2019 IL App (5th) 150477-U

NO. 5-15-0477

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 15-CF-73
	)	
TERRANCE GODFREY,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant is unable to establish that the trial court's failure to strictly comply with Supreme Court Rule 431 constituted plain error or that he should be granted a new trial on his ineffective-assistance-of-counsel claims. The defendant's sentence is reduced as it exceeded the statutory maximum by 37 years.

¶ 2 In July 2015, a Jackson County jury found the defendant, Terrance Godfrey, guilty of numerous offenses arising from a series of events that occurred in Carbondale on February 22, 2015. On appeal, the defendant argues that he was denied the effective assistance of counsel and that the trial court's failure to strictly comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) denied him a fair trial. He further argues

that the aggregate sentence imposed on his convictions exceeds the statutorily allowed maximum. For the reasons that follow, we affirm the defendant's convictions and reduce his sentence by 37 years.

¶ 3 I. BACKGROUND

¶ 4 On February 17, 2015, in Jackson County case number 14-CF-499, the defendant pled guilty to a charge of residential burglary (720 ILCS 5/19-3 (West 2014)), was sentenced to serve 10 years in the Illinois Department of Corrections, and was granted a furlough until February 25, 2015. On February 23, 2015, the State filed an information charging the defendant with three counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2014)) (counts I, II, and III), one count of aggravated battery (*id.* § 12-3.05(d)(4)) (count IV), one count of disarming a peace officer (*id.* § 31-1a(b)) (count V), and one count of attempted escape (*id.* §§ 8-4(a), 31-6(c)) (count VI). In March 2015, a Jackson County grand jury indicted the defendant on the same counts. We note that the information and indictment both alleged that the defendant qualified for mandatory Class X sentencing on counts I through V. See 725 ILCS 5/111-3(c) (West 2014); 730 ILCS 5/5-4.5-95(b) (West 2014).

¶ 5 In July 2015, the cause proceeded to a jury trial. Viewed in the light most favorable to the State (see *People v. Collins*, 106 Ill. 2d 237, 261 (1985)), the evidence adduced established the following.

¶ 6 In August 2014, K.H., who was 22 at the time, moved from Iowa to Carbondale to attend graduate school at Southern Illinois University. She shared a four-bedroom apartment on East Mill Street with Maureen O'Conner, Alexis Washa, and Kylie

Gutknecht, who were fellow students in her master's degree program. The women's apartment was approximately "130 steps" away from the apartment where the defendant, who was 42 at the time, resided with a friend on East Hester Street.

¶ 7 On the night of Saturday, February 21, 2015, K.H. and her roommates went out to dinner with approximately 15 other students from their program. The other students included Bridget Munoz, Stuart Mullen, "Carl," and "Will." After dinner, approximately half of the group went to a bar, and the other half, including K.H., went to K.H.'s apartment. The group that went to the bar later congregated at the apartment as well, and the students drank and socialized throughout the evening. The apartment door was frequently opened and closed as people came and went, and Will was drinking heavily.

¶ 8 At approximately 11:30 p.m., K.H. and Alexis left the party to watch a band perform at a nearby club. While they were gone, the defendant entered the apartment with Carl and Will. The defendant pretended that he knew Will and introduced himself as "T. Black." The defendant acted "friendly" and provided marijuana to partygoers. He also played music on a set of portable speakers that he retrieved from his apartment. The defendant was "kind of shuffling in and out" of the party all night, and he was there for at least an hour after midnight. No one at the party knew the defendant or knew that he lived nearby.

¶ 9 On Sunday, February 22, 2015, at approximately 2:15 a.m., K.H. and Alexis returned home to their apartment. The party was over at that point, and Stuart and the four roommates were soon the only persons present. Kylie was cleaning up the "bottles

and stuff," and Maureen was "sleeping off and on" on one of the two couches in the living room. A pizza was ordered, and the group "kind of watched a movie."

¶ 10 At approximately 2:30 a.m., the defendant knocked on the door of the apartment and advised that he had forgotten his portable speakers. While the defendant was gathering the speakers, Alexis asked him if he had any marijuana. The defendant indicated that he had some at his apartment and then left to go get it. When he returned with the marijuana a short time later, he and the others smoked some from a pipe. When Alexis asked the defendant what his name was, he stated that his name was "Tony." When Alexis offered to pay the defendant for the marijuana they were smoking, he declined to accept any money. When Alexis indicated that she had smoked enough, the defendant encouraged her to smoke more, which "irritated" her. K.H. testified that in addition to the marijuana that she smoked with the defendant and her roommates, she had consumed three alcoholic beverages that night.

¶ 11 After smoking the marijuana, Alexis and K.H. retired to their upstairs bedrooms and went to sleep. The defendant was advised that things were winding down and that it was time for him to leave. Kylie subsequently went to bed in her room, which was on the first floor.

¶ 12 At approximately 4 a.m., the defendant sat down on a stool by the countertop of the kitchen, laid his head down, and pretended that he was trying to sleep. Maureen was asleep on the couch in the living room where she had previously been sitting, and Stuart, who planned on sleeping on the adjacent couch, repeatedly told the defendant that he needed to go. In response, the defendant kept his head down and mumbled that he was

too tired and drunk to leave. Stuart did not believe that the defendant was that intoxicated, and the defendant's refusal to leave "spooked" Stuart, given that the defendant was "not a small man" and that they were the only two awake at the time. Stuart grabbed two knives from the kitchen "for protection" and placed them in the pockets of his pants, where the defendant could see them. When the defendant saw the knives, he continued to act "really tired" and still refused to leave. After Stuart woke Maureen and told her what was happening, they decided that the best way to "defuse the situation" was to call for a taxi to take the defendant home.

¶ 13 At approximately 4:30 a.m., Maureen called for a taxi and then returned to the couch where she had been sleeping in the living room. Thereafter, Stuart put the knives back in the kitchen and took a seat on the adjacent couch where the defendant was "easily in view." Maureen and Stuart tried to stay awake, but they were both asleep when the taxi company twice called back at approximately 5:15 a.m.

¶ 14 At approximately 5:50 a.m., the defendant walked upstairs, entered K.H.'s bedroom, and locked the door behind him. When K.H. awoke and ran for the door, the defendant wrapped his arms around her from behind, put one of his hands over her mouth, and held her facedown against the foot of her bed. When K.H. struggled, the defendant tightened his grip, making it difficult for her to breathe. The defendant then placed a gun or a gun-like object against K.H.'s head and told her that if she made any noise, he would kill her and her roommates. At that point, K.H. stopped resisting and agreed to cooperate.

¶ 15 Using pieces of clothing from her room, the defendant gagged K.H. and tied her hands behind her back. When the defendant asked K.H. if she had any money, she directed him to her debit card, hoping that he would take it and leave. Instead, the defendant removed her pants and underwear, "guided" her into a facedown position on the bed, and penetrated her anus and vagina with his tongue.

¶ 16 For approximately two hours thereafter, the defendant's assault continued. During that time, the defendant fully undressed K.H., repeatedly penetrated her anus and vagina with his penis, and forced her to perform oral sex on him. The defendant did not use a condom, and K.H. did not consent to any of the acts. K.H. later explained that she had not screamed for help because she thought that the defendant was going to kill her.

¶ 17 Using K.H.'s cell phone, the defendant recorded approximately three minutes of the two-hour encounter on two separate videos. Before making the videos, the defendant told K.H. that he "wanted [her] to convince the camera that [she] wanted him in [her] room." The defendant then forced K.H. to say things while he recorded her performing oral sex on him.

¶ 18 The first video was "a real short one" that the defendant stopped recording because K.H. "wasn't [being] convincing enough." On the second video, using vulgar terminology, the defendant had K.H. agree that she loved performing oral sex on him, that he had not forced her to perform oral sex on him, and that she wanted him to ejaculate in her vagina. The defendant also made her say, "I'm in love with Tony." K.H. later explained that when she said those things, she "was honestly scared for [her] life" and "was complying with whatever he told [her] to do." Also on the second video, in

response to references the defendant made about penetrating K.H.'s vagina, she can repeatedly be heard stating, "It hurts."

¶ 19 When the defendant penetrated K.H.'s anus "the first time," she "cried out in pain," and he asked her if she had "any lotion around." K.H. directed him to a bottle of tanning lotion, which he subsequently "rubbed *** on himself before he penetrated [her] anally."

¶ 20 At one point, in an attempt to get out of the room, K.H. advised the defendant that she needed to go to the bathroom. In response, the defendant made her urinate on the clothes in a hamper in her closet and had her perform oral sex on him while doing so. In an attempt to wake Alexis, K.H. fell into the hamper so that she hit the wall in her closet, which abutted Alexis's room. The noise woke Alexis, and when she went to check on K.H., K.H.'s bedroom door was locked, which was "unusual." Alexis heard K.H. "whimpering" behind the door and could tell that she was upset about something. When Alexis knocked on the door, however, K.H. did not respond. Presuming that K.H. was upset about something that had occurred the night before, Alexis reasoned that it would be best to address the matter in the morning and went back to bed. Alexis later stated that "in a million years," she would never have imagined what had been "happening behind that door."

¶ 21 At approximately 8 a.m., the defendant asked K.H. if she had keys to a car. When she indicated that her car keys were downstairs, the defendant had her get dressed and again gagged her and tied her hands behind her back. He then forced her into her closet and closed the door. A few minutes later, the defendant returned with K.H.'s keys and led

her out of the apartment through an upstairs exit. He placed her in the front passenger's seat of her car with the seat reclined "all the way back" so she "could barely see out the window." Before driving away, he also put on a pair of gloves that K.H. had in the car. K.H. thought that the defendant "was going to kill [her] and ditch [her] body somewhere."

¶ 22 The defendant subsequently drove K.H. to a nearby ATM, where he removed her bindings and had her withdraw cash with her debit card. Before she exited the car, the defendant told her that if she tried to run away, he would chase her down and kill her. K.H. withdrew $300, which was her debit card's daily limit, and left the transaction receipt on the sidewalk as a "trail." K.H. explained that she had been "scared that [the defendant] would dump [her] body[,] and no one would know where [she] was."

¶ 23 After K.H. returned to the car, the defendant drove past her apartment before parking and having her "switch places with him." On the defendant's instructions, K.H. dropped him off in the parking lot of the Good Samaritan House homeless shelter, which was visible from her apartment. Before getting out of the car, the defendant asked K.H. to perform oral sex on him again. When she said "no," he replied, " 'I was just kidding.' " The defendant also told K.H. that if she reported what had happened, he would kill her and that if he saw any police at her apartment, he would bomb it. While K.H. was "playing with her purity ring," she and the defendant had a brief discussion about God.

¶ 24 While driving back to her apartment, K.H. called Alexis, frantically advising that she had been "raped" and that the rapist was " 'watching the house.' " Alexis woke the others in the apartment, and K.H. was soon pounding on the front door, yelling for them

to open it. When K.H. entered, she locked the door, ran to a corner, rolled into a fetal position, and began "bawling hysterically." When Maureen announced that she was calling the police, K.H. told her not to because the defendant would kill them if she did. After K.H. calmed down to the point where she "could breathe again," she agreed that the police should be called.

¶ 25 Shortly after 9 a.m., Maureen called 911 and reported that K.H. had been raped by a man who held a gun to her head. On the recording of the 911 call, K.H. can be heard loudly crying in the background. The police immediately responded to the apartment, and an investigation ensued. The defendant was quickly identified through photographic lineups and a Snapchat video that Bridget had taken during the party at the apartment the night before. K.H.'s hamper of urine-soaked clothes was found by the closet in her room, her bottle of tanning lotion was found near her bed, and her ATM receipt was found on the sidewalk where she left it. K.H. underwent a sexual assault examination at Carbondale Memorial Hospital, and sperm later identified as the defendant's was found in her vagina. The police tried to locate the defendant at his apartment throughout the day, but he was never there. Later that night, however, he was found and arrested in a motel room less than a mile away.

¶ 26 After the defendant was arrested, he was transported to the Carbondale Police Department by Officer Eric Keller. When they arrived at approximately 8 p.m., Keller secured his firearm in a lockbox and escorted the defendant into the department's processing area. The defendant was cooperative while his personal property was removed

from his pants pockets, and Keller did not perceive that "there was going to be any problem."

¶ 27 When the defendant was subsequently taken into an adjacent room so that he could sit down and remove his shoes, Keller removed the handcuffs that the defendant had been wearing. The defendant then advised Keller that "he had an extra pair of pants underneath his outside pants." After having the defendant stand and place his hands against the wall, Keller commenced searching the extra pair of pants. During the search, the defendant "suddenly turned toward [Keller]" and grabbed him by the throat with both hands. With his hands around Keller's throat, the defendant pushed him against the wall and onto the floor. The defendant then got on top of Keller and continued to choke him for approximately 15 seconds before fleeing the room.

¶ 28 Keller immediately drew his Taser and chased after the defendant. When the defendant attempted to exit the building through a locked door in the processing area, Keller pointed his Taser at the defendant and told him to "get down." In response, the defendant advanced on Keller, grabbed the Taser, and attempted to take it. While the defendant and Keller were struggling over the weapon, additional officers ran into the processing area to assist. At that point, the defendant fled to an interview room down the hall and barricaded himself inside, using his bodyweight against a table. The defendant's attack on Keller and the defendant's attempt to escape were captured on security cameras, and recordings of the events were shown at trial.

¶ 29 After the defendant barricaded himself inside the interview room, numerous attempts to physically force the door open failed. Pepper spray was dispersed into the

room from underneath the door, but the defendant still refused to exit. Officer Molly Reeves was ultimately able to "talk" the defendant out of the room, and after being in the room for over an hour, he willingly walked out and allowed her to place him in handcuffs. Before surrendering, the defendant indicated that he wanted to speak with Reeves about the "sexual incident" in question.

¶ 30 While the defendant was subsequently being transported to the Jackson County jail, he waived his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)), and Reeves spoke with him as he had requested. When the defendant was advised that multiple witnesses had seen him at an apartment where a sexual assault had occurred, he denied any involvement in the incident and denied having been at a party across the street from his house "getting high" with some college students. The defendant claimed that he had gone to a bar on the night in question before returning to his apartment and falling asleep. The defendant indicated that he had stayed at the bar until closing time and had gotten a ride from a guy in a Jeep. When the defendant was advised that there was a video of him at the party and that there were videos of him making the victim perform oral sex on him, he indicated that he could not remember anything because he had been drunk and high on cocaine that night. The defendant insisted that he did not "know what the hell happened." The defendant admitted that he had assaulted Keller at the police department, but he denied having ever committed a sexual assault. The defendant indicated that he had not driven K.H. to an ATM.

¶ 31 For two nights after the assault, K.H. and her roommates stayed in a hotel room "at the other end of town" because they were too scared to stay at their apartment. For

approximately two months thereafter, K.H. and her roommates slept in their living room together because they were too scared to sleep alone.

¶ 32 At trial, the defendant testified that he had gone to several parties in his neighborhood on the night in question. The defendant indicated that it was one of his last nights on "furlough" and that he just wanted to "go out and have a nice time." The defendant stated that he had gotten drunk and had also been "doing coke and heroin." The defendant indicated that Will and Carl, who did not testify at trial, had invited him to the party at K.H.'s apartment. The defendant further indicated that Will had gone to his house with him when he left the party to retrieve his portable speakers. The defendant also testified that Will had provided the marijuana that had been smoked at the party. The defendant indicated that he could not remember much of what happened that night because he was drunk and high.

¶ 33 The defendant recalled returning to K.H.'s apartment after the party had ended. The defendant claimed that he had thrown up in a bathroom and had crawled to the kitchen counter, where someone had helped him into a chair. He recalled subsequently seeing a knife. The defendant testified that K.H. later woke him indicating that she wanted some marijuana. She then grabbed his arm and led him upstairs to her bedroom. The defendant indicated that he did not recall what happened after that but that he never intended to hurt anyone.

¶ 34 When cross-examined, the defendant testified that he had told the people at the party that his name was "Tony" because he had been drunk and high. He also testified that he did not "remember giving a name." The defendant stated that although he did not

know what had happened that night, he knew that he and K.H. must have had sexual intercourse because his sperm was later found in her vagina. He further stated that K.H. had specifically asked him to penetrate her anus with his penis and that he had been "respectful" when she requested that he use her tanning lotion. The defendant suggested that K.H. had wanted him to "ejaculate in her unprotected."

¶ 35 The defendant indicated that even though he had been able to operate K.H.'s phone and did not sound drunk on the videos, he had been intoxicated when he recorded K.H. performing oral sex on him and did not recall what had been said on the recordings. The defendant denied that he had forced K.H. to do anything and denied making the recordings to make it appear as if their encounter had been consensual. The defendant suggested that the videos had merely captured moments of them "talking and having sex." The defendant also denied ever hearing K.H. complain that "it hurt," but he acknowledged hearing her say it on the videos. The defendant claimed that he had been "scared" when K.H. led him upstairs.

¶ 36 The defendant denied having threatened K.H. when she later dropped him off in the parking lot of the Good Samaritan House. The defendant indicated that he had subsequently gone to a motel because his roommate did not want him to stay at the apartment that night. The defendant claimed that he "was still drunk and high" when he was arrested. He indicated that his statements to Reeves were the result of his intoxicated and drugged condition. The defendant acknowledged that he had a criminal history dating back to 1991.

¶ 37 During closing arguments, the State suggested, *inter alia*, that the defendant's claim that his sexual encounter with K.H. had been consensual was belied by the evidence that he made her urinate on her own clothing and forced her to withdraw money from an ATM. The State also noted that K.H. had repeatedly stated, "It hurts," on the second video that the defendant took with her phone. The State suggested that the defendant's claims that he had been too drunk and high to remember anything were self-serving. The State encouraged the jurors to consider K.H.'s demeanor when she unequivocally testified that "she wanted nothing to do with him at all." The State argued that the defendant's attempts to hide at the motel and escape from the Carbondale Police Department constituted further evidence of his guilt.

¶ 38 Defense counsel asserted that what occurred in K.H.'s bedroom had been a sexual encounter between two consenting adults. Emphasizing the lack of medical evidence regarding blood or injury, counsel argued that the State had failed to prove otherwise. With respect to the videos on K.H.'s phone, counsel suggested that the defendant and K.H. had decided to record themselves "having relations" and that the defendant was merely "having to coach her." With respect to the urine-soaked clothing found in the K.H.'s hamper, counsel maintained that "[p]eople do strange sexual things" and that K.H. might not have been "forced to do that." Counsel noted that the defendant had provided the only testimony regarding "how he got up to that room."

¶ 39 Referencing the "very clear" video footage of the defendant's attack on Keller and the defendant's attempt to exit the Carbondale Police Department, counsel conceded the defendant's guilt on the charges of attempted escape and aggravated battery. Counsel

argued that the defendant had not tried to take Keller's Taser, however, and was thus not guilty of disarming a peace officer.

¶ 40 Counsel repeatedly maintained that the defendant was not guilty of the criminal sexual assault charges. Counsel suggested that when K.H. was dropping the defendant off and "fiddling around with her purity ring," her "guilty conscience" had caught up with her, and she thought to herself, " 'I shouldn't have done this. What a mistake I made having sex with the guy.' " Counsel suggested that at that point, K.H. began hysterically bawling and decided to falsely claim that she had been raped. Counsel further suggested that had K.H. been as fearful of the defendant as she claimed to have been, she would have called the police before contacting her roommates.

¶ 41 The record indicates that the jury deliberated for approximately an hour before finding the defendant guilty on all six counts of the indictment. The defendant subsequently filed a motion for a new trial generally alleging that his trial attorney had been ineffective and that the State had failed to prove his guilt beyond a reasonable doubt. New counsel was appointed to argue the defendant's motion for a new trial, and in September 2015, the trial court denied the motion following a hearing. When addressing the defendant's claims, the trial court concluded that the evidence of the defendant's guilt was "overwhelming" and that his trial attorney "provided good representation *** in an extremely difficult case."

¶ 42 At the defendant's sentencing hearing, Shelley Kelley, a former employee of the Good Samaritan House, testified that in November 2014, the defendant came into the shelter to eat lunch and advised her that he was new to the area. When Shelley went

outside several hours later, the defendant was waiting on her. Shelley testified that the defendant got "uncomfortably close," requested her phone number, and asked her if she would like to go to lunch with him sometime. Shelley advised the defendant that a relationship between them would be unacceptable and could cost her her job.

¶ 43 The next time Shelley encountered the defendant at the shelter, he unexpectedly entered her office and spontaneously grabbed her and hugged her. The act "scared" Shelley, and she pushed him away, telling him that "he was going to get [her] fired." She "raised [her] voice enough [so] the people outside started to turn around and look, and he backed off." Shelley indicated that she subsequently felt unsafe at work and had a male coworker escort her to her car whenever she worked evenings.

¶ 44 Shelley testified that the defendant later obtained her phone number and started calling her. Shelley indicated that the defendant had presumably gotten her number by entering an employee-only area of the shelter where an employee contact list was kept. Shelley testified that the first time the defendant called her, she hung up on him. The subsequent times he called, she refused to answer. He then sent her several text messages, one of which included a picture of his penis and a statement "about how big his penis was and what he would do to [her]." Shelley testified that the text scared and disgusted her. Thereafter, Shelley called her cell phone provider and had them block the defendant's number.

¶ 45 Shelley indicated that the defendant had subsequently called her from another number and left her a voice message advising her that he was in jail. He later called her from a third number, and when she answered the call, he demanded that she visit him in

jail. The defendant then sent Shelley a text message from a fourth number, asking her why she had blocked his calls and "wouldn't talk to him."

¶ 46 When Shelley later learned that the defendant had sexually assaulted K.H., she felt horrible and wondered if she could have done something to prevent it. Shelley also quit her job at the Good Samaritan House because she "didn't feel safe there anymore." Shelley opined that given the way the defendant had acted towards her, *i.e.*, "almost like he could do whatever he wanted," she feared that he would victimize other females if given the opportunity to do so. Following Shelley's testimony, K.H., Maureen, and Bridget presented victim impact statements.

¶ 47 In allocution, the defendant apologized to the court for not respecting the rules of the furlough that he had been granted in 14-CF-499. Defense counsel argued that the defendant should receive consecutive six-year sentences on counts I through V and a sentence of probation on count VI.

¶ 48 Referencing section 5-8-4(f)(2) of the Unified Code of Corrections (730 ILCS 5/5-8-4(f)(2) (West 2014)), the State argued, *inter alia*, that counts I, II, and III constituted "a single course of conduct," while counts IV, V, and VI constituted another such course. See *People v. Hummel*, 352 Ill. App. 3d 269, 271 (2004) ("In order to determine whether the defendant's crimes were part of a single course of conduct, a court must determine whether the acts constituting each crime were 'independently motivated' ***."). The State also noted that consecutive sentences had to be imposed on counts I, II, and III (730 ILCS 5/5-8-4(d)(2) (West 2014)) and that the aggregate cap for those counts was 60 years (see 720 ILCS 5/11-1.20(b)(1) (West 2014); 730 ILCS 5/5-4.5-30(a) (West 2014); *People*

v. Stacey, 193 Ill. 2d 203, 214-15 (2000)). The State further noted that the defendant was eligible for mandatory Class X sentencing on counts I through V in light of his prior criminal history. See 730 ILCS 5/5-4.5-95(b) (West 2014).

¶ 49 The trial court ultimately imposed consecutive sentences on the defendant's convictions totaling 125 years. The court imposed 20-year sentences on counts I, II, and III, 30-year sentences on counts IV and V, and a 5-year sentence on count VI. Notably, the court sentenced the defendant as a Class X offender on counts I through V (see 730 ILCS 5/5-4.5-95(b) (West 2014)), and no extended-term sentences were argued for or imposed on any counts (see 730 ILCS 5/5-4.5-25(a), 5-5-3.2(a), 5-8-2(a) (West 2014)).

¶ 50 In October 2015, arguing that the 30-year sentences he received on counts IV and V were excessive given that Keller had only sustained minor injuries, the defendant filed a motion to reconsider sentence, which the trial court denied. In November 2015, the defendant filed a timely notice of appeal.

¶ 51 II. DISCUSSION

¶ 52 The defendant argues that we should reverse his convictions and grant him a new trial. In support of this argument, the defendant raises numerous ineffective-assistance-of-counsel claims and further contends that he was denied a fair trial due to the trial court's failure to strictly comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Maintaining that the aggregate sentence imposed on his convictions exceeds the statutorily allowed maximum, the defendant alternatively argues that he should be granted a new sentencing hearing or that his sentence should be reduced accordingly. We will first address the defendant's ineffective-assistance-of-counsel claims.

¶ 53 A. Ineffective Assistance of Counsel

¶ 54 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). Counsel is presumed to know the law (*People v. Perkins*, 229 Ill. 2d 34, 51 (2007)), and a reviewing court "must indulge in a strong presumption that counsel's conduct fell into a wide range of reasonable representation" (*People v. Cloutier*, 191 Ill. 2d 392, 402 (2000)). "Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have proceeded differently is sufficient to establish ineffective assistance of counsel." *People v. Dobbs*, 353 Ill. App. 3d 817, 827 (2004). "In fact, counsel's strategic choices are virtually unchallengeable." *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). "In reviewing a claim of ineffective assistance of counsel, a court must consider defense counsel's performance as a whole and not merely focus upon isolated incidents of conduct." *People v. Max*, 2012 IL App (3d) 110385, ¶ 65.

¶ 55 To succeed on an ineffective-assistance-of-counsel claim, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). "Because a defendant must establish both a deficiency in counsel's performance and prejudice resulting from the alleged deficiency, failure to establish either proposition will be fatal to the claim." *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996). "Further, in order for a defendant to establish that he suffered prejudice, he

must show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." *People v. Burt*, 205 Ill. 2d 28, 39 (2001).

¶ 56 1. Failure to Seek a Severance of Charges/Counsel's Concessions of Guilt

¶ 57 The defendant first argues that trial counsel was ineffective for failing to seek a severance of the sexual assault charges (counts I, II, and III) from the charges that stemmed from his conduct at the Carbondale Police Department (counts IV, V, and VI). The defendant suggests that had counsel moved to sever the charges, the motion would have been granted, and the jury would not have been exposed to the video of him "violently throwing Keller to the ground and choking him." The defendant further complains because counsel conceded his guilt on counts IV and VI.

¶ 58 Multiple offenses based on multiple acts may be charged in the same indictment or information so long as the acts were "part of the same comprehensive transaction." 725 ILCS 5/111-4(a) (West 2014). Multiple offenses may be tried in the same prosecution unless it appears that the defendant will be prejudiced by the joinder of the charges. *Id.* § 114-8(a).

¶ 59 A defense decision to seek a severance of charges is a matter of trial strategy. *People v. Poole*, 2012 IL App (4th) 101017, ¶ 10. Trial counsel cannot be deemed ineffective where a motion to sever would have been futile. *People v. Rosario*, 180 Ill. App. 3d 977, 982 (1989). "The granting or denial of a motion for severance is a matter largely within the sound discretion of the trial court," and "each case turns largely upon the facts presented." *People v. Sockwell*, 55 Ill. App. 3d 174, 175 (1977).

¶ 60 Here, counsel did not file a pretrial motion to sever counts I, II, and III from counts IV, V, and VI. The State, however, gave pretrial notice that it intended to introduce the evidence of the defendant's attempt to escape from the Carbondale Police Department as evidence of his consciousness of guilt. See, *e.g.*, *People v. Carter*, 2016 IL App (3d) 140196, ¶ 35 (noting that such evidence has "high probative value"). It was thus reasonable for counsel to presume that regardless of whether counts I, II, and III were severed from counts IV, V, and VI, the jury would have still been exposed to the evidence of the conduct upon which counts IV, V, and VI were based. See *People v. Gapski*, 283 Ill. App. 3d 937, 942-43 (1996).

¶ 61 On appeal, the defendant suggests that the trial court would have granted a motion to sever because the court would have concluded that the probative value of the evidence of his attempted escape was outweighed by its prejudicial effect (see, *e.g.*, *People v. Bedoya*, 325 Ill. App. 3d 926, 937 (2001) (noting that where other-crimes evidence is admissible for a relevant purpose, the trial court must nevertheless "conduct a balancing test" and exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice); see also Ill. R. Evid. 403 (eff. Jan. 1, 2011)). This claim is entirely speculative, however, and "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008). Moreover, there is no precise formula for determining whether separate offenses are part of a same comprehensive transaction (*People v. Trail*, 197 Ill. App. 3d 742, 746 (1990)), and as the State suggests, it is further speculative to conclude that the trial court would not have found that all of the acts alleged in the indictment were part of one (see *People v. White*,

129 Ill. App. 3d 308, 315 (1984) (noting that the "term 'comprehensive' is defined variously as an adjective meaning 'dealing with all or many of the relevant details; including much; inclusive' ")). In any event, because the evidence of the defendant's attempt to escape was properly admitted as evidence of his consciousness of guilt, counsel cannot be deemed ineffective for failing to seek a severance of counts I, II, and III from counts IV, V, and VI.

¶ 62 The defendant's claim that counsel was ineffective for conceding his guilt on counts IV and VI is also without merit. As counsel candidly acknowledged in her closing argument to the jury, the acts upon which those counts were based were captured on the "very clear" video recordings of the defendant's attempted escape. It was thus reasonable strategy for counsel to openly concede the defendant's guilt on those charges, hoping that she might gain credibility with the jury when arguing the defendant's consent defense with respect to counts I, II, and III. See *People v. Guest*, 166 Ill. 2d 381, 395 (1995). We also note that the video recordings aside, when speaking with Reeves on the way to the Jackson County jail, the defendant admitted that he had attacked Keller.

¶ 63 2. Failure to Make an Opening Statement

¶ 64 In its opening remarks to the jury, the State gave a detailed overview of its case and advised the jurors that the evidence against the defendant included the explicit videos from K.H.'s phone and the videos of his attempt to escape from the Carbondale Police Department. The State further advised that although the defendant told Reeves that he had not had sex with K.H., his sperm was later found in K.H.'s vagina.

¶ 65 Defense counsel reserved making an opening statement at the commencement of the defendant's trial and did not give one before the defendant took the stand. On appeal, the defendant argues that this was unreasonable. Counsel's decision to reserve or ultimately forego the making of an opening statement is a matter of trial strategy (*People v. Humphries*, 257 Ill. App. 3d 1034, 1042 (1994)), however, and the record indicates that counsel strategically decided to waive an opening statement because she was initially uncertain as to whether the defendant was going to testify and was subsequently uncertain as to what his testimony was going to be.

¶ 66 It is not unreasonable for counsel to waive an opening statement in anticipation that no evidence will be presented by the defense. *People v. Foster*, 168 Ill. 2d 465, 482-83 (1995). It is likewise not unreasonable for counsel to seek to avoid any potential conflicts between her opening statement and the defendant's trial testimony. See *People v. Penrod*, 316 Ill. App. 3d 713, 725 (2000); see also *People v. Flores*, 231 Ill. App. 3d 813, 825 (1992) (noting that the "[d]efendant was the key witness for the defense, and variances between an opening statement and defendant's testimony would have been noticed by the jury").

¶ 67 Here, the defendant's testimony was the only evidence presented by the defense, and the record indicates that the defendant did not decide to testify until after the trial court denied counsel's motion for a directed verdict at the close of the State's case. The record further indicates that counsel did not know exactly what the defendant was going to say once he took the stand. As the State observes on appeal, although the questions that counsel asked the defendant on direct examination were "mostly yes-or-no questions"

that focused on his alleged intoxication and his ability to recollect the events of the night in question, the defendant often gave "long, rambling narrative answers." Additionally, after the defendant suggested that his sexual encounter with K.H. had been consensual, counsel ended her direct examination, and the subject of consent was addressed during the State's cross-examination.

¶ 68 On appeal, the defendant suggests that because consent was the only viable defense that he could have offered at trial, counsel should have informed the jury about his consent defense, so the jury would hear the State's evidence with that defense in mind. The defendant further claims that counsel should have used an opening statement to "humanize" him. These arguments ignore that counsel could not have accomplished these tasks without the defendant's testimony and that the defendant did not decide to testify until the last minute. The decision to testify is one of the few decisions that "ultimately belong to the defendant in a criminal case" (*People v. Medina*, 221 Ill. 2d 394, 403 (2006)), and "it is improper for counsel to make opening statements about testimony to be introduced at trial and then fail to produce that evidence" (*People v. Kliner*, 185 Ill. 2d 81, 127 (1998)). Here, had trial counsel advised the jury that the defendant was going to testify, and he ultimately declined to do so, she risked losing credibility with the jury by not fulfilling her promise to present that evidence. *People v. King*, 109 Ill. 2d 514, 534 (1986); see also *People v. Briones*, 352 Ill. App. 3d 913, 918 (2004) (finding counsel ineffective for "promising the jury that the defendant would testify to the truth and, inexplicably, failing to call him"). Moreover, as previously noted,

the record indicates that counsel did not know exactly what the defendant was going to say once he took the stand.

¶ 69 Noting, *inter alia*, that the money K.H. withdrew from the ATM was never recovered, that a gun was never found, and that there was no evidence that K.H. "sustained any injuries, or had any bruising or bleeding," the defendant additionally argues that counsel should have used an opening statement to point out "flaws" in the State's case. As a matter of strategy, however, counsel could have reasonably concluded that merely emphasizing minor and explainable points would have appeared desperate given the extensive and certain nature of the State's opening remarks.

¶ 70 Under the circumstances, the defendant is unable to establish that counsel's decision to forego making an opening statement was objectively unreasonable. Moreover, even assuming otherwise, the defendant would be unable to establish prejudice given the overwhelming evidence of his guilt. See *Foster*, 168 Ill. 2d at 483.

¶ 71 3. K.H.'s ATM Receipt

¶ 72 At trial, K.H. identified the ATM receipt that she left as a "trail" on the sidewalk and further identified a copy of the debit card that she used to make the $300 withdrawal from her account. When identifying the receipt, K.H. confirmed that it bore the last four numbers of her debit card. The receipt indicates that the transaction occurred on February 22, 2015, at 8:27 a.m. The receipt was admitted into evidence without objection.

¶ 73 Detective Brandon Weisenberger of the Carbondale Police Department subsequently testified that he found the receipt on the sidewalk in front of the ATM and that there were other receipts on the sidewalk as well. He explained that he had been able

to identify the receipt through information K.H. had provided about the transaction, *i.e.*, that she had withdrawn $300 within "a general time frame" and had been charged a "foreign ATM fee." When Weisenberger identified the receipt at trial, the State specifically noted that it had already "been marked and introduced into evidence." We note when the defendant testified at trial, he was not asked about and did not otherwise address K.H.'s testimony regarding the ATM transaction.

¶ 74 On appeal, maintaining that the State introduced K.H.'s ATM receipt into evidence "through Detective Weisenberg," the defendant argues that counsel was ineffective for failing to object to the receipt's admission on the basis that the State failed to establish a proper foundation for its admission under the business-records exception to the hearsay rule. See Ill. R. Evid. 803(6) (eff. Jan. 1, 2011); *People v. Maya*, 2017 IL App (3d) 150079, ¶ 101. The receipt was not introduced through Weisenberg, however, nor was it offered or used to prove the truth of the matter asserted. See *People v. Darr*, 2018 IL App (3d) 150562, ¶ 53 ("Under the definition provided in Illinois Rule of Evidence 801(c), it is axiomatic that an out-of-court statement that is offered into evidence for reasons *other* than to prove the truth of the matter asserted is not hearsay." (Emphasis in original.)). The receipt was admitted through K.H. as an item of real evidence and was used in conjunction with Weisenberg's testimony to corroborate K.H.'s claims that the defendant had forced her to withdraw money from an ATM and that she had left the receipt of the transaction on the sidewalk as a trail. We note that the State laid an adequate foundation for the receipt's admission through K.H.'s confirmation that the receipt bore the last four numbers of her debit card, a copy of which was also admitted

into evidence. See *People v. Woods*, 214 Ill. 2d 455, 466 (2005) (noting that "where an item has readily identifiable and unique characteristics, and its composition is not easily subject to change, an adequate foundation is laid by testimony that the item sought to be admitted is the same item recovered and is in substantially the same condition as when it was recovered"). We further note that neither the amount of money withdrawn nor the exact time of the transaction were particularly relevant under the circumstances. Lastly, even assuming *arguendo* that the ATM receipt had not been introduced for a "nonhearsay purpose" (*People v. Hanson*, 238 Ill. 2d 74, 106 (2010)), the receipt would have seemingly been admissible under Illinois Rule of Evidence 803(24) (eff. Jan. 1, 2011), which "clearly states that a receipt is an exception to the hearsay rule to show payment" (*People v. Coleman*, 2014 IL App (5th) 110274, ¶ 156). "Necessarily, counsel cannot be deemed ineffective for failing to raise an objection to admissible evidence—such an objection would be futile." *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 33.

¶ 75 4. Nurse Traci Lies' Testimony

¶ 76 Traci Lies, an emergency room nurse at Carbondale Memorial Hospital, testified that she had assisted in the administration of K.H.'s sexual assault examination and had attended to her while she was at the hospital. Lies testified that while obtaining K.H.'s history as to what had occurred, K.H. had reported that "a black gentleman" had come to her apartment "around 2:30 in the morning saying that he had left something there earlier in the evening." K.H. further reported that at 6 a.m., the same man had entered her bedroom, held her face down on her bed, bound her hands, and sexually assaulted her. K.H. advised that the man had also "put something around her mouth" and had placed a

hard object that might have been a gun against her head. Lies testified that K.H. had stated that there had been forced vaginal and anal penetration in addition to oral sex. Lies explained that K.H.'s vagina, anus, and mouth had all been swabbed for evidence.

¶ 77 The State gave pretrial notice that it intended to introduce Lies' testimony pursuant to section 115-13 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-13 (West 2014)), which provides as follows:

> "In a prosecution for violation of Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012, statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule."

See also Ill. R. Evid. 803(4)(B) (eff. Jan. 1, 2011) (same).

At trial, counsel did not object to Lies' testimony, and Lies was one of the few witnesses that counsel did not cross-examine.

¶ 78 On appeal, the defendant argues that counsel was ineffective for failing to object to Lies' testimony because Lies summarized K.H.'s account of the sexual assault but offered no evidence that K.H. had received any medical treatment or diagnosis. We agree with the State that this claim fails in light of our supreme court's decision in *People v. Falaster*, 173 Ill. 2d 220 (1996).

¶ 79 In *Falaster*, the nurse who obtained the sexual assault victim's history prior to the victim's physical examination testified that "the victim reported that she had been sexually abused by the defendant since she was eight years old, that oral and vaginal sex had occurred, and that she had never bled as a result of that activity." *Id*. at 223. At the defendant's trial, the nurse's testimony was admitted pursuant to section 115-13. *Id*. at 228-29. On appeal, the defendant maintained that the nurse's testimony was improperly admitted because the victim had not undergone the examination for purposes of medical diagnosis or treatment but had rather done so "solely as a means of developing evidence for use in a subsequent prosecution." *Id*. at 229. Our supreme court concluded, however, that the examination had been conducted "for a purpose within the scope of the statute." *Id*. at 230. The court noted that section 115-13 does not distinguish between examining physicians and treating physicians and summarily rejected the defendant's assertion that "the diagnostic purpose of the examination would be incompatible with its investigatory function." *Id*. at 229.

¶ 80 Here, because Lies' testimony was admissible under section 115-13, counsel cannot be deemed ineffective for failing to object to its admission. *Lucious*, 2016 IL App (1st) 141127, ¶ 33. The defendant suggests that counsel should have objected on the grounds that Lies' testimony was more detailed than that considered in *Falaster*, but section 115-13 encompasses all statements that are reasonably pertinent to diagnosis or treatment, including, if known, the identity of the offender. See *People v. Stull*, 2014 IL App (4th) 120704, ¶ 79; see also *People v. West*, 355 Ill. App. 3d 28, 33 (2005) (holding that emergency room nurse's testimony regarding the victim's statements, which

included details of the events that preceded the attack, the ways in which she had been sexually assaulted, and her description of the assailants, was properly admitted pursuant to section 115-13). Counsel thus had no valid basis upon which to object to the admission of Lies' testimony.

¶ 81 5. K.H.'s Purity Ring

¶ 82 As previously noted, K.H. testified that before the defendant exited her car in the parking lot of the Good Samaritan House, they had a brief discussion about God. K.H. testified that while she was "playing with her purity ring," the defendant had asked her if she believed in God, and she confirmed that she did. The defendant then indicated that he was "a God-fearing man" and that he hoped that God would forgive him for what he did to her. When the State asked K.H. what a "purity ring" was, she replied, "It's just an act of saving yourself until marriage." Defense counsel did not object, and the State made no further mention of the matter.

¶ 83 On appeal, noting that under the Illinois rape-shield statute (725 ILCS 5/115-7 (West 2014)), it is improper for the State to elicit testimony that the victim of a sexual assault was a virgin prior thereto (see *People v. Sales*, 151 Ill. App. 3d 226, 231 (1986); see also *People v. Sandoval*, 135 Ill. 2d 159, 170-71 (1990)), the defendant argues that trial counsel was ineffective for failing to object to K.H.'s purity-ring testimony because it improperly bolstered her claim that her sexual encounter with the defendant was nonconsensual. As the State suggests, however, K.H. was not asked whether the ring accurately reflected her sexual history, and to the extent that her testimony suggested that she was, in fact, a virgin, "[i]t is highly possible that defense counsel allowed the

[testimony] to pass without objecting to diffuse its importance, rather than object and draw further attention to [it].” *People v. Evans*, 209 Ill. 2d 194, 221 (2004). This was a reasonable strategic decision (*id*.), and even assuming otherwise, we would conclude that any resulting error was harmless (see *People v. Harris*, 297 Ill. App. 3d 1073, 1088-89 (1998)). During closing arguments, the State did not maintain or suggest that K.H. was a virgin prior to the assault, and the evidence of the defendant’s guilt was overwhelming.

¶ 84 It must also be remembered that in her closing argument to the jury, defense counsel maintained that when K.H. was dropping the defendant off and “fiddling around with her purity ring,” her “guilty conscience” had caught up with her, and she thought to herself, “ ‘I shouldn’t have done this. What a mistake I made having sex with the guy.’ ” Counsel thus used K.H.’s purity-ring testimony to advance the defendant’s consent defense. As previously noted, when reviewing claims of ineffective assistance of counsel, a court must consider defense counsel’s performance as a whole (*Max*, 2012 IL App (3d) 110385, ¶ 65), and, “[i]n this case[,] it would appear that defense counsel used [her] imagination and resourcefulness to come up with something where [s]he had nothing to go on” (*People v. Ganus*, 148 Ill. 2d 466, 474 (1992)). We note that the same can be said with respect to counsel’s arguments regarding the urine-soaked clothing found in the K.H.’s hamper and the videos on K.H.’s phone. We further note our agreement with the trial court’s observation that counsel “provided good representation *** in an extremely difficult case.”

¶ 85 6. Defendant's Prior Criminal History

¶ 86 As previously noted, the instant offenses were committed while the defendant was on furlough in Jackson County case number 14-CF-499. The State did not reference that fact in its opening statement to the jury or during the presentation of its case.

¶ 87 In the State's answers to the defendant's pretrial request for discovery, the State advised that it was aware that the defendant had the following prior convictions:

> "Residential Burglary, 14-CF-499, Jackson County; Theft by Deception[,] 08-CF-1639, [Will County]; Burglary, Criminal Defacement of Property, 05-CF-1531, Will County; Residential Burglary, 97-CF-2734, Will County; Aggravated Battery, 01-CF-254, Livingston County; Receive/Possession/Sale of Stolen [V]ehicle, 93-CF-4712, [Will County]; Residential Burglary, 91[-CR-]2020, Cook County; Theft[,] 91[-CR-]15668, Cook County."

The record indicates that the State subsequently provided the defense with certified copies of the convictions but that neither party requested a pretrial ruling regarding which convictions would be admissible to impeach the defendant's credibility should he testify. See Ill. R. Evid. 609 (eff. Jan. 1, 2011); *People v. Williams*, 173 Ill. 2d 48, 81-82 (1996); *People v. Montgomery*, 47 Ill. 2d 510, 516-19 (1971).

¶ 88 When the defendant testified at trial, he began by stating his name and acknowledging that he had "recently lived on Hester Street in Carbondale." The following colloquy then ensued:

> "Q. And just, you've decided to testify today; is that correct?
>
> A. Yes, I did.

Q. Okay. And so just to let the jury know, you've got a criminal history, don't you?

A. Yeah, I do.

Q. And what is that?

A. Most at a young age. Most of them are car theft, residential burglaries that I had when I was young and different other small things, from two aggravated batteries that happened in Pontiac between me and a correctional office[r].

As far as everything else, that's basically what I have is just residential, car theft, and burglaries, basically theft."

When counsel subsequently questioned the defendant about the night in question, he explained he had been "on a furlough" at the time.

¶ 89 When cross-examined, the defendant reiterated his claim that he had mostly been in trouble at "a young age." He also confirmed that the furlough that he referenced being on had been granted after he had been sentenced to 10 years in 14-CF-499. The defendant further confirmed that "prior to that," he had been convicted of felony theft in 08-CF-1639, burglary in 05-CF-1531, aggravated battery in 01-CF-254, and theft in 91-CR-15668. We note that the State's cross-examination primarily focused on the defendant's claim that his sexual encounter with K.H. had been consensual and that the State did not reference the defendant's criminal history during closing arguments.

¶ 90 On appeal, the defendant contends that counsel was ineffective for opening the door to the State's cross-examination about his prior convictions. The defendant claims, *inter alia*, that because the State did not obtain a pretrial ruling as to which of his prior

convictions could be used for impeachment purposes, the State would not have been able to impeach him with any of his prior convictions but for counsel's ineffectiveness. He further contends that the two oldest convictions that the State referenced were *per se* inadmissible because they fell outside the 10-year limitation applicable to such evidence. See *Williams*, 173 Ill. 2d at 81 (noting that under "the *Montgomery* rule," evidence of a prior conviction is inadmissible for impeachment purposes where "a period of more than 10 years has elapsed since the date of conviction or release of the witness from confinement, whichever is later"). The defendant suggests that but for counsel's ineffectiveness, the jury would not have been exposed to any evidence of his criminal history and that the outcome of his trial might have been different. We disagree.

¶ 91 Here, despite the absence of a pretrial ruling on the issue, it was reasonable for counsel to presume that the State would be permitted to the use the defendant's three most recent felony convictions for impeachment purposes should the defendant choose to testify. See *People v. Atkinson*, 186 Ill. 2d 450, 456 (1999) (noting that because the defendant's credibility was a "central issue," the evidence of the defendant's prior convictions was "crucial"); see also *People v. Patrick*, 233 Ill. 2d 62, 69 (2009) ("Nothing in *Montgomery* suggests the proper time for ruling on the admissibility of a prior conviction."). It was thus reasonable strategy to anticipatorily impeach him at the outset of his testimony, hoping to minimize the prejudicial effect of the evidence. See, *e.g.*, *People v. Williams*, 147 Ill. 2d 173, 223 (1991); *People v. Davis*, 2017 IL App (1st) 142263, ¶49; *People v. Anderson*, 272 Ill. App. 3d 566, 570 (1995). We cannot conclude, however, that counsel could have anticipated that the defendant would assert that most of

his criminal history occurred when he was young, when such was clearly not the case. Moreover, it was the defendant himself, not defense counsel, who chose to portray his prior criminal background in such a manner. See *People v. Groel*, 2012 IL App (3d) 090595, ¶ 50; *People v. Sergeant*, 326 Ill. App. 3d 974, 982-83 (2001). Nor can we conclude that counsel could have anticipated that the defendant would reference his "aggravated batteries that happened in Pontiac." As previously noted, the record indicates that counsel did not know exactly what he was going to say when he took the stand. In any event, by claiming that most of his criminal history, including his "aggravated batteries," had occurred at "a young age," the defendant himself opened the door to the State's cross-examination regarding the inaccuracy of his testimony. See *Groel*, 2012 IL App (3d) 090595, ¶ 50. It is well settled that a defendant cannot be heard to complain of the admission of evidence that was invited by his own tactics or testimony (see, *e.g.*, *People v. Topps*, 293 Ill. App. 3d 39, 48 (1997); *People v. Brooks*, 251 Ill. App. 3d 927, 933 (1993); *People v. Owens*, 46 Ill. App. 3d 978, 994 (1977)), and "[t]here is no question that a defendant can open the door to the admission of evidence that, under ordinary circumstances, would be inadmissible" (*People v. Harris*, 231 Ill. 2d 582, 588 (2008)). The "pivotal question" is whether the defendant was attempting to mislead the jury about his criminal background (*People v. Villa*, 2011 IL 110777, ¶ 49), and here, we conclude that he was.

¶ 92 Under the circumstances, the defendant is unable to overcome the presumption that trial counsel's decision to preemptively impeach him was a reasonable strategic decision. To the extent that the jury learned more about the defendant's criminal history

than it otherwise might have, we conclude that the evidence was invited by the defendant himself. Moreover, even assuming *arguendo* that counsel should be faulted as the defendant suggests on appeal, the defendant is unable to establish prejudice. "[W]here the jury's verdict would not have been influenced by the admission of the prior convictions[s] as impeachment evidence, the error is harmless." *People v. Diaz*, 101 Ill. App. 3d 903, 919 (1981). In the present case, the defendant's criminal history was not a central focus of the State's cross-examination; the jury received a proper limiting instruction regarding the use of the evidence; the State did not reference the defendant's criminal history during its closing arguments; and the proof of the defendant's guilt was overwhelming.

¶ 93 B. Rule 431(b)

¶ 94 Acknowledging that he raises the claim for the first time on appeal, the defendant argues that he was denied a fair trial due to the trial court's failure to strictly comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Pursuant to Rule 431(b), during *voir dire*, the trial court must

> "ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's

decision not to testify when the defendant objects." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 95 Rule 431(b) was adopted to memorialize our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472 (1984). *People v. Glasper*, 234 Ill. 2d 173, 187 (2009). Accordingly, the four principles set forth in Rule 431(b) are commonly referred to as the "*Zehr* principles." *People v. Rogers*, 408 Ill. App. 3d 873, 875 (2011). "Although compliance with Rule 431(b) is important, violation of the rule does not necessarily render a trial fundamentally unfair or unreliable in determining guilt or innocence." *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). Moreover, in the absence of evidence that the error resulted in a biased jury, a Rule 431(b) violation is only cognizable under the first prong of the plain-error doctrine. *People v. Sebby*, 2017 IL 119445, ¶ 52.

¶ 96 Here, during *voir dire*, the trial court asked the potential jurors whether they understood or accepted each of the *Zehr* principles but did not ask whether they both understood and accepted each principle. The State thus concedes on appeal that error occurred. See *People v. Belknap*, 2014 IL 117094, ¶ 46; *People v. Wilmington*, 2013 IL 112938, ¶ 32. However, because the defendant did not object below, and there is no evidence that the error resulted in a biased jury, the parties agree that to prevail on his instant claim, the defendant must satisfy the first prong of the plain-error doctrine, *i.e.*, he must demonstrate that the evidence of his guilt was closely balanced. See *Sebby*, 2017 IL 119445, ¶¶ 48, 52; *Wilmington*, 2013 IL 112938, ¶¶ 33-34. If the defendant demonstrates that the evidence was closely balanced, then he is entitled to a new trial as a matter of law. *Sebby*, 2017 IL 119445, ¶ 78.

¶ 97 Whether the evidence of a defendant's guilt was closely balanced is a separate question from whether the evidence was sufficient to convict. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). When determining whether the evidence was closely balanced, a reviewing court "must undertake a commonsense analysis of all the evidence in context." *Belknap*, 2014 IL 117094, ¶ 50. The analysis must be a "qualitative, as opposed to a strictly quantitative," one and must take into account the totality of the circumstances. *Id.* ¶¶ 53, 62. The "inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Sebby*, 2017 IL 119445, ¶ 53.

¶ 98 Here, citing *People v. Naylor*, 229 Ill. 2d 584 (2008), and *People v. Williams*, 2015 IL App (1st) 122745, the defendant maintains that the evidence of his guilt on counts I, II, and III was closely balanced because his guilt on those counts was determined by a "credibility contest" as to whether his sexual encounter with K.H. had been consensual. We disagree.

¶ 99 In *Naylor*, our supreme court found that the evidence of the defendant's guilt was closely balanced where the trier of fact was presented with two differing versions of events, both of which were credible and neither of which was contradicted or corroborated by extrinsic evidence. *Naylor*, 229 Ill. 2d at 607-08. In *Williams*, the defendant's guilt turned on the testimony of a codefendant with a strong incentive to lie and a victim whose identification testimony was heavily impeached. *Williams*, 2015 IL App (1st) 122745, ¶¶ 24-25. The *Williams* court thus reasoned that "[c]redibility was the

key to the case" and that the "credibility question" between the defendant and the codefendant was closely balanced. *Id.* ¶ 26.

¶ 100 Here, *Williams* and *Naylor* are inapposite, and a commonsense analysis of all the evidence in context does not lead to the conclusion that the evidence of the defendant's guilt was closely balanced on the issue of consent. A commonsense analysis rather reveals that K.H. was a highly credible witness and that the defendant's trial testimony was "simply unbelievable." *People v. Hernandez-Valdez*, 260 Ill. App. 3d 644, 647 (1994).

¶ 101 K.H.'s account of the events in question was positive, consistent, and corroborated by other evidence, including the testimony of her roommates, the videos on her phone, the clothes found in her closet, and the receipt that was found on the sidewalk by the ATM. The defendant, on the other hand, offered varying accounts that changed as his awareness of the evidence against him changed, and his trial testimony was uncorroborated and questionable at best. He claimed, for instance, that because he was under the influence of alcohol and drugs, he could not recall much of the night in question, including his use of a false name. At the same time, however, he indicated that he could specifically remember things such as K.H. asking him to penetrate her anus and ejaculate in her vagina. We relatedly note that the defendant's consent defense effectively required the jury to believe, among other things, that K.H. paid a complete stranger to have unprotected sex with her, that she had motive to lie about a consensual encounter that no one knew about, and that she convincingly feigned emotional distress for months.

¶ 102 We note that the defendant's false exculpatory statements to Reeves demonstrated his consciousness of guilt and undoubtedly damaged his credibility with the jury. See *In re C.B.*, 386 Ill. App. 3d 735, 743 (2008); *People v. Milka*, 336 Ill. App. 3d 206, 227-28 (2003); *People v. Wilson*, 8 Ill. App. 3d 1075, 1079 (1972). The defendant further exhibited his consciousness of guilt by fleeing to a motel after the crime and violently attempting to escape from police custody once he was apprehended. See *People v. Jimerson*, 127 Ill. 2d 12, 45 (1989); *Carter*, 2016 IL App (3d) 140196, ¶ 35; *People v. Jones*, 162 Ill. App. 3d 487, 492 (1987).

¶ 103 "When a defendant elects to explain the circumstances of a crime, he is bound to tell a reasonable story or be judged by its improbabilities and inconsistencies." *People v. Nyberg*, 275 Ill. App. 3d 570, 579 (1995). Here, in light of the overwhelming evidence of his guilt, the defendant's consent defense was incredible, and we reject his contention that the evidence of his guilt on counts I, II, and III was so closely balanced that the trial court's failure to strictly comply with Rule 431(b) requires that he be granted a new trial.

¶ 104 C. The Defendant's Sentence

¶ 105 Maintaining that the aggregate sentence imposed on his convictions exceeds the statutorily allowed maximum, the defendant lastly argues that should we deny his request for a new trial, he should be granted a new sentencing hearing or that his sentence should be reduced accordingly. The defendant acknowledges that he did not raise this claim in his motion to reconsider sentence, but he further notes that a sentencing issue may be reviewed as plain error where it stems from a misapplication of the law. See, *e.g.*, *People*

v. Keene, 296 Ill. App. 3d 183, 186 (1998). The State concedes that the defendant's sentence should be reduced by 37 years, and we accept the State's concession.

¶ 106 As noted, the trial court imposed consecutive sentences on the defendant's convictions totaling 125 years. The court imposed 20-year sentences on counts I, II, and III, 30-year sentences on counts IV and V, and a 5-year sentence on count VI. Because the defendant's convictions on counts I, II, and III were sexual-assault convictions, consecutive sentences on those counts were mandatory. 730 ILCS 5/5-8-4(d)(2) (West 2014). Additionally, the sentences imposed on counts IV, V, and VI had to be served consecutively to the sentences imposed on counts I, II, and III. *People ex rel. Senko v. Meersman*, 2012 IL 114163, ¶¶ 10-19. The trial court imposed discretionary consecutive sentences on counts IV, V, and VI, finding that consecutive sentences on all counts were required to protect the public. 730 ILCS 5/5-8-4(c)(2) (West 2014).

¶ 107 Because the trial court treated counts I, II, and III as a set of offenses that were "committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective" (*id.* § 5-8-4(f)(2)) and treated counts IV, V, and VI as another such set, the imposition of extended-term sentences with respect to both sets would have been permissible. See *People v. Bell*, 196 Ill. 2d 343, 354-55 (2001); *People v. Coleman*, 166 Ill. 2d 247, 257 (1995). As noted, however, the court sentenced the defendant as a Class X offender on counts I through V, and no extended-term sentences were ordered on any counts.

¶ 108 Because consecutive sentences were imposed with respect to both sets of offenses, the aggregate sentencing cap for each set was the sum of the maximum terms authorized

for the two most serious felonies involved. 730 ILCS 5/5-8-4(f)(2) (West 2014). The trial court correctly applied the applicable cap of 60 years to counts I, II, and III, each of which was a Class 1 felony with a maximum authorized term of 30 years. See 720 ILCS 5/11-1.20(b)(1) (West 2014); 730 ILCS 5/5-4.5-30(a) (West 2014); *Stacey*, 193 Ill. 2d at 214-15. As the State concedes, however, the aggregate cap applicable to counts IV, V, and VI was 28 years, the two most serious offenses being Class 2 felonies with maximum authorized terms of 14 years. See 720 ILCS 5/12-3.05(h) (West 2014); 720 ILCS 5/31-1a(b) (West 2014); 730 ILCS 5/5-4.5-35(a) (West 2014); *Stacey*, 193 Ill. 2d at 214-15. The 65-year aggregate sentence that the court imposed on counts IV, V, and VI thus exceeded the applicable cap by 37 years. Pursuant to the State's suggestion and the defendant's implicit consent, we accordingly reduce the sentence imposed on count IV from 30 years to 13 years and reduce the sentence imposed on count V from 30 years to 10 years. See *People v. Jones*, 168 Ill. 2d 367, 374 (1995) (noting that a reviewing court may reduce a sentence on appeal, "where it is determined that the sentence chosen by the trial court was not authorized by law"); *People v. Elliott*, 225 Ill. App. 3d 747, 755 (1992) ("Pursuant to Supreme Court Rule 615(b)(4) (134 Ill. 2d R. 615(b)(4)), we may reduce defendant's sentence to that which is within the statutory limits."). In all other respects, the sentences imposed on the defendant's convictions are hereby affirmed.

¶ 109 III. CONCLUSION

¶ 110 For the foregoing reasons, we affirm the defendant's convictions on all counts, reduce the sentence imposed on count IV from 30 years to 13 years, and reduce the sentence imposed on count V from 30 years to 10 years.

¶ 111 Affirmed as modified.