2012 IL App (1st) 103576-U

THIRD DIVISION
December 28, 2012

No. 1-10-3576

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	))	APPEAL FROM THE CIRCUIT COURT OF
	)	COOK COUNTY
	)	
v.	)	No. 09 CR 13229
	)	
	)	HONORABLE
BARRON LEWIS, Defendant-Appellant.	)	KENNETH J. WADAS, JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Neville and Justice Sterba concurred in the judgment.

O R D E R

¶ 1 *HELD*: Defendant was convicted of aggravated criminal sexual assault and sentenced to a 15-year prison term. The appellate court ruled that the evidence was sufficient to convict. The defendant failed to show that the trial judge erred in excluding evidence of the complainant's positive test for chlamydia. The defendant also failed to show that the trial court erred in admitting the complainant's text messages into evidence. The trial judge did not abuse his discretion in proceeding on the defendant's *pro se* posttrial motion and sentencing without appointing counsel. Lastly, the trial judge did not abuse his discretion in imposing a 15-year sentence.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Barron Lewis was found guilty of aggravated criminal sexual assault causing bodily harm. 720 ILCS 5/12-14(a)(2) (West 2008). The trial judge sentenced Lewis to a 15-year term of incarceration. On appeal, Lewis argues that: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) he was deprived of his right to present a defense by the trial judge's misapplication of the Illinois rape shield statute; (3) the trial judge erred in admitting the text messages sent by C.H.; (4) the trial judge denied Lewis his right to counsel on his *pro se* posttrial motion; and (5) his sentence was excessive. For the following reasons, we reject Lewis's arguments and affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. Prior to trial, defense counsel filed a motion *in limine* to bar the admission of text messages that the complainant, C.H., sent and received during the hours leading to the charged offense as inadmissible hearsay. The trial judge denied the motion regarding the text messages C.H. sent, but he ruled that the jury would be instructed that the messages were only to be considered to show C.H.'s state of mind.

¶ 5 The State filed a pretrial motion *in limine* to bar evidence that C.H. had tested positive for chlamydia. Over defense counsel's objection that the evidence was necessary to support the defense that Lewis did not have sex with C.H., the trial judge ruled the evidence was barred under the Illinois rape shield statute (725 ILCS 5/115-7(a) (West 2008)).

¶ 6 During opening statements at trial, defense counsel argued that there was no sexual contact between Lewis and C.H., and that C.H. was motivated to lie because she was embarrassed about having a large, naked man unconscious in her bed.

¶ 7 C.H. testified that on July 5, 2009, she and fellow college student, Amanda Richardson, had recently moved into an apartment building at 833 West Buena Street in Chicago. C.H. had returned to the building after work at approximately 5:30 p.m. C.H. sat on a bench in the patio area outside the building finishing a telephone call, when she was approached by Lewis. Lewis offered C.H. a drink, which she accepted and thanked him for.

¶ 8 C.H. stated that after she finished her telephone call, she again thanked Lewis, who was listening to music on his boombox and smoking a cigar. Lewis invited her to sit with him and the two had a conversation. He spoke about his family and children, and his jazz club; she spoke about school, work, and her boyfriend. Lewis told her he lived two floors directly above her in the building.

¶ 9 When it began to grow dark, C.H. decided to return to her apartment. Lewis stated he was also going inside to get batteries for his boombox. The two made small talk in the elevator. C.H. testified that she was surprised when Lewis exited the elevator with her on the 12th floor. According to C.H., Lewis explained that he was interested in whether their apartments shared the same layout.

¶ 10 C.H. gave Lewis a brief tour of her apartment. Lewis asked whether she had any batteries, then went into her kitchen and poured them each shots of tequila. C.H. testified that

she took a sip of the tequila, but poured the rest out because she did not want to get drunk. According to C.H., she had consumed only a glass of sangria and a sip of tequila that evening.

¶ 11 Furthermore, C.H. testified that Lewis then went into her living room and sat down on a futon. C.H. sat down on a futon across from him. Lewis got up, grabbed C.H.'s arm, and told her to sit next to him. Lewis also told C.H. she had a beautiful body. C.H. stated that she had been having a good time, but began to feel awkward and that Lewis, whom she had thought was funny, began to seem "creepy."

¶ 12 C.H. tried to get up from the futon, but Lewis pulled her back down next to him. Lewis again said that C.H. had a beautiful body, adding that she needed to show it off more. Lewis had C.H. stand up and then he removed her sweatshirt, under which she wore a t-shirt and scarf. After C.H. sat down again, Lewis tried to get her to kiss him and feel his penis and groin. C.H. repeatedly told Lewis that she had a boyfriend and that this situation was "not okay." Lewis told her that no one would love her the way he would. C.H. stated that Lewis continued to kiss her and tried to grab her hands. C.H. clenched her fists and pushed him away.

¶ 13 According to C.H., Lewis became aggravated and went back downstairs to the patio area to finish smoking his cigar. C.H. testified that she followed Lewis out to the patio, explaining that she thought she could get him to remain there or return to his apartment. C.H. stood behind Lewis as he smoked and conversed with other neighbors.

¶ 14 Lewis then told C.H. he needed to return to her apartment to retrieve his boombox. The two went back to her unit. C.H. stated that she thought Lewis would leave quickly, but he

returned to the futon and again tried to kiss her and to have her feel his groin. According to C.H., Lewis was "all over her."

¶ 15 C.H. testified that she was crying and telling Lewis "no." Lewis forcibly removed C.H.'s sweatshirt. At some point while the two struggled, they knocked sangria onto the floor. C.H. tried to clean up the spill as a distraction, but Lewis carried her to her bedroom.

¶ 16 C.H. also testified that she was crying and yelling for him to stop, but Lewis forced her to remove all of her clothes. C.H. further testified that Lewis removed his clothes and tried to put his penis in her mouth, but she kept her mouth shut and turned her head away. According to C.H., Lewis struck her face, on her left cheek under her eye, and grabbed at her breasts, scratching her.

¶ 17 C.H. was then on her stomach and Lewis climbed on top of her. Lewis tried to insert his penis into C.H.'s anus, but he could not do so because C.H. was kicking. Lewis inserted his finger into C.H.'s vagina and he inserted his penis inside of her vagina. C.H. testified that she continued to tell Lewis to stop, but Lewis told her, "I am going to show you what really fucking is about." While Lewis was on top of her, he occasionally pulled on her scarf, choking her. C.H. did not know whether Lewis ejaculated, but he eventually got off of her and seemed to fall asleep.

¶ 18 C.H. stated that she quickly dressed and then began hitting Lewis with her fists, demanding that he leave. C.H. testified that she knew that Amanda would be home soon and feared what Lewis might do to her. According to C.H., Lewis awakened and dressed in the living room.

¶ 19 C.H. heard Amanda fumbling with the door locks, although C.H. stated she had locked neither the door lock nor the deadbolt. Once Amanda entered the apartment, C.H. started to cry and told her they needed to leave. Amanda went into the bathroom to remove her contacts. C.H. stated that when Amanda emerged from the bathroom, Lewis was sitting on the futon, finishing dressing. C.H. testified that she repeated that they needed to leave and yelled at Lewis to leave.

¶ 20 The three left the apartment. Lewis got on the elevator with C.H. and Amanda. Lewis introduced himself to Amanda and shook her hand. According to C.H., Lewis told Amanda he had been trying to keep C.H. happy all night and that she needed to stop crying. When the elevator reached the first floor, C.H. ran from the building. Amanda caught up to C.H., who had fallen at the end of the block. C.H. would not let Amanda touch her. C.H. telephoned her mother, but was crying and screaming, so Amanda took the telephone. Amanda then telephoned the police, who arrived as C.H. and Amanda returned to their building.

¶ 21 C.H. testified that after she spoke to the police officers, she was transported to Thorek Hospital, where a sexual assault kit was assembled. C.H. told the doctor that Lewis inserted his finger into her vagina. She also told the doctor she did not know whether Lewis had worn a condom. C.H. then went to the police station, where she identified Lewis in a lineup. At trial, C.H. identified a photograph of herself in which there is a visible bruise under her left eye, which she stated Lewis caused.

¶ 22 In addition, C.H. testified that she sent a series of text messages to Amanda, her boyfriend Tony, and her friend Lamar, throughout the evening, until Lewis took the telephone from her and threw it across the room. C.H. identified enlarged photocopies of text messages sent between

5:40 p.m. and 10:40 p.m. on July 5, 2009. The text messages sent to Amanda, admitted into evidence as People's group exhibit No. 2, included the following[1]:

"(5:40 p.m.) When r u coming home?

(5:41 p.m.) Omg something hilarious is happening![2]

(time not displayed) I cam home and was sittin on a bench and a guy walks over and hands me a sangria. Then give me a huge cigar. We r just sittin drinkin and smokin. I think hes gay.

(6:56 p.m.) Omg this guy is hilarious. Hes giving e advice on tone.

(6:58 p.m.) Omg I hope eh wot. Im kinda drunk. Come homeeee!!

(7:17 p.m.) Olg he wnts to come to my place. Come home!

(7:26 p.m.) Omg!

(7:29 p.m.) Hes in our place. But he knows I have a "bf"

(7:31 p.m) Omg I kno. Ah wheres tone?!

(7:38 p.m.) ok dude im kinda creeped out. Don't txt or cll tone. Ima cll him in a min

(7:47 p.m.) Omg!

(7:48 p.m.) Ill let u kno

(8:09 p.m.) Ya. Mandee hes like hittin in me. Im drink and im scared

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[1] The text messages contain numerous typographical errors, which became one subject of cross-examination.

[2] C.H. testified that "OMG" is short for "oh, my God."

(8:38 p.m.) Omg mqndee im bout o cry hes like trying to be all ofr me!!. whn ill u be home?

(8:40 p.m.) Please hurry mand. I cant take thos. Tone isnt answerint.

(9:21 p.m.) Ya. Omg! Help. I hate his please hurry

(10:18 p.m.) Call lamarr tell him to come here. Tone wont txt or call me back"

C.H. also testified that she sent the following text messages to her boyfriend, Tony Vanderbilt:

"(7:51 p.m.) Heyy! What's shakin?

(10:22 p.m.) Babe I need help. This guy is in my apartmebt. Help me pleawe."

C.H. further that she sent the following text messages to her friend, Lamar:

(8:39 p.m.) Hwy ome im srunk. Hillhis guys teyin to get wav[3] me. Help.

(9:21 p.m.) Please

(9:35 p.m.) I need help

(9:43 p.m.) Ly house

(10:19 p.m.) Please help

(10:20 p.m.) This guy hes in my apartmet I nee help pleawe please lamarr come here please

(10:20 p.m.) Come help me please

[3] C.H. stated that "wav" means "help."

(10:34 p.m.) please come to my house this guy ah gtg[4]

(10:34 p.m.) please tell him to come"

¶ 23 In a sidebar, defense counsel objected to the text messages being admitted as substantive evidence, based on the trial judge's ruling *in limine*. Defense counsel requested a limiting instruction. The trial judge instructed the jury that the text messages were not to be considered for their substance, but only to show C.H.'s state of mind.

¶ 24 On cross-examination, C.H. acknowledged that she had testified she only had a glass of sangria and a sip of tequila, but her text messages stated she was getting drunk. C.H. also acknowledged her text messages contained many typographical errors, but stated that she was holding the telephone at her side to conceal her activity from Lewis. C.H. admitted that she never told her friends to telephone the police. CH. also identified the jeans she wore that evening. When defense counsel noted that a tablet of Vicodin was found in her jeans pocket, C.H. denied having taken pharmaceutical drugs that evening. C.H. testified that she once had a prescription for Vicodin to treat migraine headaches.

¶ 25 Amanda Richardson testified that she had two charges of retail theft pending against her in the circuit court of Cook County, which would be dismissed once she completed a rehabilitation program for addiction to anti-anxiety medication. The addiction developed after the incident at issue in this case. Amanda denied that the State had promised her anything for her testimony in this case.

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[4] C.H. testified that "gtg" means "got to go."

¶ 26 Amanda stated that she had gone home to Michigan for the July 4th holiday in 2009, but she was returning to Chicago with a friend on July 5, 2009. Amanda testified that she received text messages from C.H. during the trip. Amanda had a drink at 2 p.m., but did not feel drunk by the time she was dropped off at her building at approximately 11 p.m. Amanda telephoned C.H. when she arrived at the building, but there was no answer.

¶ 27 When Amanda reached their apartment, she was surprised to find the door handle locked, as normally only the deadbolt was locked. Amanda opened the door and found C.H. sitting on a futon in the living room. C.H. ran up to her, but she did not immediately try to leave or say there was a rapist in the apartment. Amanda testified that she also saw Lewis in the apartment.

¶ 28 C.H. seemed to be in a panic and asked Amanda whether she wanted to leave right away. Amanda replied that she wanted to remove her contact lenses, which were bothering her. C.H. told Amanda to hurry, because they needed to go downstairs. After removing her contact lenses, Amanda noticed that the apartment was very messy, with the futons and dining room table out of place, a coffee table overturned, and sangria spilled on the floor. Amanda testified that she also noticed Lewis's underwear on a futon, but she later stated that she did not ask whose underwear it was.

¶ 29 Amanda also testified about the conversation in the elevator, adding that Lewis was slurring his words and seemed slightly off-balance. C.H. was crying and shaking in the elevator and "sort of bolted out" when the doors opened on the first floor. C.H. sprinted down the block, saying, "is he behind us, is he following us, make sure he is not following us." Once Amanda caught up, she tried putting her arm around C.H., who resisted and turned away. Amanda asked

C.H. whether Lewis had done anything to her. C.H. kept saying, "I told him it wasn't okay." Amanda ultimately asked C.H. whether Lewis had raped her, at which point C.H. collapsed and wailed, with her body shaking. Amanda noticed that C.H.'s left eye was tender-looking and puffy. Amanda further testified that the women telephoned their mothers and the police, then returned to their building to meet with the police.

¶ 30 Chicago police officer Geoffrey Roberts testified that on July 5, 2009, he received a radio call at approximately 11:30 p.m. regarding a sexual assault at 833 West Buena Street. When he arrived, Officers Eric Leal and Lisa Echeverri were already on the scene. Officer Roberts met with Amanda and C.H., who appeared distraught, fidgety and nervous. After speaking to Johnny Diamond, the building's security guard, Officer Roberts and other police went up to Lewis's apartment, but there was no answer.

¶ 31 Johnny Diamond testified that on the night at issue, he saw two women who were new residents run out of the building. One of the women seemed upset, but Johnny was unable to catch up to ask what was wrong. Lewis then approached him, which Johnny found unusual, because Lewis normally got off work at 4 a.m. Johnny thought Lewis seemed a little intoxicated. According to Johnny, Lewis went upstairs after a few minutes.

¶ 32 Officer Leal testified that when the police went back to Lewis's apartment a second time, Lewis's wife answered and Lewis later appeared behind her. After verifying Lewis's identity, the police took him into custody and transported him to the police station.

¶ 33 Evidence technician Ted Delis testified that he collected evidence from C.H.'s apartment, including a blanket in her bedroom, a cigarette butt, and a pair of men's underwear from the

living room. The parties stipulated that forensic scientist Michelle Bybe would testify that she analyzed the vaginal swabs taken from C.H. and found no semen on the swabs. Bybe would also testify that it was possible for there to be penile-vaginal contact without the test detecting semen. The parties also stipulated that forensic scientist Angela Kaeshamer would testify that she analyzed a pink and white blanket, and that Lewis's DNA profile was not found on the blanket.

¶ 34 At the conclusion of the State's case, defense counsel moved for a directed finding on the charge alleging contact between Lewis's mouth and C.H.'s vagina. The trial judge granted the motion. The trial judge also admonished Lewis about his right to testify. Lewis confirmed he did not wish to testify on his own behalf.

¶ 35 Dr. Virginia Valadka, who examined C.H. at Thorek Hospital on July 5, 2009, testified as a witness for the defense. Dr. Valadka testified that her examination of C.H.'s ears, neck, mouth, throat and genitals did not show abnormalities. Dr. Valadka found superficial abrasions on C.H.'s breasts and wrists, but no ligature marks on her neck (and C.H. did not mention being choked with her scarf). Dr. Valadka did not see any bruising on C.H.'s face, but noted that bruises may take hours to appear after someone is struck. Similarly, C.H.'s vagina and cervix did not show tearing or bruising, but the absence of tearing or bruising did not mean that no sexual assault occurred.

¶ 36 Dr. Valadka further testified that C.H. denied that Lewis penetrated her vagina with his fingers. C.H. initially told Dr. Valadka that Lewis had not used a condom, but C.H. later said that she was unsure on that point. According to Dr. Valadka, C.H. had told the nurse she was taking birth control and Lorazepam, a mild tranquilizer. Dr. Valadka stated that C.H. appeared

anxious and fearful. Dr. Valadka opined that, based on her experience, C.H.'s presentation could be deemed consistent or inconsistent with someone who was a victim of sexual assault.

¶ 37 During closing arguments, defense counsel argued that after drinking with C.H. and disrobing in her living room, Lewis went with C.H. into the bedroom and passed out on the bed. Defense counsel argued that the lack of physical and forensic evidence supported the defense that no intercourse occurred. Following jury instructions, the jury deliberated and found Lewis guilty of aggravated criminal sexual assault based on contact between his penis and C.H.'s vagina, but acquitted Lewis on the count of aggravated criminal sexual assault based on contact between Lewis's finger and C.H.'s vagina.

¶ 38 Defense counsel filed a posttrial motion for a new trial. On August 12, 2010, after the trial judge denied the posttrial motion, Lewis requested to proceed *pro se*. After admonishing Lewis pursuant to Illinois Supreme Court Rule 401 (eff. July 1, 1984), the trial judge granted Lewis's request, granted defense counsel leave to withdraw, and continued the case. Over the course of several status dates, the State tendered discovery to Lewis.

¶ 39 On October 1, 2010, Lewis filed his *pro se* motion for a new trial, claiming that the trial court erred in overruling defense objections to inadmissible evidence and prejudicial argument while sustaining the State's objections to admissible evidence . Lewis also claimed that he received ineffective assistance from his private trial counsel. Lewis alleged that trial counsel: (1) interfered with his right to testify; (2) failed to investigate and call his neighbors as witnesses; (3) failed to call character witnesses; and (4) entered into a stipulation regarding the transferability of chlamydia instead of calling a forensic scientist to testify about the subject.

¶ 40 On the hearing date for his *pro se* motion, Lewis also filed a motion for the appointment of a public defender to represent him at the hearing. The trial judge appointed an assistant public defender, who demurred on the ground that he did not know the case and was unprepared to proceed. The trial judge then informed Lewis that his motion was dilatory and that Lewis would have to present his motion himself. Marvin Bloom, Lewis's former private counsel, was present in court, but Lewis waived the right to call witnesses or present argument.

¶ 41 The State called Bloom to testify regarding his representation of Lewis. Bloom testified that he did not believe Lewis had given him any names of witnesses and that his investigator was working with descriptions of Lewis's neighbors. Bloom also testified that he discussed testifying with Lewis, who chose not to testify. Bloom explained that when questioned by police, Lewis had told them he had consensual sexual intercourse with C.H. Proceeding on a trial theory that no intercourse occurred, Bloom explained that he would not call Lewis as a witness due to the available impeachment by the prior statement to police. Bloom further testified that he did not call character witnesses because Lewis did not testify.

¶ 42 The trial court denied Lewis's *pro se* motion and proceeded to a sentencing hearing. After hearing evidence in aggravation and mitigation, the trial judge sentenced Lewis to 15 years in prison. This timely appeal followed.

¶ 43 DISCUSSION

¶ 44 On appeal, Lewis argues that: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) he was deprived of his right to present a defense by the trial judge's misapplication of the Illinois rape shield statute; (3) the trial judge erred in admitting the text messages sent by

C.H.; (4) the trial judge denied Lewis his right to counsel on his *pro se* posttrial motion; and (5) his sentence was excessive. We address Lewis's arguments in turn.

¶ 45 Sufficiency of the Evidence

¶ 46 When the sufficiency of the evidence for a criminal conviction is in dispute, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Lewis was convicted of a form of aggravated sexual assault requiring the State to prove Lewis's penis penetrated C.H.'s vagina by the use of force and caused bodily harm. 720 ILCS 5/12-13(a)(1) (West 2008); 720 ILCS 5/12-14(a)(2) (West 2008).

¶ 47 It is not an appellate court's function to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Determinations of the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are the responsibility of the trier of fact. *People v. Furby*, 138 Ill. 2d 434, 455 (1990). For a reviewing court to set aside a criminal conviction due to insufficient evidence, the evidence submitted must be so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). A complainant's testimony no longer needs to be clear and convincing or substantially corroborated for a defendant to be found guilty of a sex offense. *People v. Schott*, 145 Ill. 2d 188, 206 (1991). However, where the key evidence supporting the conviction is the complainant's testimony, a reviewing court may find such so

unconvincing, conflicting and unreasonable that a reasonable doubt of the defendant's guilt exists. See *id*. at 207.

¶ 48 In this case, Lewis argues that C.H.'s account, in which she accompanied him to the building patio after fending off his advances and failed to telephone the police or text message her friends to do so, is "improbable, unconvincing, and contrary to human experience." *People v. Vasquez*, 233 Ill. App. 3d 517, 527 (1992). However, as the State notes, the significance of the complainant's failure to cry out or attempt to escape depends upon the circumstances of each case and are merely factors to be considered by the trier of fact in weighing the complainant's testimony. *People v. Bowen*, 241 Ill. App. 3d 608, 620 (1993). Here, C.H. testified that she accompanied Lewis to the patio intending to leave him there or to get him to return to his apartment. Moreover, while unstated by C.H., a jury could believe that C.H. may have felt safer among others after fending of Lewis's initial advances.

¶ 49 While Lewis asserts that it was improbable that C.H. would have used her telephone all evening, C.H. testified that she sent her text messages surreptitiously to avoid Lewis noticing her activity. In addition, as the State notes, even when the two returned to her apartment, Lewis's advances had yet to escalate to a violent sexual assault. C.H. also testified that Lewis threw her telephone across the room when he discovered her using it – and the record on appeal shows that she did use it. C.H. sent text messages that, while not requesting they contact police, requested that the recipients come to her apartment in the hope that the situation would not escalate. A reasonable trier of fact might conclude that this may have been a serious misjudgment by C.H., a

20-year-old college student who had at least one alcoholic beverage, but it is not an account that is so improbable as to run contrary to human experience.

¶ 50 Furthermore, as the State notes, other elements of C.H.'s testimony were corroborated by Amanda's testimony of C.H.'s distraught condition and prompt outcry, as well as her observation of the condition of their apartment, with furniture displaced and what she believed was Lewis's underwear on a futon in the living room. Testimony from the police, building security guard and Dr. Valadka corroborate C.H.'s agitation after the incident. In addition, Dr. Valadka's examination revealed abrasions to C.H.'s breasts and wrists. Although Dr. Valadka did not see any bruising on C.H.'s face, the doctor acknowledges that bruises may take hours to appear after someone is struck. The evidence showed that C.H.'s face developed a bruise under her left eye, consistent with C.H.'s testimony that Lewis struck her there. The text messages C.H. sent demonstrated her state of mind over the course of the evening.

¶ 51 Viewing this record in the light most favorable to the prosecution, we conclude a rational trier of fact could have found the defendant guilty of aggravated sexual assault beyond a reasonable doubt.

¶ 52 The Illinois Rape Shield Statute

¶ 53 Lewis next argues that he was prejudiced by the trial judge's misapplication of the Illinois rape shield statute (725 ILCS 5/115-7(a) (West 2008)). Lewis contends that use of the rape shield statute violated his due process rights and right to confrontation under the sixth and fourteenth amendments to the United States Constitution (U.S. Const., amends.VI, XIV). The rape shield statute absolutely bars evidence of the alleged complainant's prior sexual activity and

reputation, subject to two exceptions: (1) evidence of past sexual activities with the accused, offered as evidence of consent; and (2) where the admission of such evidence is constitutionally required. *People v. Santos*, 211 Ill. 2d 395, 401-02 (2004). The Constitution requires that a defendant "be permitted to offer certain evidence which was *directly* relevant to matters at issue in the case, notwithstanding that it concerned the complainant's prior sexual activity." (Emphasis in original.) *Id*. at 405-06. Admission of such evidence is constitutionally required under the recited amendments to the constitution where the exclusion of the evidence prevents the defendant from presenting his theory of the case. See *People v. Sandoval*, 135 Ill. 2d 159, 175 (1990). Procedural fairness does not require the admission of evidence which is only "marginally relevant" or which "poses an undue risk of harassment, prejudice, [or] confusion of the issues." (Internal quotation marks omitted.) *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986). The alleged victim's sexual history is not "constitutionally required to be admitted" under the rape shield statute unless it would make a meaningful contribution to the fact-finding enterprise. *People v. Maxwell*, 2011 IL App (4th) 100434, ¶ 76. This is a decision best made on a case-by-case basis. *People v. Darby*, 302 Ill. App. 3d 866, 874 (1999).

¶ 54 Lewis maintains that the trial judge erred in denying his pretrial motion *in limine* to bar evidence that C.H. had tested positive for chlamydia, because the evidence was necessary to support the trial defense that Lewis did not have sex with C.H. However, as the State indicates, Lewis was required to provide an adequate offer of proof about what the excluded evidence would have been, not only to enable the trial court to take appropriate action, but also to provide the reviewing court with an adequate record to determine whether the trial court's action was

erroneous. *People v. Pelo*, 404 Ill. App. 3d 839, 875 (2010). In this case, Lewis has identified no written motion *in limine* as part of the record on appeal, if any existed. The brief portion of the transcript addressing this motion in *limine* refers to C.H.'s positive test and the assertion that Lewis had a negative test "on his entry into the jail." Lewis notes that "if a question shows the purpose and materiality of the evidence, is in a proper form, and clearly admits of a favorable answer, the proponent need not make a formal offer of what the answer would be, unless the trial court asks for one." *People v. Lynch*, 104 Ill. 2d 194, 202 (1984). Nevertheless, the record must be sufficient for this court to determine whether the exclusion of the evidence was in error. See *id*.

¶ 55 On appeal, Lewis refers to no expert evidence regarding the incubation period or the transmission of the disease. Lewis argues that the incubation period is a nonissue because he claims he never had chlamydia. However, Lewis similarly points to no evidence showing that he never had the disease. Given the absence of evidence that Lewis's test would have produced a relevant result, we cannot conclude the trial court erred in barring the evidence of C.H.'s positive test. See *People v. Redman*, 135 Ill. App. 3d 534, 542 (1985).

¶ 56 Lewis relies upon *People v. Starks*, 365 Ill. App. 3d 592 (2006) for the proposition that he had the right to introduce the chlamydia test results for both C.H. and Lewis into evidence. However, *Starks* involved the admissibility of DNA test results showing that the defendant's semen was not on the complainant's underwear, combined with the complainant's impeaching prior inconsistent statement that she was not sexually assaulted, and the State's own expert's incorrect testimony regarding the prior serology tests, cast serious doubt as to whether defendant

committed aggravated or attempted aggravated criminal sexual assault. *Id*. at 600. In contrast, Lewis has not shown that his purported negative test for chlamydia excluded him as a source of semen (there was no semen in this case) or excluded the possibility that he had sex with C.H. Lewis relies on the general rule that relevant evidence is evidence having "any tendency to make the existence of any fact in consequence to the determination of the action more or less probable than it would be without the evidence." *People v. Hope*, 168 Ill. 2d 1, 24 (1995). Yet *Crane* and its progeny clarify that, to overcome the rape shield statute, the evidence must be directly (not marginally) relevant and make a meaningful contribution to the fact-finding enterprise. *Crane*, 476 U.S. at 689-90; *Santos*, 211 Ill. 2d at 405-06. Lewis has made no such showing in this case.

¶ 57 Lewis also cites *State v. Steele*, 510 N.W.2d 661 (S.D. 1994), in which the South Dakota Supreme Court held that the defendant was denied a fair trial where the prosecution suppressed evidence of the complainant's positive test for chlamydia, in part because disclosing the information would have allowed the defendant to obtain relevant test results. See *id*. at 665-67. This case does not involve the suppression of evidence. Indeed, the State promptly disclosed C.H.'s test results, allowing Lewis to obtain and present any relevant test results for himself. Moreover, *Steele* interprets South Dakota's rape shield statute, which bars evidence of "specific incidents" of sexual conduct. *Id.* at 677. This case involves the Illinois rape shield statute, which more broadly bars evidence of "the prior sexual activity or the reputation of the alleged complainant or corroborating witness[.]" 725 ILCS 5/115-7(a) (West 2008). Thus, we do not find *Steele* persuasive authority in this case. Accordingly, we conclude that Lewis has failed to show the trial judge erred in excluding evidence of C.H.'s positive test for chlamydia in this case.

¶ 58 The Admission of the Text Messages

¶ 59 Lewis further argues that the trial judge erred in admitting the text messages sent by C.H. over the course of the evening of the assault, contending that the text messages were inadmissible prior consistent statements. The State notes – and Lewis concedes – that he forfeited the issue by objecting at trial and in the posttrial motion on the ground that the messages were inadmissible hearsay.[5] It is well established that specific trial objections forfeit all other grounds of objection. *E.g.*, *People v. Macri*, 185 Ill. 2d 1, 75 (1998). Lewis asserts that he has not forfeited the argument because he lodged an objection – albeit a different objection – at trial and in his posttrial motion. In the alternative, Lewis asks us to review this issue for plain error pursuant to Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). We conclude that the trial court did not err and the argument fails, regardless of forfeiture. See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (plain error analysis requires that we first determine whether any error occurred at all).

¶ 60 Generally, statements made prior to trial are inadmissible for the purpose of corroborating trial testimony or rehabilitating a witness. *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005). Prior consistent statements, however, are admissible in two circumstances: (1) where there is a charge

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[5] Lewis's brief claims in passing that the text messages are inadmissible hearsay. However, the sole citation Lewis offers, giving the general definition of hearsay, is to *People v. Lawler*, 142 Ill. 2d 548, 557 (1991). Coincidentally, *Lawler* suggests that the contents of a telephone conversation could be considered as evidence of the complainant's state of mind concerning whether she consented to intercourse. *Id.* at 559.

that the witness has recently fabricated the testimony; or (2) where the witness has a motive to testify falsely. *People v. Heard*, 187 Ill. 2d 36, 70 (1999). In either circumstance, the prior consistent statement must have been made before the alleged fabrication or motive to lie arose. *Id*. at 70. Prior consistent statements are admitted solely for rehabilitative purposes, not as substantive evidence. *People v. Walker*, 211 Ill. 2d 317, 344 (2004).

¶ 61 In this case, Lewis acknowledges in his brief that his trial counsel argued in the opening statements that C.H. was motivated to lie because she was embarrassed about having a large, naked man unconscious in her bed. However, relying on *People v. Belknap*, 396 Ill. App. 3d 183, 211-12 (2009), and cases cited therein, Lewis argues that, for prior consistent statements to be admissible, the charge of a motive to lie must occur during cross-examination. However, there was no issue regarding the opening statement in *Belknap*. *Belknap* relied in part on *People v. Crockett*, 314 Ill. App .3d 389, 407-08 (2000), which ruled that eliciting evidence of a prior consistent statement on direct examination in anticipation of a cross-examination attack was improper, but was a mere technical error, not a substantive one, because the charge of fabrication was made in cross-examination. No question was raised regarding the opening statement in *Crockett*. *Belknap* also relied in part on *Moore v. Anchor Organization for Health Maintenance*, 284 Ill. App. 3d 874, 885 (1996), which ruled that there must be an express or implied charge of recent fabrication or motive to lie, rather than the mere introduction of contradictory evidence. However, the *Moore* court was analyzing the defendants' opening statement to determine whether there was a charge of recent fabrication. *Id.* at 884.

¶ 62 *Moore* is not the only case in which this court has considered opening statements in the context of admitting prior consistent statements. In *People v. Ursery*, 364 Ill. App. 3d 680, 687 (2006), this court held there was no error in introducing a prior consistent statement where defense counsel suggested during opening statements that the witness had fabricated his testimony or had a motive to testify falsely. In *People v. Nicholls*, 236 Ill. App. 3d 275, 282 (1992), this court affirmed the admission of a prior consistent statement to rebut the inference of fabrication regarding a statement mentioned in defense counsel's opening statement, but not in cross-examination. Read in context, the case law establishes the rule that a party may not introduce a prior consistent statement prior to a *charge* of recent fabrication or a motive to lie. The charge opening the door to prior consistent statements may be made in opening statements as well as cross-examination. Indeed, the contrary rule would encourage counsel to make unsupported charges in opening statements.

¶ 63 Lewis suggests that even if the text messages were admissible to show C.H.'s state of mind, the messages should have been still excluded because their probative value was substantially outweighed by their unduly prejudicial effect. See *U.S. v. Brown*, 490 F.2d 758, 769-70 (D.C. Cir. 1973). In arguing the text messages were unduly prejudicial, Lewis notes that " '[t]he danger in prior consistent statements is that a jury is likely to attach disproportionate significance to them. People tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve.' " *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 52 (quoting *People v. Smith*, 139 Ill. App. 3d 21, 33 (1985)). However, in the case before us, the exception to the general rule against prior

consistent statements applies. Any repetition in admitting the text messages was warranted to rebut the charge that C.H. had a motive to lie, and was not unduly prejudicial.

¶ 64 Lastly, Lewis suggests that the text messages were unduly emphasized, where the State enlarged them for demonstrative purposes, discussed them in closing argument, and submitted them to the jury. Given that the text messages contained numerous typographical errors and slang explained about by C.H. in her testimony, the trial judge did not abuse his discretion in allowing enlargements of the messages to aid the jury in viewing them. See *People v. Bennett*, 222 Ill. App. 3d 188, 204 (1991). Moreover, as the messages were properly admitted into evidence, the prosecution was free to comment on them. See, *e.g.*, *People v. Simms*, 192 Ill. 2d 348, 396 (2000). In this case, the portion of the argument quoted by Lewis demonstrates that the State commented on the fact that the text messages showed how C.H.'s state of mind shifted over the course of the evening, which was the basis for their admission. Given that the messages were properly admitted, we also find no prejudice to the defendant in submitting them to the jury. *People v. Carrero*, 345 Ill. App. 3d 1, 14-15 (2003). In short, we conclude the trial court did not err in admitting C.H.'s text messages. Accordingly, Lewis has failed to show error on this point.[6]

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[6] Lewis argues briefly and generally that he received ineffective assistance of trial counsel where counsel did not object on the specific ground of prior consistent statements. However, since there was no error in admitting the text messages, Lewis cannot show that he suffered the prejudice required to warrant a new trial. See, *e.g.*, *People v. Buss*, 187 Ill. 2d 144,

¶ 65 The Right to Posttrial Counsel

¶ 66 Lewis next claims that the trial judge improperly denied Lewis the assistance of counsel at the hearings on his *pro se* posttrial motion and sentencing. The United States Constitution guarantees criminal defendants the right to assistance of counsel " 'at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.' " *People v. Baker*, 92 Ill. 2d 85, 90 (1982) (quoting *Mempa v. Rhay*, 389 U.S. 128, 134 (1967)). The posttrial motion is a critical part of the criminal proceeding (*People v. Abdullah*, 336 Ill. App. 3d 940, 951 (2002)), as is sentencing (*Baker*, 92 Ill. 2d at 90 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973))). Although the parties do not expressly address whether a hearing on a *pro se* motion claiming ineffective assistance of trial counsel under *People v. Krankel*, 102 Ill. 2d 181 (1984), is a critical stage, we note that the trial court is obliged to examine the factual basis of the claim and appoint counsel where the defendant presents a colorable claim. *People v. Patrick*, 2011 IL 111666, ¶ 32.

¶ 67 A criminal defendant has the corresponding right to self-representation and may proceed *pro se* provided the defendant acts knowingly and intelligently in foregoing counsel. *Faretta v. California*, 422 U.S. 806, 819, 835 (1975). When a trial court permits a defendant to waive counsel and the waiver is not knowing and intelligent, the trial court denies defendant a substantial right and commits reversible error. *People v. Jiles*, 364 Ill. App. 3d 320, 328-30 (2006). However, when a defendant is admonished in substantial compliance with Supreme

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213 (1999).

Court Rule 401(a) (eff. July 1, 1984), there is a valid waiver of counsel. *People v. Haynes*, 174 Ill. 2d 204, 236 (1996).

¶ 68 Generally, under the continuing waiver rule, when a defendant makes a valid waiver of counsel, this waiver remains in place throughout the remainder of the proceedings, including posttrial stages. *Baker*, 92 Ill. 2d at 91-92. However, there are two exceptions to this rule: "(1) the defendant later requests counsel or (2) other circumstances suggest that the waiver is limited to a particular stage of the proceedings." *People v. Palmer*, 382 Ill. App. 3d 1151, 1162. However, where the trial court has complied with Supreme Court Rule 401(a), the court can hold the defendant to his election to proceed *pro se*, even though the defendant subsequently changes his mind during trial, in light of the importance of judicial administration and the need to avoid giving a defendant the opportunity to "game the system." *Id.* at 1163. The *Palmer* court relied on *People v. Burton*, 184 Ill. 2d 1, 24 (1998), where the Illinois Supreme Court noted the case law holding that a defendant's request to proceed *pro se* is untimely when it is first made just before the commencement of trial, after trial begins, or after meaningful proceedings have begun, and stated that the decision to grant or deny a request once proceedings have begun falls withing the discretion of the trial court. There are no cases which hold that "[a] defendant's day-of-trial request for appointment of counsel should have been granted where a voluntary, knowing and understanding waiver of counsel has been made and the trial court has determined that the request masks a desire to delay trial." *People v. Pratt*, 391 Ill. App. 3d 45, 57 (2009).

¶ 69 Here, Lewis requested counsel for the hearing on his *pro se* posttrial motion and again for the immediate, subsequent sentencing hearing. The trial judge concluded that the request was

dilatory. Lewis notes that he told the trial judge that the time it took to obtain discovery from the State and gain access to the law library and typewriter in prison delayed his realization that he required the assistance of counsel to present the motion. Lewis also argues that his case is distinguishable from *Pratt*, in which the defendant was represented by three private attorneys and the public defender and elected to proceed *pro se* before seeking to revoke his waiver. See *id.* at 46.

¶ 70 However, the defendant's prior representation in *Pratt* is separate from the dilatory aspect of a request made on the day the proceedings commence. *Pratt*, 391 Ill. App. 3d at 57. Moreover, there is no doubt that the proceedings would have been delayed here, where an available public defender informed the trial judge that he could not effectively represent Lewis that day. The constitutional right to assistance of counsel may not be employed as a weapon to "thwart the administration of justice or to otherwise embarrass the effective prosecution of crime." *People v. Friedman*, 79 Ill. 2d 341, 349 (1980). The decision to deny a last minute request is reviewed for an abuse of discretion, which occurs only when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. See *People v. Ortega*, 209 Ill. 2d 354, 359 (2004); *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). We conclude that no abuse of discretion occurred here.

¶ 71 Sentencing

¶ 72 Lastly, Lewis maintains his 15-year sentence was excessive, given that he was an educated, employed and productive member of society without prior criminal convictions, who showed remorse over the offense. The trial court has "broad discretionary powers" in sentencing

a defendant. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). "Where the sentence chosen by the trial court is within the statutory range permissible for the pertinent criminal offense for which the defendant has been tried and charged, a reviewing court has the power to disturb the sentence only if the trial court abused its discretion in the sentence it imposed." *Id*. at 373-74.

¶ 73 "In sentencing a defendant, a trial court must balance the retributive and rehabilitative purposes of the punishment taking into account both the seriousness of the offense and the objective of restoring the offender to useful citizenship." *People v. Cooper*, 283 Ill. App. 3d 86, 95 (1996) (citing *People v. Hernandez*, 278 Ill. App. 3d 545, 555 (1996)); Ill. Const. 1970, art. I, § 11. The trial court may appropriately consider the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age when sentencing a defendant. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). The court may also consider the nature of the crime, protection of the public, deterrence, and punishment. *People v. Jackson*, 357 Ill. App. 3d 313, 329 (2005). "It has been emphasized that the trial court is in a superior position to assess the credibility of the witnesses and to weigh the evidence presented at the sentencing hearing." *Jones*, 168 Ill. 2d at 373. "There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and the court is presumed to have considered any evidence in mitigation which is before it." *People v. Lavelle*, 396 Ill. App. 3d 372, 386 (2009). Moreover, "a trial court is not required to give greater weight to the rehabilitative potential of a defendant than to the seriousness of the offense." *People v. Weatherspoon*, 394 Ill. App. 3d 839, 862 (2009).

¶ 74 In this case, Lewis was convicted of aggravated criminal sexual assault with bodily harm. 720 ILCS 5/12-14(a)(2) (West 2008). This is a Class X felony subjecting Lewis to a sentencing range of 6 to 30 years in prison. 720 ILCS 5/12-14(d)(1) (West 2008); 730 ILCS 5/5-4.5-25(a) (West 2008). The 15-year sentence falls within the statutory range; it is half the maximum and less than the midpoint of 18 years. The transcript shows that the trial judge discussed the aggravating and mitigating factors, specifically noting Lewis's lack of criminal record, which also led the trial judge to conclude that he was unlikely to commit another crime. Also, the trial judge also was presented with C.H.'s victim impact statement, indicating that, as a result of the assault, C.H. left her job, quit school, was seeing a therapist twice weekly and was prescribed medication to help her address her psychological trauma. Although Lewis claims he showed remorse over the offense, the State notes that Lewis claimed he did not remember the assault, that he felt as sorry for himself as he did for C.H. and stated that "my life is scarred as well." Given this record, we conclude that the trial judge did not abuse his discretion in imposing a 15-year sentence.

¶ 75 CONCLUSION

¶ 76 In sum, we conclude that a rational trier of fact could have found Lewis guilty of aggravated sexual assault beyond a reasonable doubt. Lewis failed to show that the trial judge erred in excluding evidence of C.H.'s positive test for chlamydia in this case. We also conclude that Lewis also failed to show that the trial court erred in admitting C.H.'s text messages into evidence. The trial judge did not abuse his discretion in proceeding on Lewis's *pro se* posttrial motion and sentencing without appointing counsel to represent Lewis. Lastly, the trial judge did

not abuse his discretion in imposing a 15-year sentence. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 77 Affirmed.