2015 IL App (1st) 130998-U

FIRST DIVISION
August 24, 2015

No. 1-13-0998

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TAUREAN LEWIS, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 12 CR 4547 Honorable Clayton J. Crane, Judge Presiding

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm defendant's jury conviction on two counts of criminal sexual assault. However, we vacate defendant's concurrent sentence of two 10-year prison terms and remand this cause for resentencing in accordance with section 5-8-4 of the Unified Code of Corrections (730 ILCS 5/5-8-4 (West 2012)).

¶ 2 Following a jury trial, defendant Taurean Lewis was found guilty of two counts of sexual assault and sentenced to two concurrent prison terms of 10 years. On appeal, defendant contends that (1) the trial court erroneously permitted the State to introduce highly prejudicial other crimes evidence; (2) the court improperly allowed forensic evidence purporting to identify him as the

perpetrator of a previously committed sexual assault; and (3) the State made improper and prejudicial remarks during its opening statement and closing argument. In addition, the State asks this court to remand the cause for resentencing because the concurrent sentence imposed does not conform to the statutory mandate requiring consecutive sentencing. We affirm defendant's conviction and remand this cause for resentencing in accordance with section 5-8-4 of the Unified Code of Corrections (Corrections Code) (730 ILCS 5/5-8-4 (West 2012)).

¶ 3 BACKGROUND

¶ 4 The State charged defendant, *inter alia*, with two counts of criminal sexual assault in connection with a February 6, 2012, incident involving the victim, K.M. Following admonishments from the trial court, defendant elected to proceed *pro se*.

¶ 5 Before trial, the State moved to allow other crimes evidence, specifically, evidence of defendant's sexual assaults against three other women, A.R., N.A., and M.K., to show his propensity to commit the crimes charged against him. The State argued that the three offenses were proximate in time to the charged offenses, factually similar, involved immediate outcries and generated DNA matching that of defendant. Defendant countered that there were a number of dissimilarities between the charged offenses and the other alleged crimes, he was never convicted of any of the other alleged crimes, and the case involving A.R. was expunged from his record. He also argued that the prejudicial effect substantially outweighed the probative value.

¶ 6 The trial court found that, under the balancing test set forth in *People v. Donoho*, 204 Ill. 2d 159 (2003), the other crimes evidence from the N.A. and M.K. cases were admissible, but it excluded evidence from the A.R. case. The State proceeded forward on the two counts of criminal sexual assault and nol-prossed the remaining three counts. Immediately before opening statements, the trial court admonished the jury that opening statements were not evidence; they

were "merely statements of what the attorneys expect the evidence to show so you can make sense of what is introduced." The trial court also admonished the jury that closing arguments were not evidence, but instead "how the evidence might be interpreted."

¶ 7 During its opening statement, the State told the jury:

> "[Y]ou will have an opportunity to meet [K.M.], and you will see that she is young. She was 17 when this happened, a high school student. She is very shy, she is soft spoken, and she is trustworthy. And that is exactly why this guy (indicating) targeted her because he knew that she would be the perfect victim for him and what he had in store on that day."

In his opening statement, defendant said the evidence would show K.M. consented.

¶ 8 K.M. testified that, on February 6, 2012, she was 17 years old, lived with her aunt on the west side of Chicago, and attended Espira [*sic*] Early College High School. She identified defendant in court as the person who sexually assaulted her. She met defendant a few weeks before the incident, when she was out with a group of friends and saw defendant driving a white Buick. They exchanged telephone numbers and spoke by telephone that same day and a few more times during the week. They also exchanged text messages.

¶ 9 On February 6, 2012, K.M. and defendant agreed to meet and go to a movie together. Defendant picked K.M. up from her aunt's house, but instead of going to a movie theater, defendant took her to his apartment to watch a movie. Until that point, the conversation between K.M. and defendant was friendly. K.M. described defendant as "really nice." Defendant resided on the third floor of an apartment complex. His apartment contained no furniture, with the exception of an air bed and television in the bedroom. They sat on the bed and watched a movie

together. Defendant began trying to kiss K.M. on her neck and face, but she tried to move away because she did not want him to kiss her. She told defendant, "[s]top, no, that's not what I want you to do." At first, defendant stopped, but a few minutes later, he started trying to take off K.M.'s clothes. Defendant also started to remove his clothing.

¶ 10 Next, defendant asked K.M. if she wanted to put her mouth on his penis. She said no, to which defendant replied, "[w]ell, we're going to have sex." K.M. told defendant that she did not want to have sex. He put his leg between her legs and removed her clothing. At that point, he was mostly undressed. Defendant held K.M. down with his arms and took her pants off, ripping them in the process. While removing her pants, her underwear came off as well. K.M. told defendant, "Please, no, I don't want to do this," and begged him to stop, but once he removed her clothes, he put his penis into her vagina, took it out, put on a condom, and then inserted his penis into her vagina again. K.M. did not say anything to defendant while he was doing this. Although the sexual intercourse "felt like a long time," it maybe lasted a few minutes.

¶ 11 When defendant finished having vaginal intercourse with K.M., he went to the bathroom. He returned and put his clothes back on. K.M. sat on the air bed, afraid defendant would hit her if she put her clothes back on. At some point, she felt safe enough to get dressed, but defendant asked her, "Why do you look mad?" K.M. tried to act normally and told defendant, "I'm fine." She told defendant that because she wanted to get out of his apartment safely and did not want him to think anything was wrong. He asked her if she was ready to leave, she said yes, and they got into defendant's car. While driving back to her aunt's house, defendant asked K.M. if she was going to tell the police what happened, and she said she would not. When they arrived, he again asked K.M. whether she was going to tell anyone about what happened, and she responded

no. He also asked whether she would call him again and she said, "Sure, I'm gonna call you," because she wanted defendant to think everything was all right.

¶ 12 As soon as K.M. entered the hallway outside of her aunt's house, she called her friend Tiffany Cooper and told her that she had been sexually assaulted. She started crying, and Cooper told her to go inside the house. She saw her aunt, Paulette M., and kept crying. Cooper contacted the police to report the sexual assault. The police arrived at Paulette's house and took K.M. to the hospital. K.M. described how she underwent a "rape kit" examination by a nurse. K.M. said the pants she wore during the incident initially had a hole about the size of a quarter, but defendant caused the hole to increase to the size of five quarters as he tore them off of her. On cross-examination, K.M. said she did not remember telling Chicago police detective Gina Rodriguez that she removed her own pants.

¶ 13 Cooper testified that she is a close friend of K.M. and had known K.M. throughout high school. K.M. called Cooper between 9 and 10 p.m. on February 6, 2012, crying and very upset. She immediately told Cooper that she had been raped. Cooper told her to call the police, but K.M. responded that she was too scared to do so. Cooper offered to call the police on her behalf. K.M. did not provide Cooper with any of the details of the alleged sexual assault. Cooper asked for K.M.'s location, and then Cooper called the police and directed them to Paulette's house. She was still on the telephone with K.M. when the police arrived.

¶ 14 Paulette testified that K.M. returned to her home a few minutes after 10 p.m. on February 6, 2012. She noticed something was wrong with K.M. and asked her if everything was all right. Paulette observed that K.M. had been crying and appeared upset. K.M. remained quiet, entered the house, and walked straight towards the bathroom. When K.M. exited the bathroom, she was very upset and talking to someone on the telephone. K.M. told Paulette, "Auntie, you need to go

downstairs with me. The police [are] downstairs." According to Paulette, K.M. "was crying real hard." K.M. returned from the hospital at about 4:30 a.m. and did not have her clothes from earlier. K.M. got into Paulette's bed and began crying on her shoulder. K.M. did not attend school for the next few days. She stayed in Paulette's room crying, sleeping in the same bed with Paulette at night. Normally, K.M. slept on the couch. K.M. refused to talk about the incident, and she appeared scared and upset. Paulette admitted to a previous conviction for possession of a controlled substance. On cross-examination, Paulette agreed that K.M. told her that she was going out that night to eat pizza with Cooper. Paulette also agreed that she had never met defendant and was not present at the time of the alleged incident.

¶ 15 Chicago police officer Timothy Belcik testified that, on February 9, 2012, he and his partner, Officer Diblich, were assigned to investigate and locate an offender involved in an alleged criminal sexual assault. Chicago police detective Gina Rodriguez provided defendant's physical description and first name, and instructed the officers to search the area of 2009 North Tripp Avenue in Chicago. The officers arrived at that address and observed that one of the mailboxes in the front vestibule of the building was labeled with defendant's name. The officers proceeded to a third floor apartment, knocked on the door several times, and announced their office. After failing to get a response, the officers later returned to the building, saw a white vehicle that possibly belonged to defendant, and confirmed that the license plate number of the vehicle belonged to defendant. A second attempt to knock on the door yielded no answer, so they returned to their vehicle and set up a point of surveillance.

¶ 16 Later that night, Officer Belcik noticed defendant leave the apartment building, walk up to a white vehicle, open the door, and rummage through the vehicle. Officer Belcik pulled his car up alongside defendant's vehicle. The officers got out of their car, announced their office,

and asked defendant to identify himself. Defendant looked in the direction of the officers and appeared very angry. Officer Belcik felt that defendant was seeking to flee, so Officer Belcik told defendant to turn around and put his hands on the hood of the squad car. Officer Diblich inspected defendant's vehicle and found his work identification, credit card, and a passport. After a positive identification of defendant, the officers took hold of defendant's wrist and told him that he was under arrest. At that moment, defendant became more aggressive and combative, stiffening up his arms and pulling away. Officer Belcik said it appeared that defendant made a spitting motion toward the officers. When they told defendant he was under arrest for criminal sexual assault, he responded, "Fuck you, I know what you want. You can only hold me for 48 hours." The officers handcuffed defendant and put him into their squad car.

¶ 17 Officer Belcik stated that Officer Diblich read defendant his *Miranda* warnings and asked defendant what he was doing at this location, but defendant did not reply. Officer Belcik then stated that he and his partner were worried that, based upon defendant's actions, namely, "being aggressive and confrontational and being very evasive and not answering our questions," there could have been additional victims in the apartment complex, so they canvassed the building, knocking on doors to make sure everyone was all right. Defendant's apartment door was open, so they looked inside to ensure no other victims were inside. They saw an air mattress and a television on top of a plastic container. Belcik also testified that he also saw what he believed to be a bulletproof vest, or "at least the cover" of a vest hanging in the closet. After searching defendant's apartment, the officers transported him to the police station.

¶ 18 Cynthia Riemer, a nurse at Mt. Sinai Hospital, testified as an expert witness without objection. Riemer was working in the emergency room on the evening of February 6, 2012, and was assigned to treat K.M., who was brought to the emergency room for a sexual assault

examination. K.M. said that she had been raped, and she agreed to submit to a criminal sexual assault kit examination, which is used to obtain DNA evidence from patients. A pelvic exam of K.M. showed no trauma or injury to her vagina, but Riemer stated the lack of trauma or injury to the vagina in a sexual assault is not unusual because the vagina is an elastic organ; Riemer added that, in the approximately 100 sexual assault examinations she conducted, she only recalled two instances of there being either trauma or injury to the vagina. Riemer stated that, in her opinion, K.M.'s account of what occurred on the night of February 6, 2012, was consistent with the criminal sexual assault kit administered on that date.

¶ 19 Cook County state's attorney's investigator Leonard Plaxico testified that on April 10, 2012, he was assigned to obtain a buccal swab from defendant. After obtaining the buccal swab from defendant's interior cheek, Plaxico placed it in a sealed envelope and then put it in an extra outer envelope, sealed it in front of defendant, signed it, and dated it. Plaxico returned the sealed envelope to the state's attorney's office and placed it in an evidence vault. The sealed envelope remained in the evidence vault until April 12, 2012, when Plaxico transported it to the Chicago police department's forensic services unit. He stated that he delivered the envelope in a sealed condition. Defendant did not question Plaxico on the chain of custody of the buccal swab. The parties stipulated to the chain of custody as to the transport of the criminal sexual assault kit.

¶ 20 The following day, the trial court informed the jury that it would receive evidence that defendant had been involved in another crime, and the trial court admonished the jury that the evidence was being received on the issue of motive[1] and was to be considered by them only for that limited purpose.

[1] The trial court later instructed the jury that the evidence could be considered for both defendant's intent and propensity to commit the charged offense.

¶ 21 M.K. then testified that on the night of November 11, 2007, she was 14 years old, lived in Oak Park, Illinois, with her mother, and attended Oak Park/River Forest High School. That night, she was walking to a party with her friend, Betty, when they were approached by a man driving a dark-colored Buick with two other men inside. M.K. identified defendant in court as the driver. Defendant asked M.K. how old she was and she told him that she was 14. M.K. stated that she and Betty accepted a ride to the party from defendant because Betty knew him. M.K. described defendant at that time as "cool," "nice," and "nothing weird about him."

¶ 22 Later, while walking outside after the party, M.K. and Betty saw the Buick again. Defendant circled them two or three times with the car before approaching. Another man was also in the car. M.K. and Betty got in the car and defendant took them to an apartment building, a liquor store, and finally, an alley. Defendant told them that he had to use the bathroom. Defendant drove deeper into the alley and pulled up against a garage. M.K. did not know the location of the alley. M.K. felt scared and knew something was not right. She described how defendant's demeanor changed from earlier that evening. Defendant had parked the car in the alley up against a wall so that M.K. could not exit the vehicle.

¶ 23 Defendant pulled out a gun and told M.K. and Betty to perform oral sex. Defendant pointed the gun in between M.K.'s eyes. M.K. thought about trying to escape, but realized she could not find a way out of the car. She complied with defendant's demand to perform oral sex and defendant ejaculated while her mouth was on his penis. Defendant told M.K. to swallow his semen. She complied with defendant's demand and then described how some semen fell onto the armrest, which she wiped off with her shirt.

¶ 24 Next, defendant pulled out of the alley, drove a few blocks, ordered M.K. and Betty to get out of the car, and told them not to look at the license plate. Defendant took their cell

phones. M.K. and Betty went to a friend's house and contacted the police. The police picked them up and took them to West Suburban Hospital. M.K. submitted to a criminal sexual assault kit examination, which included a mouth swab. She also gave hospital personnel her clothing. In June 2012, M.K. identified defendant as her assailant in a police lineup, stating that she was "95 percent sure," because "he still looked the same but some things had changed and I wasn't quite sure. But when I looked at like his facial structure, things stuck out to me *** and his height as well." M.K. identified defendant in a photograph of the lineup as the offender.

¶ 25 Jennifer Belna, an Illinois state police forensic scientist, testified that she was assigned to a case involving M.K. and received a criminal sexual assault kit submitted in a sealed condition and marked with a Chicago police inventory number. Belna analyzed the contents of the kit and found five semen stains on a shirt and two stains on a pair of pants. The samples were kept in a secure area of the laboratory, and Belna maintained a proper chain of custody at all times. Another Illinois state police forensic scientist assigned to the M.K. case, Heather Ralph, testified that the DNA from the semen stains found on M.K.'s shirt and pants matched that of defendant's buccal swab. Ralph testified that she maintained a proper chain of custody at all times.

¶ 26 In defendant's case-in-chief, he called Detective Rodriguez, who stated that K.M. said that she removed her own pants at the time of the incident. On cross-examination, Detective Rodriguez testified that during her interview with K.M. at Mt. Sinai Hospital, K.M. told her that she was trying to stop defendant's advances. According to Detective Rodriguez, K.M. was visibly shaken and upset when she interviewed her at the hospital.

¶ 27 Defendant next called Chicago police detective Ronald Schmuck, who testified that K.M. told him that defendant forcibly removed her jeans. Detective Schmuck was aware of Detective Rodriguez's report that stated that K.M. had removed her own pants on the night of the incident.

¶ 28 Defendant elected not to testify, the defense rested, and the matter proceeded to closing arguments. During its initial closing argument, the State recounted K.M.'s testimony regarding the forcible nature of the sexual assault and argued that the two acts of sexual penetration were not consensual. The State read Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (I.P.I. 3.14), concerning the limited purpose of allowing other crimes evidence, and then it argued that defendant committed a previous sexual assault involving M.K.

¶ 29 During his closing argument, defendant first stated, "Ladies and gentlemen of the court, once again I stand here in front of you." Defendant noted he was not an attorney and did not know as much about the practice of law as the state's attorney. He nonetheless argued that K.M.'s trial testimony was inconsistent with the police reports and that the State "has tried to prove something from 2007 that I'm totally unaware of." Defendant asked the jury to find him not guilty, and thanked them.

¶ 30 In rebuttal, the State emphasized the DNA evidence linking defendant to the sexual assault he committed against M.K. The State also argued that the jury heard from K.M. and M.K., "two young women who don't know each other, who have no reason to come in here and tell you anything other than what actually happened to them." The State also argued that "[t]hroughout the trial, you have had an opportunity to observe the defendant and he may seem like a polite young man. But keep in mind, ladies and gentlemen, he seems like that because that is one of his personalities. That is the personality that has been able to lure these women to his car, to his apartment." The State continued, "People who rape come in all shapes and sizes. Do not let the defendant fool you like he has been able to fool these young girls."

¶ 31 At the conclusion of closing arguments, the trial court instructed the jury. Among its instructions, the trial court informed the jury that opening statements were made by the attorneys

to acquaint the jury with the facts they expected to be proved. The trial court added that the attorneys' closing arguments were made to discuss the facts and circumstances in the case, and should be confined to the evidence and the reasonable inferences to be drawn from the evidence. The trial court reiterated that neither opening statements nor closing arguments were evidence, and any statement or argument made by the attorneys which was not based on the evidence should be disregarded. The trial court further admonished the jury that evidence had been received that defendant had been involved in an offense other than the one charged in the indictment for the limited purpose of proving defendant's intent and propensity, and that the evidence could only be considered for that limited purpose. The trial court concluded giving jury instructions, and the jury retired to deliberate.

¶ 32 The jury found defendant guilty on both counts of criminal sexual assault. At defendant's request, the trial court reappointed the public defender to assist him with posttrial motions. Defendant filed a motion for new trial that raised various claims but did not challenge the chain of custody with respect to Plaxico's handling of defendant's buccal swab. The court denied defendant's posttrial motion and sentenced defendant to two concurrent terms of 10 years' imprisonment.

¶ 33 The State later filed a motion to clarify sentence or correct mittimus. The State requested a clarification on whether defendant would be sentenced consecutively on both counts and asked that the mittimus be corrected to reflect five years on each count because he was charged with separate acts and the jury found him guilty of separate penetrations. The trial court denied this motion as well as defendant's motion to reconsider his sentence.

¶ 34 This appeal followed.

¶ 35 ANALYSIS

¶ 36 Other crimes evidence

¶ 37 Defendant first contends that the trial court erred in allowing the State to introduce other crimes evidence (*i.e.*, M.K.'s testimony that defendant sexually assaulted her four years' prior to the offense here) to show his propensity to commit sexual assaults. Defendant argues that the facts and circumstances of the assault involving M.K. varied greatly from the subject case, the assault of M.K. was too remote in time, and these matters resulted in the prejudicial effect of this prior incident outweighing its probative value. Defendant seeks a new trial because the incident was "highly" prejudicial and the evidence in this case was not overwhelming.

¶ 38 Section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) provides an exception to the common law bar against the use of other-crimes evidence to show propensity in cases, where, as here, a defendant is accused of criminal sexual assault. 725 ILCS 5/115-7.3 (West 2014). Under this section, evidence of another criminal sexual assault "may be admissible *** and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(b) (West 2014). Relevant matters include allowing evidence of other crimes to show a defendant's propensity to commit sex offenses. *Donoho*, 204 Ill. 2d at 176. Where the other-crimes evidence meets the threshold statutory requirement of relevance and contains probative value, it is presumed to be admissible if its probative value is not substantially outweighed by its prejudicial effect. *Id.* at 182-83. The statute provides the trial court may consider the following factors in conducting this balancing test: (1) the proximity in time to the charged offense; (2) the degree of factual similarity to the charged or predicate offense; or (3) "other relevant facts and circumstances." 725 ILCS 5/115-7.3(c) (West 2014). It should be noted, however, that with respect to the degree of factual similarity, there need only be a mere "threshold similarity," and

even "mere general areas of similarity will suffice," because "no two independent crimes are identical." *Donoho*, 204 Ill. 2d at 184-85.

¶ 39 We will not reverse the trial court's decision to admit other-crimes evidence absent an abuse of discretion. *Id.* at 182. A trial court abuses its discretion when its decision is "arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court." (Internal quotation marks omitted.) *Id.*

¶ 40 In this case, the trial court did not abuse its discretion. Defendant's theory of the case was that K.M. consented to sex, which is what defendant told the jury in his opening statement. Defendant concedes that the prior assault of M.K. was "technically" probative of defendant's intent and propensity, which would refute his consent defense. Thus, it was relevant. Defendant's claim that the facts of M.K.'s assault varied greatly from those of this case is belied by the record. M.K. and K.M. were both African-American females under the age of 18 and were around the same age (14 and 17, respectively). In both cases, defendant drove up alongside the victims, behaved in manner that was either "friendly" and "really nice" (according K.M.) or "cool" and "nice" (according to M.K.). Defendant then talked both victims into getting into his car, and drove them to a location where there would not likely be many witnesses and from which the victims could not easily flee: either his apartment (K.M.) or an alley with the victim's side of the car up against a wall (M.K.). Defendant then became aggressive and demanded oral sex from both victims; K.M. refused, so defendant forcibly vaginally penetrated her, whereas M.K. complied because defendant pointed a gun at her head. On these facts, M.K.'s assault had at least a mere threshold or general area of similarity with K.M.'s assault; indeed, the degree of factual similarity was strong and highly probative of defendant's propensity to commit a sexual offense. The existence of some differences between K.M.'s and M.K.'s assaults provides no

support to defendant's claim because no two independent crimes are identical. *Donoho*, 204 Ill. 2d at 185 (citing *Illgen*, 145 Ill. 2d at 373).

¶ 41 Defendant's citation to *People v. Johnson*, 406 Ill. App. 3d 805 (2010), does not change our holding. There, the defendant was convicted of the aggravated criminal sexual assault and the aggravated kidnapping of the victim, T.W. *Id.* at 806-07. On appeal, the defendant contended, *inter alia*, that the trial court erred in allowing in evidence of a prior uncharged sexual assault against another victim (C.V.). *Id.* at 805. This court agreed, noting that "[o]ne of the most telling differences between the two assaults was the number of perpetrators involved," explaining that C.V. testified she was sexually assaulted by the defendant and another unidentified individual, whereas the victim, T.W., testified that the defendant was the only attacker. *Id.* at 811. This court also observed three other "circumstances" that differed from T.W.'s account: C.V. said that the defendant "used a car during the assault, blew cocaine in her face and gave her alcohol during the assault, and anally penetrated her." *Id.* In addition, this court noted that the trial court failed to consider whether the risk of unfair prejudice substantially outweighed the probative value of the evidence, as required under *Donoho*, and when combined with the factual dissimilarities, resulted in the erroneous admission of the evidence. *Id.* at 812. Here, however, the factual differences are not as dramatic as in *Johnson* and defendant does not argue that the trial court in this case failed to consider whether the prejudicial impact of the proffered evidence substantially outweighed its probative value.

¶ 42 As to the remoteness in time, M.K.'s assault occurred about four years before K.M.'s assault in this case. We do not consider that length of time to appreciably lessen the probative value of that offense. Our supreme court, as well as this court, has repeatedly found even greater gaps in time to be insufficient, *per se*, to justify keeping the evidence from the jury. See, *e.g.*, *id.*

at 186 (other-crimes evidence properly admitted although 12 to 15 years had elapsed); *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994) (20-year passage of time); *People v. Ross*, 395 Ill. App. 3d 660, 675-77 (2009) (11 years, not including 6 years during which the defendant had been incarcerated); *People v. Taylor*, 383 Ill. App. 3d 591, 595 (2008) (six years). Defendant's argument on this point is not well taken.

¶ 43 Defendant also argues that the prejudicial effect of the attack on M.K. substantially outweighed its prejudicial value, especially given the fact that defendant pointed a gun at M.K.'s head and then asked her for oral sex, which defendant characterizes as "a crime so comparatively more heinous" that it was impossible for the jury to avoid convicting defendant for simply being "a bad man who deserved punishment." In support, defendant cites *People v. Nunley*, 271 Ill. App. 3d 427 (1995). Defendant's reliance upon *Nunley*, however, is misplaced.

¶ 44 In *Nunley*, the defendant was convicted of armed robbery and first degree murder in connection with the shooting death of the victim, Paul Ray, Jr. *Id.* at 428-29. On appeal, defendant claimed the introduction of other-crimes evidence was irrelevant and overly prejudicial. *Id.* at 428. In *Nunley*, the State repeatedly called witnesses to testify that the defendant "calmly" told the police that he stabbed both his mother (because " 'she had Satan in her and he had to get Satan out and the best way to do that was to cut her head off' ") and the family dog when it intervened (because it, too, was possessed by Satan). *Id.* at 429. This court held that the repeated testimony that the defendant had intended to kill his mother by decapitating her and had killed her pet when it attempted to protect her subjected him to "a mini-trial over conduct far more grotesque than that for which he was on trial," namely, the robbery and shooting of Ray. *Id.* at 432. The court held that a new trial was warranted. *Id.* at 433.

¶ 45 *Nunley* is completely distinguishable from the facts of this case. Here, by contrast, M.K.'s testimony went to show defendant's propensity to sexually assault underage females. Since defendant argued throughout trial that his sexual conduct with the victim (K.M.) was merely consensual, M.K.'s testimony that she was forced to perform oral sex on defendant because he pointed a gun at her established that this also was a nonconsensual act. Although defendant's pointing of a gun at M.K. to coerce her into a sex act is utterly repugnant, no reasonable argument can be made that it was "far more grotesque" than the conduct for which he was on trial, nor was it completely unrelated to that conduct. *Id.* at 432. *Nunley* is thus distinguishable, and defendant's argument fails.

¶ 46 Finally, even assuming, *arguendo*, that the trial court erroneously allowed the introduction of the assault against M.K., such error was harmless. See *People v. Nieves*, 193 Ill. 2d 513, 530 (2000) (holding that the improper admission of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial because of its admission). Here, K.M. immediately notified law enforcement that she had been raped, and she unequivocally identified defendant as her attacker. In addition, Nurse Riemer, testifying as an expert in sexual assault examinations, opined that K.M.'s account of what occurred was consistent with the criminal sexual assault kit administered on that date. Therefore, even if the challenged evidence had not been presented to the jury, the result of defendant's trial would not have been different. Since defendant neither suffered prejudice nor was denied a fair trial, any error in the introduction of the other-crimes evidence was harmless beyond a reasonable doubt. Accordingly, defendant's first contention of error is meritless.

¶ 47 Chain of custody of the buccal swab

¶ 48 Defendant also contends that there was a "total breakdown" in the chain of custody with respect to the buccal swab from defendant. Specifically, defendant argues that the State failed to connect the link from Plaxico (the investigator who obtained the swab) to Ralph (the Illinois state police forensic scientist who analyzed the DNA on the swab). Defendant concedes that this issue has been forfeited because he raised no objection at trial and his appointed counsel also failed to raise this issue in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphases in original.)). Defendant, however, asks that we review this issue under the plain error doctrine.

¶ 49 The plain error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 185-87 (2005). Here, defendant only argues that the first prong of the plain error doctrine applies. In that instance, defendant must prove "prejudicial error," *i.e.*, where the evidence is so close that the jury's guilty verdict may have resulted from the error and not the evidence. *Id.* at 187. In other words, "defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Id.* However, before considering whether the plain error exception applies, we must first determine whether any error occurred. *Id.*

¶ 50 When the State seeks to introduce other-crimes evidence, it must first show that defendant committed those acts. *People v. Thingvold*, 145 Ill. 2d 441, 455 (1991). It is important to note, however, that, while proof that the defendant committed the crime must be

more than a mere suspicion, it need not be beyond a reasonable doubt. *Id.* at 456. Here, M.K. identified defendant in-court, in a lineup (more than 4 years after the assault), and in a photograph of the lineup as the person who forced her at gunpoint to perform oral sex on him. On this evidence, proof that defendant committed the assault on M.K. rose well above a mere suspicion. On this basis alone, there was no error and review under the plain error doctrine would be inappropriate. *Herron*, 215 Ill. 2d at 187.

¶ 51 Moreover, any purported error in the admission of the DNA evidence fails to meet the first prong of the plain error doctrine. As noted above, K.M.'s and Nurse Riemer's testimony provided ample evidence of defendant's guilt. Defendant thus cannot establish prejudice, *i.e.*, that the jury's guilty verdict may have resulted from the chain of custody of the buccal swab in the M.K. assault and not from the evidence, or that the error alone severely threatened to tip the scales of justice against him. *Id.* Consequently, his claim of error on this point is unavailing.

¶ 52 The State's alleged misconduct

¶ 53 Defendant's last claim of error involves three instances of alleged prosecutorial misconduct. Defendant first argues that the State improperly bolstered the credibility of its witness, the victim K.M., when it informed the jury that she is "trustworthy." Defendant also challenges the State's eliciting of testimony from Officer Belcik that defendant did not respond to questions after being read his *Miranda* rights and that Belcik searched defendant's building following defendant's aggressiveness and evasion to ensure there were not additional victims. Finally, defendant complains that the State's rebuttal argument improperly referred to defendant's in-court demeanor and wrongfully bolstered the credibility of both K.M. and M.K. Defendant concedes that these claims are forfeited but again seeks first-prong plain error review.

¶ 54 The State's opening statement

¶ 55 The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove, and it may include a discussion of the expected evidence and reasonable inferences therefrom. *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). While it is true that the State may not claim anything in its opening statement that it cannot or does not intend to prove, reversible error only occurs (1) if the State's opening statement is attributable to the "deliberate misconduct of the prosecutor" and also (2) results in "substantial prejudice to the defendant." *Id.* Here, defendant cannot meet either prong of this test. Defendant points to nothing in the record to support any claim that the challenged statements were the result of "deliberate" prosecutorial misconduct, and we can find nothing. Second, as stated below, defendant did not suffer substantial prejudice such that, absent the remarks, his verdict would have been different. Moreover, it is clear from the record that the State *did* intend to prove that K.M. was trustworthy if for no other reason than that the jury would believe her testimony that she was raped over defendant's claim that she consented. Defendant's argument with respect to opening statements is without merit. Since there is no error, there cannot be plain error. *Herron*, 215 Ill. 2d at 187.

¶ 56 In any event, and as with defendant's claims above, even if the State committed error, defendant cannot meet the first prong of the plain error doctrine because he cannot show that the verdict may have resulted from the State's purportedly improper statement rather than the evidence. *Id.* We are thus compelled to reject this claim.

¶ 57 Detective Belcik's testimony

¶ 58 Defendant first notes that the State's eliciting of testimony that, when Belcik read defendant his *Miranda* rights and then asked defendant what he was doing at the scene, defendant did not reply. Defendant argues that this was an improper reference to defendant's

postarrest right to remain silent under *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (holding that using a defendant's postarrest silence after receiving *Miranda* warnings for impeachment purposes violates the due process clause of the fourteenth amendment). Defendant further complains regarding Belcik's testimony that, due to defendant's aggressiveness and evasiveness, Belcik and his partner decided to canvass the building where defendant's apartment was located out of a concern that there could be other victims inside. Defendant asserts that this testimony served no purpose other than to imply to the jury that defendant was suspect in committing other unspecified violent crimes.

¶ 59 With respect to Belcik's testimony regarding defendant's silence, it is well established that a suspect must invoke his *Miranda* rights unambiguously, and if the suspect makes either (1) an " 'ambiguous or equivocal' " statement or (2) no statement, "the police are not required to end the interrogation [citation] or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (citing *Davis v. United States*, 512 U.S. 452, 459, 461-62 (1994)). Here, after being read his *Miranda* rights, Belcik asked defendant what he was doing at that location, and Belcik recounted that defendant said nothing. There is no testimony establishing that defendant unambiguously invoked his right to remain silent, either verbally or through nonverbal conduct. Instead, defendant responded with silence. This is a crystal-clear example of a defendant failing to unambiguously invoke his *Miranda* rights because he made no statement during police interrogation after being informed of his rights. See, *e.g.*, *People v. Kronenberger*, 2014 IL App (1st) 110231, ¶¶ 35-37 (holding that the right to silence was not invoked based upon defendant's "movements of his head" and response of "Yeah" to a detective's question as to whether defendant was "done talking"), *appeal denied*, No. 117707 (Sept. 24, 2014), *cert. denied sub nom. Kronenberger v. Illinois*, ___

U.S. ___, 135 S. Ct. 1446 (2015). As such, the State's eliciting of defendant's silence in response to Belcik's question was not a *Doyle* violation. Here, too, there is no error, so there cannot be plain error. *Herron*, 215 Ill. 2d at 187.

¶ 60 As to Belcik's testimony about the canvassing of the building, we note that Belcik testified only that they were concerned that defendant's aggressive behavior and evasiveness when asked questions would lead to them finding additional victims—of some unspecified offense(s)—in the building. "It is undisputed that an officer may testify to his investigatory procedures, including the existence of conversations, without violating the hearsay rule." *People v. Jones*, 153 Ill. 2d 155, 159-60 (1992). Here, Belcik did not recount any conversations he had with third parties; he only explained why he and his partner went into defendant's building and looked into defendant's apartment (where the door had been left open). Belcik's description of what he saw corroborated K.M.'s testimony as to the state of defendant's apartment where she testified the rape took place. Finally, we note that Belcik testified that, despite his concerns, that they found no additional victims nor any evidence of criminal activity. In other words, the police thought defendant committed other offenses, but they investigated and saw nothing to raise any such suspicion. We fail to see how a police search turning up no inculpatory evidence would somehow hurt defendant. We therefore reject this claim.

¶ 61 Even assuming both claims were error, defendant's verdict would not have been different had this evidence not been presented, so defendant cannot meet the first prong of the plain error doctrine. *Herron*, 215 Ill. 2d at 187. We now turn to defendant's contention that the State's closing argument was improper.

¶ 62 The State's closing arguments

¶ 63 Defendant's last contention on appeal centers on the State's purported misconduct with respect to its rebuttal closing argument. Specifically, defendant argues that the State reached outside of the record when it argued to the jury that K.M. and M.K. did not know each other, and that the State improperly commented on defendant's demeanor at trial. Defendant again concedes that this error was not preserved but seeks refuge in the plain error doctrine.

¶ 64 The State is given considerable latitude in making closing arguments, and it may respond to comments that clearly invite a response. *People v. Hall*, 194 Ill. 2d 305, 346 (2000). "A prosecutor may argue the evidence presented, or reasonable inferences therefrom, even if the inference is unfavorable to the defendant. *People v. Tolliver*, 347 Ill. App. 3d 203, 224-25 (2004) (citing *People v. Hudson*, 157 Ill. 2d 401, 441 (1993)). Furthermore, we must review the arguments of both the State and the defense in their entirety, with the challenged portions placed in their proper context. *People v. Cisewski*, 118 Ill. 2d 163, 175-76 (1987). A significant factor in determining the impact of an improper comment on a jury verdict is whether "the comments were brief and isolated in the context of lengthy closing arguments." *People v. Runge*, 234 Ill. 2d 68, 142 (2009). In addition, we must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict. *People v. Simms*, 192 Ill. 2d 348, 373 (2000). Finally, even if a prosecutor's closing remarks are improper, "they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *Hudson*, 157 Ill. 2d at 441. Due to an apparent conflict between two supreme court cases, it is unclear what the proper standard of review is when reviewing improper closing arguments. Compare *People v. Wheeler*, 226 Ill. 2d 92, 121

(2007) (*de novo*), with *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (abuse of discretion). We need not resolve this apparent conflict, however: defendant's claim fails under either standard.

¶ 65 Here, the State argued that K.M. (the victim) and M.K. (the other-crimes witness) did not know each other. At trial, K.M. testified that, at the time of her rape, she lived with her aunt on the west side of Chicago and attended Espira [*sic*] Early College High School, whereas M.K. testified that, at the time of her rape, she lived with her mother in Oak Park and attended Oak Park/River Forest High School. K.M. and M.K. not knowing each other was a reasonable inference from the evidence adduced at trial, which the State is allowed to argue. See *Tolliver*, 347 Ill. App. 3d at 224-25 (citing *Hudson*, 157 Ill. 2d at 441). Defendant's claim thus fails.

¶ 66 With respect to the State's argument as to defendant's demeanor, it is well established that "[c]ommenting on a defendant's appearance during closing argument is implicitly recognized as falling within the bounds of legitimate argument." *People v. Jackson*, 391 Ill. App. 3d 11, 44 (2009) (citing *People v. Byron*, 164 Ill. 2d 279, 296-97 (1995)), *appeal denied*, 233 Ill. 2d 579 (2009). Here, the evidence at trial established that, on different occasions, defendant lured K.M. and M.K. into his car through his friendly demeanor in order to bring them to a secluded location where he could sexually assault them. Defendant's respectful behavior to the court was shown by his addressing the jury as "ladies and gentlemen" and thanking them at the conclusion of his closing arguments. Under these circumstances, the State's comments were both a fair inference of the evidence at trial as well as a response to defendant's attitude to the jury. See *id.*; *Tolliver*, 347 Ill. App. 3d at 224-25. In addition, the jury was both admonished (immediately before both opening statements and closing arguments) and instructed (immediately following closing arguments) that neither opening statements nor closing arguments were evidence, and to disregard any statement or argument made by the attorneys not

based on the evidence. Defendant presents nothing to counter the presumption that the jury followed the trial judge's instructions in reaching a verdict. *Simms*, 192 Ill. 2d at 373.

¶ 67 In any event, the State did not commit reversible error because these isolated comments did not result in such "substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *Hudson*, 157 Ill. 2d at 441. As discussed above, defendant's convictions were amply supported by K.M.'s unequivocal testimony as well as the State's other witnesses. Defendant's claims of error are therefore without merit, and we must honor defendant's forfeiture.

¶ 68 Defendant's sentence

¶ 69 Finally, the State argues that the trial court erred in imposing concurrent 10-year sentences on defendant because consecutive sentences are required under section 5-8-4 of the Corrections Code . 730 ILCS 5/5-8-4 (West 2014). In reply, defendant relies upon two supreme court rules. Defendant first argues that, under Supreme Court Rule 615(b), this court does not have the authority to increase a sentence on review. Ill. S. Ct. R. 615(b) (eff. Jan. 1, 1967). Defendant also argues that, under Rule 604(a), the State does not have the right to appeal sentencing issues. Ill. S. Ct. R. 604(a) (eff. Dec. 11, 2014). We note, however, that, in *People v. Arna*, 168 Ill. 2d 107 (1995), our supreme court considered and rejected precisely these two arguments. The court specifically held, "Because the order imposing concurrent terms was void, the appellate court had the authority to correct it at any time [citation], and the actions of the appellate court were not barred by our rules which limit the State's right to appeal and which prohibit the appellate court from increasing a defendant's sentence on review." *Id.* at 112-13 (citing *People v. Wade*, 116 Ill. 2d 1 (1987); *People v. Scott*, 69 Ill. 2d 85 (1977); *People v. Dixon*, 91 Ill. 2d 346 (1982)). Defendant's argument thus fails.

¶ 70 Section 5-8-4(d)(2) of the Corrections Code provides in pertinent part that the trial court "shall impose consecutive sentences" where, as here, a defendant is convicted of criminal sexual assault. 730 ILCS 5/5-8-4(d)(2) (West 2014). Thus, defendant's concurrent sentences are void. *Arna*, 168 Ill. 2d at 112-13. Although the State asks that this court correct the mittimus to reflect consecutive ten-year sentences, we agree with defendant that the better course would be to remand for resentencing. Defendant was convicted of criminal sexual assault based upon the use or threat of force, a Class 1 felony. 720 ILCS 5/11-1.2(a)(1), 11-1.2(b)(1) (West 2014). With certain exceptions not relevant here, the sentencing range for Class 1 felonies is between 4 and 15 years. 730 ILCS 5/5-4.5-30 (West 2014). After trial, the State filed a motion seeking clarification as to whether defendant would be sentenced consecutively on both counts and asked that the mittimus be corrected to reflect "five years' incarceration on each count." On the record before us, we are uncertain whether the trial court intended that defendant serve a maximum term of 10 years (in which case each conviction should reflect a 5-year term) or that each conviction reflect a 10-year sentence (resulting in a maximum term of 20 years). Therefore, we vacate defendant's concurrent 10-year sentences and remand this matter for resentencing with mandatorily consecutive sentences.

¶ 71 CONCLUSION

¶ 72 The trial court did not err in allowing the State to introduce other crimes evidence in order to establish propensity, where the proffered evidence was substantially similar to the offense alleged here, not too remote in time, and not unfairly prejudicial. In addition, defendant forfeited his claim that forensic evidence purporting to identify him as the perpetrator of a previously committed sexual assault was not erroneously introduced, but on the merits defendant's claim is unavailing. Furthermore, defendant has forfeited his challenge to the State's

opening statement and closing argument, but forfeiture aside, his contention is without merit. Finally, defendant's concurrent sentence does not conform to the statutory mandate requiring consecutive sentencing. Accordingly, we remand this cause for resentencing and affirm the judgment of the trial court in all other respects.

¶ 73 Affirmed in part; vacated and remanded in part.