2016 IL App (2d) 140768-U
No. 2-14-0768
Order filed September 30, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JERIMIAH COCHRAN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 13-CF-265 Honorable George Bridges, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: We need not determine whether the trial court abused its discretion in allowing evidence that defendant refused DNA testing for consciousness of guilt because the evidence against defendant was overwhelming and any such error was harmless.

¶ 2 Following a jury trial, defendant, Jerimiah Cochran, was convicted of aggravated kidnapping (720 ILCS 5/10-2(a)(5) (West 2012)) and two counts of aggravated criminal sexual assault (720 ILCS 5/11-1.30 (a)(1) (West 2012)). The trial court sentenced defendant to a total of 40 years' imprisonment, imposing consecutive terms of 10 years for aggravated kidnapping and 15 years for each count of aggravated criminal sexual assault. On appeal, defendant

challenges only his two convictions for aggravated criminal sexual assault, contending that the trial court abused its discretion by allowing the State to introduce evidence that he resisted the administration of a DNA swab. We affirm.

¶ 3 I. BACKGROUND

¶ 4 At trial, the State first called Gary Grayer, a North Chicago police officer. Grayer testified that, on January 26, 2013, at about 3:15 p.m., he was dispatched to 1529 Seymour Avenue. He saw a woman whom he later learned was S.M., the alleged victim. S.M. was wearing only a large t-shirt and shoes. Her hands and forehead were swollen and her lip and nose were bleeding. S.M. told Grayer who had attacked her and where it had happened. An ambulance took S.M. to the hospital. Grayer went to the hospital and photographed S.M. At no time did S.M. tell Grayer that she had been sexually assaulted. Grayer also identified photographs during his testimony, admitted into evidence, of multiple injuries to S.M.'s head, face, neck, legs, knees, and right arm.

¶ 5 Waukegan police detective Brian Hawbaker testified that he helped execute a search warrant for an apartment at 1400 16th Street on January 29, 2013. Hawbaker took photographs in the south bedroom, which were admitted at trial. The photographs depicted a large hole in the drywall, as well as apparent blood stains on the walls, carpet, window blinds, mattress, and bathtub. Apparent blood stains could also be seen on a bra and shirt, with similar stains on a broken stick, a set of wire cutters, and a pair of boots.

¶ 6 S.M. testified that she began dating defendant in 2009, and that defendant was the father of her two small boys. On January 25, 2013, S.M. was with the boys and her current boyfriend, Travelis Thomas, at a laundromat in Waukegan. The laundromat was attached to an apartment building in which defendant's mother, Catherine Wade, resided on the third floor. S.M. took the

boys to Wade's apartment while she washed her laundry. At some point thereafter, defendant called S.M. and asked her to leave the boys at Wade's apartment so he could visit them. S.M. refused and took the boys downstairs to the apartment building lobby. There, she saw defendant, who was blocking the front door.

¶ 7 S.M. testified that defendant grabbed her by the collar of her coat and pulled her to the back door of the building. A car driven by defendant's cousin, Natilie Myers, pulled up. Defendant pushed S.M. into the backseat and got in next to her. As Myers drove off, defendant asked S.M. whether Thomas was her boyfriend. When S.M. said that Thomas was not her boyfriend, defendant struck her in the face. Defendant searched S.M., found her keys, and threw them out of the car window. S.M. had left her phone with Thomas. Defendant ordered Myers to drive to his home and phoned Wade with instructions to look after the children. When they arrived at defendant's home, defendant told S.M. not to scream and said he just wanted to talk.

¶ 8 At this point in her testimony, S.M. explained that defendant had abused her on two prior occasions. On April 13, 2012, when she and defendant were in a car together, he asked her "similar questions" and slapped her after she answered. Defendant took her to a house where he again hit her and refused to let her leave. She ran away the next day. On May 30, 2012, she was parked outside a friend's apartment when defendant arrived and took her phone and keys. He then ordered her inside, where he shattered a beer bottle over her head. She was able to flea and seek help. S.M. testified that these prior incidents influenced her actions on January 25, 2013; namely, she obeyed when defendant ordered her not to scream.

¶ 9 Returning to the events of January 25, 2013, S.M. testified that defendant led her into the house as Myers went along. In his bedroom, he angrily told Myers that "he finally got this girl" and would have to "violate" her, which S.M. understood to mean a beating. With Myers present,

defendant struck S.M. in the face and called her names. Defendant then paused and instructed Myers to take some money to Wade for the children. After Myers left, defendant called S.M. names and punched her in the stomach and head. He kicked her in the head, which collided with the wall and left a large hole. Defendant accused S.M. of trying to "set [him] up" and of letting men she was dating be around her boys. He kept asking her whom she was dating and threatened to hit her if she lied. He hit her with a glass bottle and a wooden table. He also hit her with a wooden stick, causing it to break.

¶ 10 S.M. testified that, after the questioning, defendant told her to perform oral sex on him. S.M. went along because she did not want him to hit her again. Defendant did not ejaculate. Next, defendant ordered her onto the bed and penetrated her anally. She tried to push him off, but he told her to move her hands or he would hit her. Defendant then penetrated S.M. vaginally. S.M. did not want him to do it, but she feared that he would hurt her even more if she resisted. Defendant ejaculated into her vagina and fell asleep shortly thereafter. S.M. did not try to leave at that point, explaining that she had no car and she was afraid that defendant might wake up and catch her trying to leave.

¶ 11 S.M. testified that defendant demanded her Facebook password after he woke up. She initially claimed that she did not know the password, but she gave defendant the password after he got on top of her with a set of pliers and threatened to remove her teeth. Defendant opened S.M.'s Facebook account on his laptop, claiming that he wanted to see with whom she had been communicating. After a few minutes, he closed the laptop, got a pair of scissors, and cut off some of her hair. He ordered S.M. to clean the blood off of the walls and take a shower. She was still bleeding at this point. Defendant then brought S.M. a steak that he had cooked, but she did not eat it, as her face was too swollen and she had no appetite. Back in the bedroom,

defendant proceeded to ask more questions. He put on his boots and threatened to kick S.M. in the teeth if she did not cooperate. Defendant then left the bedroom to answer a phone call. S.M., wearing only a t-shirt, opened the window, jumped out, and ran. She knocked on a stranger's door. A man let her in, gave her a pair of men's shoes, and called an ambulance. The police arrived and S.M. went to the hospital.

¶ 12 S.M. acknowledged later telling defendant's investigator that she had consented to the sexual acts with defendant. She did so because "[she] was feeling bad because [she] didn't want him to have a whole bunch of years for this heinous crime." She maintained, however, that she had not actually consented to the sex acts, explaining that she had submitted out of fear.

¶ 13 On cross-examination, S.M. admitted having sex with defendant "[p]robably like two times" between March 2012 and January 25, 2013. S.M. testified that, prior to January 25, 2013, she had last spoken with defendant before Christmas 2012. On January 25, 2013, she spoke to defendant only when they were at Wade's building—she denied speaking to defendant at any point earlier in the day. S.M. admitted that she smoked marijuana with defendant on the night of January 25, 2013. She also admitted that she reported being raped to the police because she was angry with defendant.

¶ 14 Andrew Orozco, a Waukegan police officer, testified that on January 26, 2013, he went to the hospital and spoke with S.M. in the emergency room for about an hour. She was on a backboard and was wearing a neck brace. Her face was swollen, she was crying, and her voice was trembling. Orozco did not ask S.M. whether she had been sexually assaulted, and she did not volunteer anything about a sexual assault.

¶ 15 Kenneth Piton, another Waukegan police officer, testified that he spoke to S.M. on the evening of January 26, 2013. She was wearing only a t-shirt and gym shoes, and she was crying.

Piton was present when Victoria Viroglio, a registered nurse and sexual-assault nurse-examiner, performed a sexual-assault kit on S.M.

¶ 16 Viroglio was qualified as an expert in sexual assault and trauma nursing. She testified that she observed swelling and bruising on S.M.'s body and whitish dried stains on her legs. After examining S.M., Viroglio asked what had happened. S.M. explained that defendant had abducted her from a laundromat and that his cousin drove her to his house. There, he hit her with a table, a wrench and a bottle, and he pulled out some of her hair. After they both fell asleep and then awoke, he put his knees on her throat and a wrench into her mouth and threatened to pull out all of her teeth. S.M. later escaped and got help.

¶ 17 Viroglio testified that S.M. told her that defendant had ejaculated in her vagina and rectum. Viroglio saw no lacerations or trauma to either area, but she explained that this is very common in cases of forcible sexual assault. Viroglio identified several exhibits associated with the examination, including swabs from S.M.'s mouth, vagina, and anus; pubic-hair and head-hair combings; blood specimens; and fingernail clippings.

¶ 18 Timothy Ives, a Waukegan police detective, testified that he began investigating the case on January 28, 2013. He had been unable to locate defendant prior to February 1, 2013, when he learned that defendant had been located and taken to the police station. Ives and another officer met defendant, who signed a *Miranda* waiver and agreed to an interview. During the interview, Ives asked defendant why the tops of his hands were swollen; defendant said that he had been jumped by unknown people but had not reported the alleged attack. Defendant denied that Myers had driven him and S.M. from Wade's apartment, denied that he lived at 1400 16th Street, and denied that he had beaten S.M. Defendant further claimed that there would be no reason for

his DNA or seminal fluid to be found on or inside S.M. Ives took defendant for booking at the conclusion of the interview.

¶ 19 Ives further testified regarding the collection of a DNA sample on February 14, 2013.[1] Ives testified that he met defendant at the Lake County sheriff's office to execute a warrant for the collection of a buccal-cell (cheek) swab. When the prosecutor asked Ives whether defendant initially complied with his request for a swab, defense counsel objected. At a sidebar, defense counsel argued that evidence of defendant's initial resistance was irrelevant: at the time, his attorney had not been present and, when she arrived, he cooperated. The prosecutor responded that evidence of defendant's resistance would be relative evidence of his consciousness of guilt. The trial court allowed the evidence.

¶ 20 Ives proceeded to testify that defendant was not initially compliant with his request for the swab. Specifically, defendant was yelling and talking over Ives' voice as Ives was explaining the process. Defendant then refused to open his mouth and moved his head back and forth as Ives attempted to administer the test. No testimony was elicited that Ives ever made defendant aware of the warrant. Ives later obtained a swab from defendant after defendant's court-appointed attorney arrived at the police station. Ives identified a State exhibit as the buccal-cell collection kit that he had obtained. Later, the kit was given to the police crime laboratory.

¶ 21 Kelly Lawrence, a forensic scientist at the Northeast Illinois Regional Crime Laboratory, testified as an expert in forensic DNA analysis. She identified the buccal-cell collection kit and testified that it contained two swabs with defendant's known saliva standard. The laboratory

[1] Ives initially gave the date as January 14, 2013, but corrected himself later. The date is not in dispute.

also received a kit containing two swabs with S.M.'s known saliva standard and swabs from defendant's bedroom, including two from one wall and one from another wall. Finally, the laboratory received the sexual assault kit from the examination of S.M. Lawrence testified that the vaginal and anal swabs from the sexual assault kit tested positive for seminal fluid and sperm. The DNA profile obtained from the sperm was consistent with that of defendant. The oral swab did not indicate the presence of seminal fluid. The swabs from defendant's bedroom eliminated him as a source of the DNA found in the blood on the walls, but pointed to S.M. as the source.

¶ 22 Defendant testified as follows. He received a call from S.M. at about noon on January 25, 2013. He then called Wade and asked her to babysit. An hour later, he received another call from S.M. and he told her about his call to Wade. Shortly afterward, S.M. called again and said that she would be at Wade's building. At about 5 or 6 p.m., Myers drove defendant to Wade's apartment building, where he saw S.M. in the third-floor hallway, playing with the children. Defendant and S.M. conversed briefly, then exited by the back door. He did not hold onto her at all while they left. Myers was waiting, and they entered her car.

¶ 23 Defendant testified that Myers drove to his residence at 1400 16th Street. During the ride, he spoke with Wade by cell phone but he did not talk with S.M. When they arrived, S.M. went to defendant's room while defendant talked to Dion Bond, his housemate. Myers was initially in the house, but defendant asked her to buy some diapers for the children and deliver some marijuana to Wade. After Myers left, defendant and S.M. smoked marijuana, conversed, and watched videos in his bedroom. Myers returned, but at defendant's request, she went out and bought some cigars to use for smoking marijuana. Myers returned and delivered the cigars, then left again. Bond had also left. At this point, Defendant and S.M. were alone in the

apartment. They conversed and drank in the kitchen. He started cooking some steaks. Returning to the bedroom, he and S.M. conversed and then had sex. Afterward, S.M. dressed herself in defendant's t-shirt, got the steaks from the oven, and ate with defendant in the bedroom. He fell asleep, and she followed.

¶ 24 According to defendant, S.M. was using his laptop when he woke up. She closed it, but he opened it and he saw that her Facebook page was open with some comments questioning his parentage of her younger son. Defendant asked her about the comments and they got into a heated conversation. He admitted punching her, then pushing her against the wall, punching her again, and hitting her with the table. Defendant and S.M. talked for a while after the fight before falling asleep on the bed. Defendant and S.M. talked some more after they woke up, and defendant admitted pulling at S.M.'s hair during the conversation. S.M. left through the bedroom window while defendant was making some phone calls.

¶ 25 On cross-examination, defendant admitted that he had punched S.M. in the face and head, but he could not recall how many times, and he denied hitting S.M. with a stick. Defendant admitted that blood had soaked into the mattress, carpet, and walls, further admitting that none of the blood was his. He denied having put his penis into S.M.'s mouth, but admitted penetrating her anally and vaginally.

¶ 26 Defendant also admitted that he had lived at 1400 16th Street. When the prosecutor asked whether he had denied living there while speaking with Ives, defendant responded, "I never spoke to Tim Ives. I never spoke to him. When I spoke to him, I spoke to him February 14 when I was in custody in Lake County." The prosecutor then asked, "Oh, the time that you tried to not let him take your cheek swab, is that correct?" After the trial court overruled defense counsel's objection, defendant answered that he initially refused because his attorney was not

present. The prosecutor then showed defendant the *Miranda* waiver form. Defendant claimed that the signature was not his and denied signing the document.

¶ 27 In rebuttal, the State called Myers, who testified that, in exchange for her cooperation, the charge against her had been reduced from aggravated kidnapping, a Class X felony, to simple kidnapping, a Class 2 felony. She had not yet been sentenced. She clarified that, although she spoke to Ives on February 1, 2013, she did not meet with anyone from the State's Attorney's office until later and did not reach the agreement with the State until June 12, 2013.

¶ 28 Myers then testified as follows. On January 25 2013, at about 6 p.m., she got a call from defendant. She picked him up at his home and drove him to Wade's building. She parked as defendant entered the building. He returned in about half an hour, holding S.M. by the arm and the neck. S.M. wanted to sit in front, but defendant put her into the backseat with him. At defendant's direction, Myers drove to 1400 16th Street. As they left, Myers saw S.M.'s children hugging each other, adding that they had a look of "devastation." At some point during the ride, Myers saw the rear window go down; she turned around and saw defendant throw something out. Myers did not see the object, but recognized the sound as that of a pair of keys. Arriving at defendant's house, Myers parked and exited the car. Defendant took S.M. by the neck and elbow and escorted her out, although more gently than he had put her into the car. The three of them entered defendant's apartment. Soon thereafter, defendant kicked S.M., making her head collide with the wall. Bond entered as defendant was kicking S.M. in the head. After leaving defendant's apartment, she heard a loud thump and heard S.M. yell, "Oh, God, help me." She included this in her statement to the police.

¶ 29 On cross-examination, Myers admitted giving the police a written statement in which she denied that she had seen a struggle between defendant and S.M. Myers also claimed that, after running the errand for Wade, she did not return to defendant's home until the next day.

¶ 30 In its closing argument, the State emphasized the evidence that defendant had intimidated S.M. into accompanying him and having sex with him. The State noted S.M.'s testimony of similar incidents in April and May 2012. In arguing that S.M. had not consented to the sexual acts, the State emphasized the evidence of both his threats of force and his actual use of force—*e.g.*, the punching and kicking and the attacks with the bottle, the table, and the stick. The State also emphasized the circumstances surrounding S.M.'s escape and her severe injuries. The State did not refer to Ives's administration of the buccal swab or defendant's alleged resistance.

¶ 31 In defendant's closing argument, defense counsel argued that the evidence showed that defendant attacked S.M. violently only after they had had sex, when they argued over her Facebook page. Defense counsel further noted that, even after the incidents of April and May 2012, S.M. admittedly had sex with defendant twice before January 25, 2013. Defense counsel also stressed that S.M. did not tell Grayer, Orozco or the defense investigator that defendant had sexually assaulted her.

¶ 32 In its rebuttal closing argument, the State attacked defendant's theory that all of defendant's violence had occurred after the allegedly consensual sexual encounter. The State noted the evidence of the blood on the mattress, S.M.'s clothing, and the walls, arguing that none of this made sense under defendant's theory. The State pointed out that, although S.M. was reluctant to disclose the sexual assault to two male police officers, she did disclose it to Beth Hawbaker, the first woman whom she saw. The State also offered the following comments

regarding defendant's refusal to comply with the DNA test and its impact on defendant's theory that the sex was consensual.

> "I want to talk about a couple of things that [defendant] did. Refused to have his cheeks swabbed? This is consent, ladies and gentlemen. He said consent. So why would he refuse to have his cheeks swabbed? Why would he lie to the police? Why would he tell them I don't even live there?"

¶ 33 The jury found defendant guilty of aggravated kidnapping and two counts of aggravated criminal sexual assault (vaginal penetration and anal penetration). It found him not guilty of a third count of aggravated criminal sexual assault (oral penetration). In his post-trial motion, defendant argued in part that the trial court erred in allowing Ives to testify about the circumstances of the buccal swab. The trial court denied the motion and sentenced defendant as noted. He timely appealed.

¶ 34 II. ANALYSIS

¶ 35 On appeal, defendant raises one claim of error: that the trial court abused its discretion in allowing testimony about his initial resistance to Ives' attempt to obtain the buccal swab. Defendant concedes that this issue has no effect on his conviction of aggravated kidnapping, and he does not appeal that conviction. Defendant contends, however, that the evidence of his guilt of the two charges of aggravated criminal sexual assault was sufficiently close that the improper introduction of evidence that he initially refused the swab was prejudicial error. The State responds that: (1) there was no error, because the defendant's refusal was part of his ongoing attempt to impede the State's investigation; and (2) in the alternative, any error was harmless, as the evidence of defendant's refusal played only a marginal role in the State's case, and the

remainder of the evidence strongly supported the jury's findings of guilt. We agree with the State that any error was harmless, and we therefore affirm.

¶ 36 The trial court's decision to admit evidence as relevant may not be disturbed on appeal unless the court abused its discretion, *i.e.*, its decision was arbitrary, fanciful, or unreasonable. *People v. Ealy*, 2015 IL App (2d) 131106, ¶ 33. Evidence that is relevant may be excluded if the danger of unfair prejudice substantially outweighs the evidence's probative value. Ill. R. Evid. 403 (eff. Jan. 1, 2011); *People v. Hanson*, 238 Ill. 2d 74, 101 (2010).

¶ 37 In *Ealy*, the defendant was convicted of the first-degree murder of a coworker at a restaurant. The trial court admitted evidence that the defendant had refused DNA testing by the police, and that other present and former employees of the restaurant had consented to the testing. Notably, the police had not yet obtained a warrant for the testing at the time of the defendant's refusal. *Ealy*, 2015 IL App (2d) 131106, ¶¶ 12-13. After noting the similar holdings of several federal circuit courts, this court held in relevant part:

> "The State may not introduce evidence that the accused exercised his constitutional right to be free from unreasonable searches and seizures, because the prejudicial effect substantially outweighs the probative value of allowing the jury to infer the accused's consciousness of guilt from his exercise of his rights." *Id.* ¶ 51.

We accordingly held that any probative value of the defendant's refusal was outweighed by its prejudicial effect, as the fourth amendment entitled the defendant to withhold his consent to the DNA testing. *Id.* ¶ 50; accord *People v. Eghan*, 344 Ill. App. 3d 301, 312 (2003) (holding that the trial court erred by allowing the State to argue that the defendant's attempt to exercise his constitutional rights by refusing a drug test indicated that he knew he was guilty of the charged offense).

¶ 38 Here, it is undisputed that Ives had a valid warrant to obtain the DNA samples. If Ives had testified that he presented the warrant before attempting to collect the swab, we could determine that defendant had no constitutional basis for refusing consent. Pursuant to *Ealy*, the evidence of defendant's refusal would then have been arguably admissible for establishing defendant's consciousness of guilt, subject to the trial court's discretion in weighing the danger of unfair prejudice against the evidence's probative value. Factors in this analysis might have included the length of time between defendant's arrest and the attempted DNA collection, and whether defendant consistently attempted to obstruct the investigation against him. See *People v. Edwards*, 241 Ill. App. 3d 839, 844 (1993). Another factor could have been whether defendant simply conditioned his refusal, as the record in this case indicates, on the presence of his attorney. See *People v. Townes*, 130 Ill. App. 3d 844, 859 (1985) ("Even though defendant was required to submit to the requirements of the warrant, his refusal to do so was reasonably consistent with the response of a cautious innocent person who would want to seek the advice of counsel before submitting.").

¶ 39 However, it is unclear from the record whether Ives ever made defendant aware of the warrant before he attempted to obtain the buccal swab. If defendant was never made aware of the warrant, we see no reason why the rule announced in *Ealy* would not have barred the admission of the evidence for the purpose of establishing defendant's consciousness of guilt. We therefore caution that the concerns regarding the admission of this type of evidence remain pertinent where a defendant is never made aware of the existence of a search warrant. Under these circumstances, a defendant would have no reason to doubt his constitutional basis for refusing to consent to the test. See *Ealy*, 2015 IL App (2d) 131106, ¶ 60 (concluding that the

issue "turns on whether the accused has a constitutional basis for refusing to consent to the test"). We offer nothing more, other than to say that this type of problem is easily avoidable.

¶ 40 We need not further address whether evidence of defendant's refusal was erroneously allowed in this case, as we determine that any error was harmless. Defendant was convicted of the two counts of aggravated criminal sexual assault that were based on acts that, by his own admission, he actually did perform. The jury's knowledge that he initially resisted Ives' effort to obtain evidence that he had performed these acts with S.M. did not likely affect its resolution of whether she consented to them. Moreover, the State's arguments did not stress the evidence of defendant's resistance to the swabbing—the State's primary closing argument did not mention it at all, and the rebuttal closing argument did so only briefly.

¶ 41 Furthermore, there was strong evidence that S.M. did not consent to the acts of vaginal and anal intercourse. S.M.'s testimony that defendant abducted her by force and beat her inside the apartment was corroborated by Myers. This effectively counteracted the defense theory: that the extensive blood stains were caused by violent acts occurring only after defendant and S.M. completed consensual sexual acts. Finally, although S.M. did not report any sexual assault to Gray, Orozco or defendant's investigator, she did promptly tell Hawbaker and Viroglio that defendant had sexually assaulted her.

¶ 42 For these reasons, we conclude that, even if could we say that the trial court abused its discretion in admitting the evidence of defendant's resistance to the DNA test, the error in admitting this relatively minor evidence was harmless.

¶ 43 III. CONCLUSION

¶ 44 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 45 Affirmed.