2012 IL App (5th) 100360-U

NO. 5-10-0360

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Bond County.
	)	
v.	)	No. 10-CF-2
	)	
THOMAS S. SMITH,	)	Honorable
	)	John Knight,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Spomer and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in its application of the rape shield statute; the prosecutor's remarks during closing arguments were not improper; and the trial court was not required to set a determinate term of mandatory supervised release when imposing sentence on the defendant's criminal sexual assault conviction.

¶ 2 Following a jury trial in the circuit court of Bond County, the defendant, Thomas S. Smith, was convicted of multiple offenses stemming from acts of sexual misconduct that he committed against his teenaged stepdaughter, B.P. On appeal, the defendant argues that we should reverse his convictions and remand for a new trial or, alternatively, remand so that the trial court can sentence him to a fixed term of mandatory supervised release on his conviction for criminal sexual assault. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 In January 2010, the defendant was arrested on charges that he committed various acts of sexual misconduct against his stepdaughter B.P., who was 14 or 15 years old when the acts

were allegedly committed. The State later filed a second amended information specifically charging the defendant with one count of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2006)), two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2006)), and one count of sexual exploitation of a child (720 ILCS 5/11-9.1(a-5) (West 2006)). All of the charged offenses were alleged to have occurred sometime between December 1, 2006, and January 15, 2007. In May 2010, the cause ultimately proceeded to a jury trial, where the following evidence was adduced.

¶ 5 Sixteen-year-old Kyle P. testified that "in 2006 and the early part of 2007," he lived near Pocahontas in a farmhouse on White Oak Lane with his half-brother, Aaron, his sister, B.P., his mother, Cindy, and his stepfather, the defendant. Kyle indicated that in December 2006, when he was 13 and B.P. was almost 15, he noticed that the defendant's relationship with B.P. had "changed" in that they were seemingly "getting along better" than they had before. Kyle explained that the defendant and B.P. had been "spending time alone together more often," and the defendant "was buying her clothes and things," including cigarettes, which she was not supposed to have. When Cindy was not around, B.P. was also allowed to "do more stuff," such as drive the defendant's truck.

¶ 6 Kyle testified that one night when he, B.P., and the defendant were the only ones home and they were about to leave to go bowling, the defendant had told him to wait for him and B.P. outside in the defendant's truck. Curious as to why the defendant had ordered him out of the house, Kyle stopped at the porch and "looked in the window." Kyle testified that from the porch, he watched as B.P. pulled her pants and underwear down so that the defendant could look at B.P.'s "[p]rivate areas." Kyle indicated that this happened in late December 2006 or early January 2007.

¶ 7 Kyle testified that the last day the defendant lived in the farmhouse on White Oak Lane, he, Aaron, B.P., and the defendant were home all day while Cindy was at work. Kyle

indicated that the date was January 15, 2007, and there was no school because it was Martin Luther King Day. Kyle further indicated that he and Aaron had spent much of the day inside playing video games, while the defendant worked outside in the detached garage. At some point, the defendant allowed B.P. to drive his truck, and Aaron accompanied her. Shortly after B.P. and Aaron returned, Kyle and Aaron went to the garage to see what B.P. and the defendant were doing. Kyle stated that they opened the door "[i]n the front by the big door that comes up," so they could see inside. The door would only open about "[a]n inch and a half," however, because it was blocked from the inside with a large oil drum. Kyle testified that through the cracked door, he saw B.P. bent over with her pants and underwear pulled down to the ground and the defendant standing directly behind her with his overalls pulled down "past his hips." Explaining that the defendant was making a "[b]ack and forth" motion, Kyle testified that he believed that the defendant and B.P. were having sex. Kyle was "[s]hocked" by what he saw, and Aaron was even "[m]ore shocked than [he] was." Kyle and Aaron subsequently ran to a neighbor's house, where they called Cindy.

¶ 8 When cross-examined, Kyle testified that he had liked the defendant as a stepfather until the defendant began "abusing" Cindy in 2005. Kyle acknowledged that B.P. would get "rebellious" when she was not permitted to visit her friends or her boyfriend and would sometimes "sneak out at night." Kyle further acknowledged that he had only watched the defendant and B.P. in the garage for a "couple of seconds." Indicating that he and B.P. had gone to live with their father sometime after January 15, 2007, Kyle admitted that he had seen Aaron "a lot" since then.

¶ 9 Fifteen-year-old Aaron J. testified that he stayed at the farmhouse on White Oak Lane every other weekend when visiting his mother, Cindy. Aaron indicated that the last time he had been to the house was Martin Luther King Day 2007, *i.e.*, "the day that the incident happened." Aaron's testimony regarding the events of that day was consistent with Kyle's

testimony, and Aaron stated that the defendant and B.P. had undoubtedly been having sex in the garage. Aaron also indicated that about a month before the incident, the defendant's relationship with B.P. had seemingly improved in that they were not fighting as much.

¶ 10 When cross-examined, Aaron acknowledged that he was "pretty close" to Kyle and B.P. Explaining that Cindy and B.P. used to argue about things such as who B.P. was "hanging out with," Aaron also indicated that B.P. tended to do whatever she wanted.

¶ 11 B.P. testified that she was born on January 1, 1992, and lived in the farmhouse on White Oak Lane in 2006 and "the first part of 2007." B.P. stated that after starting high school in the fall of 2006, she was always in trouble and her mother, Cindy, "grounded [her] all the time." B.P. explained that her relationship with the defendant was not very good either, but because she could talk to him about things that she could not talk to Cindy about, their relationship had gotten better by the end of 2006. B.P. further explained that by the end of 2006, the defendant had also started allowing her to do things that Cindy would not let her do, such as smoke and drive. Each time such privileges were granted, however, B.P. had been required to show the defendant her breasts or her vagina, and the defendant sometimes fondled her when she did. B.P. testified that such exchanges had occurred 20 to 30 times and had always been kept secret from Cindy.

¶ 12 B.P. recalled a time that she had allowed the defendant to touch her vagina while helping him "clean up a rental house of his." B.P. testified that afterwards, the defendant had purchased her a compact disc and some clothes that she had wanted. The final occasion on which B.P. and the defendant "did something inappropriate" was Martin Luther King Day 2007. B.P. stated that the date was January 15, 2007, and she had turned 15 a few weeks before. She further stated that the defendant, Kyle, and Aaron were the only ones home at the time. B.P. indicated that after the defendant had allowed her to drive his truck that day, she had gone to the garage where he was working, and he told her that it was "time to pay

up." B.P. testified that after pulling both of their pants down, the defendant penetrated her vagina from behind and ejaculated inside of her. Cindy subsequently called the defendant on his cell phone, and B.P. could hear Cindy screaming. The defendant then drove B.P. to a neighbor's house, telling her, "[N]othing happened," as he dropped her off. When B.P. subsequently entered the house, Kyle and Aaron were already there, and Aaron seemed "really scared."

¶ 13 When cross-examined, B.P. acknowledged that she had always gotten along better with the defendant than with Cindy. B.P. further acknowledged that when the defendant was around, the whole family had done "a lot of fun things" together. B.P. indicated that prior to the incident in question, the defendant and Cindy had experienced marital difficulties stemming from the defendant's infidelity and violent temper. B.P. admitted that in November 2006, she had snuck out of the house on three separate occasions and had gotten grounded as a result. B.P. testified that she had initially told investigators that nothing had happened between her and the defendant because she had been ashamed to talk about it. B.P. admitted that she "knew what [she] was doing" and had allowed her inappropriate relationship with the defendant to go on for some time.

¶ 14 Deputy Stephen Unterbrink of the Bond County sheriff's department testified that on January 15, 2007, he had investigated "a call from a mother regarding a sexual assault on her juvenile daughter." When Unterbrink initially spoke with B.P. about the report, she told him that nothing had happened between her and the defendant. When Unterbrink spoke with Aaron, Aaron was "upset and somewhat anxious, [and he] seemed very concerned about what he had witnessed." Unterbrink testified that he collected items of physical evidence, including a "sexual assault evidence collection kit [that] was gathered by the nursing staff at the hospital that day," the underwear that B.P. had been wearing, and a "DNA buccal swab sample from the [d]efendant." Unterbrink testified that those items were subsequently turned

over to the Illinois State Police for analysis. Unterbrink stated that "semen" was later found in the "crotch area" of B.P.'s underwear and that the defendant's DNA sample was analyzed and compared to the "DNA sample" from the underwear. The parties stipulated that the findings of those procedures were as follows:

> "A major Y-S-T-R Haplotype was identified in the sperm fraction of the stain removed from the crotch area of the victim's underwear which matches the Y-S-T-R Haplotype of [the defendant]. With a 95% upper confidence limit, the major Y-S-T-R Haplotype would be expected to occur in approximately 1 in 370 unrelated African American males, 1 in 430 unrelated Caucasian males, and 1 in 290 unrelated Hispanic males, based on a database of 1,108 African American, 1,311 Caucasian, and 894 Hispanic males."

¶ 15 For the defense, Jane Ann Lantrip testified that in the fall of 2007, B.P. had approached her and introduced herself at the fire station where Lantrip and the defendant had both worked. B.P. then stated, "I'm the girl that made up all the stories and lies about [the defendant]."

¶ 16 The defendant testified that he was 34 and had been employed as a paramedic for most of his adult life. The defendant testified that he and Cindy married in 2001 and divorced in 2008. The defendant indicated that B.P., Kyle, and Aaron were Cindy's children from previous relationships. Describing their marriage as a "roller-coaster" of "good times and bad times," the defendant acknowledged that he and Cindy had sometimes argued and fought in front of her children. The defendant stated that he generally got along with B.P. and Kyle, but he and Aaron "did not get along as well" and often "butted heads." The defendant and Cindy also argued about the way she disciplined Aaron. The defendant believed that Aaron tended to "walk all over Cindy" and could pretty much do "whatever he wanted to do." The defendant indicated that when B.P. turned 14, he and Cindy recognized that B.P. should be

given additional responsibilities and privileges. By the fall of 2006, however, B.P. wanted to be out with her friends all the time, and she and Cindy argued constantly. The defendant explained that he had always been more lenient with B.P. and her brothers because he was not supposed to discipline them.

¶ 17 The defendant testified that Kyle had misperceived what he claimed to have observed from the porch of the farmhouse in late December 2006 or early January 2007. The defendant explained that he had been examining a large cut on B.P.'s waist and that she had only lowered one "side of her pants down so [he] could see it." The defendant further explained that he had sent Kyle outside to wait in the truck because B.P. had not wanted him to see the cut.

¶ 18 The defendant testified that on January 15, 2007, he had spent the day working in his garage, and B.P., Aaron, and Kyle were "in and out of the garage" all day. The defendant indicated that the door that was used to enter and exit the garage was always blocked from the inside with a barrel because it had no handle or latch, and the wind would blow it open. The defendant testified that after B.P. had helped him do some work in the garage, he had allowed her to drive his truck around the property. After a while, B.P. returned to the garage and used the defendant's cell phone to call a friend of hers. She then left and drove the truck some more. Shortly thereafter, B.P. returned again and used the defendant's phone to make another call. She then asked the defendant if he would pick up a friend of hers, and he agreed to do so since he was "going to run into town anyway[ ]." The defendant testified that "joking around," B.P. had subsequently acted as if she was not going to give him back his phone. The defendant indicated that he had to playfully chase B.P. around the garage until he was able to "catch her" and forcibly retrieve the phone. The defendant testified that when he finally got the phone back, he was standing "directly behind" B.P., but his pants were not down at the time. The defendant denied having sex with B.P. in the garage that day and

denied having ever fondled her breasts or vagina.

¶ 19 Jessica Buhs, an expert in the area of interviewing victims of child sexual abuse, testified that on February 6, 2007, she had interviewed B.P. at the Madison County Child Advocacy Center. Buhs stated that although B.P. had claimed that the defendant had abused her, B.P. had never claimed that she and the defendant had engaged in sexual intercourse. B.P. also indicated that she had never seen the defendant's penis.

¶ 20 When cross-examined, Buhs discussed child sexual assault accommodation syndrome and testified, *inter alia*, that when allegations of sexual abuse disrupt a family, the victim will "want[ ] things to go back to where they were[,] and so they will often times recant." Buhs testified that victims of child sexual abuse will often provide incomplete or inconsistent disclosures before they are ready to fully accept and talk about their negative experiences, especially in situations such as B.P.'s, where the abuse is "accidently" discovered. Buhs noted that when interviewed, B.P. had expressed fears that if her peers at school found out "there had been penis to vagina contact," then things would be "worse for her."

¶ 21 After deliberating less than an hour, the jury returned a verdict finding the defendant guilty on all four counts of the State's second amended information. The defendant was later sentenced to serve an aggregate term of 15 years on his convictions, and in July 2010, he filed a timely notice of appeal.

¶ 22 DISCUSSION

¶ 23 On appeal, the defendant argues that (1) the trial court's erroneous application of the rape shield statute prohibited him from introducing evidence that he claims offered "an alternative explanation" for the DNA evidence admitted at trial, (2) he was denied a fair trial by improper remarks that the State made during closing arguments, and (3) the trial court erred in failing to set a determinate term of mandatory supervised release when imposing sentence on his criminal sexual assault conviction. We disagree.

¶ 24 Rape Shield Statute

¶ 25 Prior to trial, the defendant filed a motion to admit evidence of B.P.'s prior sexual activity or reputation, alleging, *inter alia*, that the results of the DNA analysis that was performed on B.P.'s underwear referenced three "different semen samples present in the underwear *** only one of which had any possible connection with the defendant." Suggesting that B.P. may have been sexually active with a "boyfriend at the time these allegations arose," the motion further alleged that the presence of the two samples that could not have originated from the defendant was "clearly evidence that the semen deposited in [B.P.'s] underwear may have been [deposited by] someone other than the defendant."

¶ 26 Following a hearing, the trial court denied the defendant's motion to admit evidence of B.P.'s prior sexual activity or reputation. In a written order, citing the "so-called rape shield statute" (*People v. Siefke*, 97 Ill. App. 3d 14, 15 (1981); 725 ILCS 5/115-7 (West 2006)), the court indicated that the defendant's allegations had failed to sufficiently demonstrate that the two unmatched DNA samples found in B.P.'s underwear had any "relevance to the issues involved in this case." Noting, *inter alia*, that consent was not an issue, the State subsequently filed a motion *in limine* to exclude "any reference to the presence of sperm or other DNA material other than that of the defendant['s]." Thereafter, referencing its previous order, the trial court granted the State's motion *in limine*, and the two DNA samples with no possible connection to the defendant were never mentioned during the defendant's trial. In his motion for a new trial, one of the defendant's claims of error was that he should have been allowed to argue that the two samples "unrelated to the defendant [were] evidence that the third [sample] possibly related to the defendant may have been from someone other than the defendant."

¶ 27 In pertinent part, the rape shield statute provides as follows:

"In prosecutions for *** criminal sexual assault [or] aggravated criminal sexual abuse

> ***, the prior sexual activity or the reputation of the alleged victim *** is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim *** with the accused when this evidence is offered by the accused upon the issue of whether the alleged victim *** consented to the sexual conduct with respect to which the offense is alleged; or (2) when constitutionally required to be admitted." 725 ILCS 5/115-7(a) (West 2006).

Here, it is undisputed that the trial court's rulings were based on its application of the statute's "when constitutionally required" exception.

¶ 28 The purpose of the rape shield statute "is to prevent the defendant from harassing and humiliating the complaining witness with evidence of either her reputation for chastity or specific acts of sexual conduct with persons other than [the] defendant." *People v. Summers*, 353 Ill. App. 3d 367, 373 (2004). Nevertheless, "[t]he rape shield statute's preclusion of prior sexual conduct is not absolute," and while the statute should be applied "in a manner consistent with its purpose," it "should never be mechanically applied to obscure relevant evidence that bears directly on guilt or innocence." *People v. Hill*, 289 Ill. App. 3d 859, 862 (1997). The statute's " 'when constitutionally required' " exception "requires that a defendant 'be permitted to offer certain evidence which [is] *directly* relevant to matters at issue in the case, notwithstanding that it concern[s] the victim's prior sexual activity.' (Emphasis in original.)" *Summers*, 353 Ill. App. 3d at 373 (quoting *People v. Santos*, 211 Ill. 2d 395, 405-06 (2004)). "The true question is always one of relevancy" (*Hill*, 289 Ill. App. 3d at 864), and "[t]he alleged victim's sexual history is not 'constitutionally required to be admitted' unless it would make a meaningful contribution to the fact-finding enterprise" (*People v. Maxwell*, 2011 IL App (4th) 100434, ¶ 76). Evidentiary rulings made pursuant to the rape shield statute are "reviewed for abuse of discretion" (*Santos*, 211 Ill. 2d at 401), which "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" (*People v. Becker*, 239 Ill. 2d 215, 234 (2010)).

¶ 29 On appeal, the defendant maintains that the trial court erroneously applied the rape shield statute by prohibiting him from introducing evidence of the two unmatched DNA samples found in B.P.'s underwear. The State counters that the trial court did not abuse its discretion in excluding the evidence of the samples, because under the circumstances, the evidence "was irrelevant for the trier of fact to consider."

¶ 30 At the outset, we note that the parties disagree as to what the results of the DNA testing performed in the present case actually revealed and represent. We further note that in support of their various contentions regarding the significance of the results, both parties reference the Illinois State Police report upon which the stipulated findings presented at trial were apparently based. The defendant also references Internet websites and DNA-related articles from forensic science journals. The report, which each party accuses the other of mischaracterizing, and one such article are attached as appendixes to the parties' briefs.

¶ 31 "The purpose of appellate review is to evaluate the record presented in the trial court, and review must be confined to what appears in the record." *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994). "[T]his is particularly true when reviewing a trial court's determination under the abuse-of-discretion standard." *Id*. at 476. Furthermore, the trial court is the "proper place" to present and analyze scientific reports and information, and "this court will not take judicial notice of critical evidentiary material not presented in the court below." *Id*. at 476-77. It is also well settled that a reviewing court will not consider matters that appear for the first time as appendixes to the parties' briefs on appeal. *People v. Gacho*, 122 Ill. 2d 221, 254 (1988); *People v. Myers*, 18 Ill. App. 3d 700, 705 (1974).

¶ 32 Here, the defendant's motion to admit evidence of B.P.'s prior sexual activity or

reputation alleged that the DNA testing performed on the stain in B.P.'s underwear revealed the presence of three "different semen samples *** only one of which had any possible connection with the defendant." The defendant's motion further suggested that B.P. may have been sexually active with a boyfriend when her allegations against the defendant arose. At the hearing on the defendant's motion, no additional details regarding the DNA testing were discussed, and the identity of the alleged boyfriend was not disclosed. In its motion *in limine*, when arguing for the exclusion of "any reference to the presence of sperm or other DNA material other than that of the defendant['s]," the State referenced and quoted portions of the Illinois State Police report when advising that various "mixtures" of DNA material had been found in the stain and that the "additional Y-strand Haplotypes which [had been] discovered in the mixtures *** did not match the DNA profile of the defendant." The report itself is not in the record, however, and nothing indicates that the trial court ever saw or considered it. We also note that the trial court entered its written order denying the defendant's motion to admit evidence of B.P.'s prior sexual activity or reputation before granting the State's motion *in limine* and that when granting the State's motion, the court did so by referencing its written order denying the defendant's. Thus, when ruling on the applicability of the rape shield statute in the present case, the evidence before the trial court was that the DNA testing performed on the stain in B.P.'s underwear revealed the presence of three "different semen samples *** only one of which had any possible connection with the defendant" and that B.P. might have been sexually active with an unidentified boyfriend. With respect to the DNA testing, the court was subsequently advised that various "mixtures" of DNA material had been discovered in the stain, and "additional Y-strand Haplotypes which were discovered in the mixtures *** did not match the DNA profile of the defendant." Beyond these representations, we will not consider or attempt to interpret the parties' "new factual evidence not presented to the trial court." *Heaton*, 266 Ill. App. 3d at 477. Moreover,

a detailed understanding of the results of the DNA testing performed in the present case is not needed to resolve the issue before us.

¶ 33 On appeal, the defendant specifically argues that the "evidence that B.P. had been sexually active with one or more other individuals should have been allowed under the constitutional exception to the rape shield statute because it provided an alternate explanation for the semen in B.P.'s underwear which did not conclusively match [him], but did not exclude him either." This contention is not unlike the claims that the trial court rejected when denying the defendant's motion for a new trial and the defendant's motion to admit evidence of B.P.'s prior sexual activity or reputation, *i.e.*, that the two unmatched DNA samples were evidence that the third sample "may have been from someone other than the defendant" and that the two unmatched samples were "clearly evidence that the semen deposited in [B.P.'s] underwear may have been [deposited by] someone other than the defendant." In any event, assuming, *arguendo*, that the two unmatched samples constituted "evidence that B.P. had been sexually active with one or more other individuals," the defendant's argument is without merit.

¶ 34 "Except for identical twins, each person's DNA is different from every other person's DNA." *People v. Stremmel*, 258 Ill. App. 3d 93, 102 (1994). Here, viewing the three DNA samples found in B.P.'s underwear as evidence of sexual activity, the evidence before the trial court suggested that B.P. had sexual intercourse with three different males, one of whom was possibly an unidentified boyfriend and one of whom was possibly the defendant. The stipulated evidence regarding the expected occurrence rates of the "Y-S-T-R Haplotype" that was matched to the defendant was evidence that someone other than the defendant might have deposited the matched sample, and as the State suggests on appeal, evidence that B.P. had sex with persons other than the defendant "would not have excluded the [d]efendant from sexually assaulting [B.P.] in this case." Under the circumstances, the trial court

properly applied the rape shield statute and did not abuse its discretion in excluding the evidence of the unmatched samples as irrelevant. *Cf. People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 185-87 (2001) (holding that evidence of the victim's prior sexual history was admissible under the rape shield statute where it provided "another plausible explanation" for the physical evidence that supported her allegations that her father had sexually assaulted her).

¶ 35 Closing Arguments

¶ 36 The defendant next contends that he was denied a fair trial by improper remarks that the State made during closing arguments. The defendant acknowledges that he raises this issue for the first time on appeal, but to circumvent his procedural default of the claim (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), he asks that we review it under the plain error doctrine or as a claim of ineffective assistance of counsel premised on his trial attorney's failure to object to the allegedly improper remarks. Either way, we agree with the State's assessment that the defendant's argument fails.

¶ 37 To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Patterson*, 217 Ill. 2d 407, 441 (2005). "Under *Strickland*, a defendant must prove not only that defense counsel's performance fell below an objective standard of reasonableness, but also that this substandard performance caused prejudice by creating a reasonable probability that, but for counsel's errors, the trial result would have been different." *People v. Johnson*, 218 Ill. 2d 125, 143-44 (2005). "Because [a] defendant must satisfy both prongs of the test, the failure to satisfy either element precludes a finding of ineffective assistance of counsel under *Strickland*." *People v. Shaw*, 186 Ill. 2d 301, 332 (1998).

¶ 38 "[T]he plain-error doctrine bypasses normal forfeiture principles and allows a

reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). "In both instances, the burden of persuasion remains with the defendant" (*id.* at 187), and in any event, "[t]he initial step in conducting plain-error analysis is to determine whether error occurred at all" (*People v. Walker*, 232 Ill. 2d 113, 124 (2009)). Such is the case because "in the absence of error, there can be no plain error." *People v. Brant*, 394 Ill. App. 3d 663, 677 (2009); see also *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 39 "It is well established that prosecutors are afforded wide latitude in closing argument, and improper remarks will not merit reversal unless they result in substantial prejudice to the defendant." *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994). "A prosecutor's comments must be considered in the context of the parties' arguments as a whole and their relationship to the evidence." *People v. Hall*, 194 Ill. 2d 305, 350 (2000). "To be proper, closing argument comments on evidence must be either proved by direct evidence or be a fair and reasonable inference from the facts and circumstances proven." *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992). "Arguments based on facts or reasonable inferences drawn from the facts are within the scope of proper argument even where they reflect unfavorably on the accused." *People v. Manley*, 222 Ill. App. 3d 896, 907 (1991).

¶ 40 Here, during closing arguments, when discussing the DNA evidence admitted at trial, the State argued the following:

> "You heard a little bit about the DNA [evidence] ***. And, I know that was brief. You know the DNA [evidence] *** in this case is not like DNA [evidence] you see on TV, [on] CSI, or something like that. It's not one in eight quadrillion people. It's just not that way in this case. The evidence was 1 in 430 Caucasian males, 1 in

370 African American males, 1 in 290 Hispanic males.

Now, what that means is that the sample from the [d]efendant and the sample from the crotch of [B.P.'s] underpants were looked at, and there were common characteristics between those. And, those characteristics occur in every 430 Caucasian males. So, hypothetically, I am just pulling this number out of the air, if there are 8,600 males in Bond County, Illinois, not sure there are, but if there are 8,600 males in Bond County, Illinois, that would be 20–20 males in the class of people that could have been the contributors of that semen. And, the [d]efendant's one of those 20.

It doesn't prove he did it. But it also doesn't exclude him. It puts him in a class of people. But, think about that. Whoever put that semen in there had to be someone [B.P.] had contact with. [B.P.] is 15. Even [when] she is allowed to drive, she is not driving to Highland. She's not driving to Collinsville and Fairview Heights. She's not going anywhere for periods like that. She is *** constricted in where she can go. She is here in Pocahontas all the time.

And, on that day, the witnesses said nobody left. They drove down the road and back, but nobody left the area. They were there pretty much all day long. The only person she was alone with that day was the [d]efendant. The [d]efendant had access to her 24/7. The [d]efendant had access to her that day and he was alone with her in the garage.

* * *

Look again, the DNA doesn't begin to prove this case by itself. And it doesn't exclude the [d]efendant from having done it either. It is what it is. He is in the class. That's all. He's in the class of people, but he was the only one that was there. He was

the only one that was alone with her, and he's in the class of people that are potential donors."

¶ 41 In response, noting that the State's DNA evidence was not "particularly strong," defense counsel argued that because "everybody travels," the contributor of the DNA sample identified as having possibly originated from the defendant could have come from anywhere. Maintaining that the sample matched to the defendant had not been deposited in B.P.'s underwear "during the incident in question," counsel further argued that if the defendant had ejaculated inside of B.P. as she had claimed, there "would have [been] evidence of semen in [her] vagina."

¶ 42 On appeal, referencing his previous contention that the two unmatched DNA samples found in B.P.'s underwear constituted evidence that B.P. was sexually active and thus provided an alternative explanation for the presence of the sample matched to him, the defendant maintains that the State falsely argued that the defendant "was the only male who had 'access' to B.P." The defendant further suggests that because the State "knew that [the defendant] could not have been the only male alone with B.P.," the State's alleged misrepresentations to that effect were "particularly egregious and unfair."

¶ 43 As previously noted, the evidence at trial established that "[a] major Y-S-T-R Haplotype *** identified in the sperm fraction of the stain from [B.P.'s] underwear" matched the defendant's and that "[w]ith a 95% upper confidence limit, this major Y-S-T-R Haplotype would be expected to occur in approximately *** 1 and 430 unrelated Caucasian males, *** based on a database of *** 1,311 Caucasian *** males." The evidence at trial also established that on January 15, 2007, the defendant was the only person alone with B.P. who fell within the class of the possible contributors. When considered in their proper context, the State's remarks were therefore fair comments on the evidence presented for the jury's

consideration, and contrary to the defendant's intimations, the State did not suggest that the incident in the garage was the only time B.P. had ever been "alone" with a man. Under the circumstances, the defendant is unable to establish plain error or prevail on his ineffective-assistance-of-counsel claim. *People v. Kuntu*, 196 Ill. 2d 105, 129-30 (2001).

¶ 44 Mandatory Supervised Release

¶ 45 The General Assembly has mandated that a term of mandatory supervised release (MSR) be included as part of every sentence of imprisonment. *People v. Horrell*, 235 Ill. 2d 235, 243 (2009); *Holly v. Montes*, 231 Ill. 2d 153, 165-66 (2008). Section 5-8-1(d)(4) of the Unified Code of Corrections (730 ILCS 5/5-8-1(d)(4) (West 2006)) specifically directs that "for defendants who commit the offense of *** criminal sexual assault, *** the term of [MSR] shall range from a minimum of 3 years to a maximum of the natural life of the defendant." Here, pursuant to section 5-8-1(d)(4), the trial court ordered that the defendant's term of imprisonment on his criminal sexual assault conviction be followed by an MSR term of "three years to life."

¶ 46 Citing *People v. Rinehart*, 406 Ill. App. 3d 272 (2010), wherein the appellate court remanded the cause of a defendant convicted of criminal sexual assault so that the trial court could impose a fixed term of MSR pursuant to section 5-8-1(d)(4) when the trial court failed to do so (*id*. at 279-81, 283), the defendant's final argument on appeal is that the indeterminate term of MSR that the trial court imposed on his criminal sexual assault conviction is void. Our Illinois Supreme Court recently held that *Rinehart* was wrongly decided, however, and that pursuant to section 5-8-1(d)(4), when imposing sentence on a defendant convicted of criminal sexual assault, "[t]he defendant's MSR term is an indeterminate three years to natural life." *People v. Rinehart*, 2012 IL 111719, ¶¶ 11, 23-30. Accordingly, we reject the defendant's contention that his cause must be remanded so that

the trial court can sentence him to a fixed term of MSR on his criminal sexual assault conviction.

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, the defendant's convictions and sentences are hereby affirmed.

¶ 49 Affirmed.