

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 01-CF-143
)	
MARK J. ANDERSON,)	Honorable
)	Blanche Hill Fawell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying defendant's motion for forensic testing under section 116-3 because one type of the testing sought in the motion was scientifically available at the time of trial, and because any results would not produce noncumulative evidence that could significantly advance defendant's claim of actual innocence. Therefore, we affirmed.

¶ 2 Defendant, Mark J. Anderson, appeals from the trial court's denial of his motion for forensic testing under section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2012)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 8, 2001, defendant was charged by indictment with three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2000)) and one count of aggravated sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2000)) for acts he allegedly committed against his girlfriend's nine-year-old daughter, A.F., between September 1, 2000, and December 25, 2000. Count I alleged that defendant placed his penis in A.F.'s mouth while in the basement of their home; count II alleged that he did the same thing while in a bedroom; and count III alleged that defendant placed his finger inside A.F.'s sex organ. Count IV, alleging aggravated sexual abuse, alleged that defendant had A.F. fondle his penis for his sexual arousal.

¶ 5 In August 2001, the trial court conducted a hearing pursuant to section 115-10 of the Code (725 ILCS 5/115-10 (West 2000)). After hearing testimony, the trial court ruled that out-of-court statements A.F. allegedly made to her brother J.F., and to a DCFS investigator, Casey Woodham, were sufficiently reliable to be admissible at trial.

¶ 6 In January 2003, the defense moved to reopen the section 115-10 hearing based on A.F. recanting her accusations against defendant. A hearing took place the following month, after which the trial court ruled that there was nothing in the recantation that warranted changing the earlier ruling that A.F.'s statements to J.F. and Investigator Woodham were reliable.

¶ 7 Defendant's trial commenced on June 25, 2003. According to evidence presented by the State, on January 31, 2001, the police responded to a report of sexual abuse at defendant's home. The police arranged for an interview at the Du Page County Children's Center (Children's Center) that same day, and A.F. spoke to Investigator Woodham.

¶ 8 Investigator Woodham asked A.F. about good touches and bad touches; A.F.'s answers indicated that she understood the difference. Woodham asked if anyone had ever touched her private part in a bad way. A.F. said that her brother, K.A., and her dad, meaning defendant, had

touched her. K.A. once kicked her in her private part, and defendant had rubbed her front private part and made her feel uncomfortable. In response to Woodham's questions, A.F. said that defendant had touched her private part over her underwear once and under her underwear twice, and defendant made her touch his private part. She said that defendant made her go downstairs, watch naked people on the computer, and then suck his front private part. She said that he had made her suck his private part five or six times, most of the times in the basement and twice in her bedroom. It had not occurred for a couple of weeks; she thought the last time was before Christmas because defendant told her what some of her Christmas presents were. The incidents occurred when she was either home alone with defendant or J.F. was home too.

¶ 9 Woodham asked A.F. to describe what would happen when she and defendant were in the basement. A.F. said that defendant would be sitting in the chair by the computer, with his legs apart, and she would be on her knees, sucking his private part. Without being asked by Woodham, A.F. got out of her chair and demonstrated the position. Woodham asked A.F. to describe what would happen in the bedroom, and A.F. said that defendant would be sitting on the bed while she was kneeling on the floor. When asked to describe defendant's private part, A.F. said that it was small and hairy, and defendant made her "lick it like a lolly pop [sic] from his balls to the tip." Woodham questioned whether it was hard or soft, and A.F. said that it was like wood. Woodham asked if anything came out of it, and A.F. said that "white stuff" came out. A.F. went on to say that defendant told her that girls drink the white stuff, like it, and swallow it. Once time he squirted it into her mouth. Other times he would say that it was coming, she would move out of the way, and he would squirt it on the floor or on the chair.

¶ 10 Woodham asked what the substance tasted like, and A.F. said that it was horrible and "like a disgusting unmade kind of food." A.F. described the substance as looking like banana

juice; she said that she thought it would taste like banana juice, but it did not. When she was sucking on defendant's private part, it would go down to the back of her throat and make her cough. Defendant said that if A.F. told anyone she would be in "big, big trouble." At Woodham's request, A.F. drew pictures of defendant's private part, and the pictures were admitted into evidence at trial.

¶ 11 Woodham interviewed A.F. again on December 30, 2002, this time with Robert Holguin, a criminal investigator assigned to the Children's Center. A.F. started off by saying that she did not want defendant to go to jail for something that he did not do. A.F. said that somebody else "did this" to her, and she thought his name was Robert. She described him as tall and white, with dark hair and a mustache. A.F. explained that she met Robert at the park, and he asked where she lived. J.F. was with her at the park, but he did not see Robert. There were days that A.F.'s mother would take defendant to work, and Robert came over at these times. A.F. let him in the house even though she did not want him to come in. They went into her bedroom, and he rubbed her front private part and made her suck his front private part. This took place four or five times. A.F. said that she told her mom about Robert a couple of weeks before, when they were driving to Kentucky. A.F. first said that no one was home when Robert came over, but later she said that J.F. would be home but sleeping. A.F. said that she never told J.F. about Robert.

¶ 12 J.F. provided the following testimony. He was 13 years old at the time of trial, and in 2000 he lived in Downers Grove with his mother, defendant, and his siblings. A.F. told J.F. a secret sometime between when they moved to Downers Grove and when defendant got arrested. She said that she had to rub and suck defendant's private part and that it tasted nasty. A.F. demonstrated with a hand motion what she did with defendant's penis, and she said that white

stuff came out. One time when J.F. was home alone with A.F. and defendant, J.F. got in trouble, and defendant sent him to his room. J.F. heard a “blaring moan” coming from the room next to him, which was A.F.’s room, but it could have been from A.F.’s radio.

¶ 13 J.F. had referred to defendant as his father for the past eight or nine years. J.F. loved defendant and did not want him to get into trouble. However, J.F. would not lie to protect defendant. After defendant’s arrest, J.F. tried to get A.F. to change her statement so that defendant would not go to prison. J.F. remembered telling a prosecutor that defendant said that if he went to prison, he would die there, but J.F.’s mom might have said that to him.

¶ 14 Frances F. testified as follows. She was the mother of J.F., A.F., and K.A. Defendant was K.A.’s father. Frances met defendant in 1994, and they moved to the Downers Grove house in June 2000. Between September 1, 2000, and December 25, 2000, she left A.F. alone with defendant more than five times, and she left A.F. and J.F. alone with defendant more than five times.

¶ 15 On January 13, 2001, Frances was in the car with J.F., and she told him that she and defendant were going to break up. J.F. then told Frances that defendant had touched A.F. When they got home, Frances sent J.F. into the house and had A.F. come to the car. Frances had a conversation with A.F. during which A.F. cried. Frances called the police later the same day. After defendant was arrested, Frances did not have contact with him for a while. Frances started talking with him again by phone in February 2001 at least every week.

¶ 16 In February 2001, A.F. came into Frances’s room while Frances was in bed and said that defendant had not done this but rather “Rob” had. The same month, Frances conveyed this information to A.F.’s “teacher, her social work, psychologist” Miss Yochim. On March 5, 2001, Frances informed Woodham of this information outside of a courtroom. The same day, she

brought a letter she wrote addressed to Dan Guerin, an assistant State's Attorney, but it did not mention Rob.

¶ 17 Defendant provided Frances with the same level of financial support before and after his arrest. After the arrest, Frances occasionally saw defendant socially and had stayed at his residence in Skokie. She was not in love with defendant, but she cared for him like a friend because he was K.A.'s father. Her relationship with defendant would not cause her to lie for him or choose him over A.F.

¶ 18 According to other evidence presented by the State, defendant came to the police station on the night of January 13, 2001, for questioning, and he waived his *Miranda* rights. A video of the interview, which lasted about one hour, was played for the jury. In the video, defendant initially denied A.F.'s allegations. He admitted watching pornography on the basement computer and masturbating, and he said that A.F. once came down and saw him. She later asked defendant about what he had been doing, and he showed her some websites to teach her about sex. Defendant denied ever touching A.F. Later during the interview, defendant admitted some of the allegations and began to cry and say that he wanted to get "this off his chest." He admitted that A.F. performed oral sex on him twice and she had used her hand on his penis twice. Defendant denied ejaculating into her mouth but admitted that some pre-ejaculation fluid may have gotten in her mouth. Most of these acts took place in the basement, but on occasion they took place in A.F.'s room. Defendant provided a time frame for the events, which was consistent with A.F.'s time frame. He denied touching A.F.'s vagina. Defendant was remorseful about his conduct but also said that A.F. was willing to do the acts, and he had not forced her. In the video, the interviewing officers left the room, and defendant talked on his cell phone with his

mother. Defendant said that the situation was “screwed up” and that A.F. described “everything to a T.”

¶ 19 James Pavelchik, a forensics investigator for the Du Page County Sheriff’s Department, was dispatched to A.F.’s home on January 14, 2001. He used equipment to check for blood and semen in A.F.’s room, and he found one potential sample on the carpet. As he was getting ready to leave, a family member brought a comforter which someone said had been on A.F.’s bed on some point in the past. Pavelchik collected the comforter for further testing. Pavelchik did not take any samples from the basement because officers had told him that defendant had masturbated in the basement, so there was no sense processing that area.

¶ 20 Tamara Camp, a forensic scientist with the Du Page County Sheriff’s Department, testified to the following. The carpet sample tested negative for the presence of blood or semen. The comforter was “heavily soiled,” and Camp tested over 100 areas on it. Three stains tested positive for semen. One of the stains was a “mixture,” containing one full DNA profile and some additional DNA markers from a second person, but they did not match defendant or A.F. The other two stains contained semen, but Camp was not able to obtain a DNA profile from these. The DNA was either degraded, inhibited from reaction, or simply not present in a sufficient quantity. Camp had taken seven “tape lifts” on the blanket to collect hair and fibers, but she did not do any testing on them.

¶ 21 A.F., age 11 at the time of trial, provided the following testimony. Before defendant was arrested in January 2001, she met a man named Rob when she was at the school park with J.F. Rob was tall and white, with dark hair and a mustache. Rob asked A.F. her name, where she went to school, and where she lived, and A.F. answered these questions. Rob came to the house one morning while Frances was dropping defendant off at work, K.A. was with their grandma,

and J.F. was sleeping. A.F. let Rob into the house, and he asked to go to her room because he needed to talk to her privately. Once there, he started touching the inside of her private part and asked her to suck his private part, which she did. Something came out of his private part, which looked like banana juice and tasted “nasty.” A.F. spit the substance out onto her shirt. Rob said that if she ever told anyone, he would hurt her family.

¶ 22 Rob came over four or five times total, always in the mornings before school started when Frances was dropping defendant off at work and J.F. was sleeping. Each time, Rob would do the same thing and white stuff would come out. Sometimes it went in A.F.’s mouth, and sometimes on her covers. Rob touched her private part each time and sometimes had A.F. touch his private part. Rob’s visits stopped before defendant was arrested. A.F. identified the pictures she drew at Woodham’s request as drawings of Rob’s penis. One showed it as “wood,” and the other showed it as “not wood.” A.F. learned the word “wood” from J.F., and Rob also would call his private part “wood” when it got longer.

¶ 23 Before defendant’s arrest, A.F. told J.F. that defendant had abused her. After defendant was arrested, J.F. asked A.F. to lie so that defendant would not go to prison. She did not want defendant to go to prison and felt “really bad” that he was arrested because of what she said. After the arrest, she could not see defendant anymore whereas her brothers still got to do things with him, which made her sad.

¶ 24 A.F. remembered telling Woodham that it was defendant who abused her. She did not remember using a chair to demonstrate how she sucked and rubbed his private part. She also did not remember telling Woodham that defendant made her watch pictures of naked boys and girls on the computer. Once, she came downstairs while defendant was on the computer and saw “cartoonish” pictures of boys and girls, but defendant closed the image right away.

¶ 25 The first time A.F. told someone about Rob was after defendant got arrested and after J.F. told her to lie. Frances was sick in bed and A.F. told her that Rob did this, not defendant. Frances said that she could not talk about it and to get out of the room. A.F. did not recall telling Woodham that the first time she told anyone about Rob was during a trip to Kentucky.

¶ 26 On cross-examination, A.F. was asked if she knew the difference between a truth and a lie, and she replied “[s]ometimes.” When asked, “And is this the truth?”, A.F. responded in the affirmative.

¶ 27 After the trial court denied his motion for a directed verdict, defendant testified to the following. He began a romantic relationship with Frances in mid-1994. After a few months, she, A.F., and J.F. moved in with defendant. In 1997, their son K.A. was born, and they eventually moved to Downers Grove. Defendant financially supported Frances and the children, and he continued to do so after his arrest. Defendant had not been in a romantic relationship with Frances since January 13, 2001. He still had contact with her on a weekly basis because he saw J.F. and K.A. on weekends.

¶ 28 Defendant recalled being interviewed by the police on January 13, 2001, and stated that the video accurately depicted the interrogation. For the first 30 minutes of the interview, defendant denied inappropriate sexual contact. However, the investigator kept questioning him about the allegations, saying that he believed A.F., and defendant felt like the investigator would never believe him. The investigator had mentioned counseling, and defendant thought that was what the investigator wanted him to do. Defendant thought that if he changed his version of events, “there was going to be closure to it.” Essentially, defendant admitted the allegations because he wanted the conversation to stop. When he was talking to his mother on his cell phone, he said that he thought that Frances was behind the accusations because they had talked

about breaking up, and Frances did not want defendant to have custody of K.A. At trial, defendant denied all of the charges and testified that he had never touched A.F. in a sexually inappropriate way.

¶ 29 Defendant acknowledged that after admitting the allegations during the interview, he told the investigator that he was being truthful. When asked if he was confessing to get the interview to stop, defendant said on the video, “I want it to stop, too, but I’m telling you this. You need to know this. I have to get it off my chest.” At trial, defendant testified that what actually happened was that A.F. came across him masturbating to pornographic computer sites and later questioned him about it. He then found some sex education web sites for her. He agreed that one of the sites dealt with bisexuality.

¶ 30 Frances testified for the defense that the comforter that was taken into evidence was purchased new in July 2000. No one but A.F. had used the comforter. A.F. normally slept with the comforter in the bedroom, but if she was sleeping in the living room or basement, she would use the same comforter. Frances had touched the comforter in that she had picked it up off the floor in A.F.’s room and the living room. Frances had washed the comforter during the time A.F. was using it. A.F. stopped using the comforter in December 2000, and Frances put it in a box in the basement.

¶ 31 The jury found defendant not guilty of count III and guilty of the remaining three counts. Defendant subsequently filed a motion for a new trial, which the trial court denied on October 31, 2003. Defendant was sentenced to 10 years’ imprisonment for each of the predatory criminal sexual assault convictions and three years’ imprisonment for the aggravated criminal sexual abuse conviction, with all terms to run consecutively, for a total of 23 years’ imprisonment.

Defendant filed a motion to reconsider the sentence, which the trial court denied on February 11, 2004.

¶ 32 Defendant appealed, and this court dismissed the appeal for lack of jurisdiction because defense counsel had filed a premature notice of appeal and failed to file a new notice of appeal. Defendant then filed a postconviction petition asserting, *inter alia*, that defense counsel was ineffective for failing to file a timely notice of appeal. The trial court denied the petition, and defendant appealed. On February 2, 2010, this court remanded the case for the trial court to determine the applicability of *People v. Ross*, 229 Ill. 2d 255 (2008). The trial court thereafter ruled that *Ross* applied and that defense counsel was ineffective in failing to file a timely notice of appeal. It therefore allowed defendant to file a late notice of appeal.

¶ 33 In his direct appeal, defendant argued that: the trial court abused its discretion in allowing A.F.'s hearsay statements to be presented at trial under section 115-10; count I should be reversed for lack of a *corpus delicti*; and the sentences imposed on the sexual assault offenses were excessive in light of his background. This court affirmed defendant's convictions and sentences. *People v. Anderson*, No. 2-10-0341 (2011) (unpublished order under Supreme Court Rule 23).

¶ 34 On May 10, 2012, defendant filed a motion for forensic testing that was not available at trial. He alleged that identity was at issue at trial because A.F. testified that a person named Robert perpetrated the crimes against her, not defendant. Defendant sought forensic testing of evidence from the comforter identified at trial as belonging to A.F. Specifically, he requested that the hair and fibers collected from the seven tape lifts, which were never previously analyzed, be subjected to PCR/STR mitochondrial (mtDNA) testing and Y-chromosomal short tandem repeat (Y-STR) DNA analysis. Defendant additionally requested that the three stains from the

comforter be subjected to these tests, which he alleged were not available at the time of the prior testing. Finally, defendant requested that any DNA profiles be compared to those of individuals on the “CODIS” database.

¶ 35 The State filed a responsive motion stating that under section 116-3(a)(2) of the Code (725 ILCS 116-3(a)(2) (West 2012)), defendant was required to show that the technology for such testing was not available at trial. The State maintained that mtDNA testing was invented in the late 1990s, and the testing here took place between February 2001 and June 2003. The State further argued that defendant forfeited his request for Y-STR DNA testing by failing to explain how the results would be materially relevant to his claim of actual innocence; that Y-STR testing cannot establish who is the singular contributor of evidence at a crime scene; that Y-STR has never been found to be admissible at trial in Illinois; and that while claiming identity was at issue, defendant failed to address any other evidence the State presented that resulted in his conviction.

¶ 36 The trial court denied defendant’s motion on July 18, 2012, on the basis that identity of the individual who committed the acts of sexual penetration was not at issue at trial. The trial court stated that the issue instead was whether the State proved defendant guilty beyond a reasonable doubt.

¶ 37 On August 22, 2012, defendant filed a motion to reconsider, arguing that he should have been allowed to file a reply to the State’s response. On August 30, 2012, defendant filed a motion for leave to refile his motion to reconsider, stating that he may have forgotten to sign the first motion. On September 5, 2012, the trial court granted defendant’s motion for leave to file but denied his motion to reconsider. Defendant timely appealed.

¶ 38

II. ANALYSIS

¶ 39 On appeal, defendant challenges the trial court's denial of his motion under section 116-3. We review *de novo* a trial court's ruling on a motion for testing pursuant to section 116-3 without an evidentiary hearing. *People v. English*, 2013 IL App (4th) 120044, ¶ 14. Relatedly, we are not bound by the trial court's reasoning for its ruling and can affirm the judgment on any basis in the record. *Id.*

¶ 40 A defendant may bring a motion for forensic testing not available at trial if the evidence that is sought to be tested was either not previously subject to the testing now requested, or it was previously tested but "can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results." 725 ILCS 5/116-3(a) (West 2012). Under section 116-3, a defendant must establish a *prima facie* case that identity was at issue in the trial, and that the evidence to be tested was subject to a sufficiently secure chain of custody. 725 ILCS 5/116-3(b) (West 2012); *English*, 2013 IL 120044, ¶ 15. The court shall allow testing if it determines that the requested testing uses a generally accepted scientific method and the results have the potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence, even though the results may not completely exonerate the defendant. 725 ILCS 5/116-3(c) (West 2012). Evidence is materially relevant to a defendant's claim of actual innocence if it tends to significantly advance the claim. *English*, 2013 IL App (4th) 120044, ¶ 21. To make such a determination, the court must evaluate both the evidence introduced at trial as well as the evidence that the defendant seeks to test. *Id.*

¶ 41 Regarding the first requirement, that the evidence sought to be tested was either not previously tested or the requested tests were not scientifically available at the time of trial, defendant notes that the hairs were never subjected to any DNA testing. He maintains that

although the three semen stains were previously tested, they can now be subjected to mtDNA testing and Y-STR testing. Defendant notes that his trial took place in 2003 and maintains that the forensic testing took place over a period of several months in 2001. He cites journal articles stating that mtDNA testing was invented in the late 1990s and Y-STR analysis was not adopted until the early 2000s. Defendant cites a Texas case for the proposition that mtDNA testing was not “widely available” in 2003, and he argues that the State’s forensic scientist did not offer any testimony suggesting that mtDNA or Y-STR testing were scientifically available testing options in use at the time.

¶ 42 For the requirements of a *prima facie* case, defendant argues that the record shows that the evidence to be tested was subject to a sufficiently secure chain of custody. He further argues that identity was a central issue because the trial hinged on a recanted accusation by A.F., who testified at trial that another man was her abuser, and because defendant maintained his innocence at trial, claiming that his incriminating statements to police were coerced. Defendant argues that in dismissing his request for testing, the trial court wrongly concluded that identity was not at issue based on evidence showing he was the perpetrator. Defendant maintains that the strength of the State’s case is not relevant to the determination (see *People v. Rozo*, 2012 IL App (2d) 100308, ¶ 19), but rather a defendant makes a sufficient case for forensic testing by showing that he claimed at trial that another person committed the crime (see *People v. Bailey*, 386 Ill. App. 3d 68, 74 (2008) (a defendant who confesses is entitled to seek relief under section 116-3 if he contests his guilt at trial)). See also *People v. Urioste*, 316 Ill. App. 3d 307, 314 (2000) (“Provided that identity was a genuine issue, contested during the trial that led to the conviction, a lingering question of actual innocence could still exist.”).

¶ 43 Finally, defendant argues that the testing he seeks has the potential to produce new, noncumulative evidence that significantly advances his actual innocence claim. Defendant points out that Y-STR targets just the DNA of the male chromosome, making it well-suited for mixed-gender samples, and can conclusively exclude a man from the pool of possible suspects. See *People v. Barker*, 403 Ill. App. 3d 515, 527 (2010). Defendant cites journal articles for the proposition that mtDNA testing may be helpful in situations where PCR testing has failed, where there are small amounts of DNA, or where the DNA is old or degraded, and he argues that it could potentially yield results for the two samples where Camp was unable to obtain any. Defendant argues that re-testing all three of the semen stains using the new tests also has the potential to establish whether all three were from a common contributor.

¶ 44 Defendant additionally argues that DNA testing of the hairs and semen stains could identify A.F. as a contributor, which would affirmatively tie A.F. to the blanket and rebut the State's argument at trial that the blanket was not important. Defendant maintains that the testing would not be cumulative of the evidence that he was already excluded as the contributor to one of the semen stains, because the State's failure to identify the contributor to the two remaining stains allowed the jury to speculate that defendant may have been the source of that semen, whereas tests excluding him from all stains would foreclose the possibility of such speculation. Defendant argues that if the testing shows that A.F. was a contributor to the DNA mixture in either of the two mixed semen samples and defendant was not, it would strongly suggest that the sexual assaults were committed by someone else. Finally, defendant argues that any unidentified profiles should be compared to those in the CODIS database to potentially identify the actual offender.

¶ 45 As it did in the trial court, the State again argues that testing of evidence for the trial took place between February 2001 and June 2003, subsequent to the invention of mtDNA testing in the late 1990s. It also repeats its argument that defendant forfeited his request for Y-STR DNA testing by failing to explain in his motion how such testing would have the scientific potential to produce evidence materially relevant to his claim of innocence. The State argues that, regardless, a Y-STR test would not have the potential to produce more probative results here. The State cites *People v. Zapata*, 2014 IL App (2d) 20825, ¶ 5, where this court held that Y-STR testing has gained general acceptance. In doing so, we quoted a California appellate court case stating that Y-STR testing is essentially the same as PCR-STR testing,¹ except that it allows the analysis of only male DNA in a mixed sample that also contains female DNA. *Id.*

¶ 46 The State further argues that favorable test results would not significantly advance defendant's claim of innocence because contrary to defendant's claim that the comforter was A.F.'s, evidence at trial showed that the blanket was in the basement of the home. According to the State, although Frances testified that only A.F. used the comforter, France's credibility at trial was "virtually non-existent" because she was still seeing defendant socially. The State also argues that even if the tests showed someone else's DNA, it would not undermine defendant's conviction given the evidence at trial, including defendant's videotaped confession and J.F.'s testimony that A.F. confessed to him that defendant was sexually abusing her. Last, the State argues that defendant is not entitled to DNA testing because identity was not at issue at trial because both A.F. and J.F. knew defendant.

¶ 47 Looking first at the subject of identity, we agree with defendant that identity was at issue at trial. Defendant's theory of the case was that another man who called himself Robert or Rob

¹ PCR-STR testing was done on the semen stains on the comforter here.

was actually the person who had sexually abused A.F., and that defendant's confession to the police was a result of police coercion. The prior confession alone does not remove identity as an issue at trial, as a defendant who confesses may still seek relief under section 116-3 if he contests his guilt at trial. *Bailey*, 386 Ill. App. 3d at 74. In this manner, this case is distinguishable from *People v. Urioste*, 316 Ill. App. 3d 307, 310 (2000), cited by the State, because there the defendant admitted to the acts charged at trial but asserted insanity. Further, as mentioned, "the strength of the State's evidence is not a hurdle that the defendant must overcome to meet the requirements of the statute." *Rozo*, 2012 IL App (2d) 100308, ¶ 19.

¶ 48 That being said, we ultimately agree with the State that the trial court did not err in denying defendant's motion for forensic testing. Defendant's trial took place in 2003, and he admits that mtDNA testing was invented in the late 1990s. Thus, mtDNA testing was "scientifically available at the time of trial" (725 ILCS 5/116-3(a) (West 2012)), so the semen stains were ineligible for re-testing using this procedure. Although defendant argues that it was not widely available and there is no evidence that such testing was used in Illinois at the time of his trial, that is not the standard required under the statute. See *Rozo*, 2012 IL App (2d) 100308, ¶ 10 ("The standard is not whether the lab that tested the evidence has fully implemented that particular test but whether the test was" scientifically available.).²

² We further note that in *People v. Kliner*, 203 Ill. 2d 402, 405-06 (2002), the trial court entered an order in 2001 allowing mtDNA analysis. Defendant argues that the availability of mtDNA testing was not at issue in *Kliner* and was not addressed in that decision. Nonetheless, the fact that the trial court entered an order allowing such testing indicates that it was available in Illinois at that time.

¶ 49 Moreover, we agree with the State that any genetic testing of the hair and stains would not produce noncumulative evidence that could significantly advance defendant's claim of actual innocence. Given testimony that the comforter was being stored in the basement of the family home and had been on the living room floor at times, the presence or absence of A.F.'s or defendant's hair on the blanket would be insignificant. Similarly, whether A.F.'s bodily fluids could be identified in the semen stains would not resolve whether defendant was the perpetrator. Most significantly, the jury already heard evidence that defendant was excluded as the source of one of the semen stains. Thus, the jury already had physical evidence before it that the comforter allegedly used exclusively by A.F. had a semen stain on it that did not come from defendant, and the jury still found defendant guilty of sexual offenses against A.F. Evidence that defendant was also not the source of the other two stains would be largely cumulative of the evidence that he was not the source of the first stain, and it would not significantly advance his claim of actual innocence. *Cf. People v. Savory*, 197 Ill. 2d 203, 214-15 (2001) (where bloodstain was only a minor part of the State's evidence against the defendant, it was not materially relevant to the defendant's claim of actual innocence because a favorable test result would exclude only one relatively minor item from the evidence of guilt); *People v. Bailey*, 386 Ill. App. 3d 68, 76-77 (2008) (where the State's case was based upon the defendant's confession and knowledge of the crime scene, and the parties stipulated that certain fingerprints and an eyebrow hair at the scene did not match the defendant or the codefendant, forensic testing would not materially advance the defendant's claim of actual innocence). Accordingly, the trial court did not err in denying defendant's motion for forensic testing under section 116-3.

¶ 50

III. CONCLUSION

¶ 51 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 52 Affirmed.