

2013 IL App (1st) 113421-U

No. 1-11-3421

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SIXTH DIVISION
September 27, 2013

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 3425
)	
DEMARCO WHITLEY,)	The Honorable
)	Thomas Fecarotta,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *HELD:* The State's evidence was sufficient to sustain defendant's criminal sexual assault convictions. The trial court did not err in considering inadmissible hearsay testimony.

¶ 2 Following a bench trial, defendant, Demarco Whitley, was convicted of four counts of criminal sexual assault and sentenced to a total of 16 years' imprisonment. On appeal, defendant contends the State failed to establish he was guilty beyond a reasonable doubt. Defendant

additionally contends the trial court erred in relying on the complaining witness' prior consistent statements. Based on the following, we affirm.

¶ 3

FACTS

¶ 4 At trial, S.G. testified that she met Pierre Steel in a park in the summer of 2009 when she was fifteen years old. The pair met three or four times thereafter. According to S.G., Steel would pick her up in his car and they would drive around and park somewhere to talk. On one occasion, Steel was at S.G.'s house when he laid down on a guest bed, exposed his penis, and asked S.G. to have sex with him. S.G. refused and told him to leave. S.G. testified that Steel "smelled like marijuana" and "was acting a little different." According to S.G., she never told anyone about the incident. S.G. admitted that she lied to the police in January of 2010 when she was asked whether she had any prior encounters with Steel before the alleged assault. S.G. maintained that she withheld her prior relationship with Steel because "she didn't want [the police] to think it was her fault." The first time S.G. reported the 2009 encounters with Steel was in February 2010 while speaking to the Assistant State's Attorney (ASA).

¶ 5 S.G. testified that she arrived home from school around 3:15 p.m. or 3:20 p.m. on January 29, 2010, and exchanged phone calls and text messages with Steel. Steel invited S.G. to hang out with him and his cousin, defendant, that night. She agreed, but told Steel to pick her up before her mother returned from work at 7:15 p.m. According to her testimony, S.G. thought she would "just hang out" with the boys when they arrived. When Steel picked S.G. up at approximately 6 p.m., Steel was in the driver's seat of the car and defendant was in the passenger seat. S.G. sat in the rear. S.G. was wearing black leggings, a camisole, and a jacket. Steel

proceeded to drive the car to a parking lot in the rear of a church approximately two minutes away. According to S.G., it was dark outside and the parking lot was not illuminated. There were no other people in the parking lot. S.G. described the temperature of the car as hot, so she removed her jacket and placed it next to her. At that point, Steel and S.G. had been conversing. Steel then said S.G. "should hook up" with his cousin, which S.G. interpreted to mean have sex with defendant. S.G. refused, but Steel continued to suggest that defendant and she have sex. S.G. described Steel's tone as "playful," stating that she "thought he was serious, but [she] didn't think he would care if [she] said no. [She] thought he was just asking to ask." At the time, defendant remained silent in the front passenger seat.

¶ 6 Defendant then exited the car to take a phone call. Steel remained inside the car with S.G., continuing to suggest that she have sex with defendant. S.G. responded that she "didn't want to." S.G. testified that she had never had any prior sexual encounters with Steel. Defendant returned to the car at some point and Steel also received a phone call. Steel exited the car to take the call, but told defendant to get in the back seat with S.G. Defendant moved into the back seat next to S.G. Defendant did not say anything and S.G. described the situation as awkward. S.G., however, did not think anything was going to happen or that they would make her do something. When Steel returned to the car, S.G. described his mood as "aggravated and agitated." Steel told S.G. that they would not take her home if she did not have sex with defendant. S.G. continued to refuse. Then, defendant touched S.G.'s shoulder and pulled down her bra strap. Steel insisted that she "[j]ust do it. Just do it. It's not a big deal." S.G. again refused and replaced her bra strap on her shoulder. According to S.G., she did not attempt to leave the car because "[i]t was

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January and it was really cold, and [she] didn't think that they would do anything. [She] thought that they would just get tired of it and just take [her] home."

¶ 7 Steel then flattened the front passenger seat and defendant unzipped his pants and pulled out his penis. Defendant touched his penis and touched S.G.'s left breast. S.G. continued to say "no" and pushed defendant's hand away. In response, defendant grabbed S.G.'s wrist and placed her hand on his penis. S.G. attempted to pull her arm away, but defendant would not let go. S.G. repeated that she "didn't want to do it and [she] wasn't kidding and [she] really just wanted to leave." According to S.G., Steel and defendant were big and muscular. She knew that they both played on the high school football team. S.G. stated that she was scared. She then heard Steel lock the door and saw him adjust the rearview mirror so that he could observe her and defendant. According to S.G., she did not think it was a good idea to get out of the car despite being "really worried" because "it's like if [she was] on foot and they're in a car and [she] tried to get out, they can still catch [her]. So [she] thought it would be better if [she] just stayed in there because [she] didn't want them to do anything worse." S.G. continued to hope that they would stop. S.G. retrieved her phone from her jacket, which defendant had moved to the console between the front seats.

¶ 8 According to S.G., Steel then grabbed the back of her neck and pulled her head to his lap in the driver's seat while the lower half of her body remained in the back seat. Steel had unzipped his pants and forced S.G.'s head onto his penis to perform oral sex. S.G. yelled and told them to "stop." Simultaneously, defendant pulled S.G.'s leggings and underwear down and started touching her vagina. Defendant penetrated S.G.'s vagina with his fingers causing her pain.

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S.G. "started screaming." S.G. was able to scream because she was moving her head from side to side to avoid putting her mouth on Steel's penis. Despite her efforts, Steel continued to hold the back of her neck and S.G.'s mouth was forced onto Steel's penis at times. Defendant then inserted his penis into S.G.'s vagina. After "a while of that," S.G. stated that she "felt something wet on [her] leg." S.G. said she "was freaking out" and moving around because she thought defendant had ejaculated. Defendant removed his penis and showed her that he had ejaculated into a condom. Defendant told S.G. to calm down and stop yelling. Defendant pushed S.G. down onto the collapsed front passenger seat and held her down. Defendant again inserted his penis into S.G.'s vagina. S.G. was in pain and was crying. Defendant then inserted his penis into S.G.'s anus. Defendant continued to push S.G. against the seat. S.G. begged defendant to "stop it" and asked Steel to take her home. Steel observed from the front driver's seat until defendant removed himself from S.G. and sat behind the driver's seat. At that point, S.G. pulled up her pants and continued crying. S.G. sat down. Steel then turned the car on.

¶ 9 S.G. testified that she retrieved her cellular phone to call her friend Amanda. S.G. did not reveal what had occurred to Amanda out of fear that they would do "anything else." However, through the process of yes or no questions, S.G. informed Amanda that she was in trouble and was on her way to Amanda's house. While in route, defendant told S.G. that he "needed to come, and *** asked if [she] would give him head or blow job." Despite S.G.'s refusal, defendant pulled S.G.'s head down and forced her mouth onto his penis. According to S.G., she "kept moving [her] head. [She] didn't want to. [She] was trying to pull away. [Defendant] let go of the back of [her] head." S.G. said she gave Steel directions to a random house because she did

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not want them to know where Amanda lived.

¶ 10 When they arrived at the random address, S.G. exited the car and Steel told her he would call her later. The car drove away and S.G. walked to Amanda's house. On the way, S.G. called her mom to tell her that she was going to Amanda's house, but she did not discuss the assaults because S.G. did not want her mom to be "upset with [her]." S.G.'s mother was still at work. While at Amanda's house, S.G. told Amanda that she "had been in a car with two guys, that they locked the doors, that they were bigger than [her], that they were football players, and that they made [her] have sex with them, and [she] didn't know what to do."

¶ 11 S.G. eventually left Amanda's house and returned to her home. S.G.'s mother was home from work, but S.G. did not tell her about the incident initially. Sometime later that evening, S.G. approached her mother and told her that "what had happened to [her] happened to [her] friend Jessica and that Jessica needed advice on what to do." According to S.G., she made up the fictitious Jessica to observe her mother's reaction, *i.e.*, "to see if she would think that the girl deserved it or if she thought that it shouldn't have happened." S.G.'s mother advised S.G. that Jessica should tell her parents and go to the hospital, adding that "no means no." S.G. then returned to her bedroom for the remainder of the evening. When undressing, S.G. noticed that the left leg of her leggings had been torn. S.G. brushed her teeth.

¶ 12 At some point in the evening, S.G. sent her boyfriend, who was away at college, a text message. In the course of the texting conversation, S.G. told her boyfriend that she was "crying and stuff." In addition, S.G. texted the following messages: (1) "Okay. So my friend Pierre called me and asked me to come out, which I guess I shouldn't have. And when I got in his car,

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his cousin was there. And then they started whispering and s***, and I was like okaaay [*sic*"]; (2) "Pierre pulled into a parking lot and told his cousin to get in the back seat"; (3) "And then Pierre was like 'Are you going to hook my man up or whatever,' and I was like, 'No' "; (4) "And he was like, 'Well, I'm not driving you home until you make him come' "; (5) "And I was like, 'No, I really can't.' You have to understand, they were two really big guys and we were behind a church with nobody there"; (6) "His cousin started touching me and shit. And I was like, 'Okay, this isn't even funny. I'm not interested.' Pierre locked the doors and I was like, 'F***' "; (7) "And the rest I just need to tell you on the phone. I swear I did absolutely nothing intentionally. I wouldn't call it rape, but there was [definitely] no consent."

¶ 13 S.G. testified that she did not describe what occurred as rape because she "felt like rape was a really strong word, but [she] wanted [her boyfriend] to understand that [she] did not want to do it and that they forced [her] to do it." S.G. stated that she believed rape to be "like someone getting drugged at a club or like being pulled into an alley or like an 8-year-old girl with a 50-year-old man." S.G. described feeling guilty for having agreed to go in the car. S.G. added that she never wanted to perform any sexual acts and that she repeatedly said "no."

¶ 14 The next morning S.G. approached her mom and told her that Jessica's story was really her own. In response, S.G.'s mother took her to the hospital. S.G. wore the same underwear and socks that she had on during the incident, but the rest of her clothes were different. S.G. was examined and she spoke to a nurse. Later that day, S.G. went to the Rolling Meadows police department where she met with Detective Fiore to report the incident. S.G. brought the clothes she had worn the prior day with her to the police station. While at the police station, S.G.

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identified Steel in a photographic array. A few days later, in early February, S.G. was shown another photographic array, but she did not identify anyone. According to S.G., she did not get a "good look" at defendant while in Steel's car during the incident. S.G. did, however, identify Steel's car in a different photographic array.

¶ 15 S.G. reported that she stayed home from school for three months after the assaults because she was in shock and "was really sad." S.G. described having nightmares and suffering depression and high anxiety. S.G. eventually sought help from a therapist.

¶ 16 On cross-examination, S.G. testified that she did not discuss anything sexual with Steel prior to him picking her up in his car on the date in question. S.G., however, said that Steel asked if she wanted to "knock his back." S.G. testified that she did not know the meaning of the terminology. S.G. also testified that she communicated with Steel to inform him to hurry to her house so she could leave before her mother returned home from work. S.G. admitted that, prior to leaving her house on the date in question, she called her mom to say she was going out, but failed to provide the accurate details because S.G. knew her mother "probably wouldn't think it was a good idea." According to S.G., she was using her phone to send text messages to friends while in route to the church parking lot. S.G., however, never told any of her friends where she was or who she was with at that point. S.G. testified that she had access to her phone at different points throughout the incident and that she never attempted to open the car door.

¶ 17 Amanda Faust testified that, on January 29, 2010, at approximately 6:25 p.m., she was running errands with her mother when she received a phone call from S.G. Amanda and S.G. had been friends since second grade. The pair lived on the same block. Amanda described S.G.'s

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voice during the call as "very scared" and she repeatedly said "I need to come over now."

Amanda stated that S.G.'s tone was completely uncharacteristic. Amanda asked S.G. if she was safe and S.G. responded, "no." S.G. only responded yes or no and continued to repeat that she needed to come over. Amanda instructed S.G. to go to the house. Amanda's brother was home and Amanda and her mother were on their way home.

¶ 18 When Amanda returned home, S.G. was in Amanda's bedroom sitting on the floor, which was uncharacteristic because S.G. was very comfortable in Amanda's home. Amanda described S.G. as appearing in shock and scared. Amanda asked what had happened with the understanding that S.G. had plans to go to the movies with Steel and his cousin. Amanda testified that she learned about the plans to go to the movies a few days before the date in question. However, S.G. told Amanda that they did not go to the movies, but instead parked in a church parking lot. S.G. reported that "they asked her to do favors, and she said no. And that she was overpowered by them, and they locked the doors." Amanda advised S.G. to tell her mother and go to the hospital. Shortly thereafter, S.G. left Amanda's house. Amanda testified that she had not spoken to S.G. again since the date in question even though the girls spoke daily up until that point. According to Amanda, S.G. was "different" after the incident, in that she was "very quiet and reserved and wasn't her fun, outgoing, bubbly self."

¶ 19 Francoise Gracia, S.G.'s mother, testified that she spoke to S.G. on the date in question when S.G. arrived home from school. Gracia testified that she spoke to S.G. on the telephone again at approximately 6:30 p.m. According to Gracia, S.G. did not sound like "herself." S.G. told Gracia that she was going to Amanda's house. When Gracia returned home from work

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around 7:15 p.m., S.G. was not at home. When S.G. arrived home, Gracia described her as "very, very upset and crying." S.G. reported that something happened to her friend Jessica. S.G. asked Gracia whether "you get in someone's car and they touched you, wanted to have sex with you, and you said no, is that rape?" Gracia answered in the affirmative and pleaded with S.G. to have Jessica call Gracia if she did not want to inform her own parents. S.G. refused. Gracia then told S.G. to advise Jessica not to bathe, wash up, or take her clothes off. Gracia again offered to take Jessica to the hospital. S.G. was still crying, but asked her mother to leave her bedroom. Gracia complied.

¶ 20 The next morning, S.G. walked into Gracia's room and asked whether Jessica was wrong for getting into the car. Gracia comforted S.G. and told her that she would always be there for S.G. if something happened. At that point, S.G. admitted that the fictitious Jessica story happened to her. Gracia then took S.G. to the hospital. Gracia was present while a nurse conducted a physical examination. Gracia testified that she did not realize how much the boys "ravaged" her daughter. After S.G. was released from the hospital, Gracia took S.G. to their home to retrieve the clothing she had worn during the incident and then proceeded to the police station. According to Gracia, after the incident, she "lost" her daughter who was angry and no longer playful.

¶ 21 On cross-examination, Gracia testified that she checked S.G.'s cellular phone all of the time. However, when Gracia attempted to view S.G.'s text messages on the date in question, the messages were deleted. Gracia stated that S.G. deleted her text messages every day. Gracia then retracted and said that she did not check S.G.'s phone.

¶ 22 Ann Schmidt testified that she was the nurse that treated S.G. on January 30, 2010.

During the examination, S.G. told Schmidt that Steel picked her up around 5:30 p.m. on the prior evening and she sat in the back seat of the car because Steel's cousin was in the front passenger seat. When Steel began driving away, S.G. asked where they were going because she thought they were just going to sit and talk. Steel told her not to worry that they were just driving around. S.G. heard Steel and the cousin whispering in the front seat while she text messaged one of her friends. Steel drove to a church parking lot and parked the car. Steel told his cousin to enter the back seat of the car and instructed S.G. to "take care of him." S.G. responded that she did not want to. Steel stepped out of the car to answer a phone call and the cousin sat in the back seat. The cousin also answered two phone calls. At some point, S.G. removed her coat because it was warm in the car. The cousin proceeded to unzip his pants and reveal his penis. S.G. responded that she did not know the cousin and did not want to do anything.

¶ 23 S.G. told Nurse Schmidt that Steel said she could not return home until she "took care of his cousin." According to S.G., Steel locked the car doors when he turned off the ignition. S.G. reported that the cousin attempted to touch her breasts and Steel collapsed the front passenger seat. S.G. said that, at that point, "it got very aggressive." S.G. realized "how big they were." Steel forced her to lay on the collapsed seat while the cousin removed her leggings. S.G. observed the cousin remove a condom from his wallet. S.G. then felt the cousin's fingers in her vagina while Steel forced S.G. to perform oral sex on him. S.G. reported that nobody was around and "she felt she had no choice." S.G. also felt the cousin insert his penis into her vagina. S.G. told the cousin to "get off of [her]." S.G. reported that the cousin removed one condom and

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threw it out of the car. He put on another condom, but S.G. could not describe exactly what defendant was doing at that point. S.G. said that it was "over and that she was able to sit back" and dress herself.

¶ 24 S.G. reported that Steel started the car, but told her that she "couldn't go home until [she made] her cousin come, and the cousin's penis was forced in her mouth." S.G. replied that she needed to make a phone call to her friend Amanda and that, while she did so, she "used her hand" on the cousin's penis. S.G. reported that she did not consent to having a penis in her mouth or intercourse.

¶ 25 Nurse Schmidt testified that she asked S.G. questions specific to the rape kit, during which time S.G. reported that the cousin penetrated her vaginally and anally with his penis, as well as with his fingers. S.G. added that she was forced to perform oral sex on Steel and the cousin. During the physical examination, S.G. complained of neck pain. Nurse Schmidt did not observe any injuries to her vagina or anus. According to Nurse Schmidt, due to the passage of time between the incident and the exam, it was not unusual to observe a lack of injury. However, Nurse Schmidt stated that the lack of injury could be indicative of consensual sex. While examining S.G.'s vagina, Nurse Schmidt observe a milky discharge, which she swabbed. Nurse Schmidt opined that the discharge could either be normal female flora, a bacteria or STD, or semen. Nurse Schmidt also observed milky discharge in S.G.'s anal cavity, which she swabbed. Nurse Schmidt opined that the discharge either drained from S.G.'s vagina or was semen ejaculated into her anus. Nurse Schmidt additionally took swabs from S.G.'s mouth. However, Nurse Schmidt testified that she would not expect to find evidentiary material when an individual

has brushed his or her teeth. Nurse Schmidt did not observe any obvious bruising on S.G.'s body.

¶ 26 Detective Mike Fior testified that he was a Rolling Meadows police officer assigned to investigate the victim's sexual assault case. On January 30, 2010, at approximately 1:30 p.m., he spoke to S.G.'s mother, Gracia, and Nurse Schmidt at the hospital. Detective Fior instructed Gracia to bring S.G. to the police station when they were finished at the hospital. Around 4 p.m. that day, Detective Fior observed the church parking lot where the incident occurred and retrieved a condom on the premises. Shortly thereafter, Detective Fior returned to the police station and interviewed S.G. At the conclusion of the interview, Detective Fior conducted a photographic array during which S.G. identified Steel. On February 2, 2010, Detective Fior conducted another photographic array for S.G. that included a photograph of defendant. Defendant's name had been learned during the course of the investigation. S.G. did not identify anyone. However, Detective Fior also showed S.G. photographs of Steel's car, which she identified as the car used during the incident.

¶ 27 On March 4, 2010, Detective Fior went to defendant's residence in Glen Ellyn, Illinois. Defendant's parents provided consent to enter the home and to interview defendant. Detective Fior testified that defendant was "wheeled in" to the room. When asked about January 29, 2010, defendant said he stayed home from school on that date and Steel visited his house. Defendant provided that he left the home at some point to pick his sisters up from school and then returned. However, around 5 p.m., he and Steel left the house. Defendant said he did not remember anything after that time. Detective Fior then retrieved a sample from defendant's mouth for purposes of DNA.

¶ 28 On February 8, 2011, Detective Fior arrested defendant in the parking lot of Glenbard West High School. Defendant was transported to the police station where he was interviewed. Initially, defendant said he could not recall any events from the date in question. Detective Fior responded by stating that the police had DNA "from numerous areas and that [the detective] needed the truth from [defendant]." Defendant then said that Steel, whom he referred to both as his friend and cousin, drove to defendant's house and placed a phone call to a girl. Steel conducted the phone call on the speaker. According to defendant's oral statement, Steel and the girl were talking about sexual things. After the phone call, defendant and Steel left and drove to the girl's house in Rolling Meadows.

¶ 29 Steel called the girl when they arrived and she exited her house. The girl then entered the rear of the car. Defendant said the girl and Steel began a conversation while driving a short distance to a parking lot. Steel parked the car. Defendant then exited the front passenger seat and entered the rear seat where the girl was seated. Steel locked the doors and "yelled to the girl, let's do this." Defendant stated that he "knew this to mean sex." Steel told the girl that he wanted oral sex, so he unzipped his pants and exposed his penis. The girl said "no several times and that she wasn't going to do anything sexual several times, but Steel grabbed the back of her head by her hair and forced her mouth on to his penis." Defendant described the girl's physical positioning as half of her body in the front seat with her lower body near defendant. Defendant then rolled down the girl's pants, placed a condom on his penis, and placed his penis into her vagina for several minutes. Defendant said he "nuttled" or ejaculated and removed his penis, removed the condom, and threw the condom out of the rear passenger window. Defendant next

placed his penis in the girl's anus for a short time. According to defendant's statement, Steel simultaneously continued to force oral sex. When defendant and Steel were finished, the girl sat down. The girl then retrieved her cellular phone and called a friend. After the phone call, she asked Steel to take her to the friend's house. Steel started the car and began driving from the parking lot. Defendant then told the girl that he wanted her to perform oral sex. He described the girl's reaction as "scared or reluctant, but she agreed to." When they were close to the friend's house, defendant requested that Steel continue driving around the block until the oral sex was completed. Eventually they stopped at the friend's house and the girl exited the car. Steel told her not to tell anybody about the incident.

¶ 30 After taking the girl to her friend's house, Steel and defendant stopped at a gas station and purchased some food. They continued driving toward defendant's house. While in route, defendant noticed Steel was speeding and told him to slow down. Neither Steel nor defendant wore seat belts and the pair were in a car accident. Steel died as a result of his injuries from the accident.

¶ 31 According to defendant's statement, he knew that the girl did not want to perform any sexual acts or have sex with him or Steel because she repeatedly said no and seemed scared and reluctant. In addition, she repeatedly said she didn't want to do anything.

¶ 32 On cross-examination, Detective Fior admitted that defendant provided an oral statement that was included in the detective's police report. Defendant did not review the report. Detective Fior testified that, during their interview at the police station, S.G. said she had known Steel prior to the date in question. S.G. stated that, at some point in September or October of 2009, Steel

had been to her house with a group of friends. S.G. never mentioned that he was at her house alone or that he exposed his penis to her. In relation to January 29, 2010, S.G. said that during her initial conversation with Steel he asked her whether she would "rub his back." S.G. did not know the meaning of the phrase, but Detective Fior discovered the meaning at a later time.

Detective Fior learned that "rub his back" meant some type of sexual relations, oral or vaginal. S.G. told Detective Fior that her leggings were torn when they were removed. Detective Fior confirmed the tear in the leggings in the rear left thigh.

¶ 33 Detective Fior further testified that, when interviewing defendant on March 4, 2010, he informed defendant that he needed to collect a DNA sample for an incident that he was investigating. Prior to speaking to defendant, Detective Fior told defendant's parents that he was investigating an allegation that defendant had sex with a girl without her consent. Then, when interviewing defendant on February 8, 2011, defendant told Detective Fior that he did not remember the incident in question. Detective Fior did not include defendant's lack of memory in his report because Fior did not believe defendant was telling the truth. According to Fior, when defendant stated that he had no memory of the events in question, he was not making eye contact, appeared deceptive, and did not appear scared.

¶ 34 On redirect examination, Detective Fior testified that, on March 4, 2010, defendant had no problems understanding or responding to questions.

¶ 35 ASA Melanie Fialkowski testified that, on February 8, 2011, she arrived at the Rolling Meadows police station to investigate the incident in question. Around 11 a.m. on that date, she spoke to Detective Fior and reviewed his reports related to the incident. In addition, ASA

Fialkowski interviewed S.G., her mother, Gracia, and Amanda. ASA Fialkowski then interviewed defendant. Defendant waived his *Miranda* rights and spoke to ASA Fialkowski. After a brief conversation, ASA Fialkowski asked defendant if he was willing to memorialize his statement in writing. Defendant agreed. At the conclusion of the statement, ASA Fialkowski reviewed the statement with defendant. Defendant signed each page without making changes to the statement. The statement was read into evidence. In relevant part, the statement provided:

"[Defendant] states that on January 29, 2010, he was at his house in Lombard with Pierre Steel. [Defendant] states that he and Pierre are not related but that he thought of Pierre as his cousin. [Defendant] states that in the afternoon around 3:00 p.m., Pierre called a girl from his cellphone and asked the girl if she would be willing to do certain sexual things with him, but he can't remember what exactly. [Defendant] states that the girl agreed to do those things, and he and Pierre left [defendant's] house in Pierre's mom's car, a dark-colored Ford Fusion. [Defendant] states that as they left [defendant's] house, Pierre told him that the girl lived up in Rolling Meadows. ***.

[Defendant] states the girl got into the back seat. [Defendant] states that at this time, Pierre was driving and [defendant] was in the front passenger's seat. [Defendant] states that Pierre drove a short distance to a parking lot and parked the

car. [Defendant] states that once Pierre parked the car, [defendant] got into the back seat with the girl. ***.

[Defendant] states that the girl and Pierre started arguing because Pierre wanted the girl to do sexual stuff to them that she didn't want to do. [Defendant] states that Pierre was demanding that the girl give Pierre a blowjob, but the girl kept saying I don't know. [Defendant] states the girl was also saying no, that she didn't want to do anything sexual with him. [Defendant] states that at this time, Pierre grabbed the girl by the back of the head and pushed her head down into Pierre's lap where his penis was out. [Defendant] states the girl was between the two front seats with the head in the front seat with the rest of her body still in the back seat. [Defendant] states at this time he pulled down the girl's pants and put a condom on his own penis. [Defendant] states that he then put his penis in her vagina while Pierre had still got her by the back of the head—by the back of the head pushing her face into Pierre's lap.

[Defendant] states that after he 'nut,' which means ejaculate, he took off the condom and threw it out the window into the parking lot. [Defendant] states that Pierre started driving the car away, and [defendant] asked the girl for a blowjob. [Defendant]

states the girl looked hesitant but put her mouth on his penis anyway. [Defendant] states that sometime during this ride, the girl called her friend. [Defendant] states that the girl told Pierre where to drop her off, and he believed it was her friend's house. [Defendant] states that before he had sex with the girl, Pierre never threatened him to have sex with the girl or he would do something to him. [Defendant] states that after they dropped the girl off, they went and got gas, got something to eat, and were driving home when the car crashed."

¶ 36 On cross-examination, ASA Fialkowski testified that defendant never said he had anal sex with S.G. In addition, defendant asked S.G. for a "blowjob" and did not force oral sex.

¶ 37 The parties agreed to stipulate that, if called by the State, DuPage County Sheriff Drugan would testify that he responded to the scene of a car crash on January 29, 2010. The occupants of the car were Steel and defendant. Steel was deceased and defendant was hospitalized.

¶ 38 In addition, the parties agreed to stipulate that, if called by the State, Detective Joseph Pistorius would testify that on January 30, 2010, he retrieved a criminal sexual assault kit from the hospital and inventoried it. The kit was sent to the crime lab. Detective Pistorius would testify further that he recovered a condom from the church parking lot and inventoried it. The condom was sent for analysis.

¶ 39 The parties further agreed to stipulate that, if called by the State, Veronica Jackson, forensic scientist for the Illinois State Police, would testify that, within a reasonable degree of

scientific certainty, she discovered semen on the inside of the recovered condom, on the vaginal swab, on the anal swab, and on the underwear. Moreover, if called by the State, Greg DiDomenic, forensic scientist for the Illinois State Police, would opine that, within a reasonable degree of scientific certainty, the outside of the recovered condom contained defendant's DNA, as well as a partial profile from which S.G. could not be excluded. DiDomenic would further testify that there was insufficient DNA on the vaginal swab to ascertain an identity. However, DiDomenic would testify that the anal swab contained defendant's DNA and a minor DNA profile from which S.G. could not be excluded. DiDomenic would opine that the DNA on S.G.'s underwear belonged to defendant.

¶ 40 The State rested its case-in-chief. The trial court denied defendant's motion for a directed finding.

¶ 41 Tiana Whitley, defendant's sister, testified that she was home on January 29, 2010, when, at about 4:30 p.m., Steel placed a call to a girl on speakerphone. Tiana overheard Steel ask the girl if she wanted to hang out with him and his cousin. The girl agreed. Tiana also overheard Steel ask the girl if she would "knock his cousin back," which meant give oral sex. The girl agreed. According to Tiana, Steel placed a second call and said, "we'll be there soon." Steel told Tiana that they were going to Rolling Meadows. Steel and defendant drove away in Steel's mother's black Ford. According to Tiana, the girl called Steel twice, but Tiana did not hear both sides of the conversations because Steel did not use the speakerphone. Tiana was aware that a girl accused Steel and defendant of rape. Tiana admitted that she never reported the conversations she overheard to the police or the ASA.

¶ 42 The parties stipulated that, if called by the defense, Justina Stepawicz would testify that she was friends with S.G. and the pair had plans to go to the mall on January 29, 2010. Justina would testify that S.G. called her and told her that S.G. was in a car with two boys. Justina would testify that S.G. sounded normal on the phone.

¶ 43 Defendant testified that, on the date in question, he stayed home from school to run errands for his mother. Defendant said his cousin, Steel, came over at some point and told defendant that he knew a girl that liked to perform oral sex. Steel called the girl on speakerphone and asked her whether she would "knock my man's back?" The girl replied in the positive, but told them to hurry up. While in route to her house, the girl called Steel. Steel assured her that they were on the way. When they arrived, S.G. entered the car. Defendant could not recall whether S.G. was wearing a coat. The group exchanged introductions and Steel asked S.G. where she wanted to go. S.G. replied that she had no preference. Steel drove to the parking lot.

¶ 44 After parking the car, Steel received a phone call and exited the car. When he returned, Steel told defendant to sit in the back seat with S.G. Defendant did so and helped Steel push the front passenger seat forward. Defendant asked S.G. if she was ready. She replied in the positive and moved to the center of the car. Defendant removed S.G.'s leggings, placed a condom on his penis, and engaged in vaginal sex with S.G. According to defendant, S.G. never told him no or asked him to stop. She was not screaming or crying. Neither Steel nor defendant held S.G. down. Defendant never penetrated S.G. vaginally with his fingers. After defendant ejaculated, he removed the condom and threw it out of the car. Defendant testified that he never used the terminology "nut" to describe ejaculation. Defendant exited the rear seat and entered the front

passenger side of the car. When he was back in the car, he observed S.G. performing oral sex on Steel. S.G. was not screaming or crying and did not indicate that she wanted to stop.

Approximately four or five minutes later, S.G. made a phone call to a friend. Defendant then asked S.G. to perform oral sex on him. S.G. agreed. While performing oral sex on defendant, S.G. gave Steel directions to her friend's house. Defendant testified that Steel never locked the doors to the car during the incident.

¶ 45 Later that evening, Steel and defendant were in a car accident. Steel died as a result of his injuries. Defendant testified that he was in a coma for a few days as a result of his injuries.

According to defendant, he was hospitalized for a week and underwent brain surgery.

¶ 46 On March 4, 2010, two detectives arrived at defendant's home and requested permission to take a swab from defendant's mouth. Defendant was never informed that the swab was retrieved in relation to a criminal sexual assault. Defendant testified that the detectives asked about his injuries and he reported short-term memory loss. Defendant initially testified that the detectives merely questioned him regarding the accident, but defendant later testified that the detectives questioned him about the sexual assault. Defendant said he recalled the incident, but later retracted remembering having had sex in the car.

¶ 47 On February 8, 2011, Detective Fior approached defendant at school. Defendant was transported to the Rolling Meadows police station. According to defendant, he attempted to call his father before leaving school, but was prevented from doing so. Defendant spoke to the police and admitted that he had sex with S.G., but denied that she said no, that she was forced, that she was crying, that she looked hesitant, and that she was held down. Defendant testified that the

police responded to his statements by saying, "no, that's not right." Defendant said he requested to make a phone call on five separate occasions and was told the call would be forthcoming.

According to defendant, the ASA treated him poorly from the "get go." When defendant reported that he had sex with S.G. and she never said no, the ASA responded that his story could not be accurate. The ASA said, "No. I'm a woman, and no woman would do that." Defendant testified that the ASA never advised him that he could make changes to his memorialized statement. The ASA did show defendant each page of the memorialized statement and told him to sign each page. According to defendant, the ASA told him that if he signed the statement he would be released to go home. Defendant said his memorialized statement was not accurate. Defendant further testified that, when shown a photograph by the police, he said he did not recall the girl in the picture. The police, however, told him to "sign it. That's her." Defendant denied inserting his penis into S.G.'s anus.

¶ 48 On cross-examination, defendant testified that, after the detectives left his home in March 2010, his parents and he discussed the fact that the detectives were investigating a sexual assault. Defendant said he recalled the events of the date in question when asked by his parents. Defendant told his parents he had consensual sex with a girl. On February 8, 2011, while at the police station, defendant initially told the detectives that he did not recall the events of January 29, 2010. The detectives responded by telling defendant that they had DNA evidence and defendant should tell the truth. Defendant then reported the events of the date in question. Defendant stated that he stayed home from school and Steel was over at his house. Steel called a girl. Defendant did not hear the conversation, but he and Steel drove to pick up a girl. Steel

drove a short distance to a church parking lot and defendant entered the rear seat of the car.

Defendant denied telling the detectives that Steel said, "Let's do this." Defendant admitted that

Steel told the girl he wanted sex, but denied that the girl said "no" at least three or four times.

Defendant denied telling the detectives that Steel grabbed the girl's head and forced her head onto

his penis. Defendant admitted reporting that, while the girl was performing oral sex on Steel,

defendant pulled down her pants and placed a condom on his penis. Defendant inserted his penis

into the girl's vagina for several minutes. Defendant exited the car and threw the condom on the

ground. Defendant denied inserting his penis into the girl's anus. Defendant admitted that he

requested oral sex from the girl, but denied that she appeared to be reluctant and scared.

Defendant denied reporting that Steel instructed the girl not to "tell anyone." Defendant never

told the detectives that the girl did not want to perform any sexual acts on Steel or defendant.

¶ 49 According to defendant, when reporting the events in question, the detectives repeatedly said, "No, that's not--no, no. That's not right. No. We know that's not what happened. No."

Defendant additionally testified that, when he spoke to the ASA, she "already knew what to say"

and repeatedly said, "No, that's not right. No woman does that." When memorializing

defendant's statement, the ASA instructed defendant to tell her exactly what happened on the date

in question. Defendant testified that he reported the story of consensual sex as he had testified in

court. The ASA continued to type on her computer as defendant spoke; however, when the ASA

returned with the statement to review with defendant, the statement was not accurate.

¶ 50 Defendant testified that he signed the first page, which was accurate, but that every time

he told the ASA to make a change thereafter he was refused. By the time the statement reported

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that defendant entered the back seat of the car once Steel parked, defendant no longer told the ASA that the statement was inaccurate and needed to be changed because she did not believe defendant. Defendant did not tell the ASA to change the statement reporting that Steel and the girl argued because Steel wanted her to perform sexual acts and she did not want to do so.

Defendant denied telling the ASA that Steel held the back of the girl's head or that she was forced to perform sexual acts. Defendant admitted that the statement said he had sex with the girl against her will. Defendant, however, testified that he signed the statement so that he could go home. Defendant testified that he was not treated well by the police or the ASA. Over defense counsel's objection, defendant testified that having sex with the girl was fun and he enjoyed the oral sex. He agreed that there were no other girls that were willing to perform two types of sex without having any conversation.

¶ 51 The trial court found defendant guilty of four counts of criminal sexual assault. In so finding, the court stated, in relevant part:

"The record reflects that this Court has carefully listened to the evidence and arguments of counsel, viewed the credibility of the witnesses, taken copious notes of the testimony, reviewed all the stipulations again, reviewed my notes. I meticulously and carefully considered the evidence because I realize the gravity and import of my decision, not only to the defendant and defendant's family and friends, but to the victim of this case and their family.

There is no doubt in my mind that sex [*sic*] the way the victim said it did. I either believe the defendant made the statements to Detective Fior and the assistant state's attorney, or I don't. If I believe the defendant's version of the facts, then I don't believe the others. ***.

I guess the telltale for me is when the defendant testified. To put it nicely, I find that his testimony was not only unbelievable, but poorly contrived. ***. [H]e would have this Court believe that there's portions of the statement he said and there's portions of the statement he didn't say. But if you read the statement, the statement is, in my opinion, clear and convincing to this Court as to exactly what happened.

Remember, remember this—and I didn't hear this from either side. ***. [S.G.] still hasn't identified the defendant as the person who attacked her. She doesn't know. So she has no motive to put it on this defendant. I believe she honestly and fairly stated what happened. ***.

And the other telltale for this Court is this: If I were to believe the defendant, I would believe that he went to Rolling Meadows, met this young [S.G.], who got into the back seat of the car, and in a matter of a few short minutes—I'm not talking ten

minutes; I'm talking a few minutes—he's in the back seat of the car, which he wasn't invited, and he's rolling down, using his own language, her pants, and he takes a condom out of his wallet, which he conveniently carries with himself, and then penetrates her vaginally.

Now, think about that for a moment. If the defendant said—the defendant says that it's consensual. There is not one piece of conversation. Not one bit of conversation between the defendant and [S.G.] Not one. I don't even think I heard a hello.

There are quite a few other inconsistencies in the defendant's testimony, and I point out for the record when I say it was contrived, I really believe at one point in his testimony he was panicked. The record will reflect that during his testimony, at the —upon review of this case by a higher court, that the Court said something to the defendant like—I don't remember exactly my words, but I said is everything okay? Because he turned to me, and his eyes were like saucers, and he seemed to be in a panicked mode. And he actually was just staring at me.

The issue of force in this case, like all criminal sexual assault cases, is a necessary element. The defendant is charged by the statute with criminal sexual assault in that he knowingly

committed an act of sexual penetration upon [S.G.] between –
contact between [defendant's] penis and [S.G.'s] vagina by use of
force or threat of force.

The force in this case, and the Court finds, is Pierre Steel
holding her down; and the threat of force is threatening not to take
her home, locking the doors, the evidence that this defendant
pushed her towards the front seat. ***.

So that's the force or threat of force that I believe exists in
this case. And that force isn't diminished simply because
[defendant] didn't hold her head down. He's responsible in part
when someone else holds her head down."

The trial court found defendant guilty of one count of penetrating S.G.'s vagina with his penis,
one count of penetrating S.G.'s anus with his penis, one count of contact between defendant's
penis and S.G.'s mouth, and one count of penetrating S.G.'s vagina with his fingers. The trial
court denied defendant's subsequent motion for a new trial. Defendant was sentenced to four
years' imprisonment on each of the four counts, to be served consecutively. This timely appeal
followed.

¶ 52

DECISION

¶ 53

I. Sufficiency of the Evidence

¶ 54 Defendant first contends the State failed to prove him guilty of criminal sexual assault
beyond a reasonable doubt where (1) S.G.'s testimony was improbable, unconvincing, and

contrary to the human experience and (2) defendant's memorialized statement was unreliable.

¶ 55 A challenge to the sufficiency of the evidence requires a reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in the original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is not the reviewing court's function to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony, and resolves conflicts or inconsistencies in the evidence. *People v. Williams*, 388 Ill. App. 3d 422, 429 (2009). In order to overturn a judgment, the evidence must be "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). "[A] conviction based upon testimony that is improbable, unconvincing, and contrary to human experience requires reversal." *People v. Vazquez*, 233 Ill. App. 3d 517, 527 (1992).

¶ 56 Pursuant to section 12-13(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/12-13(a)(1) (West 2010)), a defendant is guilty of criminal sexual assault when he "commits an act of sexual penetration by the use of force or threat of force." 720 ILCS 5/12-13(a)(1) (West 2010). There is no definite standard establishing the amount of force necessary to sustain a criminal sexual assault charge. *Vazquez*, 233 Ill. App. 3d at 527. Each case must be considered on its own set of facts. *Id.*

¶ 57 Consent is a defense to criminal sexual assault. 720 ILCS 5/12-17(a) (West 2010).
Consent is defined as:

"a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent." 720 ILCS 5/12-17(a) (West 2010).

Where a sexual assault victim has the use of her faculties and physical powers, the evidence must demonstrate that the act was against her will. *People v. Carlson*, 278 Ill. App. 3d 515, 520 (1996). However, if the State proves that the victim was overcome by superior strength or paralyzed by fear, useless or foolhardy acts of resistance are not required. *Id.* (citing *People v. Warren*, 113 Ill. App. 3d 1, 6 (1983)).

¶ 58 A. Evidence was Improbable, Unconvincing or Contrary to the Human Experience

¶ 59 Defendant contends the State's evidence was "improbable, unconvincing or contrary to the human experience" where: (1) S.G. testified that she thought the boys were going to pick her up and the trio would simply sit and talk in the car; (2) S.G. failed to resist the sexual advances despite numerous opportunities to do so; (3) there was no physical evidence to support the assaults; and (4) S.G. had motivation to fabricate the assaults.

¶ 60 Defendant argues that the evidence contradicted S.G.'s testimony of innocently getting together to hang out. First, defendant points to S.G.'s testimony that, prior to meeting Steel and defendant, Steel asked S.G. on the telephone whether she would "knock his back" to demonstrate that S.G. had knowledge the encounter was for sexual purposes. According to defendant, the phrase "knock his back" was commonly understood to mean sex. While Tiana confirmed that the

conversation took place between Steel and S.G., S.G. testified that she did not know the meaning of the phrase. Tiana testified that the phrase meant to give oral sex, but Detective Fior testified that he discovered the meaning of the phrase only after speaking to S.G., who remained unaware of the phrase's meaning. Ultimately, it was for the finder of fact to resolve the inconsistencies across the testimony. See *Williams*, 388 Ill. App. 3d at 429.

¶ 61 Defendant next highlights the fact that S.G. called Steel a number of times before being picked up and told them to hurry so she would miss her mother returning from work as evidence that S.G. believed the encounter was for sexual purposes. S.G. testified that she wanted to avoid her mother because she knew her mother would not condone her accepting a ride from two boys. However, S.G.'s consent to spend time with Steel and defendant did not equate to consent to engage in sexual acts. It was for the fact finder to assess the credibility of S.G.'s testimony. *Id.*

¶ 62 Defendant further points to the fact that S.G. removed her coat promptly upon entering the car to demonstrate that she understood the encounter was for sexual purposes. S.G. consistently testified that she removed her coat because the temperature was warm in the car. Again, it was for the fact finder to assess the credibility of S.G.'s testimony. *Id.*

¶ 63 Defendant finally points to the fact that S.G.'s failure to inform the police about her prior encounter with Steel exposing himself in 2009 demonstrated she intended to engage in sexual acts on the date in question. S.G. admitted that she lied to the police when initially questioned regarding her prior relationship with Steel; however, S.G. explained that she was afraid of being blamed for the sexual assaults. Moreover, the evidence is uncontested that Steel exposed his penis while in S.G.'s home in 2009, but she refused to engage in any sexual acts and instead told

Steel to leave. Yet again, it was for the fact finder to assess the credibility of S.G.'s testimony.

Id. In sum, we cannot say the testimony was improbable, unconvincing, and contrary to human experience. *Vazquez*, 233 Ill. App. 3d at 527.

¶ 64 Defendant further contends S.G.'s testimony was not credible because the evidence failed to demonstrate the requisite use of force by defendant and because S.G. did not avail herself of opportunities to exit the car or to use her cellular phone. We disagree and note that "[i]t is well settled that a criminal sexual assault conviction may be sustained on the victim's testimony alone." *Carlson*, 278 Ill. App. 3d at 521. According to S.G.'s testimony, she continuously stated that she did not want to engage in sexual activity and repeatedly attempted to withdraw from Steel's and defendant's grasps. S.G. testified that Steel held her head down while forcing her to perform oral sex, that defendant penetrated her vagina with his fingers while her head was being held by Steel, that defendant held her down while forcing his penis into her vagina and anus, and that defendant held her head down and forced her to perform oral sex on him. According to S.G.'s testimony, she did not attempt to exit the car when Steel and defendant took phone calls because she did not believe the boys were going to force her to engage in sexual acts. Once Steel locked the car doors and S.G. feared that something was going to happen, she did not attempt to exit the car because she was worried the boys, whom she noted were big, muscular football players, would catch her. S.G. testified that she retrieved her cellular phone before the assaults began, but that she did not place a call to her friend Amanda until after all of the assaults other than the oral sex of defendant had concluded.

¶ 65 Numerous witnesses, including Amanda, Gracia, and Nurse Schmidt confirmed the assaults took place and testified regarding S.G.'s actions and demeanor following the assaults. The trial court expressly found S.G. credible and this court will not substitute its judgment for that of the trial court. *People v. Bowen*, 241 Ill. App. 3d 608, 619 (1993). Moreover, "[m]erely because a victim does not cry out for help or try to escape at the slightest opportunity is not determinative on the issues of whether she was forced to have sexual intercourse, or whether she consented to having sexual intercourse, especially if she was threatened or in fear of being harmed [citation], overcome by the superior strength of the assailant, or paralyzed by fear." *Id.* at 620. We conclude the evidence demonstrated that the assaults were against S.G.'s will.

¶ 66 To the extent defendant argues S.G.'s version of the events was improbable, unconvincing, and contrary to human experience because there was no physical evidence of trauma, we note that "the lack of medical evidence of physical injury does not establish the victim consented to have sexual intercourse. Physical injury or resistance is not necessary to prove a victim was forced to have sexual intercourse." *Id.* at 620. Nurse Schmidt testified that there was no evidence of physical injury, but that it was not unusual to observe a lack of injury due to the passage of time between the assaults and the physical examination. The lack of physical evidence of injury does not cause S.G.'s testimony to be improbable, unconvincing, or contrary to human experience.

¶ 67 We similarly are not persuaded that S.G. had a motive to fabricate a claim of criminal sexual assault making her testimony improbable, unconvincing, and contrary to human experience. Although the exact text messages do not appear in the record, S.G. testified that she

exchanged a series of text messages with her boyfriend on the evening of the assaults. This was after S.G. reported the incidents to her friend Amanda. In the text messages, S.G. informed her boyfriend that she was in the car with Steel and "his cousin" when Steel said he would not drive her home until she made the cousin "come." S.G. texted "I swear I did absolutely nothing intentionally. I wouldn't call it rape, but there was [definitely] no consent." In her testimony, S.G. explained that she did not describe the assaults as rape because she "felt like rape was a really strong word, but [she] wanted [her boyfriend] to understand that [she] did not want to do it and that they forced [her] to do it." S.G. also testified to feeling guilty for having agreed to ride in Steel's car. Viewing the evidence in the light most favorable to the State, there is no basis for claiming S.G. fabricated her version of the assaults.

¶ 68 In sum, we do not find S.G.'s testimony was improbable, unconvincing, or contrary to human experience.

¶ 69 B. Defendant's Unreliable Police Statement

¶ 70 Defendant contends the trial court erred in finding his police statement to be credible where defendant initially told the police that he could not remember the events of the date in question presumably because of his injuries related to the car crash on that date, his parents were not present during the interview, the police and the ASA refused to believe his version of the events, he was not permitted to make changes to his statement and/or he was told he could go home if he signed the statement, and the trial court made inaccurate personal observations regarding the statement. We disagree.

¶ 71 At the outset, it is worth noting that defendant did not file a motion to quash his police statement. Moreover, we note that defendant was 17 years old at the time of the assaults and 18 years old when interviewed. Defendant was not a minor at the time of the interview. Moreover, there is no *per se* rule that a juvenile must be afforded the opportunity to consult with a parent prior to a police interview. *People v. Minniti*, 373 Ill. App. 3d 55, 72 (2007).

¶ 72 In addition, defendant's testimony was inconsistent regarding his recall of the events in question. On direct, defendant testified that, on March 4, 2010, he suffered short-term memory loss, but on February 8, 2011, he testified that he recalled the events in question yet later retracted that testimony. Then, on cross-examination, defendant testified that, on March 4, 2010, he recalled the encounter with S.G. after speaking to his parents once the detectives left. Defendant described the encounter as consensual sex. Defendant further admitted on cross-examination that he initially denied recalling the events in question when interviewed at the police station on February 8, 2011. However, when the police informed him that they had DNA evidence, defendant provided a statement of the assaults. In his memorialized statement, defendant provided that S.G. agreed to suggested sexual activities over the phone, but repeatedly protested engaging in any sexual acts once in Steel's car. However, at trial, defendant testified that some of the statement was accurate, yet defendant also testified that the statement was wholly inaccurate and was only signed to ensure his release from police custody.

¶ 73 It was the trial court's duty to assess defendant's credibility and assign weight to his testimony. *Williams*, 388 Ill. App. 3d at 429. We will not substitute our judgment where the trial court has made a credibility determination. *Evans*, 209 Ill. 2d at 209. The trial court expressly

stated that it did not find defendant's trial testimony credible, but did find Detective Fior's and ASA Fialkowski's testimony regarding defendant's police statements to be clear and convincing. It was the province of the trier of fact to resolve conflicts or inconsistencies in the evidence. *Id.*

¶ 74 To the extent defendant argues the trial court made inaccurate personal observations, we find no error. The trial court observed defendant's demeanor while testifying and specifically noted that, during cross-examination, defendant's "eyes were like saucers, and he seemed to be in panicked mode." Again, we will not substitute our judgment where the trial court has made a credibility determination. *Evans*, 209 Ill. 2d at 209. Similarly, the trial court relied upon the evidence in determining that it was improbable that a teenage girl would enter a car and begin engaging in consensual sexual acts in the nature of those in this case without the exchange of conversation. We find the evidence supports the trial court's conclusion.

¶ 75 In sum, we do not find the trial court erred in relying on defendant's memorialized statement.

¶ 76 C. Insufficient Proof to Support Count III

¶ 77 Defendant contends there was no evidence to support his conviction for count III, namely, the anal penetration of S.G.

¶ 78 Although there was no physical injury to S.G.'s anus and Nurse Schmidt testified that she could not conclusively testify regarding the original location of the milky discharge found in her anus, S.G. unequivocally testified that defendant penetrated her anus with his penis and defendant's statement to Detective Fior confirmed as much. We recognize that defendant did not report to ASA Fialkowski that he had anal intercourse with S.G. and it was not included in the

memorialized statement; however, it is well-settled that "a criminal sexual assault conviction may be sustained on the victim's testimony alone." *Carlson*, 278 Ill. App. 3d at 521. We conclude the evidence was sufficient to support defendant's conviction for penetrating S.G.'s anus with his penis.

¶ 79 In conclusion, after viewing the evidence in a light most favorable to the State, we find the evidence was sufficient to support defendant's convictions.

¶ 80 II. Inadmissible Hearsay

¶ 81 Defendant finally contends that he is entitled to a new trial because the trial court relied on the inadmissible hearsay testimony of Nurse Schmidt and Gracia regarding statements made by S.G. The State contends defendant has forfeited review of his contention by failing to contemporaneously object at trial to all of the challenged testimony instead of the very limited objections raised and failed to include the alleged errors in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant acknowledges that he did not include the errors in his posttrial motion, but responds that defense counsel properly objected at trial to the contested testimony.

¶ 82 An unpreserved error may be reviewed pursuant to the doctrine of plain error under two circumstances. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). Plain error will be found when "(1) a clear or obvious error occurred and the evidence [was] so closely balanced that the error threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error [was] so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process regardless of

the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant bears the burden to establish plain error. *Herron*, 215 Ill. 2d at 182. Before engaging in a plain error analysis, a reviewing court must first determine whether any error occurred. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009).

¶ 83 Whether to admit evidence is within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v. Caffey*, 205 Ill. 2d 52, 115 (2001). "An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable [citation] or where no reasonable person would agree with the position adopted by the trial court [citations]." *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 84 In relation to Nurse Schmidt, defendant contends the trial court erred in admitting her hearsay testimony regarding statements S.G. made about the sexual assaults. Pursuant to section 115-13 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-13 (West 2010)), "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 of external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule." 725 ILCS 5/115-13 (West 2010). A trial court has the discretion to determine whether the statements made by the victim fall within the exception. *People v. Davis*, 337 Ill. App. 3d 977, 989 (2003). "A trial judge, when acting as the finder of fact, is presumed to have considered only admissible evidence in reaching his decision." *Id.* at 990.

¶ 85 Defendant has not overcome the presumption that the trial court considered only admissible evidence. Our review of Nurse Schmidt's testimony reveals that her conversation with S.G. was related to the sexual assaults and the circumstances and manner in which they took place. The conversation falls within the exception because it was related to S.G.'s diagnosis and treatment. To the extent defendant contends Nurse Schmidt's testimony that S.G. believed she would just sit and talk with the boys in the car, that defendant unzipped his pants and made a comment about his penis, that S.G. believed she had no choice but to comply because of the size of the boys, and that Steel told S.G. she could not go home until she "made him come" was excessive and unrelated to diagnosis and treatment, we find any errors harmless. The challenged testimony was cumulative and corroborated by substantial other evidence, namely, S.G.'s own testimony, the DNA evidence, and defendant's admissions regarding the events in question. *Id.* at 990-91. Moreover, defense counsel was provided an opportunity to cross-examine Nurse Schmidt, thereby eliminating the main rationale for the exclusion of hearsay testimony and further mitigating any error. *Id.* at 991.

¶ 86 In relation to Gracia's testimony, defendant contends the trial court erred in allowing her to testify to more than "the minimal details necessary to show that the alleged crime occurred," thereby improperly bolstering S.G.'s testimony. The relevant law provides:

"In general, the testimony of a witness may not be bolstered by showing she made similar statements out of court; however, a well-established exception exists for sexual assault cases where the prosecuting witness made a prompt complaint of the incident.

[Citation.] Evidence that a complaint was made is admissible to corroborate the victim's testimony. [Citation.] The sole purpose of this exception is to rebut the presumption arising from the complainant's silence. Therefore, only the fact of the complaint is admissible; neither the details of the complaint nor the identity of the named perpetrator is admissible. [Citation.] Additionally, any error in the admission of hearsay testimony is ordinarily considered harmless where the testimony is supported by other corroborated evidence. [Citation.]" *People v. Ware*, 323 Ill. App. 3d 47, 51 (2001).

There is no fixed time limit to qualify as a prompt complaint; however, the complaint must have been made without any inconsistent or unexplained delay. *People v. Evans*, 173 Ill. App. 3d 186, 199 (1988). Additionally, the complaint must have been voluntary and spontaneous as opposed to a result of a series of questions. *Id.*

¶ 87 Following our review of the testimony, we find the trial court did not err in admitting Gracia's testimony. Notably, the statements challenged by defendant were those made by Gracia, not by S.G. For example, defendant challenges Gracia's testimony that S.G. was really, really upset and crying when she reported the Jessica story, as well as Gracia's advice to the fictitious Jessica. Those statements were not inadmissible prior consistent statements as described by defendant. Rather, the hearsay statements that were made by S.G. to Gracia were prompt, in that they were made within 24 hours of the incident, were spontaneous in manner, and only included

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the fact of the complaint, namely, that S.G. got into a car and was forced to have sex.

¶ 88 In sum, we find the trial court did not abuse its discretion in admitting the testimony of Nurse Schmidt and Gracia. To the extent any of Nurse Schmidt's testimony did not comply with section 115-13 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-13 (West 2010)), we find any error was harmless.

¶ 89 CONCLUSION

¶ 90 We conclude the evidence was sufficient such that any rational trier of fact could have found the essential elements of criminal sexual assault beyond a reasonable doubt. We further conclude the trial court did not err in allowing inadmissible hearsay.

¶ 91 Affirmed.