2019 IL App (3d) 170239-U

Order filed May 3, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
	)	Knox County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0239
v.	)	Circuit No. 15-CF-490
	)	
WESLEY E. ENGLAND,	)	Honorable
	)	Paul L. Mangieri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Schmidt and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The defendant's statutory speedy trial rights were not violated. (2) The evidence was sufficient to convict him of aggravated criminal sexual assault. (3) The defendant's sentence to 29 years' imprisonment was not excessive.

¶ 2 The defendant, Wesley England, appeals his conviction for aggravated criminal sexual assault and sentence to 29 years' imprisonment, arguing (1) the Knox County circuit court erred in denying his motion to dismiss on speedy trial grounds, (2) he was not proven guilty beyond a reasonable doubt, and (3) his sentence was excessive.

¶ 3 I. BACKGROUND

¶ 4 A. Pretrial Speedy Trial

¶ 5 On November 2, 2015, the defendant was charged by information with aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(5) (West 2014)) and criminal sexual assault (*id.* § 11-1.20(a)(1)). He was placed in custody that day. The defendant filed a speedy trial demand on November 5, 2015. He first appeared in court on November 6, 2015, where the court set the matter for a preliminary hearing on November 17, 2015, on defense counsel's request. Based on the testimony of a police officer at the preliminary hearing, the court found probable cause existed to believe that the defendant committed a felony. The following exchange then occurred:

> "[THE COURT]: Shall we set down an arraignment?
>
> [DEFENSE COUNSEL]: Judge, actually, if we could, we'd like to go to arraignment today. [The defendant] also has two other cases that are up on the jury pre-trial calendar on November 23rd—
>
> THE COURT: Put them all on the same one?
>
> [DEFENSE COUNSEL]: Correct. So we would move to continue the two cases *** from November 23rd to the next jury pre-trial calendar in front of Judge Shipplett, which would be February. And the case that we just had the prelim on, we'd waive further reading, enter a plea of not guilty with a jury demand, ask that it be set on the—and I think the next calendar that's available would be the February calendar then."

¶ 6 On February 1, 2016, the State said it was ready to proceed to trial, but the court stated that it needed to recuse itself. The case was set over to February 16, 2016. On February 16,

defense counsel asked to continue the case to March. On March 7, 2016, defense counsel again asked to continue the case so that the defendant could retain private counsel.

¶ 7 On May 2, 2016, defense counsel stated that they were ready to proceed to trial, but the State asked for a continuance. The court denied the motion for a continuance and set the matter for a jury trial on May 16, 2016. On May 16, the State asked for a continuance, noting that the victim was on a previously scheduled trip. The court granted the continuance over defense's objection and set the matter for trial on June 20, 2016.

¶ 8 On June 1, 2016, the defendant filed a motion to dismiss the case for violation of his right to a speedy trial. The motion alleged that the defendant was placed in custody on November 2, 2015, and that the 120 days required by the Speedy Trial Act (Act) (725 ILCS 5/103-5 (West 2014)) expired on May 31, 2016. The defendant alleged that the speedy trial clock continued to run from November 3, 2015, to February 16, 2016, was tolled from February 16 to May 2, 2016, and continued to run from May 2, 2016.

¶ 9 On June 6, 2016, both parties stated that they were ready for trial. The case proceeded to a hearing on the motion to dismiss for speedy trial on June 9, 2016. The defendant called Kelly Cheesman who testified that she was the circuit clerk for Knox County. She stated that she closes pretrial calendars about two weeks prior to the date of pretrial in order to prepare for the scheduled trials. Heather Kent testified that she was a deputy clerk for Knox County. She was in the courtroom for the defendant's preliminary hearing on November 17, 2015. When asked why she placed the defendant's pretrial on the February 1, 2016, calendar, she stated, "The December pretrial was already closed. It was scheduled for November 23rd, and his prelim was November 17th. So there was no time to put it on that pretrial. So we were scheduling for the February 1st." She said Cheesman had notified her on November 6, 2015, that it would be closed. The

defendant thus argued that, since his case could not be placed on the docket prior to February 1, 2016, that delay was attributable to the State. In denying the motion, the court noted that the defendant filed a written speedy trial demand in this case on November 5, 2015. The court stated that on November 17, 2015,

> "[Defense counsel] [said the defendant] has two cases that are up on the jury pretrial calendar for November 23rd. The Court at that point says, put them all on the same? [Defense counsel] said, correct. Put them all on the same? Correct. So we would move to continue the two cases that are previously set on the November calendar *** from the November 23rd calendar to the next pretrial calendar *** which would be in February.
>
> Defense counsel specifically asked. This is not such a case where it was dictated by the circuit clerk as to when these things are gonna be scheduled ***. [Defense counsel] specifically asked to continue the two cases that were set for pretrial and combine them to run together at the same time with [this case] and asked that [this case] be continued to February."

The court considered the other delays in the case and denied the motion, finding that the speedy trial period had not lapsed.

¶ 10 The defendant filed a motion to reconsider the court's denial of his motion to dismiss based on a speedy trial violation. The defendant argued that the court miscalculated the term under which the defendant should have been brought to trial as it was the deputy circuit clerk, not defense counsel, who required the defendant's case to be placed on the February docket and so that delay should not be attributable to the defendant, but instead to the State. The court denied the motion to reconsider. In doing so, it stated,

"As it relates to the time frame of the continuance that the Court found from November 17th, 2015 to February 16th, 2016, that again, was brought about, the Court finds, by the actions of defense counsel.

On November 17th, 2015, there was a preliminary hearing and subsequent arraignment of [the defendant], and both counsel now have talked about acquiescence, and I meant to use that as an example. I don't find that [defense counsel] acquiesced in the setting of [this case] to the February jury calendar. I find that he requested that. It wasn't a mere acquiescence. It's an actual expression and request that it be continued to that date.

Now, it may be true or it may not be true, and I suppose based upon the testimony from Ms. Cheesman and from

* * *

—Ms. Kent, that [defense counsel] may have come to the understanding that all previous pretrial calendars were closed, and so the next available one was February, but that brings us back to the question that I presented to [defense counsel].

In order for that to have any type of import, that means the clerks are running the court system relative to protection of a defendant's right to speedy trial. That's not the clerk's role. The clerk does procedural things. It's up to the attorneys and the State to determine whether or not any procedural setting by a clerk is going to violate someone's statutory or constitutional right to a speedy trial.

> I'm not saying that [defense counsel] had any type of nefarious intentions when he acted the way he did on November 17th, but I think it's important for the record to reflect the manner and method in which this matter was set to the February trial calendar."

The court then read through the transcript from November 17, 2015, noting, "The Court then says, put them all on the same one? It's the Court who's saying put them the closest that we can, which would be in about four or five days, which is very observant of the defendant's right to a speedy trial." The court then noted that defense counsel moved to continue all of the defendant's cases to February. The court said,

> "All I'm saying and stating for the record is the February date was a date that was specifically asked by defense counsel and not one that was set by the Court. It was asked by defense counsel, and it may have been based on information that the clerk provided, but that does not control.
>
> Setting by the Judge controls, not some *** suggestion by the clerk. There are many times, many times in procedure where the clerk will say this should go on the—by way of example now, this should go on the September calendar, and many times, either defense counsel or the State's Attorney's Office says, no, Judge. It can't go. It has to be set prior to that, and it gets set prior to that.
>
> The clerks don't control the setting of cases. They may procedurally *** give suggestions as to what it would normally be, but if it moves it outside a defendant's statutory right to a speedy trial, in this particular case, I find that [defense counsel] specifically asked for it to be moved out into February, and so

the time from November 17, 2015 to February 16, 2016 is actually time in which the *** right to a speedy trial was tolled."

¶ 11 On June 20, 2016, the day of the defendant's scheduled jury trial, the defendant asked for a continuance, which was denied. He then waived his right to a trial by jury, and the matter was set for a bench trial on August 5, 2016. The parties agreed that the delay was attributable to the defendant. The parties then agreed to continue the case to August 25, 2016. On that date defense counsel asked for a stipulated bench trial and that it be set on November 10, 2016. The case history report only stated that the bench trial scheduled for November 10 was cancelled. Further court dates were listed for December 5, 2016, and January 6, 2017, but provided no notes, and the record provides no transcripts, as to what transpired on these dates.

¶ 12 B. Bench Trial

¶ 13 The bench trial was held on January 11, 2017. The parties stipulated to the chain of custody of various items of physical evidence recovered from the victim and the defendant. Yu Chen Shumard testified that on November 2, 2015, she was 60 years old. On that morning, she was walking a path at Lake Storey, a park in Galesburg, as she did every day. She and her husband had owned the Old Peking Chinese Restaurant, but had retired. Her husband had passed away on July 20, 2015. Shumard said that as she neared the two-mile marker at Lake Storey, "somebody grabbed me from behind and turn me around, and I saw a man, one hand hold on to my shoulder. The other hand, he hold on to his [penis]." The man was wearing a dark hooded sweatshirt, dark pants, and black shoes. Shumard said to him, "please, don't do that. I just lost my husband." She did not "think [she was] gonna live through [it]." She noticed that the front of his shoe was separated from the sole. She identified the shoes in evidence as the shoes the defendant was wearing. Shumard took her cell phone out of her pocket, and the defendant

grabbed it and said, “what are you gonna do, call police?” Shumard replied to him, “I don’t feel good. My doctor might call me.” The defendant then knocked her down on the paved walking path. He then “dragged [her] to [the] side of [the] path [off] of the pavement.” Shumard said, “[W]e didn’t go very far. I *** still [could] see the *** walking path, and he pushed me down. So [she] was on [her] knees, and he told [her]—he took his penis out. He told [her], he [said], suck it, or I’m gonna hurt you pretty bad.” He pushed her head down and placed his penis in her mouth without her consent. The defendant told Shumard that they were going to go farther into the woods so that no one would see. Shumard was afraid that if they did she would not come out alive. Shumard said to him, “[L]et’s go to my house. It will be more comfortable ***. I don’t live very far from here.” She testified that she said this because she knew a lot of people walked around Lake Storey everyday and maybe she could get help. The defendant agreed to go with her, but told her “if [she] [made] any scene, he would hurt [her] very bad.” She told him she would not make a scene.

¶ 14 As they walked, the defendant had one hand behind her. Shumard stated that she did not know if he had a weapon. Shumard said she tried to make conversation. She asked the defendant his name and how old he was. He said his name was John and that he was 25. Shumard told him he was younger than her children. The defendant then grabbed her breast and told her had been watching her and that she had “a very nice, firm breast.” She asked what he did for a living, and he told her he was a landscaper. She said she needed landscaping done at her house. Shumard said she tried to keep the conversation going in order to stay alive. Shumard first spotted two older ladies who looked “frail.” She did not think they could help her so she did not say anything. Then they passed Cindy Pepmeyer, who Shumard recognized since she also frequently walked the path. As Pepmeyer was alone, Shumard did not think she could help. They then saw

two other ladies approach. Shumard believed these ladies could help her. At that time, her cell phone which was in the defendant's pocket, began ringing. Shumard told the defendant to give her the phone. One of the ladies heard Shumard say this and told the defendant to give Shumard her phone. The defendant denied having Shumard's phone. Shumard started screaming and told the ladies that the defendant tried to rape her. The defendant then ran off.

¶ 15 Janet Wright and Tricia Sweeney testified that on the day of the incident they were going to go for a walk. They arrived at Lake Storey between 9:30 and 10 a.m. They had parked their vehicle and began their walk when they saw Shumard and the defendant walking side by side about 20 feet away. They had not met the defendant or Shumard before that day. They both made in-court identifications of the defendant. Shumard immediately "came running, scared, nervous, and yelling" when she saw them. Shumard was yelling, "He stoled my phone. He raped me. He raped me. He raped me." Shumard also said the defendant was trying to take her back to her house. The defendant was wearing a dark hoodie. He was quiet and "acted like *** [he] didn't want her to yell or scream." Wright told the defendant to give Shumard her phone back. Sweeney began calling 911, and the defendant ran into the park. Wright and Sweeney stayed with Shumard until the police arrived. The police took Wright and Sweeney in the police car to the other side of the park where other officers had apprehended a suspect. The officers asked if the man they had apprehended was the perpetrator. Wright then identified the defendant as the perpetrator. He had taken off the hoodie, but she still recognized him. Wright stated that Shumard remained upset throughout her contact with her and showed her scrapes on her knees and elbow.

¶ 16 Six police officers and a detective with the City of Galesburg responded to the call and testified at trial. Officer Kwan Cheuk met with Shumard, Pepmeyer, Wright, and Sweeney.

Officer Christopher Hootman assisted Cheuk. Wright and Sweeney described the perpetrator as "a skinny, white male *** 25 years old, with facial hair, wearing a black hooded sweatshirt." They said that the suspect had departed on foot eastbound through the soccer field. Cheuk and Hootman observed that Shumard had mud stains around the knees on her pants and a laceration on her left elbow. Hootman stated, "I've known the victim for many years, and she was very distraught, very upset." Shumard was a family friend, and he knew her through the restaurant she used to own. Hootman spoke to Shumard, who told him,

> "she was walking on the blacktop-paved bike path which goes around Lake Storey on the north side, and she was coming up on—there's a wooded area on the bike path that comes up to the—it's an iron bridge that's just been dedicated. She was approaching that bridge, and a white male subject with a scruffy—scruffily-faced beard wearing a black hooded sweatshirt came out and pulled her into the woods."

Shumard was transported to the hospital in an ambulance.

¶ 17 When Officer Mark McLaughlin was dispatched to the call, he was told that the suspect had fled eastbound on foot so he responded to the east area of the park. He was given a description of the suspect as a thin white male with a "scraggly beard" wearing a black sweatshirt. McLaughlin observed a white male on the path and asked him to come toward him. The man was wearing a T-shirt and pants, but did not have a black sweatshirt. McLaughlin stated that he was "gonna ask him if he'd seen anybody fleeing eastbound." However, when the man approached, McLaughlin noticed that he was thin, had a scraggly beard, and was potentially the suspect. McLaughlin identified the man in court as the defendant. He told the defendant that he was looking for a suspect that had ran and that the defendant matched the description. The

defendant told McLaughlin that he was walking around, waiting for his sister to pick him up because his truck had run out of gas. Cheuk and Hootman brought Wright, Sweeney, and Pepmeyer to the location where McLaughlin had found the defendant. All three women identified the defendant as the perpetrator. McLaughlin then handcuffed the defendant.

¶ 18 Officer Michael Ingles, Officer William Boynton Jr., and Detective Kevin Legate responded to the same area as McLaughlin. Ingles and Legate looked for the black sweatshirt and cell phone that the defendant may have had in his possession. They found a black hooded sweatshirt under the bike path bridge near the soccer field. They further found a cell phone near the water's edge, which was also entered into evidence. Boynton looked for the truck that the defendant had stated had run out of gas. He found the defendant's truck about four feet from the walking/bike path at the park. Boynton looked in the window and saw that the gas gauge showed a little over a quarter tank of gas.

¶ 19 Officer Damon Shea testified that he responded to the call. He was responsible for preserving and processing the evidence. He presented a photographic lineup to Shumard, and she identified the defendant as the man who assaulted her.

¶ 20 Detective Legate interviewed the defendant at the scene in the back of the squad car. Legate read the defendant his *Miranda* rights, and the defendant agreed to talk to him. Legate mostly asked the defendant about his truck, and the defendant told him it had ran out of gas. He also interviewed the defendant in a recorded interview at the jail. Legate asked the defendant if he had any sexual contact with anybody at Lake Storey. The defendant told Legate that "he received oral sex from a short Asian lady." Legate stated, "[The defendant] admitted to running from the scene as the lady started screaming that he had raped her to—as other pedestrians were walking by." The defendant initially denied knowing anything about the sweatshirt or the cell

phone, but then admitted to putting the black sweatshirt under the bike path bridge and placing Shumard's cell phone in the water. He provided the location of these objects without Legate telling him where the evidence had been found. He told Legate that he hid the sweatshirt because "[h]e was trying to change his appearance so [the police] could not see him—find him." He indicated that he put the cell phone in the water because "he did not want to get in trouble." The defendant further told Legate that

> "he had went to Lake Storey and *** had to *** urinate. *** So he had walked out in the woods approximately 40 feet away from where his truck was and was urinating; and at that time, he stated a female had made a comment to him about urinating; and he had stated in using his words, do you wanna suck it? At that point, she approached him and began giving him oral sex."

Further,

> "[the defendant] stated, at some point, a few seconds later, that he stopped, and that she had made mention to maybe going back to her house and that—because he didn't feel comfortable there, and that they began walking back to the—his truck, and that's when other people were walking by, and she began screaming rape."

The defendant said that he did not use force, but that he could see where the victim "could have felt threatened." The defendant also stated that the victim "had fallen down in the woods prior to her giving him oral sex."

¶ 21 The State rested. The defense made a motion for a directed verdict, which was denied. The defense presented no evidence. The court found the defendant guilty. In doing so, the court

discussed the circumstantial evidence and the testimony of the police officers, Sweeney, and Wright. It then stated,

> "So there's circumstantial evidence to present—to support the State's case. There's corroborative evidence to support the State's case.
>
> But as a trier of fact, this Court has to state clearly for the record that the direct testimony and the direct evidence presented to the Court through the testimony of Ms. Shumard is so completely overwhelming and compelling that the Court is 100 percent convinced of its accuracy and its truthfulness, and through Ms. Shumard's testimony alone, even if the trier of fact did not have circumstantial evidence or corroborative evidence, *** this Court would absolutely believe Ms. Shumard on each and every element that's necessary to establish this offense."

The defendant filed a motion for judgment of acquittal notwithstanding the verdict or a new trial, which were denied.

¶ 22 C. Sentencing

¶ 23 At the sentencing hearing, Shumard's victim impact statement was read. The statement read that Shumard used to walk in the park every day, but has been unable to return as it is now "a place of distress and fear." She was humiliated, not just by the attack, but by having to describe it to the police and her children. She now finds it hard to leave the house and lives in fear. She has had to start seeing a therapist. A victim advocate witness coordinator testified that the restitution owed to Shumard was $1427.71, for Shumard's medical expenses and the cost of a new phone. The presentence investigation report (PSI) indicated that the defendant had multiple prior offenses. The defendant reported that he would consider himself a drug addict due to his

frequent cannabis use. The defendant indicated that he previously worked two jobs, but both employers stated that he had never worked there.

¶ 24 The defendant's mother, Virginia, testified that the defendant angered quickly after the death of his father in 1997. The defendant's sister, Jessica, testified that the defendant had been living with her and helped around the house. She also noticed that the defendant became angry after their father's passing. Stephanie Bent testified that she was the mother of the defendant's ten-year-old son. The defendant supported his son and, since the defendant's incarceration, their son has been depressed and angry.

¶ 25 The sentencing range was 6 to 30 years' imprisonment. The State asked that the defendant be sentenced to 26 to 28 years' imprisonment. The defendant asked for six to eight years' imprisonment. The defendant made a statement in allocution, stating, "I would like to say sorry to the lady that she took, you know, what was said a whole different way then what was meant because I did not mean it in no way like—like they're putting it out to be." He then discussed his work history and stated that he helps his family as much as possible.

¶ 26 The court stated that it considered the facts of the case, the PSI, and the evidence presented in aggravation and mitigation. In aggravation, the court found (1) the defendant's conduct caused or threatened serious physical harm; (2) that, based on the defendant's previous eight convictions, he had a history of prior criminal activity; (3) the defendant committed the crime while on bail pending trial for two prior felony offenses; and (4) the sentence is necessary to deter others from committing the same crime. The court specifically stated that it did not take into consideration the age of Shumard as an aggravating factor since it was inherent in the offense. In mitigation, the court found that the imprisonment of the defendant would entail an excessive hardship to his dependents. The court stated,

"The Court is particularly troubled by the fact that the defendant's prior convictions in [the two cases that were pending at the time this crime was committed] also included assaults or batteries upon women. The Court is also troubled by the fact that of all of the assaults, the last three felonies for which now [the defendant] has been found guilty, the two aggravated batteries and also this, all of them were performed in a rather brazen fashion and all of them occurred in a public setting.

The Court is also troubled by the fact that the felonies for which [the defendant] stands convicted in [the other two cases] and now this case all involve components somewhat of a sexual nature in that the allegations contained in the charges in [the other two cases] involved the allegation of the grabbing of the breast by the defendant, and in this case, involved the sexual penetration of the victim.

The Court views the close proximity of these offenses as clearly exhibiting a clear escalation of the physicality of assaults from the offenses described in [the other two cases], and in this case, ultimately culminating in the aggravated criminal sexual assault of Ms. Shumard.

The Court has further considered that pursuant to *People v. Erickson*, 117 Ill. 2d 271, *People v. Neal*, 111 Ill. 2d 180, and *People v. Ward*, 113 Ill. 2d 516, all Supreme Court cases, that a nonstatutory additional aggravating factor that can be present is a defendant's lack of remorse or continued protestations of innocence, and the Court is troubled by the defendant's statement and attitude regarding the offense that was attached to the [PSI].

> Specifically, [the defendant] in his statement prepared on February 3rd, 2017 has written, I do not accept the fact that I am also said to have forced her to do so. I would not force myself on anyone. The defendant specifically states that his opinion of the victim is that [‘]she is by far the worst person that I’ve ever come across, and she knows none of this was forced upon her.[’]
>
> [The defendant] further writes in reference that [‘]I am being treated as a rapist and that is not who I am, and concludes his statement with, with all this being said, I hope you are happy putting someone away that isn’t guilty of rape. I do not see how you, the State, or the so-called victim sleep at night. May God truly have mercy on all of you.[’]
>
> I find that that constitutes [the defendant’s] lack of remorse and a continued protestation of innocence, and I find that to be particularly troubling, and it is considered and factored into this sentence as well.”

The court sentenced the defendant to 29 years’ imprisonment on the aggravated criminal sexual assault conviction. The defendant filed a motion to reduce sentence and a motion to reconsider sentence, which the court denied.

¶ 27 II. ANALYSIS

¶ 28 On appeal, the defendant argues (1) the court erred in denying his motion to dismiss on speedy trial grounds, (2) the evidence was insufficient to convict him, and (3) his sentence was excessive.

¶ 29 A. Speedy Trial

¶ 30 The defendant first contends that the court erred in denying his motion to dismiss on speedy trial grounds.

¶ 31 In Illinois, a defendant has both a constitutional and a statutory right to a speedy trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103-5(a) (West 2014). Although the Act implements the constitutional right to a speedy trial, the statutory right and the constitutional right are not coextensive. The defendant, here, does not argue that his constitutional right to a speedy trial was violated. Therefore, the only question is whether his statutory right to a speedy trial was violated.

¶ 32 The Act states, in pertinent part,

> "Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant ***. Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2014).

In 1999, the Act was amended to include the last sentence requiring a defendant to make a written or oral objection to any delay in his trial in order to keep the speedy trial clock tolling.

> "Under the preamended statute, only affirmative acts by the defendant that caused or contributed to the delay would toll the speedy-trial clock. [Citation.] Express agreements to continuance on the record were considered to be affirmative acts attributable to defendants, but mere silences or failures to object to continuances requested by the prosecution or the court were not." *People v. Cordell*, 223 Ill. 2d 380, 386 (2006).

"Thus, any cases decided before 1999, any cases decided based on the 1999 statute, or any cases that relied primarily on pre-1999 cases are simply not relevant to a present determination about whether a delay was agreed to by a defendant." *People v. Jones*, 2018 IL App (1st) 151307, ¶ 24.

¶ 33 Our supreme court in *Cordell* interpreted this newly added last sentence and stated,

> "[In this case] [d]efendant did demand trial at his arraignment on March 5, 2002, and again at the status hearing on April 26. On each occasion, however, the demand for trial was made *before* the trial court proposed any trial dates. Defendant voiced no objection to any proposed to actual delay. A simple request for trial, before any 'delay' is proposed, is not equivalent to an objection for purposes of section 103-5(a). See *People v. Peco*, 345 Ill. App. 3d 724, 734 (2004) ('while no magic words are required to constitute a speedy-trial demand, there must be some affirmative statement requesting a *speedy* trial in the record' (emphasis added)). As amended, section 103-5(a) places the onus on a defendant to take affirmative action when he becomes aware that his trial is being delayed. To allow basic requests for trial, made before any delay was even proposed, to qualify as objections to 'delays' not yet proposed would provide defendants with another sword to use after the fact to overturn their convictions. This does not comport with the intention of section 103-5(a)." (Emphasis in original.) *Cordell*, 223 Ill. 2d at 391-92.

The *Cordell* court concluded, "Defendant did not object to any of the delays in his trial. Therefore, under section 103-5(a), these delays are considered 'agreed to' by defendant ***." *Id.* at 392.

¶ 34 Here, the defendant was taken into custody on November 2, 2015. Therefore, the speedy trial clock began on November 3, 2015. See *People v. Pettis*, 2017 IL App (4th) 151006, ¶ 20 (in calculating the speedy-trial period, we exclude the first day and include the last day). On appeal, the defendant solely argues that the delay from November 17, 2015, until February 16, 2016, is attributable to the State. Thus, defendant concludes that the speedy trial clock should not have been tolled during this time. The defendant concedes that the speedy trial clock was tolled from February 17 until May 16, 2016, during which time the defendant had asked for two continuances. Accordingly, only if the period of time from November 17 to February 16 was not attributable to the defendant would the 120 days have expired at the time the defendant filed his motion to dismiss on June 1, 2016.[1]

¶ 35 On November 17, 2015, the following exchange occurred:

> "[THE COURT]: Shall we set down an arraignment?
>
> [DEFENSE COUNSEL]: Judge, actually, if we could, we'd like to go to arraignment today. [The defendant] also has two other cases that are up on the jury pre-trial calendar on November 23rd—
>
> THE COURT: Put them all on the same one?
>
> [DEFENSE COUNSEL]: Correct. So we would move to continue the two cases *** from November 23rd to the next jury pre-trial calendar in front of Judge Shipplett, which would be February. And the case that we just had the prelim on, we'd waive further reading, enter a plea of not guilty with a jury demand, ask that

[1]Though the defendant was not actually tried until January 11, 2017, the defendant makes no argument that his speedy trial right was violated after his motion to dismiss. Moreover, we find that the record would not support such a contention.

it be set on the—and I think the next calendar that's available would be the February calendar then."

This record clearly shows that defense counsel specifically moved to continue this case to February 2016. The court asked defense counsel if he wanted this case continued to November 23, 2015, so that all three of the defendant's cases would be together, but defense counsel instead moved all three to the February calendar. "When a defense attorney requests a continuance on behalf of a defendant, any delay caused by that continuance will be attributed to the defendant." *People v. Mayo*, 198 Ill. 2d 530, 537 (2002). While the clerk and deputy clerk testified at the hearing on the motion to dismiss that the November calendar was closed, the record does not show that they proposed the February date, nor does the record contain any interchange with the representative of the clerk's office on November 17, 2015.

¶ 36 Moreover, even if we accept the defendant's argument that he did not ask for a continuance, but only set the case on the February schedule at the court clerk's behest, we note that, as stated above, the *Cordell* court held that if a defendant does not affirmatively object or affirmatively assert a speedy trial demand on the record after a delay is proposed, such defendant acquiesces to the delay and the speedy trial period tolls. *Cordell*, 223 Ill. 2d at 391-92. The defendant did not object or affirmatively assert his speedy trial demand on the record. Therefore, the delay was attributable to the defendant, the speedy trial period tolled, and the court did not err in denying the motion to dismiss.[2]

¶ 37 B. Sufficiency of the Evidence

[2]We note that the circuit court also held that subsection (e) of the Act applied, and the defendant argues that the court erred in applying it. Because we find that the defendant's speedy trial right was not violated under subsection (a), the subsection the defendant sought to use, we need not consider this argument.

¶ 38 The defendant next contends that he was not proven guilty beyond a reasonable doubt of aggravated criminal sexual assault.

¶ 39 "When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "This means the reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Collins*, 106 Ill. 2d at 261. We give great deference to the trier of fact. See, *e.g.*, *People v. Saxon*, 374 Ill. App. 3d 409, 416-17 (2007).

> "[I]n a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. [Citations.] A reviewing court will not reverse a conviction simply because the evidence is contradictory [citation] or because the defendant claims that a witness was not credible." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 40 In order for the defendant to be convicted of aggravated criminal sexual assault, the State had to prove (1) the defendant committed an act of sexual penetration, (2) the defendant used force or threat of force, and (3) the victim was 60 years of age or older. 720 ILCS 5/11-1.30(a)(5), 11-1.20(a)(1) (West 2014).

¶ 41 Here, Shumard testified that she was 60 years old and walking at Lake Storey when the defendant grabbed her from behind. The defendant knocked her down on the walking path and dragged her off the pavement. He pushed her onto her knees, "took his penis out," and told her to "suck it, or [he would] hurt [her] pretty bad." The defendant then pushed her head down and placed his penis in her mouth without her consent. The defendant told her they were going to go farther into the wooded area so that they would not be seen. Shumard testified that she was afraid that he might kill her so she told him that they should go to her house. She did this in the hope that on the walk to the vehicle, she could find someone to help her. The defendant told Shumard that if she made a scene, he would hurt her. We note that "the testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant." *Siguenza-Brito,* 235 Ill. 2d at 228. The court found Shumard credible, stating that her testimony was "so completely overwhelming and compelling that the Court is 100 percent convinced of its accuracy and its truthfulness." We defer to this credibility finding. See *id.* Thus, Shumard's testimony alone was sufficient to convict the defendant as she was credible and her testimony established all three necessary elements of the offense.

¶ 42 Moreover, Shumard's testimony was corroborated by numerous other witnesses. Wright and Sweeney testified that as soon as they saw Shumard, she came running toward them and yelled that the defendant had raped her and taken her phone. They stated that Shumard was nervous and scared. Both of them identified the defendant. When McLaughlin first came upon the defendant, the defendant told him that he was at the park waiting for his sister because his truck had run out of gas. The defendant's truck was later located and it was not out of gas. He later stated that he was urinating in the woods, when Shumard approached him and commented about him relieving himself in a public place. The defendant said to her, "do you wanna suck it?"

She then gave him oral sex. He stated that, though he did not use force, he could see where Shumard "could have felt threatened." Moreover, the black sweatshirt the defendant was wearing and Shumard's cell phone were found hidden under the bridge and in the water, respectively. The defendant admitted to putting them there because he wanted to change his appearance and did not want to get into trouble. Taking the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

¶ 43 C. Sentencing

¶ 44 Lastly, the defendant argues that his sentence was excessive. See *People v. Heider*, 231 Ill. 2d 1, 18 (2008) (filing a motion to reconsider sentence considering the issue is sufficient to raise an excessive sentence claim on appeal). A circuit court's sentencing decisions are entitled to great deference and will not be altered by a reviewing court absent an abuse of discretion. *People v. Jackson*, 375 Ill. App. 3d 796, 801 (2007). The circuit court is granted great deference by reviewing courts because it is in a better position to determine the appropriate sentence since it has the opportunity to weigh factors like "the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense or greatly at variance with the spirit and purpose of the law as the circuit court has broad discretion to sentence a defendant to any term within that range. *People v. Alexander*, 239 Ill. 2d 205, 212-13, 215 (2010).

¶ 45 Here, the defendant's sentence fell within the statutory range. Aggravated criminal sexual assault is a Class X felony (720 ILCS 5/11-1.30(d) (West 2014)) with a sentencing range of 6 to 30 years' imprisonment (730 ILCS 5/5-4.5-25(a) (West 2014)). The defendant's 29-year prison

sentence is below the maximum possible sentence and is presumptively valid. See *People v. Busse*, 2016 IL App (1st) 142941, ¶ 27 (sentence within the statutory range is presumptively valid). At sentencing, the court stated that it considered all the evidence presented. The only mitigating factor the court found was that the imprisonment of the defendant would entail an excessive hardship to his dependents. However, the court found significant aggravating factors, including the physical harm to Shumard, his criminal history, that he was on bail when committing the offense, and that the sentence was necessary for deterrence. Moreover, the court noted that the two felonies the defendant was on bail for when committing the instant offense were both aggravated batteries against women, "performed in a rather brazen fashion," in a public places, and all involved "components somewhat of a sexual nature." The court noted that all three offenses were fairly close in time and "exhibit[ed] a clear escalation of the physicality." The court further commented on the defendant's complete lack of remorse and his attitude regarding the offense, particularly where the defendant wrote in the PSI that Shumard was "by far the worst person that [he had] ever come across." The lack of remorse is a proper subject for consideration at sentencing. *People v. Bannister*, 232 Ill. 2d 52, 91 (2008). We cannot say that the sentence is manifestly disproportionate to the nature of the offense or greatly at variance with the spirit and purpose of law. Therefore, the court did not abuse its discretion. *Alexander*, 239 Ill. 2d at 215.

¶ 46 In coming to this conclusion, we reject the defendant's argument that his sentence was excessive because it was greater than in other aggravated criminal sexual assault cases around Illinois. "The fact that a lesser sentence was imposed in another case has no bearing on whether the sentence in the case at hand is excessive *on the facts of that case*." (Emphasis in original.) *People v. Fern*, 189 Ill. 2d 48, 56 (1999).

¶ 47 III. CONCLUSION

¶ 48 The judgment of the circuit court of Knox County is affirmed.

¶ 49 Affirmed.