, 2010, defendant first appeared in court. Assistant public defender Andrew Hanson was assigned to defendant's case but Hanson was not present in court on July 22. The case was continued by agreement of the parties and on June 6, 2011, the trial court set trial for August 22, 2011. On August 17, 2011, the State filed a motion for a continuance, conceding that 24 days of the speed- trial term were attributable to the State thus far. Defendant objected to the State's motion for a continuance and asked that the August 22, 2011, trial date remain in place. The trial court granted the State's motion and set a new trial date for September 26, 2011. On September 26, 2011, Assistant Public Defender Margaret O'Connor appeared and informed the court that Assistant Public Defender Hanson was ill and unavailable. The prosecutor remarked that the case was "day 60" on the speedy trial term. The trial court set a status date for October 20, 2011.

¶ 6 On October 20, 2011, the court handed O'Connor a second superseding bill of indictment, which she reviewed with defendant. The prosecutor stated that the second superseding bill "doesn't substantively change anything" but only added the word "knowingly" to counts three through seven. Defendant pleaded not guilty, asked that the case be set for "speedy trial," and stated that he did not want any more continuances. The trial court told defendant that it was up to his attorney to decide whether or not the case was ready for trial. The trial court set a status date for November 3, 2011.

¶ 7 On November 3, 2011, Hanson was present and asked the trial court to set a trial date. Defendant, after being granted permission to speak to the court, expressed dissatisfaction with Hanson, stating:

> "Hanson did come to see me, but the only thing that he did was apologize for missing his court date. I mean, we didn't get no further in the case, no discussion.

> I know you told him to come see and see me before now, but, you know, I would like another attorney. *** we didn't talk about nothing.
>
> *** this is my life I'm concerned about, you know. I don't know if he been - - he hasn't been effective, you know. We can set another court date and he can miss again. He obviously has an illness or something like that."

Defense counsel Hanson replied that he met with defendant, and defendant "indicated that he wanted the matter set for trial. So that's where we left things. That's basically what I was going to represent to the Court." The trial court asked Hanson if there were any substantive motions "that need to be filed or heard in this case." Hanson replied "No." The trial court then stated, "Okay. My first available trial date is January 9th [2012]." Hanson stated that he had another in-custody client, Mr. Dejoin, whose case Hanson believed was older than defendant's, and who "definitely wants his trial to proceed." The trial court stated, "The other option is January 23rd [2012]." The clerk determined that defendant had been in custody longer than Dejoin. The trial court set defendant's trial date for January 23, 2012, "so Mr. Hanson can do each of the cases, Mr. Dejoin and [defendant]." The trial court explained that, "The cases are so close in time. I already have Dejoin scheduled. So I will give [defendant] the second January setting date." The trial court also stated, "I am going to deny your [defendant's] oral motion for a different public defender." Subsequently, the following colloquy occurred:

> "[DEFENDANT]: Can I say I want to set it for speedy trial? I don't want no more continuances. I object to any continuances regardless if he [Hanson] represents me or not.
>
> THE COURT: That's a matter for your attorney to decide when he is ready.
>
> [DEFENDANT]: I don't have a right to a speedy trial?

THE COURT: You have the right to a speedy trial. You don't have the right to assert that right unless your attorney agrees and says, yes, I'm ready, I want to demand an immediate speedy trial.

HANSON: Mr. Dock is indicating that he wants to ask for a speedy trial.

THE COURT: All right. Show that defense answered ready and demands immediate speedy trial. That's the date I gave him, and after that date, they made the speedy trial demand. Thank you.

[PROSECUTOR]: I am still asking that the time be tolled.

[DEFENDANT]: That means the time is against me?

THE COURT: I set the trial date. If it is continued beyond that date, the time will be charged against the State.

[DEFENDANT]: The 120 is running on my time?

THE COURT: The 120 is not running because it was set by agreement for that date.

[DEFENDANT]: We object to that. We don't agree to that.

THE COURT: That's a decision for your attorney to make. The scheduling has already been done. Your attorney has scheduled that date because of a conflict he has with another defendant who is in custody. The matter is as I've intended. From now on after that the time will be running."

¶ 8 After numerous continuances by agreement of the parties, defendant's trial began on July 9, 2012, on the second superseding bill of indictment. Defendant's counsel, at this time Assistant Public Defender Nicholas Zimmerman, did not move to discharge defendant based on a violation of the speedy trial statute before trial began.

¶ 9 During opening statement defense counsel stated the following:

"[Defendant] got over on Neva and David, he duped them, and he tricked them, but he did not commit armed robbery, and he did not commit criminal sexual assault.

Allow me, please, to tell you what actually happened. On April 23, the day before, [defendant] was at the mini mart which is right near the Travelodge, it's just down the street. At that time, on that day he met Neva. She approached him and said she was looking for work. Now, what that means is that she was looking for crack cocaine. She told him she wanted work. He said okay. He asked her to meet him around the back of the mini mart. She did that. He sold her crack cocaine and he gave her his cell number. That was during the daytime on the 23rd.

Sometime after dark he got a call from Neva. Again she was looking for more crack cocaine. He told her, look, I'm on the other side of town. I'm sorry, I can't. Call me later.

Later on, again this is at sometime after dark, she called again. He was back home. And he lives near the Travelodge and near the mini mart. He was back home. And [defendant] said, okay let's meet at your place. And they had discussed that [Neva] was living at the Travelodge.

[Defendant] met [Neva] early that morning at the Travelodge. And at some point, either while they were on the phone or in person, they negotiated the price for the crack cocaine. Now, what they agreed to, what Neva agreed to was what's called a dope date. Now a dope date is when person A has drugs and person B wants the drugs but person B doesn't have money, they will agree to perform some sort of sexual favor for person A in exchange for the drugs.

[Defendant] met with Neva in the parking lot. They went inside room 110. She voluntarily let him in. And they were in the room, and they were there for some period of

time. They were drinking alcohol. They were partying together, doing drugs together. At some point Neva asked to begin to perform the sex act that she had promised for the drugs. She wanted more drugs. [Defendant] said, look why don't you do something with David. I'm, you know, I'm fine with this.

Those two began performing sexual acts together in front of [defendant]. Later on [defendant] got involved in this to some extent. During that time, when he was involved in this, Neva asked him for some drugs. At that point he got up, put on his pants, buckled up his pants, put on his clothes, and began to get his coat and leave. And it was at that point that Neva and David realized that they had been duped, that they had done something but they weren't getting the benefit of the bargain. They weren't getting the drugs because he had duped them.

* * *

Ladies and gentlemen, you're going to hear two very different stories about what happened on April 24, 2010. The evidence will show you, specifically the physical evidence that was gathered and observed by the police will show you that what [defendant] says happened happened, that there was no armed robbery committed, there was no sexual assault committed. He is not guilty of those offenses, and I'm going to ask that you find him not guilty of those offenses."

¶ 10 The State presented the testimony of one of the complainants. David C. testified as follows. David had a warrant out for his arrest in Winnebago County for a probation violation regarding an April 2012 conviction of unlawful restraint. David understood that the warrant could not be served while he was acting as a witness in this case. In addition, in 2004 David was convicted of theft in Texas and in 2012 he was convicted of retail theft in Winnebago County.

¶ 11 David also testified as follows. As of April 23, 2010, David was homeless, but he and Neva were staying at the Travelodge in Rockford because a church had paid for a week's stay. At around 4 p.m. on April 24, Neva told David that she wanted some marijuana. David told Neva that he did not think it was a good idea, but Neva left the hotel room and returned a few minutes later. Neva knocked on the hotel room door, David let Neva and defendant into the room. David did not know defendant at the time and did not know his name but David had seen defendant "probably a couple of hours prior to that, walking the halls." Once Neva and defendant were in the hotel room defendant asked Neva how much marijuana she wanted and Neva replied, "just a nick," or $5 worth. Defendant reached into his pocket but instead of pulling out marijuana, he pulled out a handgun and demanded money. Neva handed defendant $90 and David gave defendant $2. While still holding the handgun, defendant ordered David and Neva to get naked, told David to lie, face down, on the bed, ordered David to roll over and put a pillow over his face, and ordered Neva to get on top of David and give David oral sex. David knew that Neva was doing as defendant had ordered because David peeked out from under the pillow. Defendant then told Neva to sit on top of David's genitals and defendant climbed up on the bed, unzipped his pants, and ordered Neva to give him oral sex. Neva performed oral sex on defendant and then defendant told Neva to get on the floor by the foot of the bed while defendant laid alongside David. Defendant then began to perform oral sex on David while Neva performed oral sex on Defendant. During this time, defendant continued to hold the handgun in his hand. After about five minutes David heard the door slam shut and defendant said something like, "Get hack here, b***h," and David heard the door slam again. David looked up and saw that no one else was in the room. David ran to the door and saw defendant by the back entrance of the hotel. Defendant pointed a handgun at David and said, I'll shoot you, and defendant exited the hotel through the back entrance which led to the back

parking lot. Both David and Neva, both, still naked, ran to the lobby to the front desk and asked the clerk to call 911. The clerk gave them something to cover themselves and Neva called 911 but she was too nervous so she handed the phone to David. The police arrived at the hotel about 15 minutes later.

¶ 12 David identified people's exhibits one through seven as photographs depicting room 110 of the Travelodge hotel at the time the incident occurred. David identified people's exhibit nine as video footage from the hotel that was played for the jury while David explained what it depicted. The video showed Neva, at a time stamp of 4:58, running up to the front desk naked, followed shortly by David, also naked, and the clerk handing them something to cover up with. The video also showed Neva picking up the phone and then handing it to David.

¶ 13 During cross examination by defense counsel David testified as follows. Neva left the hotel room at approximately 4:40 a.m. to find someone to buy marijuana from in the hotel parking lot. Neva came back to the room with defendant after only about two or three minutes. Prior to defendant's arrival, David and Neva drank brandy; Neva drank more brandy than David, and David drank three or four beers. When defendant was in the room he drank the brandy and Dr. Pepper from a can. Defendant drank with his left hand and held the handgun in his right hand. Defense counsel asked David if Neva actually called someone to meet her in the parking lot; if Neva actually went to purchase crack cocaine; and if any call had been made ahead of time to arrange the purchase. David replied, "No," to all of these questions. When Rockford police officer Michael Garnhart arrived at the hotel David told him a different story than the one David told in court. David told Garnhart that Neva left the hotel room to get better reception on her cell phone; but that was not true. Neva, actually left the room to buy drugs. David told Garnhart that a black man was following Neva as she rushed in the door to the room. Actually, Neva walked in the door just like anyone would and they allowed defendant to come in the room.

David and Neva decided to lie to the police and not to tell them that Neva went outside to buy drugs. They were afraid of getting in trouble for buying a "nickel bag" of marijuana. David told the police that his wallet was missing, but it was actually back in the hotel room. David and Neva failed to show up for meetings with detective and failed to return their phone calls because they were "scared." After the incident, David requested that the hotel return to David the money that the church had paid the hotel. The hotel refused but moved David and Neva to a different room. The police asked David and if he wanted to go to the hospital and if he wanted to have a rape kit performed on him. Despite the fact that David claimed that defendant's saliva was on his body, David chose not to go to the hospital or have a rape kit performed. David testified that he was not injured.

¶ 14 On redirect examination David testified that he did not go to the hospital because he had no physical injuries. David missed appointments and did not return phone call at first because he felt his "manhood was taken from him," but then he wanted to "come clean."

¶ 15 Neva S. testified as follows. In 2005 Neva was convicted of "attempted obstruction of justice" and in 2006 she was convicted of a violation of the "Controlled Substances Act." On the date of the incident Neva was David's girlfriend. Neva and David were homeless but were staying at the Travelodge in Rockford because a church had paid for their stay. At around 4 p.m. on the day of the day of the incident Neva received a cell phone call from her mother about Neva's father going to the hospital. Neva went outside of the hotel room to get better reception on her cell phone. While outside she saw a black man standing by the dumpsters and she asked him if he had any "weed." The man said "yes," so Neva brought the man back to the hotel room. Neva testified that she had never seen this man before and that she would not recognize him if she saw him again.

¶ 16 Neva also testified as follows. David let Neva and the man into the room. When Neva went to get the $5 for the "weed" she heard a cocking sound, like a gun and then saw the man with a gun in his hand. The man asked for her money and Neva gave him $90; all the money she had. The man then ordered Neva and David to remove their clothes and told David to lie down on the bed and put a pillow over his face. The man told Neva to "suck [David's] dick." As Neva complied the man walked around the room, went through drawers and the room safe removing items, looked in the refrigerator, and drank from a bottle of liquor that Neva had left on the table. At some point the man told Neva to turn around and "put her butt in the air and stuff." Neva thought the man was going to rape her in the "butt" but he did not. Instead, the man "just like felt on [Neva] and stuff" between her legs and on her "butt." The man grabbed Neva, turned her around, stuck his penis in her mouth, and had Neva perform oral sex on him while he was standing at the foot of the bed. Then the man told Neva to go to the bottom of the bed and the man got onto the bed and began "sucking David's dick." Neva ran out of the room to the front desk and told someone at the desk to call 911. Neva testified that she was not truthful with the police when she first spoke to them because she did not want to get in trouble for trying to buy pot. Neva testified that she had previously met RJF (a woman the prosecutor subsequently called to testify against defendant), but was not sure where she had seen her before.

¶ 17 During cross-examination by defense counsel Neva testified as follows. Defense counsel asked Neva if she had met the man that she brought to the hotel room at a "mini-mart" the day before the incident. Neva replied, "No." Defense counsel asked Neva if she bought crack cocaine from "that person" the day before the incident. Neva replied, "No." Neva testified that on the day of the incident, she did not go outside the hotel room intending to buy marijuana, but when she saw the man standing in the parking lot she decided, at that time, to buy some marijuana from him. Defense counsel asked Neva whether she actually attempted to buy

crack cocaine. Neva replied, "No." Neva also denied that she and David partied, drank alcohol, and smoked cigarettes with the man.

¶ 18 Mary Daniels, an employee of the Travelodge, testified as follows. Daniels was working at the front desk at the hotel on April 24, 2010 at about 5 a.m. when a man and a woman ran into the lobby without clothes on. The woman was crying and screaming and said, "Quick, quick, call the police. We've just been robbed at gunpoint by a black man." Daniels gave the couple something to cover them up, and gave them the phone to call the police.

¶ 19 Rockford police detective Brian Shimaitis testified as follows. At about 6:25 a.m. on April 24, 2010, Shimaitis was called to the Travelodge to investigate the offenses reported by Neva and David. Shimaitis took photographs of and fingerprints from Room 110. He took photos of a Dr. Pepper can lying on top of the room safe because it was reported that the suspect had opened up and consumed some of the contents of the can while in the room. Shimaitis fingerprinted the Dr. Pepper can and took a swab from around the mouth of the can which he submitted for DNA analysis. There were some ashes on top of the can and cigarette butts inside the can.

¶ 20 Forensic scientist, Laurie Lee, an employee of the Rockford Forensic Science Laboratory, testified that the DNA sample taken from the Dr. Pepper can matched the DNA swab taken from defendant.

¶ 21 RJF was called as a witness regarding an alleged assault against her by defendant in December of 2007. Prior to her testimony the trial court instructed the jury that the evidence it was about to hear was to be considered only regarding the issues of defendant's intent, motive, and lack of mistake. RJF testified as follows. On December 8, 2007, at about 11 p.m., RJF and a girlfriend began using crack cocaine, drinking, and listening to music. After a while RHF told her girlfriend she was going to drive her home and go home too. As RJF was on her way

to drop off her friend, RJF ran out of gas. Two pedestrians helped push RJF's car to a nearby gas station but after she filled her car with gas, the car would not start. The gas attendant would not let RJF use the station's jumper cables unless she paid for them and he told RJF she had two hours to remove her car from the station. RJF asked customers if they had jumper cables, to no avail. Eventually, RJF left the gas station to find some help. Because there was a bad snowstorm and RJF's girlfriend had no shoes on, they walked to another friend's house who lived a block or two away. RJF, now alone, began walking back to the gas station when defendant pulled his vehicle up beside RJF and asked her if she was okay and if she needed a ride. Because defendant's car had a baby seat and baby toys inside, RJF thought it would be all right to ask defendant to help her. Defendant told RJF that his grandfather lived a few blocks down the street and had jumper cables, so RJF got into the car with defendant. A few blocks down the road, defendant backed his car into a driveway next to a house, took a drink from a beverage, and turned toward RJF. RJF thought defendant was reaching to get out of the car, but instead, defendant reached back toward her and hit her with an object to her chest so hard that she could not move anything but her eyes. RJF had been holding $10 that she intended to give to whoever helped her start her car, and defendant said, "Give me the f*****g $10, b***h," and snatched the money from her hand. Then defendant told RJF to get undressed and order her to give him oral sex. Defendant also engaged in vaginal and anal intercourse with RJF which she submitted to because she feared for her life. During the incident defendant "held a piece of something between his fingers that had a point to it," but RJF "couldn't tell what it was."

¶ 22 RJF testified that after the incident defendant started his car, told her to get out, shoved her out of the car, threw her belongings in the road, and drove away. RJF made her way back to the gas station and the police were there. On February 20, 2009, RJF met with a Rockford

police detective and identified defendant in a photo array as the man who assaulted her in December 2007.

¶ 23 At the close of the State's case the trial court granted defense counsel's motion for a directed verdict on count seven of the indictment alleging anal penetration by defendant against Neva. Defense counsel advised the trial court that defendant was not going to testify and defendant confirmed that he had chosen not to testify.

¶ 24 Defense counsel called Rockford police officers Richard Gambini, Michael Garnhart, and Daniel Bastile to perfect impeachment of RJF, David, and Neva. Garnhart also testified that in the course of investigating the alleged offenses he had an opportunity to check the Travelodge for the location of security cameras which showed different locations of the hotel from various angles. Garnhart testified that he was not able to determine if there was a camera covering the exit that David told an officer defendant had fled from and Garnhart was not able to recover any video footage from a hotel employee. Closing arguments were presented and the jury was instructed.

¶ 25 The jury found defendant guilty of two counts of armed robbery and four counts of aggravated criminal sexual assault. On July 20, 2012, defendant filed a *pro se* posttrial motion alleging, *inter alia*, a violation of his speedy trial rights and ineffective assistance of counsel. On August 2, 2012, defense counsel Zimmerman filed a motion for a new trial. On August 23, 2012, Zimmerman filed an amended motion for a new trial. Zimmerman did not allege a speedy trial violation in either motion. On August 23, 2012, Zimmerman informed the court that defendant had filed a *pro se* motion alleging ineffective assistance of counsel and that "one of his allegations of ineffectiveness is a speedy trial issue." The trial court discharged Zimmerman after admonishing defendant and allowed defendant to proceed *pro se*. On August 30, 2012, defendant filed an amended motion for a new trial; on November 9, 2012, defendant

filed a "Re-amended" motion; and on November 26, 2012, defendant filed an amendment to his "Re-amended" motion.

¶ 26 On January 10, 2013, retained counsel Kunai Kulkarni filed an appearance on defendant's behalf. On March 12, 2013, Kulkarni filed a motion for a new trial, alleging, *inter alia*, ineffective assistance of counsel by both Hanson and Zimmerman for their failure to protect defendant's speedy trial rights.

¶ 27 On May 23, 2013, Zimmerman testified that he was defendant's attorney for approximately nine months. Zimmerman also testified that he was aware that Hanson had represented defendant prior to Zimmerman and that defendant had attempted to make demands for a speedy trial while represented by Hanson, but Zimmerman never filed a motion to dismiss based on speedy trial grounds. After hearing testimony and argument the trial court denied defendant's posttrial motion and the case proceeded to sentencing.

¶ 28 The trial court merged counts three and four (both charging aggravated criminal sexual assault) and sentenced defendant to 75 years on each conviction to be served consecutively at 85%. The trial court sentenced defendant to consecutive terms of 75 years on each of the five counts. Defendant filed a motion to reconsider sentence on June 4, 2013. The trial court denied the motion on June 5, 2013. Defendant, *pro se*, filed a notice of appeal on June 5, 2013. Subsequently, appointed appellate counsel filed an amended notice of appeal.

¶ 29 II. ANALYSIS

¶ 30 A. Ineffective Assistance of Counsel

¶ 31 On appeal defendant argues that he received ineffective assistance of counsel because his attorney failed to move to discharge him from custody based on statutory speedy trial grounds.

¶ 32 To establish a claim of ineffective assistance of counsel, a defendant must show that, (1) counsel's performance was deficient, and (2) that the deficient performance resulted in prejudice.

People v. Simpson, 2015 IL 116512, ¶ 35, citing *Strickland v. Washington*, 466 U.S. 668, 687, 695 (1984).

¶ 33 1. Speedy Trial Violation

¶ 34 The failure of counsel to move for discharge on the basis of a speedy trial violation will constitute ineffective assistance of counsel where there is a reasonable probability that the defendant would have been discharged had a timely motion been made and there was no proffered justification for the attorney's decision not to make such a motion. *People v. Shipp*, 2011 IL App (2nd) 100197, ¶ 17. If there was no lawful basis for raising a speedy-trial objection, counsel's failure to assert a speedy-trial violation cannot establish either prong of *Strickland*. *People v. Phipps*, 238 Ill. 2d 54, 65 (2010). Therefore, we must first determine whether defendant's statutory right to a speedy trial was violated before we can determine whether counsel was ineffective. See *People v. Cordell*, 223 Ill. 2d 380, 385 (2006).

¶ 35 A defendant possesses both a constitutional and a statutory right to a speedy trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103–5(a) (West 2012). Although these provisions address similar concerns, the rights they establish are not coextensive. *People v. Woodrum*, 223 Ill. 2d 286, 298 (2006). We observe that, in this case, defendant asserts only a violation of his statutory right to a speedy trial, and has not raised a constitutional issue. See *id*.

¶ 36 The right to a speedy trial for a defendant in custody, as was defendant, is covered by section 103-5(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-5(a) (West 2012)). Section 103-5(a) of the Code provides, in pertinent part:

> "Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant * * *. Delay shall be considered to be agreed to by the

defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2012).

¶ 37 The 120-day speedy-trial period begins to run automatically when a defendant remains in custody pending trial. *People v. Phipps*, 238 Ill. 2d 54, 66 (2010). If a defendant is not tried within the statutory speedy-trial period, the defendant must be released and the charges dismissed. 725 ILCS 5/103-5(d) (West 2010). Pursuant to section 103-5(a), a delay is any action by the parties or the court that moves the trial date outside of the speedy-trial term. *Cordell*, 223 Ill. 2d at 390.

¶ 38 Pursuant to section 103-5(a), to prevent the speedy-trial clock from tolling, a defendant must object to any attempt to place the trial date outside the 120-day period. *Cordell*, 223 Ill. 2d at 390. "Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." *People v. Peco*, 345 Ill. App. 3d 724, 732 (2004). Section 103-5 does not mandate any "magic words" constituting a demand for trial, but it requires some affirmative statement in the record requesting a speedy trial. *Cordell*, 223 Ill. 2d at 390. In addition, a defendant is bound by the actions of his attorney unless he clearly and convincingly attempts to assert his right to discharge his attorney and proceed to an immediate trial. *People v. Mayo*, 198 Ill. 2d 530, 537 (2002).

¶ 39 The parties agree that on November 3, 2011, the count stood at 60 days attributable to the State. Defendant argues that the 81-day period from November 3, 2011 to January 23, 2012, is attributable to the State for purposes of the speedy-trial term. The State argues that it is not responsible for that delay because defense counsel's actions were attributable to defendant, and defendant did not discharge his attorney and express his wish to proceed *pro se* to an immediate trial.

¶ 40 In *Cordell*, 223 Ill. 2d 380, defense counsel asked the trial judge to set a trial date. *Id*. at 383. The trial court suggested June 11, 2002, and defense counsel did not object that the proposed date was outside section 103-5(a)'s 120–day limit. *Id*. The trial was set for June 11, 2002, and on that day, the defendant was tried, convicted, and sentenced. *Id*. at 383-84. On appeal, defendant argued that defense counsel was ineffective because he failed to move for dismissal based on the alleged violation of defendant's statutory right to a speedy trial. *Id*. at 385.

¶ 41 The supreme court rejected defendant's ineffective assistance of counsel claim based on his speedy-trial argument. *Id*. at 392-93. The court explained that "delay" (725 ILCS 5/103–5(a) (West 2002)) includes "[a]ny action by either party or the trial court that moves the trial date outside of [the] 120–day window." *Id*. at 390. A narrower construction would ignore the plain language of the statute and would also eliminate trial courts' flexibility "from even proposing dates that fall outside the 120-day period, thus, removing a portion of the discretion they require for setting a court schedule." *Id*. The court explained that the after the trial court proposes a date outside of the 120-day period, the defendant has the option of either accepting the date or rejecting the date by objecting to it. *Id*. Thus, the defendant may use "section 103-5(a) as a shield against any attempt to place his trial date outside the 120-day period." *Id*. However, the defendant may not acquiesce in setting the trial date outside of the 120-day period and then later use "section 103-5(a) "as a sword after the fact, to defeat a conviction." *Id*.

¶ 42 The supreme court's reasoning in *Cordell* defeats defendant's claim in this case. Although defense counsel stated that defendant "is indicating that he wants to ask for a speedy trial," defense counsel did not object when the trial court subsequently set the trial date beyond the 120-day limit. Further, defense counsel did not object when the trial court stated that the 120-day delay was attributable to defendant. Defendant was bound by his attorney's actions. *Mayo*, 198 Ill. 2d at 537. Further, although defendant objected to the trial court attributing the

delay to him, nothing in the record indicates that defendant clearly and unequivocally attempted to assert his right to discharge his attorney and proceed to an immediate trial, *pro se*. See *id*.

¶ 43 In sum, the record indicates that the 81-day delay discussed above was attributable to defendant and, therefore, defendant was brought to trial well within the 120-day statutory limit. Because no violation of defendant's right to a speedy trial occurred, filing a motion to dismiss based on a speedy-trial violation would have been futile. Therefore, defendant cannot establish ineffective assistance of counsel based on this claim. See *People v. Peco*, 345 Ill. App. 3d 724, 735 (2004).

¶ 44 Defendant cites *People v. Pearson*, 88 Ill. 2d 210 (1982), to support his argument. In *Pearson*, the defendant "clearly and convincingly attempted to assert his right to discharge his attorney and proceed to an immediate trial." *Id*. at 215. The defendant in *Pearson* asserted "his readiness to proceed" to trial by stating, "you are not my attorney *** I'm ready for trial." *Id*. In this case defendant never clearly and convincingly attempted to discharge his attorney and never indicated that he was ready to proceed to an immediate trial. Therefore, *Pearson* is distinguishable from this case.

¶ 45 2. Opening Statement

¶ 46 Next, defendant argues he received ineffective assistance of counsel because during opening statement defense counsel "promised" the jury that it would hear evidence contradicting the complainant's story but then defense counsel failed to offer any such evidence during the trial. Defendant argues that this was evidence that only defendant could have provided, thereby "promising" that defendant would testify.

¶ 47 Under the two-prong test for assessing whether trial counsel was ineffective, articulated in *Strickland*, 466 U.S. 668 (1984), a defendant must show that (1) 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 would have been different. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). In this case, the facts surrounding defendant's claims of ineffective assistance of counsel are undisputed, thus, our review is *de novo.* See *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008) (because the facts surrounding the defendant's ineffective assistance of counsel claim were undisputed, the court's review was *de novo*).

¶ 48 "In demonstrating, under the first *Strickland* prong, that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct must be considered sound trial strategy." *Id.* Under the second prong, a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome. *Id.* In order to establish ineffective assistance of counsel, a defendant must satisfy both the performance and prejudice prongs of *Strickland.* *Id.* at 144-45; see also *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010) (because a defendant must satisfy both prongs of this test, the failure to establish either prong is fatal to the claim). Thus, if a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697. This determination must be made on the basis of the entire record, not isolated instances. "This determination must be made on the basis of the entire record, not isolated instances." *People v. Everhart*, 405 Ill. App. 3d 687, 696 (2010). Effective assistance of counsel refers to competent, not perfect, representation. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

¶ 49 "A counsel's failure to provide promised testimony is not ineffective assistance *per se.*" *People v. Manning*, 334 Ill. App. 3d 882, 892 (2002); see also *People v. Schlager*, 247 Ill. App. 3d 921, 932 (1993) ("the test is not whether defense counsel fulfilled all the promises he made during

his opening remarks but, rather, whether defense counsel's errors were so serious that, absent those errors, the result of the proceeding would likely have been different").

¶ 50 Defendant contends that defense counsel "promised" the jury that defendant would testify and that the prosecutor was able to capitalize on defense counsel's failure to offer the promised evidence during the rebuttal portion of her closing argument. However, the record does not support defendant's contentions. At the beginning of his opening statement, defense counsel stated, "Allow *me*, please, to tell you what actually happened." (Emphasis added.) Defense counsel told the jury that defendant and Neva had spoken on the phone and set up a drug deal in exchange for sex, or a "dope date," at the Travelodge where Neva and David lived. After they all engaged in consensual sex, Neva asked for the drugs but defendant left. Defense counsel stated that the complainants had been "duped"; that they consented to sex acts with defendant in exchange for sexual acts, or a "dope date," but "weren't getting the benefit of the bargain." Defense counsel then vigorously cross-examined Neva, trying to elicit from Neva the version of events defense counsel told the jury during opening statements. For example, defense counsel asked Neva if she had met the man that she brought to the hotel room at a "mini-mart" the day before the incident; if she had bought crack cocaine from the man the day before the incident; if she had actually attempted to buy crack cocaine from the man rather than marijuana.

¶ 51 During the rebuttal portion of closing argument, the State commented on defense counsel's opening statement. The State argued as follows:

> "[Defense counsel's] opinions are not evidence. *** In fact, in defense counsel's opening statement you heard him spin a tale. He told you that this was a dope date, sex in exchange for drugs, that they had previously talked, that the defendant agreed to meet them, that they were going to perform sex acts in exchange for drugs, that Neva and David,

> he wanted to watch them, so they got together, and then the defendant got involved to some extent, then when David and Neva wanted the drugs the defendant took off.
>
> * * *
>
> What defense counsel told you did not materialize in the evidence you received. I don't know why, and I don't care. It doesn't matter because it cannot be considered.
>
> His statements cannot be used to convict or acquit. At this point they are sound that has no relevance in reaching your verdict, along with his opinions."

¶ 52 Contrary to defendant's assertion, the record does not show that defense counsel promised that defendant would testify or that the State was allowed to comment on defense counsel's alleged "promise." The prosecutor's rebuttal argument merely responded to defense counsel's alternative explanation that the complainants had agreed to exchange sex for drugs. See *People v. Magallenes*, 409 Ill. App. 3d 720, 749 (2011).

¶ 53 Further, even if defense counsel had promised that defendant would testify, we need not reach the question of whether defense counsel's performance was deficient, because defendant fails to show prejudice, such that the result of the proceeding would have been different. In this case, the State's evidence was overwhelming. David and Neva testified that they were sexually assaulted and robbed at gunpoint in their hotel room. David identified defendant as the man who assaulted and robbed David and Neva. The State's DNA evidence established that defendant's DNA matched the DNA found on the Dr. Pepper can found in the hotel room. Additionally, the State presented evidence of defendant's prior sexual assault of RJF. Defendant has not shown that there is a reasonable probability that the result of the trial would have been different if defense counsel had not allegedly promised that he would testify. Accordingly, defendant's claim of ineffective assistance of counsel based on defense counsel's alleged promise during opening statement fails. See *Houston*, 226 Ill. 2d at 144.

¶ 54 Defendant relies on *People v. Briones*, 352 Ill. App. 3d 913 (2004). However, the appellate court determined that defense counsel was ineffective based on aggregate errors of defense counsel. *Id*. at 921. Defense counsel expressly told the jury during opening argument that the defendant would testify and defense counsel allowed an improper jury instruction to be given. *Id*. at 915, 921 (defense counsel stated during opening argument that the defendant is "going to get up here on the witness stand and he's going to testify"). Further, in *Briones*, the State's evidence was not overwhelming. *Id*. at 921. In this case, defense counsel did not promise that defendant would testify, there are not aggregate errors of defense counsel, and the evidence against defendant is overwhelming. Therefore, *Briones* is distinguishable from the case at bar.

¶ 55 Defendant also cites *Hampton v. Leibach*, 347 F. 3d 219 (7th Cir. 2003) and *Ouber v. Guarino*, 293 F. 3d 19 (1st Cir. 2001), to support his argument. In both *Hampton* and *Ouber*, defense counsel explicitly told the juries that the defendant would testify. *Hampton*, 347 F. 3d at 257 (defense counsel told the jury, "[Defendant,] Mr. Hampton will testify and tell you that he was at the concert. Mr. Hampton will tell you that he saw what happened but was not involved with it"); *Ouber*, 293 F. 3d at 22 (defense counsel told the jury, "The case is going to come down to what happened in that car and what your findings are as you listen to the credibility and the testimony of Todd Shea versus what you[r] findings are as you listen to the testimony of [defendant,] Barbara Ouber"). In this case, defense counsel never expressly promised that defendant would testify. Therefore, *Hampton* and *Ouber* are distinguishable from this case.

¶ 56 B. Sentencing

¶ 57 Defendant argues, and the State concedes, that the trial court erred by ordering defendant to serve his armed robbery sentences at 85%. Section 3-6-3(a)(2) of the Unified Code of Corrections (Code), also known as the truth-in-sentencing law, limits the sentencing credit that

certain prisoners are eligible to receive. 730 ILCS 5/3-6-3(a)(2) (West 2010). The truth-in-sentencing law requires a defendant convicted of, *inter alia*, aggravated criminal sexual assault, to serve at least 85% of his court-imposed sentence. 730 ILCS 5/3-6-3(a)(2)(ii) (West 2010). However, a defendant convicted of armed robbery is required to serve at least 85% of his imposed sentence only "when the court has made and entered a finding *** that the conduct leading to conviction for the enumerated offense resulted in great bodily harm to the victim." 730 ILCS 5/3-6-3(a)(2)(iii) (West 2010). Because the trial court made no such findings in this case and the victims testified that they were not injured, defendant is entitled to good conduct credit on his armed robbery sentences.

¶ 58 Next, defendant argues that the trial court erred by ordered him to serve his sentences for both of his armed robbery convictions consecutively to his sentences for his three aggravated criminal sexual assault convictions. Defendant argues, and the State concedes, that he should serve his two sentences for armed robbery concurrently to each other, and consecutively to the three sentences for aggravated criminal sexual assault. We agree with defendant.

¶ 59 Consecutive sentences are mandatory where a defendant is convicted of multiple offenses of aggravated criminal sexual assault (720 ILCS 5/12-14 (West 2010)). 730 ILCS 5/5-8-4(a) (West 2010). *People v. Curry*, 178 Ill. 2d 509, 539 (1997) ("[C]onsecutive sentences are mandatory only for those offenses which trigger the application of section 5-8-4(a)"). However, where a defendant is convicted of multiple offenses of armed robbery, consecutive sentences are mandatory only where the defendant inflicts "severe bodily injury." See *id*. The trial court must impose concurrent sentences unless a statutory exception requires consecutive sentences. *People v. Ruiz*, 312 Ill. App. 3d 49, 63 (2000). "Sentences for multiple non-triggering offenses may be served concurrently to one another after any consecutive sentences for triggering offenses have been discharged." *Curry* 178 Ill. 2d at 539. In this case, as noted, defendant did not inflict

"severe bodily injury" on the victims. Therefore, defendant was not subject to mandatory consecutive sentences for both of his armed robbery convictions. However, defendant must serve one of armed robbery convictions consecutively to the sexual assault sentences. Accordingly, defendant must serve his two armed robbery sentences concurrently to each other, but consecutively to the three aggravated criminal sexual assault sentences.

¶ 60 Finally, defendant argues that the trial court improperly imposed a 150-year aggregate prison term in excess of that authorized by statute. Defendant argues that under the relevant statute, section 5-8-4(c)(2) of the Code (730 ILCS 5/5-8-4(c)(2) (West 2010)), the trial court was limited to sentencing defendant to an aggregate of 120 years, and not, 150 years. Section 5-8-4(c)(2) of the Code provides, in pertinent part:

> "[T]he aggregate of consecutive sentences for offenses that were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective *shall not exceed* the sum of the maximum terms authorized under Section 5-8-2 for the 2 most serious felonies involved * * *." 730 ILCS 5/5-8-4(c)(2) (West 2010).

¶ 61 Defendant was convicted of five Class X felonies. Section 5-8-2(a) of the Code allows for the imposition of an extended term sentence where, as here, the judge found an aggravating factor; that defendant had a prior Class X felony conviction within 10 years of the current Class X felony for which he was being sentenced. See 730 ILCS 5/5-8-2(a) (West 2010); 730 ILCS 5/5-5-3/2(b)(1) (West 2010). An extended term sentence for a Class X felony ranges from 30 to 60 years. 730 ILCS 5/5-4.5-25(a) (West 2010). Defendant thus contends that the maximum aggregate prison sentence for the two most serious felonies was 120 years.

¶ 62 The State argues that the trial court properly added on two terms of 15 years' imprisonment for defendant's convictions of aggravated criminal sexual assault with a firearm

pursuant to section 12-14(d)(1) of the Criminal Code of 1961 that provided, "[a] violation of subsection (a)(8) [aggravated criminal sexual assault where the aggravating factor is that the accused was armed with a firearm] is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/12-14(d)(1) (West 2010) (now 720 ILCS 5/11-1.30(1) (West 2014). The State cites *People v. Johnson*, 386 Ill. App. 3d 1146 (2006), to support its argument.

¶ 63 When we interpret statutes, we must ascertain and give effect to the legislature's intent, which is best determined by the language used in the statute. See *People v. Gutman*, 2011 IL 110338, ¶ 12. Courts are to construe the statute as a whole, so that each word, phrase, and sentence is given a reasonable meaning and is not rendered superfluous. *Id*. Because interpreting statutes presents a question of law, our review is *de novo.* See *id*.

¶ 64 Where, as here, the plain language of two statutes conflict with each other, the court may consider the purposes of the statutes, the problems sought to be remedied, and the goals to be achieved. *Moore v. Green*, 219 Ill. 2d 470, 479-80 (2006). Further, where a general statutory provision and a more specific statutory provision relate to the same subject, the court will presume that the legislature intended the more specific provision to govern. *Id*. at 480. In addition, courts are to presume that the legislature intended the more recently enacted statutory provision to control. *Id*.

¶ 65 In 2000 the legislature enacted Public Act 91-404 (Pub. Act 91-404, § 5, eff. Jan. 1, 2000), which amended the sentencing provisions of several different felony offenses including the offense at issue here, aggravated criminal sexual assault. See *People v. Sharpe*, 216 Ill. 2d 481, 484, fn. 1 (2005). "These amendments add a *mandatory* additional term of years to whatever sentence would otherwise be imposed." (Emphasis added.) *Id*. at 484-85. When it enacted Public Act 91-404 the legislature noted "the serious threat to the public health, safety, and welfare

caused by the use of firearms in felony offenses." *Id*. at 521-32. By enacting Public Act 91-404 the legislature intended to impose particularly severe penalties to deter the use of firearms in the commission of felonies. *Id*. 532. Our supreme court determined that these add-ons imposed by Public Act 91-404 were "reasonably designed to remedy the evil the legislature was targeting." *Id*.

¶ 66 With *Sharpe* in mind, the appellate court decided, *Johnson*, 368 Ill. App. 3d 1146, a case similar to the case at bar. In *Johnson*, the defendant argued that his 145-year aggregate prison sentence was void because it included a mandatory firearm add-on for home invasion and, therefore, violated section 5-8-4(c)(2) of the Code. *Id*. at 1168. The appellate court held that the firearm add-on took precedence over section 5-8-4(c)(2) of the Code. *Id*. at 1170. The appellate court reasoned that, (1) the legislature intended that the "mandatory firearm enhancement penalty be *added* to 'whatever sentence would otherwise be imposed' " (Emphasis in original.) *Id*. at 1170 (quoting *Sharpe*, 216 Ill. 2d at 485). The *Johnson* court also explained that the mandatory firearm add-on statute was the more recently enacted statute. *Id*.

¶ 67 In this case, the aggravated criminal sexual assault provision of the Criminal Code of 1961 was amended by the same statute at issue in *Johnson* (Public Act 91-404). For the same reasons stated in *Johnson*, we determine that the firearm add-on at issue here takes precedence over section 5-8-4(c)(2) of the Code. See *Johnson*, 368, Ill. App. 3d at 1170. Defendant notes that where a penal statute is ambiguous it must be strictly construed in favor of the defendant. However, this rule of lenity is subordinate to a court's obligation to determine the legislature's intent and, therefore, the rule of lenity will not be construed so rigidly to defeat such intent. *Gutman*, 2011 IL 110338, ¶ 12. Given the language of the statute, the legislature's stated purpose, and the fact that its enactment is more recent, the rule of lenity cannot apply here. Accordingly, the trial court properly sentenced defendant to an additional 30 years' imprisonment for two convictions of

aggravated criminal sexual assault with a firearm. See 720 ILCS 5/12-14(d)(1) (West 2010). Therefore, the trial court properly sentenced defendant to a 150-year aggregate term of imprisonment. Upon remand the court may not sentence the defendant to an aggregate term in excess of 150 years.

¶ 68 III. CONCLUSION

¶ 69 Accordingly, defendant's convictions are affirmed, his sentences are vacated, and the case is remanded for resentencing consistent with this decision.

¶ 70 Affirmed, in part, vacated, in part, and remanded.