

No. 1-10-3575

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 09 CR 4788
)	
HENRY WALKER,)	Honorable
)	James B. Linn
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

- ¶ 1 *Held:* The trial court did not abuse its discretion in denying defendant's motion for a continuance to secure absent witnesses' testimony where (1) 18 months had passed since arraignment; (2) defendant provided little information concerning his attempts to secure those witnesses; (3) the State agreed to allow the jury hear the witnesses' written statements; (4) their live testimony would be cumulative; and (5) defendant was not prejudiced.
- ¶ 2 Following a three-day jury trial, defendant Henry Walker was found guilty of aggravated criminal sexual assault, attempted aggravated criminal sexual assault, robbery and aggravated battery. He received respective sentences of 28, 12, 7 and 5 years in prison. On appeal, he asserts the trial court abused its discretion in denying his motion for a

continuance, filed on the day scheduled for trial, in order to secure the appearance of five witnesses. We affirm.

¶ 3

I. BACKGROUND

¶ 4

On March 13, 2009, defendant was charged with multiple counts arising from an incident that occurred a month earlier at a University of Illinois at Chicago (UIC) parking garage located at 915 South Paulina (the parking garage). He was charged, in pertinent part, with aggravated criminal sexual assault based on sexually penetrating the victim by putting his finger in her vagina by the use or threat of force during the course of a robbery (720 ILCS 5/12-14(a)(4) (West 2008)). He was also charged with attempted aggravated criminal sexual assault based on attempting to put his penis in the victim's vagina (720 ILCS 5/8-4, 12-14(a)(4) (West 2008)). In addition, he was charged with robbery based on taking the victim's car keys (720 ILCS 5/18-1(a) (West 2008)) and aggravated battery in that he caused her great bodily harm by beating her face and body (720 ILCS 5/12-4(a) (West 2008)). Approximately 18 months passed between the arraignment and the jury trial due to, among other things, a behavioral clinical examination, DNA testing, defense counsel's difficulty visiting defendant in Joliet, a substitution of assistant public defenders, the trial court admittedly over-scheduling itself, the State providing two amended answers to discovery, defense counsel subsequently obtaining certain evidence regarding defendant's detention by police, and hearings on defendant's pretrial motions to quash and suppress evidence, suppress identification and suppress statements.

¶ 5

On the first day of trial, defendant filed a motion seeking a continuance because he had

failed to secure the appearance of necessary witnesses, specifically, Dr. Jonathan Dela Cruz, Dr. Joseph Colla, Zenaida Johnson, RN, Clinton Elmore of the Chicago Fire Department (CFD), and Michael Sipusich of the CFD. The motion alleged that those witnesses would essentially testify that the victim denied that vaginal penetration occurred and argued that their testimony was necessary because the element of penetration was in dispute.

¶ 6 When defense counsel asked leave to file the motion before trial began, the court asked why she wanted a continuance. Defense counsel responded as follows:

"[T]here are five medical personnel that we have attempted to try to get personal service on. We have been unsuccessful to date. These five people all introduced [the victim] [*sic*], the complainant in this matter, and took statements from her that are inconsistent with the police reports. Specifically, there is no mention of digital penetration to any of these five medical personnel, and that is the most serious count Mr. Henry Walker is facing in this matter. We ask Your Honor to consider this continuance because we believe these witnesses are critical in his defense."

¶ 7 Upon further inquiry, defense counsel stated that the witnesses were not under subpoena and the State added that Patricia Brenza, a nurse, would be able to testify to any medical treatment. The court then asked whether Brenza could testify that the victim said there was no penetration, as written in the medical records. The State agreed that Brenza could testify to the records' content but the court sought clarification:

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"I want to know what exactly you are willing to stipulate [as to] to the five people she wants to call that she never subpoenaed? I am hearing this for the first time on the day of trial. I need to know with certainty what you are willing to stipulate to, and then I will talk about whether a continuance is required or not. My feeling is it's probably not. But I need to know exactly and they need to know what they are going to be able [to] tell the jury in their opening statement."

The State explained that the medical records consistently reflected the victim's allegation that defendant tried to insert his penis into her vagina but that the contention lay with the allegation of digital penetration. The State agreed "to stipulate that it is reported in the medical records to the doctor that interviewed her, who we believe is Dr. De La Cruz, who is not under anyone's subpoena, that she reported no digital penetration to the resident De La Cruz, and that that information repeats itself throughout the medical records. We would also stipulate that Dr. Colla *** would testify that he wrote in his report 'the patient reported no digital penetration,' however he never interviewed her." Defense counsel then noted that the victim did not disclose digital penetration to the emergency personal either.

¶ 8 The court denied the motion, finding that the victim could be cross-examined with the statements in the records, that the State was agreeing to let the jury hear the records' content, and that the evidence sought in the motion was circumstantial. Accordingly, the court determined that a continuance would be "outside the interest of justice" and the trial proceeded. At trial, the defense did not contest the robbery or aggravated battery charges but attempted to persuade the jury that defendant did not sexually assault or attempt to

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sexually assault the victim.

¶ 9 The victim, a medical technologist at UIC, testified that when she left work at about 8 p.m. on February 13, 2009, she was carrying a bag containing her purse. She went to the second floor of the parking garage and was startled when she saw defendant but then said hello. As the victim walked away, she heard footsteps behind her and quickly turned around. Defendant was directly behind her and demanded her money but the victim replied that she did not have any. She tried to activate the car alarm on the remote control in her hand but could not do so. As she reached into her bag to give defendant her money, he took her keys and put them in his pocket.

He then grabbed her jacket and dragged her 10 to 15 feet.

¶ 10 When the victim screamed, defendant told her to "shut up." He punched her two or three times in the left side of her face, knocking her to the ground, but her bag remained on her shoulder. When defendant asked why her hand was in her bag, she replied that she was trying to get her purse but defendant told her to remove her hand. In addition, the victim told defendant to take her purse but he did not do so. Instead, he said, "show me your pussy," put his hands in her underwear and inserted two fingers into her vagina. Defendant knelt beside her and said, "oh, good you're wet." He then grabbed her left breast from under her shirt. At some point, a car passed and defendant moved the victim to a more secluded position. He then pulled her pants, underwear and shoes off. When she tried to get away, he struck her in the face and said, "You're a fighter. Stop fighting." He got on top of her, held his forearm against her neck and kissed her. Defendant then

spread her legs and rubbed his penis on the outside of her vagina but did not insert it. The victim forcefully squeezed defendant's testicles but he said that it did not hurt.

¶ 11 A car subsequently approached and honked. Defendant pulled up his pants and ran, leaving the victim's bag behind. After a woman approached the victim and gave her scrub pants, a police officer arrived and the victim described her assailant. An ambulance then arrived. Shortly thereafter, the victim identified defendant, who was in the custody of the police. She also identified her key and the accompanying alarm control. During the victim's testimony, a surveillance video of the parking garage was shown. The victim testified that the video showed, among other things, defendant following the victim, and subsequently running away, while apparently pulling up his pants. The victim was examined at UIC, where a sexual assault kit was performed. She sustained injuries to her face, wrist, knees, lower back and buttocks. In addition, her nose was broken, her face was permanently dented, and she did not return to work until September 2009.

¶ 12 On cross-examination, the victim testified that no one who interviewed her in the ambulance or at the hospital asked whether defendant "penetrated [her] vagina with his fingers." In addition, she did not tell Elmore or Sipusiph, the two men from the CFD who rendered aid to her in the parking garage, that defendant placed his fingers in her vagina. When the victim spoke to Johnson, the victim denied "vaginal penetration." She did not, however, tell Dr. Dela Cruz that she was "felt by male hands in [her] genital area, and that the male placed his hand near [her] genital region and attempted penetration." The victim further testified that she did not tell Dr. Colla that defendant "grabbed at [her] genital

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area, but did not successfully penetrate."

¶ 13 On redirect examination, the victim testified that when speaking to Johnson, the victim denied "vaginal penetration" because she believed that meant "penis insertion." For the same reason, the victim said that she was not "raped." In addition, neither Dr. Dela Cruz, Dr. Colla nor anyone else asked the victim whether defendant "put his fingers inside of [her]" and the victim did not know what "digital penetration" meant prior to this incident. Furthermore, she told the police that defendant put his fingers in her vagina.

¶ 14 Ligaya Reyes-Estrella, a nurse at the UIC Medical Center, testified that when she was returning to her car on the second floor of the parking garage after leaving work, she heard a woman say, "Ow, ow, help me." Reyes-Estrella then saw a black man kneeling on the floor so she went to the emergency button and reported her observations to the operator. In addition, Joy Madukwe, also a nurse at the UIC Medical Center, testified that when she was on the second floor of the parking garage, driving toward the exit, she saw a woman who was bare from the waist down. The woman said, "Help me," and Madukwe saw that a man was lying beside the woman. Madukwe made eye contact with the man and began honking. The police subsequently arrived, but the man was gone. When Madukwe approached the injured victim who had been on the ground, another woman was already assisting her and brought her pants to wear. The police left but returned a short while later with the man Madukwe had seen.

¶ 15 Officer David Cardwell testified that on the night in question, he was assigned to the parking garage after one woman reported, through an emergency communication box,

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that another woman was screaming in the garage. When he arrived at the second level, he heard honking as well as a woman screaming and proceeded on foot until he encountered the victim, a middle-aged white woman who was bare below the waist aside from socks. She had many contusions, was bleeding and had been beaten. Shortly thereafter, other individuals appeared. The victim was mumbling that she had been raped and described the perpetrator. Officer Cardwell issued a flash message and requested Emergency Medical Service (EMS). In response, Officer Gerald Jenkot immediately stated over the radio that he saw a black male exit the garage. As a result, Officer Cardwell looked outside, saw defendant running across the street, and subsequently observed Officer Jenkot stop defendant. After EMS assisted the victim to the street level, she was allowed to view defendant, who was sitting in a police car. Officer Cardwell then returned to the scene where he found two alcohol swab packets and blood stains. He later retrieved the rape kit from the emergency room.

¶ 16 Officer Jenkot testified that after overhearing a dispatch and receiving a description of an offender, he saw defendant run from a stairwell in the parking garage. Officer Jenkot reported his observations, pursued defendant and called for additional units. Defendant eventually dove to the ground, and said, "I didn't do nothing to that woman." He did not appear to be under the influence of drugs or alcohol. A protective pat-down revealed that defendant's pockets contained a car key, remote control, rubber or latex gloves, packets of alcohol swabs, a piece of paper displaying his name and approximately \$20. After defendant was handcuffed and placed in Officer Jenkot's police car, the victim positively

identified defendant as well as the keys in his possession. At the police station, the police took defendant's blood-stained clothing, including his underwear, and gave him a paper jumpsuit. When Officer Jenkot checked on defendant, he was washing his penis in the sink. Officer Jenkot also identified the surveillance video showing the officer chase defendant and bring him into custody. On cross-examination, Officer Jenkot testified that he did not record his observation of defendant washing himself and identified a photograph taken of defendant shortly after his arrest.

¶ 17 Brenza, a nurse at the UIC Medical Center, testified that when the victim came to the emergency room due to a sexual assault, she was crying, was in a degree of shock and repeatedly asked, "[w]hy do they teach us to cooperate, to go along?" Dr. Dela Cruz and Dr. Colla examined the victim. According to the medical records, she sustained injuries to her left eye, left side of her face, jaw line, nasal bridge, left shoulder, right hand, buttocks and knees. The victim's nose was also broken. In addition, Brenza was present when Dr. Dela Cruz and Dr. Colla performed a vaginal exam. The medical reports stated that there was blood at her cervical opening, which can be caused by an object being inserted in the vagina, and that the victim experienced cervical motion tenderness. Brenza subsequently gave the criminal sexual assault kit directly to Officer Cardwell.

¶ 18 On cross-examination, Brenza testified that Johnson prepared the triage notes, which stated that "the patient denied vaginal penetration." Brenza also testified that Dr. Colla's notes said that "patient reports attacker did not successfully digitally penetrate her." In addition, Dr. Dela Cruz noted that there was no erythema or swelling in the external

genitalia. Brenza further testified that the blood noted in the cervical opening was the same area from which menstrual bleeding occurs. On redirect examination, however, Brenza testified that the victim was ovulating at the time of the incident and that Johnson's notes did not state that the victim denied vaginal penetration by any particular object. Brenza further testified that Dr. Dela Cruz's notes stated that the victim reported being felt in her genital area and that Brenza never heard any doctor or nurse ask the victim what had been inserted into her vagina.

¶ 19 Detective Armando Juarez testified that during his three interviews with the victim, she said that defendant penetrated her vagina with his fingers. In addition, forensic scientist Ronald Tomek testified that no semen was found on the vaginal swab in the sexual assault kit and Nicholas Richert testified that the DNA profile derived from the blood stain on defendant's boxer shorts matched the victim's DNA profile.

¶ 20 Assistant States Attorney [ASA] Kevin Deboni testified that at about 1:30 p.m. on February 14, 2009, he spoke to defendant, who did not appear to be intoxicated or under the influence of drugs. Defendant stated that when he attacked the victim, she defended herself, a scuffle ensued, her pants came off and he assaulted her. During the interview, defendant gave a written statement, which was published for the jury.

¶ 21 Defendant stated that at about 7:15 p.m. on the night in question, he decided to steal a car. He came across a parking garage and waited by the elevators. A white woman passed him and he followed her. When she turned around, he grabbed her bag and told her to give it to him, but she would not let go and started fighting. As a result, he punched her

in the face and she fell down. He pulled at the car keys in her hand, causing the alarm trigger to break off. Defendant then put it in his pocket and subsequently put the keys in his pocket following further struggle. When the woman kept struggling, he punched her again. In addition, defendant patted her pockets but found nothing. Nonetheless, he hit her again because she was still fighting. As the woman tried to get away, defendant grabbed the back of her pants and she "wiggled out" of them, as well as her underwear.

The woman tried to escape and defendant grabbed her leg, causing her to fall down.

While she was on the ground, defendant put his finger in her vagina and he may have also touched her breasts. Defendant stated that originally, he only intended to take a car and money and did not know why he put his finger in her vagina "because that is not his thing."

¶ 22 A car subsequently approached and the black woman driving the car honked. When defendant ran down the stairs and out of the parking garage, a police car chased him. At some point, he knew he was stuck and gave up. The police arrested him and recovered the victim's keys. Defendant also had rubber gloves with him because he did not want to leave prints on any car that he stole and his alcohol swabs were from the barber shop he had visited. On cross-examination, ASA Deboni testified that defendant never denied penetrating the victim's vagina.

¶ 23 Defendant testified on his own behalf that on February 13, 2009, he smoked marijuana, drank alcohol, went to his mother's house and later went to his girlfriend's house, where he smoked more marijuana and drank more alcohol. Defendant later went to the second

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floor of a parking garage to rob someone, even though he had some money. When defendant saw the victim, he followed her. She turned around, defendant reached for her bag and she screamed, leading him to hit her in the face. While defendant was trying to get her bag, he hit her again and she fell down with the bag still wrapped around her shoulder. Defendant knelt beside the victim and patted her pockets but they were empty. He then grabbed the victim's alarm key, broke it, and put it in his pocket. In addition, defendant kept hitting the victim in order to get the ignition key, which was in her hand. He managed to get the key but the victim held on to her bag. While they were pulling on the bag, it fell under a car. The victim attempted to run while defendant unsuccessfully reached for the bag. As a result, defendant grabbed the victim by the back of her pants, causing them to come off. He testified that he never put his fingers in her vagina, never fondled her breasts, and never attempted to put his penis in her vagina. When a woman pulled up in her car and honked, defendant ran down the stairs, as seen in the surveillance video shown to the jury. Defendant testified that he was holding his pants up in the video because they were too big and he ultimately stopped running because he was surrounded by the police.

¶ 24 After the police had taken the keys from defendant's pocket and returned him to the garage, the victim pointed at him and he was taken to the police station, where they gave him a paper suit to wear in exchange for his blood-stained clothing. Defendant began throwing up due to the drugs and alcohol he had consumed. He eventually spoke to Detective Juarez and Detective Murphy because the latter detective said defendant would

only be charged with robbery if he admitted to what he did. Defendant said that he robbed and struck the victim but did not say that he put his fingers in her vagina.

Defendant also testified, however, that he subsequently stated that he put his fingers in the victim's vagina because the detectives told him he needed to say that. In return, the detectives would look out for him and see that he was charged with robbery.

Notwithstanding his admission, it was false. Defendant further acknowledged that he made changes to his statement so that it would be in his own words instead of the ASA's words.

¶ 25 On cross-examination, defendant testified that he injured the victim even after obtaining her car keys, but did not get the chance to use the alarm key to find her car. He also testified that he was unable to retrieve the victim's purse, she never offered him money and he never told her to keep her hand out of her bag. In addition, he had taken Ecstasy on the day of the offense and was high at the police station, although his statement said otherwise. Defendant further testified that the holding cell did not have a sink. On redirect examination, he acknowledged that one of the two holding cells he was in had a sink and explained that he had gloves to avoid leaving fingerprints as well as alcohol swabs to prevent a "break out" after having his hair braided.

¶ 26 After the defense rested, the State called Detective Murphy, who testified in rebuttal that defendant said he used two fingers to penetrate the victim's vagina. Neither Detective Murphy nor anyone in his presence promised defendant he would only be charged with robbery if he admitted to the sexual assault. On cross-examination, Detective Murphy

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testified that defendant initially stated that he only committed a robbery and denied any sexual conduct but he subsequently admitted to the latter. The State presented a certified statement of defendant's prior conviction for armed robbery (Case No. 06 CR 21526-01).

¶ 27 Defense counsel then spread of record that Theresa Pittman at the UIC Medical Center had accepted service on behalf of Johnson and Dr. Colla and that the subpoenas had been issued for that day of trial. The court essentially found that the victim's statements and reasons for them had been elicited and that no other remedy was in order. Defense counsel confirmed that she was not asking for warrants to be issued and noted that she had previously filed a motion for a continuance. The court then reiterated that it had found the better remedy would be to allow the jury to hear what those witnesses wrote in their reports, that a continuance would be outside the interest of justice, that numerous witnesses and parties were ready for trial and that the victim needed to be done with this ordeal. In addition, the court found defendant had a "very adequate" chance to present his defense.

¶ 28 The jury found defendant guilty of aggravated criminal sexual assault (finger to vagina), attempted aggravated criminal sexual assault (penis to vagina), robbery and aggravated battery. Defendant subsequently filed a motion for a new trial, arguing that the court erred by denying his motion for a continuance. Before denying the motion, the court stated as follows:

"The case had been set for trial. We had gone through some difficulties getting it to trial. The witnesses were subpoenaed. The defense thought that they

wanted some medical personnel from the hospital for the purpose of listening to, eliciting what they believe might be some prior inconsistent statement by [the victim] while she was being treated.

The court found, balancing all the needs of the parties, it would not be in the best interest to continue it. I gave some latitude and relaxed some of the rules to allow the evidentiary rulings, not be so strict, and give you some latitude to elicit from the witnesses that were available the things that you wanted to elicit, the very things that you were concerned about. I don't find that Mr. Walker was denied any due process rights."

¶ 29

II. ANALYSIS

¶ 30 On appeal, defendant challenges the trial court's denial of his motion for a continuance to obtain the testimony of five absent witnesses. As a threshold matter, the State challenges defendant's failure to comply with certain procedural requirements, defects that the State did not raise when defendant filed his motion in the trial court. Specifically, the State observes that section 114-4(a) of the Code of Criminal Procedure (the Code) provides that if a motion for a continuance "is made more than 30 days after arraignment the court shall require that it be in writing and supported by *affidavit*." 725 ILCS 5/114-4(a) (West 2010). Similarly, the State points to Cook Count Circuit Court Rule 15.1(h), which states that motions for continuances in cases on ready status "shall be looked upon with disfavor" and "[a]ny motion for continuance in such cases shall be by written affidavit submitted to the court with oral or written notice to opposing counsel by 3:30 p.m. the

previous business day." Cook Co. Cir. Ct. R. 15.1(h) (eff Sept. 1, 1980). The State observes that defendant did not attach an affidavit to his motion and observes it appears that defendant did not comply with the notice requirement. Even assuming that neither requirement provided a basis for the court's decision, we nonetheless find the trial court did not err in denying the motion.

¶ 31 The trial court's decision to deny a continuance will not be reversed absent an abuse of discretion. *People v. Walker*, 232 Ill. 2d 113, 125 (2009). Nonetheless, where the court's "refusal of additional time in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights, a resulting conviction will be reversed." (Internal quotation marks omitted.) *Id.* at 125 (quoting *People v. Lewis*, 165 Ill. 2d 305, 327 (1995)). Section 114-4(b)(3) of the Code states that "[a] written motion for continuance made by defendant more than 30 days after arraignment may be granted when *** [a] *material* witness is unavailable and the defense will be *prejudiced* by the absence of his testimony; however, this shall not be a ground for continuance if the State will stipulate that the testimony of the witness would be as alleged." (Emphasis added.) 725 ILCS 5/114-4(b)(3) (West 2010). In addition, section 114-4(d) states that "[t]he court may upon the written motion of either party or upon the court's own motion order a continuance for grounds not stated in [subsection] (b) *** if he finds that the interests of justice so require." 725 ILCS 5/114-4(d) (West 2010). In addition, in reviewing the denial of a motion for a continuance, the appellate court has previously considered whether (1) the defendant was diligent in attempting to secure the witness's presence; (2)

the defendant has shown that the witness's testimony was material and may have affected the verdict; and (3) the exclusion of the testimony prejudiced the defendant. *People v. Moore*, 397 Ill. App. 3d 555, 561 (2009). Furthermore, the supreme court has stated that whether the trial court has abused its discretion depends on each case's facts and circumstances and there is no mechanical test for determining when the denial of a continuance violates the accused's substantive right to defend himself. *Walker*, 232 Ill. 2d at 125. Factors to consider include, among other things, (1) the movant's diligence; (2) the defendant's right to a speedy, impartial and fair trial; (3) the interest of justice; (4) the case's history; (5) the case's complexity; (6) the seriousness of the charges; (7) docket management; (8) judicial economy; and (9) inconvenience to the parties and the witnesses. *Id.* at 125-26.

¶ 32 Defendant relies heavily on *Walker*, where the supreme court found the record clearly showed that the trial court completely failed to exercise discretion in ruling on the defendant's motion for a continuance and did not consider any relevant factors before denying the motion. *Id.* at 126. The supreme court noted that the history of the case did not show a pattern of delay attributed to the defendant and that the trial court's statement that defense counsel's explanation for being unprepared was "irrelevant" distinguished the case from other cases where the parties dispute whether the trial court appropriately weighed the relevant factors. *Id.* at 126-27. The supreme court also noted that the court did not ask counsel for the length of the continuance sought, denied the request with less than a page of trial transcript, and did not comment on the interest of justice, the case's

complexity, the severity of the double-murder charges, docket management, judicial economy, or inconvenience to the parties or witnesses. *Id.* at 125, 127, 129.

Furthermore, because the defendant requested a bench trial, rather than a jury trial, it may have been more easy to reschedule. *Id.* at 128. The supreme court also found that the trial court openly displayed baseless hostility toward defense counsel and that the record did not show defendant was seeking a continuance as a vehicle for improper delay. *Id.* at 128-29. Based on the specific facts presented, the supreme court concluded that the trial court acted reflectively and completely abdicated its responsibility to engage in an informed deliberation. *Id.* at 129. The supreme court then reminded the bench and bar that a continuance involves a defendant's constitutional right to a fair, procedurally sound trial, "which necessitates the making of a sufficient record to establish that defendant has been afforded a fair process." *Id.*

¶ 33 The case before us is readily distinguishable from *Walker*. Here, the discussions of defendant's request for a continuance were extensive, covering a total of seven pages of trial transcript. The trial court initially asked defense counsel why she was seeking a continuance, rather than stating that counsel's reason was irrelevant, and noted that the court was hearing of this problem for the first time. Defense counsel explained that the five witnesses were critical to the defense because they would testify that the victim did not mention digital penetration. The court asked whether the witnesses were under subpoena and learned that they were not. Defense counsel stated that her attempts to have them served were unsuccessful without specifying why. In addition, the court considered

the circumstantial nature of the prospective testimony and asked for the facts to which the State was willing to stipulate. This was appropriate given that section 114-4(b)(3) states that the absence of a material witness is not a grounds for a continuance "if the State will stipulate that the testimony of the witness would be as alleged." 725 ILCS 5/114-4(b)(3) (West 2010). When defense counsel raised the issue at the end of trial, counsel declined to ask for warrants to be issued for the witnesses who had been served during trial. The court found that the defense's strategy had been implemented through the cross-examination of the victim and Brenza and considered the interests of the parties, the witnesses and the victim. Before denying defendant's motion for a new trial, the court further explained that there had been difficulty in getting the case to trial, that the court found it better to relax evidentiary rules for defendant's benefit, and that defendant's due process rights were not violated. Unlike *Walker*, the record clearly shows that the court considered several factors in denying defendant's motion for a continuance. Contrary to defendant's suggestion, *Walker* does not state that a trial court must expressly apply every factor considered.

¶ 34 As defendant suggests, the record does not show that a lack of diligence on his part caused 18 months to pass between the arraignment and trial. It does not follow, however, that the trial court could not consider the delay in its decision. On the contrary, the overall delay in this case speaks to several of the appropriate factors enumerated in *Walker*, such as the case's history, docket management, judicial economy and convenience to the parties and witnesses. *Cf. Moore*, 397 Ill. App. 3d at 561-62 (finding

that the desire to adhere to a predetermined schedule is not a proper basis for the denial of a continuance but that such basis was not reversible error where the defendant did not make an offer of proof regarding the absent testimony). In addition, defendant argues that neither the State nor the trial court alleged before trial that defendant lacked diligence in attempting to secure the absent witnesses. We reiterate that *Walker* does not require the court to articulate all of its reasoning. Nonetheless, defendant disregards that the trial court noted it was hearing of defendant's difficulty for the first time and ignores that it is his burden to demonstrate why a continuance is appropriate, not the trial court's burden to show the contrary. See *People v. Meeks*, 249 Ill. App. 3d 152, 171 (1993). Similarly, while defendant argues the trial court failed to ask defendant how long of a continuance was needed, defendant did not volunteer that information, possibly because counsel did not know how long it would take to subpoena the witnesses' testimony.

¶ 35 Defendant made no record of when he began his attempt to secure the testimony of those witnesses through subpoenas or why he was unable to do so before trial began. *Cf. People v. Timms*, 59 Ill. App. 3d 129, 135-37 (1978) (The trial court failed to grant a continuance where defense counsel did not lack diligence in securing the absent witnesses, family members who were expected to testify on their own, where the witnesses' appearance was delayed by last minute events unrelated to the issuance of a subpoena, and where the witnesses would have corroborated the defendant's alibi.). In addition, no subpoenas or returns have been included in our record on appeal. Defendant has never suggested that any of the five witnesses were newly discovered when defendant

presented his motion for a continuance and his success in having two of the witnesses served during trial does not itself show that defendant was diligent. *Cf. People v. Martinez*, 2011 IL App (2d) 100498, ¶¶ 5-8 (appeal pending) (the record affirmatively showed the State had been attempting to secure missing witnesses for at least 10 months); see also *People v. Scales*, 307 Ill. App. 3d 356, 358 (1999) (the trial court does not abuse its discretion by denying a motion for a continuance when no reasonable expectation exists that the witness will be available to testify in the foreseeable future). Furthermore, although defendant argues that the State did not object to its motion, the State clearly indicated that it preferred to proceed to trial by conceding the statements in the medical records.

¶ 36 Diligence aside, the record shows that the absent witnesses' testimony would be cumulative not material. *Cf. People v. Cobb*, 97 Ill. 2d 465, 478-79 (1983) (the trial court failed to permit the defense a reasonable opportunity to locate and present the testimony of a foundation witness necessary for the testimony of a second witness who would identify offenders other than the defendant). It was undisputed at trial that the victim did not tell medical personnel that defendant put his fingers in her vagina. Accordingly, the substance of what the victim told medical personnel was not closely contested (*Cf. People v. Wilson*, 120 Ill. App. 3d 950, 959 (1983) ("On the question of materiality and possible prejudice, it is clear that the issue of defendant's sanity at the time of the occurrence was closely contested")), and additional testimony to that fact would be cumulative. In addition, while the victim explained that she denied or failed to report rape, vaginal

penetration and digital penetration to medical personnel because she misunderstood those terms, defendant never suggested at trial that the absent witnesses had any means of impeaching the victim's personal understanding and defendant never made an offer of proof to that effect. *Moore*, 397 Ill. App. 3d at 561-62 (where a defendant seeks a continuance to secure a witness's presence, the defendant must make an offer of proof as to the witness's proposed testimony). To the extent defendant argues that the absent witnesses could have rebutted the victim's testimony that she was not asked about penetration, defendant never relayed that information to the trial court.

¶ 37 For similar reasons, we reject defendant's assertion that he was prejudiced by the absence of cumulative circumstantial evidence. The absent witnesses did not witness the offense and would not have bolstered the credibility of defendant's testimony any more than the cross-examination of Brenza did. Despite undisputed testimony that the victim did not report to medical personnel that she had been digitally penetrated, the jury apparently believed the victim's explanation that she did not understand the terminology and that defendant had digitally penetrated her vagina, as corroborated by Detective Juarez's testimony that that the victim reported digital penetration, and by defendant's written statement representing the same.

¶ 38 Nonetheless, defendant contends that the written statements of Dr. Dela Cruz, Dr. Colla and Johnson, presented through the testimony of Brenza, were hearsay and an inadequate substitute for the live testimony of those witnesses. *People v. Donegan*. 2012 IL App (1st) 102325, ¶ 33 (hearsay is an out of court statement offered to establish the truth of

the matter asserted). Defendant ignores that this hearsay evidence was favorable to the defense, not the State. In addition, it is well-settled that "[w]hen hearsay evidence is admitted without an objection, it is to be considered and given its natural probative effect." (Internal quotation marks omitted.) *People v. Harris*, 2012 IL App (1st) 100077, ¶ 26 (quoting *People v. Banks*, 378 Ill. App 3d 856, 861 (2007)). Under these circumstances, where the State did not object, but rather, suggested that these out of court statements be admitted in this manner, those statements were to be given their natural probative effect by the jury and were, as a result, an adequate substitute for the witnesses' live testimony. Moreover, had the medical witnesses themselves testified about the victim's out of court statement, it too would have been hearsay if offered for the truth of the matter asserted, *i.e.*, that defendant did not penetrate the victim's vagina with his fingers. To the extent that defendant merely wished to impeach the victim, that objective was accomplished through the cross-examination of the victim and Brenza in the State's case in chief. Thus, under these circumstances, defendant has not shown that Brenza's testimony regarding the victim's out of court statements was an inadequate substitute for the absent witnesses' testimony. We find it extremely unlikely that the result would have been different had defendant presented the cumulative evidence at issue. Accordingly, defendant cannot demonstrate prejudice.

¶ 39 We further reject defendant's assertion that prejudice is irrelevant to his motion because the error alleged affects his sixth amendment right to compel the testimony of witnesses (see U.S. Const., amend. VI.), relying on *United States v. Gonzalez-Lopez*, 548 U.S. 140

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(2006). In *Gonzalez-Lopez*, the Court held that demonstrating a violation of the sixth amendment right to *choice of counsel* did not require showing prejudice and that such a violation is not subject to harmless error analysis. *Id.* at 146, 152. Nonetheless, the Court also reaffirmed that a violation of a different sixth amendment right, the right to the effective assistance of counsel, is not complete absent a showing of prejudice. *Id.* at 148. Accordingly, *Gonzalez-Lopez* does not stand for the principle that no sixth amendment violation requires a showing of prejudice and does not control the issue before us.

¶ 40 Finally, we note that although defendant asserted in his opening brief that the trial court failed to impose a determinate term of mandatory supervised release, he now concedes that his argument is foreclosed by the supreme court's recent decision in *People v.*

Rinehart, 2012 IL 111719, ¶¶ 23-30.

¶ 41 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 42 Affirmed.