NO. 2-09-1060

IN THE

APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 19th Judicial Circuit,
Plaintiff-Appellee,	)	Lake County, Illinois.
	)	
-vs-	)	No. 92 CF 2751
	)	
JUAN A. RIVERA, JR.,	)	Honorable
	)	Christopher C. Starck
Defendant-Appellant.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE

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ISSUES PRESENTED FOR REVIEW

(1) Whether Defendant was proven guilty beyond a reasonable doubt of first degree murder?

(2) Whether the trial court erred in refusing to allow expert testimony on false confessions?

(3) Whether the circuit court properly allowed evidence of the victim's prior sexual activity?

(4) Whether the trial court abused its discretion in refusing to admit evidence regarding the results of defendant's polygraph examination? If so, whether any error was invited by defendant?

(5) Whether the trial court abused its discretion in admitting evidence regarding the electronic monitoring system at issue herein?

(6) Whether the circuit court properly barred documentary evidence offered by Defendant?

(7) Whether the trial court properly concluded that the non-suppression of Defendant's confession was law of the case?

ARGUMENT

I

DEFENDANT WAS PROVEN GUILTY BEYOND A REASONABLE DOUBT OF FIRST DEGREE MURDER.

Defendant first claims that he was not proven guilty beyond a reasonable doubt because the primary evidence against him consisted of his confessions to the police and his admissions to other criminals. (Def. Br. at 32-46). A review of the evidence under the applicable standards of review establishes that Defendant's claim is without merit.

STANDARD OF REVIEW

When addressing a challenge to the sufficiency of the evidence on appeal, it is not the reviewing court's function to retry a defendant. People v. Larson, 379 Ill.App.3d 642, 654 (2d Dist. 2008). Rather, the reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. People v. Letcher, 386 Ill.App.3d 327, 330 (2d Dist. 2008); Larson, 379 Ill.App.3d at 654. This standard applies whether the evidence is direct or circumstantial. People v. Wheeler, 226 Ill.2d 92, 114 (2007). Moreover, the People are not required to exclude every reasonable hypothesis of innocence. Larson, 379 Ill.App.3d at 654. When the determination of guilt or innocence depends on the credibility of the witnesses and the weight to be given to their testimony, it is for the trier of fact to resolve any conflicts in the evidence. Larson, 379 Ill.App.3d at 654. A reviewing court is not to substitute its judgment for that of the jury. Larson, 379 Ill.App.3d at 654. Therefore, testimony may be found insufficient only when it is clear from the record that no reasonable person could accept it. People v. Weathersby, 383 Ill.App.3d

226, 229 (2d Dist. 2008); *see also* People v. Tenney, 205 Ill.2d 411, 428 (2002) (a conviction will not be reversed simply because the defendant tells the reviewing court that a witness was not credible); People v. Baldwin, 256 Ill.App.3d 536, 542 (2d Dist. 1994) (a jury's verdict based on substantial and credible evidence is not rendered reversible because other evidence which might, if believed, have resulted in a different verdict). When judging whether a case should be reversed outright based on insufficient evidence, a court will consider all of the evidence presented at trial, including any that was improperly admitted. Lockhart v. Nelson, 488 U.S. 33, 40-41 (1988); People v. Gibson, 136 Ill.2d 362, 383-84 (1990).

ANALYSIS

Here the evidence was clearly sufficient to meet the applicable standard. The evidence against Defendant at the trial now under review consisted of inculpatory statements made by him to private parties, some of whom were other inmates, and to the police. The earliest of these statements, while not confessing the crime, were inculpatory in light of the circumstances in which they were given and their dishonest nature. The later statements are confessions to the crime, some of which include a damning knowledge of the facts, including many which Defendant would not have known unless he had been involved.

On August 17, 1992, Holly Staker, the 11-year-old victim, was found stabbed to death in the second floor residence at which she had been babysitting the two young children of Dawn Engelbrecht — a five and one-half-year-old boy and a two and one-half-year-old girl. (R. 13861-73, 13876-90, 14471-84, 15891-15901; P. E's. 200). An autopsy conducted the following day determined that she had been choked, stabbed 27 times, and sexually assaulted both vaginally and anally. (R. 15761-15828; P. E's. 161-75, 184). For six weeks,

the police conducted an intensive investigation, interviewing numerous witnesses, following up numerous leads and interviewing numerous suspects without success. (R. 14185-87, 14390-91, 14182; Def. Ex. 97 k, q, t, v, x, y).

On September 29, 1992, Officer Michael Blazincic interviewed inmate Ed Martin at the Lake County Jail after learning that Martin had information about this crime. (R. 14365-66, 16168-69, 16189). As a result of that interview, Blazincic learned that Defendant was a possible witness to the crime. (R. 14366-70, 16186-88). Martin testified that he was arrested for a probation violation and taken to the Lake County Jail on September 14, 1992. (R. 14358-59). A day or two later, Defendant, whom Martin had known for about 14 months, approached and greeted him. (R. 14359-60). Defendant then asked if Martin had been interviewed about Holly's murder. (R. 14361). Martin had lived about 200 yards from the apartment in which Holly was murdered. (R. 14391-92). Along with several other people, he had been a suspect in the crime, and had given blood, saliva and hair samples. (R. 14390-91). Martin told Defendant that he had been interviewed and had been cleared. (R. 14361). The following day, Defendant told Martin he might have information about who committed the murder. (R. 14364). Defendant said that he had been at a party and seen a suspicious person coming and going several times. (R. 14364-65).

As a result of Martin's tip, Detectives Held and Gentilcore went to the Hill Correctional Center on October 2, 1992, and interviewed Defendant. (R. 13955-57). Defendant was not a suspect at that time. (R. 14002). Defendant told them that he knew the victim and knew the woman for whom she had been babysitting as the "Mexican" bartender at Cheers. (R. 13961). Defendant claimed that, at around 3:00 p.m. on the day of the

murder, he and his girlfriend had gone to party at the Craig residence located near County and Franklin Streets. (R. 13965-66; P. Ex. 150). A male named Michael, who lived at the Craig house, was at the party. (Id.). Defendant described how, during the party a Hispanic or mixed-race man had several times left and returned. (R. 13967-68; P. Ex. 150 at 2-3). The last time this happened, between 7:30 and 8:00 p.m., the man returned after 45-60 minutes out of breath and sweating, with mud on his shoes, a fresh four-inch scratch on his cheek and a stretched shirt-sleeve. (R. 13968; P. Ex. 150 at 2-3). When, five minutes later, two police cars passed the Craig's house the man again left and Defendant did not see him again. (Id.). Defendant and others at the party went to see where the police cars had gone and found them on Hickory Street where there was a great deal of activity. (R. 13969). Defendant said that he tried to talk to the Mexican lady-bartender from Cheers who lived in the house. (Id.). This, in fact was Dawn Engelbrecht, who did bartend at Cheers and in whose home the victim had been killed. (R. 13969-70). Using a photograph, Defendant identified a man named Robert Hurley as looking like the person who kept leaving and returning to the party. (R. 13985). Held wrote down what Defendant had told him, and had Defendant review and sign the statement. (R. 13972-75, 13982-84; P. Ex. 150 at 2-3). Defendant also signed question sheets verifying, *inter alia*, that he understood English, was not then under a doctor's care, had not consumed alcohol in the prior 12 hours, was giving the statement voluntarily without the presence of a lawyer, and that the statement was the truth. (R. 13977-80, 13983-84; P. Ex. 150 at 1, 4). However, during a later interview on October 29, 1992, Defendant admitted that this statement was false. (R. 13995).

On October 27, 1992, Defendant was taken to Chicago to be interviewed while attached to a polygraph machine. (R. 14033-34, 14184-86, 14599, 14801-02). Defendant told the polygraph examiner, Michael Masokas, essentially the same story he had told Detective Held about the suspicious actions of Robert at the party at the Craig's house. (R. 14194-96). Defendant denied being involved in the killing and said that Michael Jackson had introduced him to Robert at the party at the Craig's house. (R. 14194-95). Defendant believed that Michael was running the party. (R. 14195). Defendant told Masokas that he knew the victim both because she had baby-sat for his sister-in-law and because his sister went to school with her, and that he had seen the victim on the street a couple of times. (R. 14196-97). This information came out during a dialog where Masokas would ask questions and Defendant would answer. (R. 14197). He also stated that he knew Dawn Engelbrecht because she tended bar at a local establishment (Id.). Defendant repeated the same story in a second interview on that same day. (R. 14198). Defendant never said that he had been at home on the date of the crime on electronic monitoring (EMS) and never said that he had spoken by phone with his mother in Puerto Rico. (R. 14197-98).

The following day, Defendant was interviewed by Officer Blazincic. (R. 14050-53). Defendant again told essentially the same story about the party, Michael, and Robert that he had told to Detective Held on October 2 and to Masokas the previous day. (R. 14054-59; P. Ex. 154). He also said that Robert explained his condition by saying he had fallen. (R. 14057). Defendant also said that he and others observed the lights of emergency vehicles and proceeded toward Hickory Street, where they believed those vehicles were located. (R. 14057-58). At Blazincic's request, Defendant personally wrote and signed a written version

of his statement. (R. 14059-62; P. Ex. 154). When asked why his girlfriend had denied going to a party at the Craig's house, Defendant replied that she had lied, probably out of fear. (R. 14064). Defendant maintained that Michael Jackson would confirm his story. (R. 14065). Defendant was then taken to a room where Jackson was and given lunch. (R. 14066-67). Afterwards, he and Jackson were left alone. (R. 14176, 14804-05). Jackson testified that, when they were alone, Defendant said that the police were trying to "railroad" him for something he didn't do, and asked Jackson to give him an alibi by saying they had been together on that day. (R. 14176, 14182). However, although he was Defendant's friend, Jackson had not been at a party at the Craig's house nor seen Defendant on that day. (R. 14172-73, 14179). Jackson had been at a Travel Lodge with the mother of his son that night. (R. 14172-73). Therefore, he told Defendant he would not lie for him. (R. 14177-78, 14806). Afterwards, Defendant willingly took a ride with officers, and showed them the Craig residence. (R. 14073-77). When it was pointed out to him that, due to the configuration of the streets, he could not have seen the emergency lights on Hickory Street from the Craig residence, Defendant claimed that he saw reflections of the lights. (R. 14080). Blazincic never heard Defendant say on either October 27 or 28, that he was at home on EMS at the time of the crime. (R. 14149).

The next day, October 29, 1992, Defendant underwent another polygraph examination in addition to three other separate interviews with Masokas. (R. 14089, 14199-200, 14304-12; *see also, supra* Section IV 58-61). He again told Masokas essentially the same story about the party, Robert, and seeking out the emergency vehicles, but added two new facts. (R. 14205). Defendant now said, for the first time, that when he and others

sought to find the emergency vehicles, Jackson went instead to a hotel. (R. 14205-06). He also said, for the first time to Masokas that, while he and the others were at the scene that night, he approached Engelbrecht and asked what was happening but retreated when she became hysterical. (R. 14206). He changed that story to say that he had approached Engelbrecht on the next morning, August 18, but changed back to saying that he had seen her on the evening of August 17, when he was told that Engelbrecht had identified him as the person who approached her on that evening. (R. 14208, 14210-11). Defendant then claimed that he had lied about the party in order to get the police "off his back." (R. 14208-09, 14212). He then told Masokas that he had heard there was to be a party, went to the Craig's home, and waited outside for two or three hours without knocking or calling out. (R. 14212). He then heard sirens and followed lights to the scene. (R. 14212-13). He then approached Engelbrecht, but left her and stood across the street because she was hysterical. (R. 14213).

Defendant was then taken to a larger room where Officers Held and Davis joined them. (R. 14213-14, 14315). Defendant again said that he had made up his original story about the suspicious person at a party to get the police "off his back." (R. 14316). When reminded that he had first told that story to Eddie Martin, he denied doing so and denied telling the same story to the police during the interview at Hill Correctional Center. (R. 14317-18). The officers also told Defendant that he couldn't have waited for hours at the Craig's because there had been people coming and going there. (R. 14322). Defendant continued to maintain that he saw the lights on Hickory Street from the Craig home, although the officers told him that was impossible due to the configuration of the streets. (R. 14215). However, he did change his story again. Now he claimed that he did not wait at the Craig's

the entire time before he saw the lights. Instead, he said that he left there and went to a park where he bought and smoked some marijuana. (R. 14216). Then, while walking around the neighborhood, he stole some speakers from a car, took them home, and walked back to the Craig's house. (R. 14216). He knew Engelbrecht as a bartender at Cheers, knew the victim through his sister, and knew that the victim had been babysitting. (R. 12318-321). He also revealed that he had approached Engelbrecht because he knew Holly was babysitting. When asked how Defendant knew Holly was babysitting, Defendant's response, in an apparent moment of candor, was that "it just slipped out." (R. 14318). Davis and Masokas left the room for awhile, leaving Held alone with Defendant. (R. 14219). Defendant told Held the story about leaving the Craig's and going to a park, stealing speakers, returning to see lights, and approaching an hysterical Engelbrecht. (R. 14325-28). He told Held that the speakers were probably still at home in his basement. (R. 14326).

When Masokas and Davis returned, they accused Defendant of killing Holly. (R. 14221, 14328-29). Defendant became upset and denied the murder. (R. 14221-22, 14329-30). He reasserted his story about going to the park and stealing speakers. (R. 14223, 14330-31). However, he changed what he had told Held only a few minutes before, and now claimed that he had sold the speakers to someone named "Eddie" for $100. (R. 14330). Defendant said that he had unplugged his EMS monitor so he could leave home to go to the Craig's, and never claimed to have been at home that whole evening. (R. 14224-25, 14321-24).

After this interview concluded, Defendant was driven back to the Lake County Jail, where he was further interviewed by various police officers. (R. 14349-50, 14603-05,

15465-66). The officers continued to ask Defendant about inaccuracies and inconsistencies in his stories. (R. 14603-05, 15389, 15469). Eventually, Defendant first admitted that he had been in the apartment with the victim and then admitted that he had killed her. (R. 14611-13, 15471-73). He then gave an oral statement about the crime and later signed a written statement consistent with this version. (R. 14617-27, 15475-87; P. Ex 157).

According to this statement, Defendant was walking down Hickory Street after having ingested cocaine and marijuana when the victim called him over to her. She said that she was babysitting and was lonely. He knew the victim through his sister, and also knew the little boy and little girl for whom she was sitting. He also knew the children's mother as a bartender at Cheers. He accepted the victim's invitation to come inside to the second floor apartment. He played with the little girl for awhile and, when she left, the victim came and sat on the couch with him. The victim asked him if he knew much about sex and when he had lost his virginity. He told the victim to stop such talk, played with the little girl again for awhile and went to the bathroom. When he returned, the victim had changed from a sleeveless shirt and tight shorts into a nightgown or similar garment, and she tried to seduce him. When he again told her to stop, she got angry. Eventually, she kissed him, and he gave in to her. He put the little girl in a bedroom. The little boy had gone outside. Defendant returned, put a cushion from a rocking chair on the floor and had consensual vaginal and anal intercourse with the victim between the living room and dining room. He did not think he ejaculated as he withdrew before that could happen so that she would not get pregnant. He went to check on the little girl, who had begun to cry. The victim followed him into the bedroom and asked if they were going to continue having sex and teased him about his

performance. When he declined to continue, she got angry and retrieved a knife. A fight ensued during which the victim was stabbed. He washed his hands and the knife in the kitchen sink, and left through the back door. He fled around the back of the house because of a fence, ran between a garage and the house next door, and there threw down the knife, which he had broken in two. He went home, changed, burned his bloody clothes in a dumpster near his house, and returned to the murder scene. There he saw the police and Engelbrecht. He tried to talk to her, but she was too upset. At the officers' request, Defendant described the apartment where the crime occurred. (R. 14617-27, 14644, 15475-87; P. Ex 157).

Some of the facts and events in Defendant's latest statement were inconsistent with facts known to the police, so they questioned him further. (R. 14661-62, 14822-23, 15656-59, 15922). As a result of this further questioning, Defendant gave another statement that was also reduced to writing. (R. 15932-48; P. Ex. 160). Defendant again recounted, among other matters, how he had been using drugs, was walking on Hickory Street, and was invited into the upstairs apartment by the victim who was babysitting for a little boy and little girl. (R. 14826-27, 15933-35; P. Ex. 160 at 1). He now recalled that the victim was wearing black stirrup pants and a multi-colored shirt. (P. Ex. 160 at 1). After having a conversation about sex, they removed their clothes and engaged in foreplay on the living room floor. (R. 14829-30, 15935; P. Ex. 160 at 1). However, Defendant was unable to get an erection sufficient to enter the victim. (Id.). Again, he stated that he went into a bedroom to tend to a crying child, and that the victim followed him into that bedroom and made fun of his performance. (R. 14830-31, 15935; P. Ex. 160 at 1-2). Defendant then told and demonstrated how he had

grabbed the victim's face and pushed her down hard onto a bed causing her to tumble over the bed and hit the wall. (R. 13935-37). He then went to the kitchen, retrieved a knife and returned to the bedroom to scare the victim. (R. 14831, 15937; P/ Ex 160 at 2). A struggle ensued when she saw the knife and he repeatedly stabbed her. (R. 14832, 15938-41; P. Ex 160 at 2). Using a pen, Defendant demonstrated to the officers how he had stabbed her underhanded and overhanded, and in the legs, arms, chest, and neck. (Id.). After stabbing the victim, he noticed he had an erection and entered her vaginally and anally. (R. 14833-34, 15941-42; P. Ex 160 at 2). He noticed her move as he left the bedroom. (R. 15942). As in the previous statement, Defendant stated that he washed his hands and the knife in the kitchen sink and left through the back door. (R. 14834-35, 15942; P. Ex. 160 at 2). This time he stated that he grabbed a mop from the area and damaged the back door to make it look like someone had broken into the apartment. (Id.). He then used a towel to wipe the mop, doorjamb, and doorknob. (R. 14835-36, 15943; P. Ex. 160 at 2). Again using a pen, he demonstrated for the officers how he had left the mop leaning in the back hallway. (R. 14843-47, 15943-44). He again recounted how he had fled, broken and disposed of the knife, burned his clothes, returned to the scene, and attempted to speak with Engelbrecht, who stated "you can't raise your kids anywhere." (R. 14836-338, 15944-46; P. Ex 160 at 2-3).

Also, while eating lunch after he had confessed, Defendant told Officer David Ostertag, that he was going to Hell because he had killed the victim, and reiterated earlier comments that he intended to kill himself because he had murdered the victim. (R. 14615, 14632, 15468, 15642, 15863).

Finally, two fellow inmates testified that Defendant also confessed to them. Frank McDonald testified that, while he was in the Lake County Jail from November of 1992 through February of 1993, he read the Illinois Criminal Code and was asked by other inmates to read the discovery in their cases. (S.R. 88-89, 95-97).[1] Defendant asked McDonald to read the discovery in his case to find information on another suspect. (S.R. 97-98). McDonald read the entire discovery package three times and went through it a fourth time to focus on the evidence against Defendant and the other suspect. (S.R. 99). When he then returned the discovery to Defendant, he told Defendant that he was in trouble because he had killed the victim, to which Defendant replied: "Yeah, I did." (S.R. 99-100). Defendant asked if there was anything that could possibly help him, and McDonald replied that Defendant should not show the discovery to anyone else. (S.R. 100).

At Defendant's second trial, David Crespo testified that he and Defendant attended Spanish language Bible classes while they were both in the Lake County Jail in May of 1997. (R. 9597, 9601-04).[2] As they returned from Bible class on one occasion, Defendant was sobbing and told Crespo" "I killed that little girl." (R. 9607). Defendant later told Crespo not to repeat what Defendant had told him or Defendant would "send a kite" (have Crespo hurt by other inmates). (R. 9608). Phillip Vitello, a former Lake County Correctional

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[1] An edited version McDonald's testimony from Defendant's first trial (which appears at R. 9787-9817 of the record on Appeal) was read into the record but not transcribed at the trial now under review. (R. 14282-83). The edited version was added in this appeal on motion of Defendant.

[2] This testimony was read into the record but not transcribed in the trial now under review. (R. 15422).

Officer, confirmed that Defendant and Crespo attended a Spanish language Bible class together. (R. 15838-49; P. Exs. 196-98).

Thus, although there was no eyewitness testimony or forensic evidence positively connecting Defendant with the crime at his third trial, his several confessions and the circumstances under which they occurred were certainly sufficient for a reasonable jury to convict him beyond a reasonable doubt — and, as cited above, that is the sole question before this Court. *See also* People v. Cunningham, 212 Ill.2d 274, 279-80 (2004) (emphasizing that a conviction is reversed for insufficient evidence only when the fact-finder's conclusion is unreasonable, that is, when the only reasonable inference is exculpatory). When a defendant chooses to explain a situation, he must provide a reasonable story or be judged by its improbabilities and inconsistencies. People v. English, 403 Ill.App.3d 121, 136 (1st Dist. 2010); People v. Nivens, 293 Ill.App.3d 1, 6 (2d Dist. 1992). The trier of fact need not accept the defendant's explanation, but may judge its probability or improbability in light of the surrounding circumstances. Nivens, 293 Ill.App.3d at 6.

Defendant's involvement in the investigation began when, while incarcerated for a separate crime, he asked a friend who lived near the scene of the murder (Martin) whether the friend had been questioned by the police about his possible involvement. When the friend answered that he had been questioned and had been cleared, Defendant concocted a story about seeing a suspicious person while attending a party near the murder. A few days later, Defendant told the same story to police investigators who regarded him as a possible witness. Defendant claimed that he had made this story up to get the police off his back even though he originally told it to Martin and then to the police when he was not a suspect. He

repeatedly changed his story when the police caught him in lies. He changed his story about Michael Jackson's involvement in the party after Jackson refused Defendant's request to lie for him. Then, when told that there had been no party at the Craig's house he told a ridiculous story about having waited at that house for hours without checking to see if anyone was home. When caught in this lie, he made up a story about wandering about, stealing speakers out of a car, and taking the speakers home to his basement. Minutes later, presumably realizing that the police could verify whether such speakers were in his basement, he claimed that he had sold the speakers. He was again caught in his lie. Eventually, apparently realizing that the police were too diligent for him to fool, he admitted that he had killed the victim. Even then, he sought to diminish his culpability by claiming that the victim had initiated sex — which he consented to only after repeated urging by the victim — and that the victim had been killed in self-defense only after she had come at him with a knife. Finally, although still giving false information about several details, Defendant admitted that he was the one who retrieved the knife from the kitchen, that he had repeatedly stabbed the victim, and that he then assaulted her both vaginally and anally. Certainly, the jury had the right to judge Defendant negatively in light of this progression of ever more inculpatory lies.

Moreover, Defendant's statements indicate an amazing familiarity with the facts of the crime. Defendant knew that Holly had been babysitting a little boy and little girl in an upstairs apartment with both a front and back entrances. He correctly recounted that the victim was 11 years old and had been sexually assaulted and stabbed multiple times. His time-line for when the crime occurred — both in his early attempts to divert attention to a

suspicious person at a nonexistent party and his later confessions was consistent with evidence that the victim had spoken with two people on the telephone between 5:45 and 6:45 p.m., and was dead by 8:15 p.m. (R. 13933-37, 13940-49, 14478-79, 16427). He knew that the back door had been damaged. He knew that the victim had been left in one of two bedrooms in that apartment. He knew that there had been a struggle. He knew that the little boy had been outside and the little girl inside at the time of the crime. He knew that those children's mother worked at a nearby tavern. He knew that the murder weapon was a knife from the kitchen of that apartment, and that the knife had been dropped outside the apartment.

As Defendant notes in a later argument, all of these facts were published in newspaper accounts of the crime. (Def. Br. at 93-94) (citing Def. Exs. 96-97). This argument presumes that Defendant either read or was told of those accounts, or that he was fed these facts by the police. There was no evidence that Defendant read these accounts. The only evidence that he might have been told about them came from Defendant's father, who testified that he had learned about the murder in the newspaper and on television, and then discussed it with Defendant. (R. 17711-12). However, there was no testimony if and what details of the crime were discussed. (Id.). Moreover, although Defendant's father testified that he could read English, his knowledge of the language was limited. He admitted that he did not speak it well and testified through an interpreter. (R. 17692-93, 17712). Also, the argument presumes that Defendant could recall all of these second-hand facts when "falsely" confessing. The People submit that is much easier to, and more likely that Defendant did, remember matters that were experienced firsthand. Likewise, there was no

evidence that the police fed this information to Defendant. Therefore, this case is different than that cited by Defendant, in which it was a matter of record that the defendant had been informed of the facts in question. People v. Lindsey, 73 Ill.App.3d 436, 448 (1st Dist. 1979).

Further, Defendant accurately recounted several facts which were not mentioned in any of the newspaper articles. First, as set forth above, Defendant repeatedly said that he returned to the scene, approached and spoke to Dawn Englebrecht.[3] Defendant first told of this encounter in his October 2, 1992 statement to Officer Held at the Hill Correctional Center. (R. 13969). Held had no previous knowledge of the encounter. (R. 16970-71). Englebrecht confirmed the encounter and, consistent with Defendant's account, said that the person asked her what had happened and that she complained that a person could not raise their children anywhere. (R. 14485-86). At the current trial, she testified she could not identify Defendant as the person who approached her. (R. 14489). However, both she and Officer Blazincic testified that, in October 1992, she had positively identified Defendant as the person who approached her. (R. 14486-87, 15373-80, 15391-93). She recognized that, at the 1993 trial, she had identified Defendant as that person and testified that there was no question in her mind about that identification. (R. 14490-91, 14503). Thus, Defendant's claim that no eyewitness put him anywhere but home that day is untrue, even if his statements are discounted. (Def. Br. at 38). Although she denied it had anything to do with

[3] Recognizing that all the evidence must be taken in the light most favorable to the People, Defendant asserts that none of his arguments rely on the credibility of the People's witnesses. (Def. Br. at 43 n. 17). Nevertheless, Defendant claims it "bears noting" that, although an officer testified Defendant spoke of the conversation with Engelbrecht on October 2, Defendant's signed statement from that date does not mention the conversation. (Id.). It is beyond the People how something "bears noting" if it is irrelevant. As he does at other places in his brief, Defendant is merely trying to improperly influence this Court.

her new inability to connect Defendant to the encounter, she was impeached with the fact that, after her identifications of Defendant in 1992 and 1993, a lawyer representing Defendant struck up a friendship with her and her children in which he would take the children to baseball games and other events. (R. 14504-07, 14557). Englebrecht also confirmed Defendant's statement that he knew her as a bartender at Cheers. (R. 14485, 14495-97, 15379).

Defendant asserts that he could have learned of the confrontation between Engelbrecht and a young man on the street that night through conversations with friends who were there. This ignores Engelbrecht's identification. Moreover, there is no evidence supporting Defendant's conjecture. Shanita Craig, one of the two People whose testimony Defendant cites, testified that she went to the scene twice from a nearby home that night for 10-15 minutes each time. (R. 16667-71). Although Craig testified to telling Defendant the next day about everything she saw that night, she was impeached with her 1998 testimony that she did not remember whether she had spoken with Defendant after the murder. (R. 16675-76,16682-84). She was also impeached with her admission that, although she was 17 years-old at the time, she had been drinking since the early afternoon on that day. (R. 16677-78). Most importantly, Craig never testified to seeing someone approach and speak to an upset woman on the street that night. (R. 16656-88). Notably, she admitted that she was not at the scene during the entire event. (R. 16680). The other witness cited by Defendant, Yolanda Black, who accompanied Craig and others to the scene, did not testify that she ever told Defendant of what she saw. (R. 16690-99). Like Craig, Black never testified to having seen someone approach and speak to an upset woman on the street. (Id.). This, despite

testifying that she saw an upset white woman throw her purse — which, according to Engelbrecht, occurred when she was approached by a person (Defendant) that night. (R. 14485-86, 16698). Thus, it is not unreasonable to believe that Defendant had not read or been told of the encounter with Engelbrecht before he recounted it to the police.

Next, although some of the articles indicated that the perpetrator had broken in through the apartment's back door, unlike Defendant, none of them attributed the damage to a blue mop from the back landing. (Def. Ex. 97). Defendant, on the other hand, described how he used the mop to damage the door in order to make it look like a break-in and then replaced it in the corner of the landing. This is consistent with other evidence. The mop is shown in the police video of the crime scene leaning against the wall on the back landing, exactly as Defendant would later describe. (R. 13902; P. Exs. 86, 200 at 5:00, 6:24-26). Further, Defendant's statement is consistent with the fact that no damage was done to the door frame or its lock, meaning that entry was not actually gained by forcing that door. (R. 13902, 13915). When forensic scientist William Wilson examined the damaged door he found semi-circular gouges, and imbedded blue plastic and paint. (R. 14438-39). When he told police to search for a blue implement about one inch in diameter, the mop was retrieved and taken to him for testing. (R. 14441-42, 16240-41; P. Ex. 26). Wilson examined the mop and found that the blue plastic and paint from the mop were consistent with that on the damaged door. (R. 14444-45). Defendant's forensic criminologist agreed that the mop in question had done damage to the back door. (R. 16320). Defendant contends that statements about the mop might have been fed to him by one or more of the investigators who questioned him. Again, despite Defendant's opportunity to cross-examine the investigators,

there is no evidence to support this pure supposition. In fact, some of them testified that they did not know of the mop before Defendant spoke of it. (R. 14836, 15943). The most Defendant can do is cite conflicting evidence about whether certain investigators knew of the evidence. Even if all of the investigators knew of the mop's importance when they each interviewed Defendant, in the absence of contrary evidence, the jury could reasonably believe that the investigators withheld this fact when they asked him about potential damage to the back door.

More importantly, Defendant has chosen to ignore several other facts contained in his confession that were not reported in any of the newspaper articles offered by him. Defendant correctly stated that, as you entered the apartment through the front door, you entered the living room, the couch was on the left as you enter, the television was at the end of the couch and there was a rocking chair on the right as you entered. (R. 14626; P. Exs. 5-6, 9, 157 at 3, 200 at 1:53-2:20). He correctly stated that the house was messy, that you went to the kitchen through the dining room, and then to the bathroom and bedrooms through the kitchen. (R. 14620, 14626; P. Exs. 5-9, 11-14, 16-19, 30-36, 157 at 2-3, 200). He correctly stated that the children's room had two beds, one on either side of the room, and a dresser. (R. 14621; P. Exs. 34-40, 157 at 2, 200 at 8:40-10:20). The People's exhibits show a chair cushion and the victim's panties near where the living room and dining room meet, where Defendant claimed that sex began on a cushion taken from a nearby chair. (R. 14621; P. Exs. 11-13, 157 at 2, 200 3:20-25). In his second confession to the police, Defendant correctly stated the victim was dressed in a multi-colored blouse and dark stirrup pants. (R. 15948; P. Exs. 40-41, 160 at 1). He correctly stated that the murder weapon was

a knife taken from the apartment's kitchen. (R. 14510, 14831; P. Exs. 57-58, 160 at 2). Although the newspaper articles spoke only of stab and slash wounds to the victims upper body, Defendant correctly told and demonstrated to the police how he had also stabbed the victim in the lower body. (R. 15786, 15789, 15859, 15938-39; P. Exs. 40-41, 171-72, Def. Exs. 96-97). The blood on the kitchen sink corroborates Defendant's statement that he washed the blood from his hands and the knife in that sink. (R. 14623, 14834-35, 15942; P. Exs. 20, 157 at 3, 160 at 2, 200 at 4;30-35). Defendant correctly stated that the knife was broken in two before it was discarded outside the house. (R. 14448-50, 14624, 14836-37; P. Exs. 57-58, 157 at 3, 160 at 2-3). Finally, and perhaps most tellingly, Defendant correctly stated that the victim was just beginning to develop pubic hair. (R. 15824; P. Exs. 157 at 2, 171-72). There is no evidence that Defendant was fed all or any of these facts. Absent such evidence, a reasonable jury could certainly determine that Defendant's extensive knowledge of the crime and the scene — both through these facts and those contained in newspaper accounts — confirmed his guilt beyond a reasonable doubt.

Defendant advances three specific reasons he could not be reasonably found guilty beyond a reasonable doubt. First, he notes the 2005 DNA test which established that sperm residue on the wooden portion of the victim's vaginal swabs could not have come from him compels an acquittal. Next, he claims that the jury was unreasonable in accepting his confessions. Lastly, he asserts that the jury could not have reasonably relied on the testimony of the fellow inmates who testified about Defendant's statements to them. Each claim fails.

Defendant asserts that no reasonable jury could have convicted him in light of the DNA evidence. However the People presented sufficient evidence to persuade a reasonable

jury that his "exclusion" as the perpetrator was not the only inference which could be drawn. The People presented evidence on and argued two alternative theories: (1) the vaginal swab stick eventually tested had been contaminated, or; (2) the victim had prior sex with another male. In support of the first theory, the People presented the testimony of Brian Wraxall, who had testified for Defendant at the first trial. He testified that, in 1993, he had found limited quantities of sperm on the vaginal swabs. (R. 15198, 15245). Under the type of DNA testing used at that time, Wraxall had testified at the first trial that Defendant was excluded as the donor of the sperm. (R. 15254-55). However, he realized now that his 1992 test results might have been inaccurate due to his own contamination of the sample. (R. 15255). Elizabeth Benzinger, another DNA expert, testified that she was aware of instances of contamination affecting newer DNA tests, because the older tests were less sensitive and, therefore, demanded less stringent laboratory procedures to protect against contamination. (R. 17005). DNA analyst William Frank performed a review of the work done by Defendant's expert Alan Keel of Forensic Science Associates, who determined that Defendant was not the source of the sperm. (R. 17053). Frank testified that after reviewing the evidence and the findings of Forensic Science Associates, he did not reach a conclusion as to whether the evidence had been contaminated. (R. 17066). Also, while Defendant correctly cites that there was a single DNA profile found in the most recent tests, it is noteworthy that those tests were performed on the wooden stick of the vaginal swab because the cotton portion had been used up in earlier tests. (R. 15203, 15210-13, 16752). Therefore, contrary to Defendant's argument that any contamination had to occur within a day of the murder, it is possible that the single profile on the stick was different than, and

added after, any sperm on the cotton portions of the swab. Therefore, while contamination of the sample may have been unlikely, it was not ruled out. Importantly, Wraxall admitted that his earlier testimony excluding Defendant as the sperm donor was suspect do to possible contamination.

The People presented evidence to suggest that the victim might have been sexually active in the days before the murder. The victim's twin sister Heather testified that when she and the victim were eight, the older brothers of a neighborhood friend forced them to perform oral sex by telling them it would taste like popsicles and then pushing the sisters' heads down. (R. 15405-06). Heather also testified that she and the victim once masturbated in front of each other to show each other that they were both interested in the same things around the same time and to find out that they masturbated differently. (R. 15406-07). Defendant argues that the sperm on the vaginal swab could not be from a prior sexual encounter because there was no sperm found in the panties the victim was wearing on the day she was assaulted and killed. But, the evidence established that the sperm need not have been from sex earlier on that day. Wraxall testified that, in his experience, sperm can last in a vagina four or more days. (R. 15272). He also testified to literature stating that sperm can last up to 17 days in a vagina. (R. (Id.). It is certainly reasonable to believe that the residue of sperm injected into a vagina up to four days before might not find its way into underwear worn for the first time on the day in question. Indeed, Benzinger specifically testified that it is possible to find sperm in a vagina while not finding any in the underwear. (R. 17002). She also testified that there was no way to date sperm. (R. 17008). Similarly, Frank testified that he was unable to determine whether the sperm he tested in this case had

been deposited at the time of the sexual assault and murder. (R. 17093) Further, there was evidence that the sperm in question was degraded, indicating that it had been in the victim's vagina for some period of time. (15259, 15271, 15273, 16481, 16484, 16766, 16948-49).

Therefore, it was not unreasonable for the jury to conclude that, in light of the other evidence, either the evidence purportedly DNA excluding Defendant was tainted or that the sperm involved was not connected with the victim's rape and murder. Of course, this Court found that the evidence at Defendant's first trial was sufficient to convict Defendant beyond a reasonable doubt despite Wraxall's testimony that the sperm could not have come from Defendant. People v. Rivera, 2-94-0075 at 2, 34 (1996) (unpublished order pursuant to Illinois Supreme Court Rule 23).

Defendant next argues that it was unreasonable for the jury to believe his confessions. He argues that there were other facts which he did not mention or about which he was incorrect, such as that Engelbrecht threw her purse on the street, that there was a partial pizza on the couch, that Engelbrecht's son was apparently never inside at the same time as Defendant, that her daughter was not in diapers, and referred to Engelbrecht as a "Mexican Lady." Defendant may have forgotten or chosen not to mention the matters he did not mention. He may have been mistaken about other matters or, as he did at other times, lied in order to put himself in a better light. The fact that Engelbrecht is not Mexican does not change the fact that she and Defendant recognized each other from Cheers, where she tended bar. Other alleged inconsistencies or omissions were likewise explained. For instance, the fact that the investigating officer found no residue of burned clothes in the dumpster behind Defendant's home is unpersuasive since the dumpster was not checked until over two months

after the crime. (R. 10160-61). There was testimony that pry marks on the back door not mentioned by Defendant could have occurred at an earlier time. (R. 16399). In any event, no omissions or mistakes overshadow the long list of facts Defendant accurately reported.

Defendant also argues that his confessions could not be believed because of his low intelligence, emotional distress, and the nature of his interrogation. Defendant cites to no case holding that a person of his IQ cannot credibly and voluntarily confess. Moreover, there was evidence to show that he was not incapable of doing so. Although his English spelling was not good, English was not his native language. However, he is intelligent enough to be fluent in both English and Spanish. (R. 14038, 14070, 14150, 14173-74, 14192, 17694-96, 17716). There was also evidence that Defendant could speak and write Hebrew and play card games. (R. 17538-40). Defendant was informed of his rights and repeatedly agreed to speak to the police. (R. 13906, 14038, 14051, 14073, 14185, 14192, 14203, 14247, 14816-20, 15374-75; P. Exs. 151-55, 183). There was testimony that Defendant was coherent, and did not complain of being tired or otherwise ask to stop during his interrogations. (R. 14280, 14308, 14609-10, 14615-16, 14646-50, 14811, 14827-31, 14839-40, 14850-51, 15474). Notably, Defendant's initial confession to the police occurred before his emotional reaction. (R. 14612-37). The fact that he became emotionally upset after confessing to the murder and sexual assault is hardly surprising given the heinous nature of the crime and possible ramifications of a likely conviction. In this regard, Defendant cried when he originally confessed his guilt. (R. 14612-13, 15470-73). He also sobbed when he confessed to Crespo. (R. 9607). He indicated concern about the possibility of being incarcerated in a maximum security facility and told the police that he intended to kill himself instead. (R. 14615,

14632, 15468, 15642, 15863). Also, his confessions to McDonald and Crespo occurred separate and apart from any police interrogation. Finally, the jury heard extensive testimony about Defendant's emotional reaction, and even visited the "rubber room" in which he was kept during that time. (R. 14634-36, 15491-96, 15698-710, 16526, 17127-49, 17177-92, 17260-321). They also heard the testimony of Dr. Robert Galatzer-Levy regarding Defendant's emotional reaction as well his general intellectual and emotional history. (R. 17363-558). Again, it was for the jury to weigh this evidence, and its determination was not unreasonable.

Although Defendant makes little mention of it in this argument, at trial he asserted an alibi defense based on his EMS monitor and testimony from his parents that, on the evening of the murder, Defendant took part in a telephone conversation with his mother, who was in Puerto Rico. However, there was significant evidence from which the jury could reasonably reject the alibi. (*See, infra* Section V 73-79). There was testimony that Defendant would often leave his house and either disconnect the EMS monitor unit or remove the ankle unit by softening its plastic band in hot water and stretching it over his foot. (R. 9615, 14224-25, 14321-22, 15422, 15861, 15861, 15875-77, 17938-39). Concomitantly, there was evidence about the unreliable nature of the EMS system at the time. (R. 17616-689). Defendant himself told the police that he had disconnected the sending unit in order to attend the party at the Craig's house. (R. 14224-25, 14321). In fact, in each of his statements to the police, the earlier exculpatory statements and the later confessions, Defendant admitted that he had left home on the evening of the murder. And, Engelbrecht's identification of him as the person to whom she spoke on the street confirms this. Moreover,

the police repeatedly testified that Defendant never said that he was home all that evening, that EMS and/or his father would confirm this, or that he had talked to his mother on the telephone from Puerto Rico. (R. 14149, 14198, 141225, 14606, 14284, 15471). Additionally, Defendant's father was impeached with the fact that, in the days after Defendant's arrest, his father did not tell the authorities of the phone call and, likewise did not mention the phone call when he testified before a grand jury. (R. 17722-26).

Finally, Defendant asserts that the fellow inmates who testified about his statements to them were not believable. He notes that, during a hearing regarding the admissibility of e-mails sent by Edward Marin, a prosecutor indicated he personally thought Martin is a "whack job." (R. 14398). However, the prosecutor never indicated that Martin was unbelievable with regard to his testimony that he told the police about Defendant's story about a suspicious person he saw while attending a party at the Craig's home. (Id.). Of course, that information was confirmed when Defendant told the same story to the police a few days later. Although Defendant impeached Martin regarding his trial testimony about certain specific statement's told Officer Blazincic that Defendant had made, he was not similarly impeached regarding Defendant's statement about the suspicious person at the party. (R. 14372-73, 16168-7).

Defendant asserts that Frank McDonald and David Crespo should not be believed because they "each had an obvious motive to fabricate testimony." (Def. Br. at 45). Defendant cites no case, and the People know of none holding that a reasonable jury must disbelieve a witness who has any arguable motive to testify in a particular manner or is otherwise impeached. Rather, as cited above, it is for the jury to judge the credibility of the

witnesses. Here, McDonald and Crespo both testified that they had not asked for, and did not anticipate, receiving anything from the People in return for their testimony. (R. 9613-14; S.R. 104-06). Both were subject to cross-examination and impeachment by Defendant. (R. 9616-61; S.R. 106-117). Further, to the extent it can be judged from the cold record, the People submit that a review of their entire testimony shows that both men were forthright about their respective criminal histories and other short-comings.

In sum, although Defendant presented evidence suggesting he had not sexually assaulted and murdered Holly Staker, that conclusion was not compelled in light of the People's evidence. Defendant's initial interest in following the police investigation of the case, his initial false and continuously changing lies inculpating another person, his repeated confessions under varied circumstances, his complete failure to use EMS or the telephone conversation with his mother until trial, and the striking array of facts he knew about the crime were more than sufficient for the jury to convict despite Defendant's evidence. Therefore, this Court should not reverse Defendant's conviction on reasonable doubt grounds.

II

THE TRIAL COURT DID NOT ERR IN DENYING ADMISSION OF FALSE CONFESSION TESTIMONY.

Defendant next maintains that he was unduly restricted regarding the expert testimony he was allowed to elicit concerning the credibility or reliability of his multiple confessions. According to Defendant, the issue of whether the trial court erred in barring his proposed expert testimony is, in significant part, controlled by this Court's opinion in People v. Cardamone, 381 Ill.App.3d 462 (2d Dist. 2008). (Def. Br. at 59). Assuming Defendant was correct on this point when he filed his brief on July 13, 2010, such is no longer the case. On December 2, 2010, the Illinois Supreme Court issued its decision in People v. Becker, 293 Ill.2d 215 (2010), which overruled Cardamone, albeit *sub silencio*, on the issue upon which Defendant depends on the Cardamone decision. The People further submit that Becker controls all of the claims raised on this issue, including those raised by the proposed *Amici*, The Innocence Network and The American Psychological Association.[4] Under Becker, this Court should affirm the trial court's decision to exclude the proposed expert testimony.

STANDARD OF REVIEW

Trial judges are given broad discretion when determining the admissibility of expert testimony. People v. Enis, 139 Ill.2d 264, 290 (1990). A court abuses its discretion where

[4] The People have filed contemporaneously with this brief a motion to strike these *amicus* briefs. The People have included references to these *amicus* briefs in case this Court denies their motion to strike.

its decision is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. People v. Illgen, 145 Ill.2d 353, 364 (1991).

Apparently there is some confusion over the proper standard of review under which this Court should examine Defendant's claims regarding his proposed expert testimony. Defendant argues that the trial court felt it was under the obligation to exclude Defendant's proposed testimony under the law of the case doctrine. (Def. Br. at 49, *citing* to C. 4088-89). Indeed, this Court has previously held, in an unpublished portion of its 2002 opinion, that the trial court properly held false confession testimony inadmissible. People v. Rivera, No. 2–98–1662 (2002)(unpublished portion of opinion under Illinois Supreme Court Rule 23). However, the portion of the record to which defendant cites in his brief was the portion of the record where the trial court was ruling on Defendant's renewed motion to suppress his confession and whether Dr. Saul Kassin, Defendant's proposed expert, would be allowed to testify at a hearing on a renewed motion to suppress. (C. 3930-4098 or R. 12242-401). The trial court concluded that, since this Court had already ruled on the suppression of Defendant's confession, it was bound by the law of the case by this Court's holding. (C. 4088-89 or R. 12400-01). Immediately thereafter, Defendant indicated that he would submit something regarding whether Dr. Kassin's testimony would be admitted at trial. (C. 4089 or R. 12401). Thereafter, the issue of the admissibility of Dr. Kassin's proposed testimony was revisited additional times. (R. 12524-12536; 12891-94). The People submit that during these additional arguments, the trial court utilizing the offer of proof regarding Dr. Kassin's testimony for the proposed successive suppression hearing, exercised its discretion in refusing Dr. Kassin's proposed testimony at trial. Because no Illinois Appellate Court has

sanctioned the use of false confession testimony, the trial court concluded it would not be appropriate in this case. (R. 12893).

Regarding the testimony of Dr. Robert Galatzer-Levy, Defendant urges that the trial court was bound by the law of the case to allow him to testify that Defendant's "psychiatric disorders were apt to have led him to say anything during interrogation that would relieve the pressure (including to falsely confess to the crime)." (Def. Br. at 51). Defendant maintains this is so because Dr. Heinrich was allowed to testify similarly at the second trial. (Def. Br. at 50, *citing* R. 19871-72). The People submit that just because Dr. Heinrich was allowed to testify to something in the second trial does not make the admissibility of that testimony "law of the case." When Defendant attempted to elicit such testimony from Dr. Galatzer-Levy, the trial court simply exercised its discretion in sustaining the People's objection to such testimony. (R. 17376-91).

ANALYSIS

Illinois Courts have many times cautioned against the overuse of expert testimony:

> Such testimony, in this case concerning the unreliability of eyewitness testimony, could well lead to the use of expert testimony concerning the unreliability of other types of testimony and, eventually, to the use of experts to testify as to the unreliability of expert testimony. So-called experts can usually be obtained to support most any position. The determination of a lawsuit should not depend upon which side can present the most or the most convincing expert witnesses. People v. Becker, 293 Ill.2d 215, slip op. at 14-15 (2010), *quoting* People v. Enis, 139 Ill.2d 264, 289 (1990).

In an effort to curtail the reduction of court proceedings to battles between opposing experts, the Illinois Supreme Court established certain standards for admissibility. Becker, 293 Ill.2d 215, slip op. at 15. In Enis, for example, the court mandated that a trial judge, when determining the admissibility of expert testimony, and when considering the reliability

of the expert testimony, should balance its probative value against its prejudicial effect. Enis, 139 Ill.2d at 290. In the exercise of discretion, the trial judge should also carefully consider the necessity and relevance of the expert testimony in light of the relevant facts before admitting it for the jury's consideration. Enis, 139 Ill.2d at 290. Expert testimony is only necessary when the subject is both particularly within the witness's experience and qualifications and beyond that of the average juror's, and when it will aid the jury in reaching its conclusion. People v. Cloutier, 156 Ill.2d 483, 501 (1993); Enis, 139 Ill.2d at 288. Expert testimony is not admissible on matters of common knowledge unless the subject is difficult to understand and explain. People v. Gilliam, 172 Ill.2d 484, 513 (1996). A trial court does not err in barring expert testimony where the matter at issue is not beyond the ken of the average juror. Watkins v. Schmitt, 172 Ill.2d 193, 206-07 (1996).

An additional independent basis for excluding certain expert witness testimony, such as the testimony proffered by Defendant here, concerns the impropriety of asking one witness to comment directly on the credibility of another's testimony or out-of-court statements. Becker, 293 Ill.2d 215, slip op. at 16. Illinois law generally forbids one witness from commenting directly on the credibility of another. Becker, 293 Ill.2d 215, slip op. at 16, *citing* People Kokoraleis, 132 Ill.2d 235, 264 (1989); and People v. Henderson, 394 Ill.App.3d 747, 753-54 (4th Dist. 2009). This is so because questions of credibility are to be resolved solely by the trier of fact. Becker, 293 Ill.2d 215, slip op. at 16. While some cases such as Kokoraleis involve opinions of lay witnesses regarding the credibility of another, the error is much, much more egregious "qualitatively and in terms of apparent authority" if an expert opines regarding the credibility of witness testimony or "out-of-court statements."

Becker, 293 Ill.2d 215, slip op. at 16. This independent basis for the exclusion of expert testimony is the primary one behind the Illinois Supreme Court's decision in Becker.

Becker, like this Court's decision in Cardamone, involved charges of sexual abuse perpetrated against a child (Cardamone involved several children). Becker, 293 Ill.2d 215, slip op. at 2; Cardamone, 381 Ill.App.3d at 462. At trial, the Becker defendant sought to admit expert testimony regarding the child victim's hearsay statements that were ruled admissible under section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10 (West 2006)). Becker, 293 Ill.2d 215, slip op. at 6. The subject matter of the rejected expert testimony included: (1) the alleged improper interview techniques used to garner the statements from the child; (2) the child's predisposition to give a false statement due to her desire to please her primary care giver (her mother); and (3) the child's predisposition to give a false statement due to her ongoing psychotherapy. Becker, 293 Ill.2d 215, slip op. at 5. The trial court's reasons for rejecting the proposed expert testimony included that admission of the testimony would likely result in a situation where "two battling experts" vie for the jury's role of determining credibility and that the defendant still had the significant benefit and safeguards afforded by cross examination. Becker, 293 Ill.2d 215, slip op. at 7-8.

After the trial and the defendant's subsequent guilty verdict, the appellate court (with one justice dissenting) reversed, relying almost exclusively upon this Court's opinion in Cardamone. Becker, 293 Ill.2d 215, slip op. at 11-12, *citing* People v. Becker, No. 3-07-0660 (2008) (unpublished order under Supreme Court Rule 23). The appellate court majority reasoned that the proposed expert testimony in that case directly analyzed the effects of suggestion, repetition and narration on the child's memory and applied scientific theories to

the questioning and interview techniques used to garner the child's out-of-court statements. Becker, 293 Ill.2d 215, slip op. at 12. According to the appellate majority, such testimony was on the same subject of the testimony that this Court held should have been admitted in Cardamone. Becker, 293 Ill.2d 215, slip op. at 12 *citing* People v. Becker, No. 3-07-0660 (2008) (unpublished order under Supreme Court Rule 23). The appellate court in Becker, summarized this Court's holding in Cardamone as follows:

> The court concluded that . . . the experts' testimony was supported by the testimony of the victims, who reported the events at an age when young children have difficulty remembering events, had told the story numerous times even without suggestion, and were interviewed using leading and suggestive questions instead of being allowed to give a narrative response. The court further determined that the experts' testimony did not constitute improper commentary on the credibility of victims because the experts had not interviewed the victims and had not made any determinations as to whether they were credible. Cardamone, 381 Ill.App.3d at 507. Becker, 293 Ill.2d 215, slip op. at 12, *quoting* Becker, No. 3-07-0660 (2008) (unpublished order under Supreme Court Rule 23).

After allowing the People's petition for leave to appeal (People v. Becker, 234 Ill.2d 527 (2009), the Illinois Supreme Court reversed. Becker, 293 Ill.2d 215, slip op. at 19-20. Using the legal framework detailed above, the court held that the proposed expert testimony would, in part, for all practical purposes advise the jury to disregard the child's out-of-court statements. Becker, 293 Ill.2d 215, slip op. at 15. While the expert opined that she hoped her testimony would "educate" the jury why they "should or should not put weight on [the] credibility" of the child's out of court statements, this was a "tactical equivocation" on the part of the expert. Becker, 293 Ill.2d 215, slip op. at 15. The expert's testimony in reality would have constituted direct adverse commentary on the credibility of the child. Becker, 293 Ill.2d 215, slip op. at 15. The court was careful to define "credibility" in the way it was

employing the word in the decision – "in the broadest, utilitarian sense as defined in Black's Law Dictionary: 'The quality that makes something (as a witness or some evidence) worthy of belief.' " Becker, 293 Ill.2d 215, slip op. at 15-16, *quoting* Black's Law Dictionary 423 (9th ed. 2009). The court thus held that the trial court had not abused its discretion, given the facts before it, by excluding the proposed expert testimony. Becker, 293 Ill.2d 215, slip op. at 16.

In addition to being an unacceptable comment on the credibility of the child's out-of-court statements, the proposed expert testimony did not involve matters beyond the ken of the average juror. Becker, 293 Ill.2d 215, slip op. at 16. According to the court, "couching the[] principles in technical terms" did not render the operative principles at play difficult to understand. Becker, 293 Ill.2d 215, slip op. at 16. The court then analogized the facts currently before it to the facts that had been before it in Gilliam, where the court specifically held that false confession testimony was properly held inadmissible by the trial court. Becker, 293 Ill.2d 215, slip op. at 16-17, *citing* Gilliam, 172 Ill.2d at 512-13.

While the expert in *Gilliam*, like Dr. Galatzer-Levy here, was allowed to testify as to defendant's mental state or condition at the time of his confession, he could not testify on the circumstances surrounding the voluntariness or competency of defendant's confession. Becker, 293 Ill.2d 215, slip op. at 16-17, *citing* Gilliam, 172 Ill.2d at 512-13. Describing the similarities between the facts of Becker and the facts of Gilliam, the court reasoned as follows:

> Describing a procedure with some parallels to the section 115-10 procedure employed in this case, this court noted that "the admissibility of a confession that is challenged on the ground that it is involuntary is a matter for the trial court to determine in the first instance out of the presence of the

> jury. If the court rules that the confession is voluntary and admissible in evidence, the defendant still has the right to present evidence to the jury that affects the credibility or weight to be given the confession. Becker, 293 Ill.2d 215, slip op. at 17, *quoting* Gilliam, 172 Ill.2d at 512-13.

In both cases, the court reasoned that the facts sought to be imparted by the expert regarding the circumstances surrounding the out-of-court statements could have been imparted through the testimony of other witnesses. Becker, 293 Ill.2d 215, slip op. at 17; Gilliam, 172 Ill.2d at 512-13. In Becker, the defendant had imparted the concepts sought to be laid out by the expert, in layman's terms, to the jury in summation. Becker, 293 Ill.2d 215, slip op. at 17. Similarly, in Gilliam, the court held that the concepts, including the concept of psychological compulsion to confess, could have been imparted (but apparently were not) through the testimony of other witnesses Gilliam, 172 Ill.2d at 512-13.

As conceded by Defendant, there is no principled basis for distinguishing between the proposed expert testimony of Dr. Kassim in this case from the exclusion of the experts in Cardamone. (Def. Br. at 60). Thus, there is no principled basis for distinguishing between the proposed expert testimony of Dr. Kassim in this case from the exclusion of the experts in Becker, as Becker involved the exclusion of the same type of testimony this Court held should have been admitted in Cardamone. Becker, 293 Ill.2d 215, slip op. at 12, *citing* People v. Becker, No. 3-07-0660 (unpublished order under Supreme Court Rule 23).

Although Defendant effectively concedes that this Court must reject his argument (and the arguments of the proposed *Amici*) on this issue under Becker, the People offer the following additional analysis. First of all, the proffered additional testimony of Dr. Galatzer-Levy and the proposed testimony of Dr. Kassin are equally controlled by Becker and the other cases in Illinois that have rejected false confession testimony. *E.g.*, Gilliam, 172 Ill.2d

at 512-13; People v. Bennet, 376 Ill.App.3d 554, 571 (1st Dist. 2007) (expert testimony regarding the defendant's interrogative suggestibility resulting, in part, from his limited intellect properly barred); People v. Wood, 341 Ill.App.3d 599, 608-09 (1st Dist. 2003) (expert testimony that defendant was easily coerced and susceptible to intimidation properly excluded). Defendants are prohibited, under this line of cases, from usurping the juror's role on credibility and from presenting expert evidence on a subject that can be presented by other witnesses. Becker, 293 Ill.2d 215, slip op. at 15-16.

In this case, while Defendant presented extensive evidence from Dr. Galatzer-Levy regarding his mental condition at the time of his confessions, he also sought to have to Dr. Galatzer-Levy opine that his mental condition made him susceptible to confessing falsely. (Def. Br. at 47). Likewise, Defendant sought to Dr. Kassin testify that Defendant's cognitive ability, psychological state and other factors made Defendant more likely to confess falsely. (Def. Br. at 48-49). While Defendant might quibble that he did not intend to have these witnesses draw the final inference for the jury regarding the effect their proposed testimony should have on the jury, such "tactical equivocation[s]" should be unavailing to Defendant. Becker, 293 Ill.2d 215, slip op. at 15.

In addition, Defendant was able to, and to an extent did, offer the concepts that he wished to put forward with the barred expert testimony through other witnesses. As noted above, Dr. Galatzer-Levy testified extensively with regard to the alleged intellectual deficiencies and alleged psychological problems that Defendant argued dramatically affected the credibility of his confessions. These topics included: (1) that Defendant had a low I.Q. particularly in the verbal arena (R. 17395-403); (2) that Defendant suffered from major

depressive disorder and depressive personality disorder; (R. 17405-10); (3) that Defendant suffered from an acute psychotic disorder or an acute psychotic episode at the time of his confessions as a result of the interrogation which led him, among other things, to become incomprehensible and unable to understand anything that was going on between himself and other people (R. 17405-18, 17415); (4) that sleep deprivation, the length of the interrogation and Defendant's asthma, among other things, exacerbated Defendant's inability to function normally (R. 17418-23); (5) that Defendant's cognitive development was impaired in such a way as to interfere with his ability to reason and to respond (R. 17452); (6) that Defendant would say grossly contradictory things and be unable to recognize the incongruity (R. 17453); (7) that as a result of his acute psychotic state at the time of his confessions Defendant may have lost his sense of reality and his ability to appreciate what was happening. (R. 17454); and (8) that Defendant had become "decompensated" or had experienced a severe loss in normal function and the ability to recognize reality. (R. 17550-51). The People submit that these were the only diagnoses that Defendant wished to put before the jury and that Defendant was simply precluded from emphasizing to the jury through expert testimony his theory that these problems may have led Defendant to falsely confess.

In addition to the testimony of Dr. Galatzer-Levy, through cross examination of Masokas and Officer Maley, Defendant was able to directly elicit the following: (1) that people some times falsely confess; (2) that lengthy interrogations some times lead to false confessions; (3) that young people who are unstable mentally some times falsely confess; (4) and that Defendant had difficulties with language. (R. 14227-28, 14236-37 and 15977).

Thus, the record demonstrates that Defendant was able to elicit the testimony he sought to have Drs. Kassin and Galazter-Levy offer from Masokas, at least for the topics about which he chose to ask other witnesses. Moreover, Defendant argued all of these issues in summation, including that his alleged physiological and emotional problems were occurring at the critical time he was signing his confessions. (R. 18082-89, 18095 and 18139).

In sum, the People urge this Court to hold that under Becker the trial court did not abuse its discretion in barring the expert testimony that Defendant proffered on false confessions.

III

THE CIRCUIT COURT PROPERLY ALLOWED EVIDENCE OF THE VICTIM'S PRIOR SEXUAL ACTIVITY.

Defendant next, for several reasons, asserts that the circuit court erred when it allowed the People to present evidence of the 11-year-old victim's prior acts. He asserts that this evidence was barred by the Illinois Rape Shield Act (the Act), a lack of relevance, and Illinois evidentiary law governing the manner in which a person's character may be proven at trial. (Def. Br. at 65-75). A brief *amicus curiae* filed by four victims' rights organizations also addresses the application of the Act and the relevance of the specific evidence in question. (V. Rts. *Amicus* at 4-24).[5] Contrary to the claims of Defendant and the *amici*, the evidence was properly admitted pursuant to the language of the Act and Illinois precedent.

STANDARD OF REVIEW

Defendant's first arguments on appeal present issues of the applicability of the Act to this case and of the relevance of the evidence admitted. Questions which involve the interpretation of a statute are reviewed *de novo*. People v. Hunt, 234 Ill.2d 49, 914 N.E.2d 477, 482 (2009). A court's primary objective when construing a statute is to give effect to the intent of the legislature, which is best determined by giving the statutory language its plain and ordinary meaning. Hunt, 914 N.E.2d at 482. The statute should be reviewed in its entirety, with each section evaluated with the other provisions. Id. A court will not use other construction aids when the plain and ordinary language of the statutory language is clear and

[5] The People have filed contemporaneously with this brief a motion to strike this *amicus* brief. The People have included references to the *amicus* brief in case this Court denies their motion to strike.

unambiguous. Id.; *see also* People v. Sandoval, 135 Ill.2d 159, 170-71 (1990) (construing the reach of the Rape Shield Act based on its plain language).

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence. People v. Garcia-Cordova, 392 Ill.App.3d 468, 487 (2d Dist. 2009). It is within a trial court's discretion to determine whether evidence is relevant and admissible, and the trial court's decision on the issue will not be reversed absent an abuse of that discretion. Garcia-Cordova, 392 Ill.App.3d at 487. A trial court abuses its discretion where its determination is arbitrary, fanciful, unreasonable, or where no reasonable person would take the trial court's view. Id. at 487-88.

ANALYSIS

The Act declares:

> a. In prosecutions for [aggravated criminal sexual assault and other sex-related crimes], the prior sexual activity or the reputation of the alleged victim or corroborating witness under Section 111-7.3 of this Code is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim or corroborating witness under Section 115-7.3 of this code with the accused when this evidence is offered by the accused upon the issue of whether the alleged victim or corroborating witness under Section 115-7.3 of this Code consented to the sexual conduct with respect to which the offense is alleged; or (2) when constitutionally required to be admitted.
>
> b. No evidence admissible under this Section shall be introduced unless ruled admissible by the trial judge after an offer of proof has been made at a hearing to be held in camera in order to determine whether the defense has evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. Such offer of proof shall include reasonably specific information as to the date, time and place if the past sexual conduct between the alleged victim of corroborating witness under Section 115-7.3 of this Code and the defendant. Unless the court finds that reasonably specific as to date, time or place, or some combination thereof, has been offered as to prior sexual activity with the defendant, counsel for the

> defendant shall be ordered to refrain from inquiring into prior sexual activity between the alleged victim or corroborating witness under Section 115-7.3 of this Code and the defendant. The court shall not admit evidence under this Section unless it determines at the hearing that the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice. The evidence shall be admissible at trial to the extent an order by the court specifies the evidence that may be admitted and areas with respect to which the alleged victim or corroborating witness under section 115-7.3 of this Code may be examined or cross examined.

725 ILCS 5/115-7 (West 2009).

In the instant case, the People presented evidence of two prior instances of sexual conduct by the 11-year-old victim. The victim's twin sister Heather testified that when she and the victim were eight, the older brothers of a neighborhood friend forced them to perform oral sex by telling them it would taste like popsicles and then pushing the sister's heads down. (R. 15405-06). Heather also testified that she and the victim once masturbated in front of each other to show each other that they were both interested in the same things around the same time and to find out that they masturbated differently. (R. 15406-07).[6]

The admissibility of the People's evidence was addressed at two pretrial hearings. First, Defendant presented a motion in limine to preclude all evidence of the victim's sexual

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[6] Heather also testified that, on the day she was murdered, the victim wore a pair of red lace underwear which Heather and the victim shared and which were their favorite. (R. 15401-03). While Defendant objected to this evidence below as evidence of prior sexual activity, he does not do so on appeal. (R. 14011-14, 14025-27, 15402; Def. Br. at 67-68 n. 34). Moreover, any complaints about this evidence are without merit for two reasons. First, it is not evidence of past sexual conduct. Neither Defendant nor the *amici* have cited any case, and the People have found none, holding that a choice of clothing constitutes sexual conduct or activity. Also, the testimony did not involve the past. It involved the clothing worn by the victim at the time of the crime. Concomitantly, the People did not present evidence or argument connecting the underwear with the victim's sexual knowledge or proclivities. Rather, the purpose of the evidence was to show that the victim's underwear were found in an area where Defendant said he had sex with the victim. (R. 13738-40, 13900, 18186; P. Exs. 12, 157 p. 2, 157 p. 1-2, 187, 200).

activity pursuant to the Act. (R. 12537-63).[7] At that hearing, Defendant argued that the Act applies to both an accused and the People, that the Act applied in a case which involved predicate sex offenses, that neither of the listed exceptions applied in this case, and that the People should be required to disclose the nature of their evidence. (R. 12537-45, 12553-63). Responding to questions from the circuit court and the People's argument, Defendant specifically argued that the People had no constitutional rights with which to invoke the second statutory exception. (R. 12543-44, 12553-54). The People argued that the Act did not apply in a murder case, that like a defendant they are also entitled to a fair trial, that the policy underlying the Act of preventing a defendant from harassing and humiliating a victim with irrelevant evidence of past sexual behavior should not apply when the victim is deceased, that the Act allows for the admission of evidence that explains physical evidence such as semen, and that the People are not required to disclose all of their testimony before trial. (R. 12546-53).

The circuit court then denied Defendant's motion. It ruled that the Act did not apply to a charge of murder, although it would or might apply to the predicate sexual offenses. (R. 12557, 12559). It ruled that even if the Act applied, the People should be allowed to present evidence to explain the presence of semen other than Defendant's in the victim. (R. 12557-63). In this regard, the circuit court noted that, because of the issues involved, the case law generally spoke of the constitutional rights of a defendant, but that the People also had constitutional rights and that fundamental fairness would also allow the People to rebut

[7] While the circuit court indicated it had reviewed the motion (R. 12556-57), the People have been unable to locate a copy of the motion in the Common Law Record.

Defendant's evidence and argument that he was not the killer because another person's sperm was found in the victim. (R. 12557-58). Finally, the circuit court ruled that the relevance of the particular evidence would be addressed at trial, and that, unlike in a civil case, the People were not required to disclose specific testimony before trial. (R. 12558, 12562).

Defendant later filed a second motion arguing, in part, that pursuant to the Act the circuit court was required to review the People's evidence at an in camera hearing pursuant to 725 ILCS 5/115-7(b). (C. 5006-14; R. 12880-82). The circuit court also denied this motion. (R. 12882).[8]

Defendant argues that the Act applies to preclude the People's evidence in this case because he was charged with two counts of felony murder based upon his aggravated sexual assault of the victim. (Def. Br. at 70; V. Rts *Amicus* at 13-15). Citing various Illinois cases, Defendant and the *amici* note that the predicate felony underlying a charge of felony murder is a lesser-included offense of the felony murder charge whether or not the defendant is also separately charged with the predicate offense. (Id. and cases cited therein). The People do not quarrel with this assertion or the cited precedent. However, the argument ignores the fact that Defendant was not charged only with felony murder. Defendant was also charged and tried on the charge of knowing murder. (R. 18197-204). No argument was made below, or has been made on appeal, that the Act applies to trials for knowing murder, and such an

[8] Neither Defendant nor the amici has raised an issue regarding the circuit court's failure to hold a hearing. Presumably, this is because several references in the plain language of the Act teach that such a hearing is only required regarding evidence admissible under the first exception — past sexual conduct of the victim or corroborating witness with the defendant. 725 ILCS 5/115-7(b) (West 2009).

argument would be contrary to the plain language of the Act since murder is not a listed triggering offense. Thus, the People's evidence was admissible with regard to the knowing murder charge. In this regard, Defendant made no request for a limiting instruction. (C. 5006-14; R. 12537-63, 12880-82), and has not argued on appeal that the trial court's failure to give a limiting instruction *sua sponte* amounted to plain error.

Defendant and the *amici* have cited to cases purportedly holding that other state's Rape Shield laws apply when a defendant is charged with felony murder based on a predicate sex offense. (Def. Br. at 70; V. Rts *Amicus* at 15 n 1). Of course, this court is not bound by the precedent of other jurisdictions. People v. Christiansen, 116 Ill.2d 96, 130-31 (1997); People v. Allen, 323 Ill.App.3d 312, 316 (4th Dist. 2001). Moreover, two of those cases are not on point. In one, a federal trial judge conducting a habeas corpus review of a state court decision issued an unpublished order based not on the merits, but on that defendant's procedural default of his issue in the state court. Mitchell v. Artus, 2008 WL 2262606 at * 24-26. Also, there is no indication that the issue of whether the state Rape Shield law applied in felony murder cases based on sex offenses was ever litigated in the state courts. *See generally* Mitchell, 2008 WL 2262606. Another of the cited cases does not deal with a Rape Shield statute. Instead, it involves a California statute that allows, in a trial for a "sexual offense" the introduction of a defendant's past "sexual offense(s)." People v. Story, 204 P.2d 306, 312 (Cal. 2009). Further, the California Supreme Court found that such evidence was admissible where "[f]irst degree felony murder with rape and burglary (based on entry with the intent to rape) was the *only* theory of first degree murder presented at trial" and thus unquestionably involved "sexual conduct" as defined by the statute. Story, 204 P.2d

at 312 (emphasis added). Thus, the question of the statute's application when triggering and non-triggering offenses are charged was not presented or decided.

Defendant and the *amici* also argue that the circuit court was wrong to determine that the People have constitutional rights and, therefore, apply the Act's exception for evidence that is constitutionally required to be admitted. (Def. Br. at 70-72; V. Rts. *Amicus* at 15-19). Again, Defendant and the *amici* fail to fully analyze the law and circumstances. Their argument is contrary to precedent, the Illinois Constitution, and the Constitution of the United States.

Defendant and the *amici* correctly argue that the rights granted to "persons" under, *inter alia*, the Fifth, Sixth, and Fourteenth amendments to the Constitution of the United States and the Due process clause of the Illinois Constitution are for the benefit of individuals. However, they ignore other equally important portions of both constitutions and forget that the very purpose of those documents is to define the powers of government. The People of the United States ordained and established the Constitution of the United States of America in part to establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty to themselves and their posterity. U.S. Const. Preamble. The Illinois Constitution was likewise ordained and established to establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty. Ill. Const. of 1970, Preamble.

With regard to meeting these goals, the federal Constitution sets forth that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved t the States respectively, or to the People." U.S. Const. Amend XI. The

Illinois Constitution declares that to protect the rights of persons "and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed." Ill. Const. of 1970 Art I, § 1. It further sets forth that "[t]he enumeration in this Constitution of specified powers and functions shall not be construed as a limitation of powers of state government." Ill Const. of 1970 Art. II. § 2. In sum, it is the duty of governments to protect their citizens and they are granted the powers necessary to do so. Certainly, the fair and just application of criminal laws are an important part of this duty and power. Accordingly, it has been held that the State also has a right to a fair trial. People v. Holmes, 141 Ill.2d 204, 227 (1990); People v. Barner, 374 Ill.App.3d 963, 971 (1st. Dist. 2007). Indeed, the State's right to a fair trial is equally important to and should be protected to the same extent as that of a defendant. People v. Meisenhelter, 381 Ill. 378, 389 (1942); People v. Roy, 172 Ill.App.3d 16, 24-25 (4th Dist. 1988); People v. Dilger, 125 Ill.App.3d 277, 281 (2d Dist. 1984).

Citing People v. Darby, 302 Ill.App.3d 866, 874 (1st Dist. 1999), Defendant correctly recounts that the Act's exception for the admission of evidence that is constitutionally required was added after our supreme court's decision in Sandoval. (Def. Br. at 71). There, the supreme court determined that in order for the Act to pass constitutional muster, it had to be interpreted to allow a defendant to confront the witnesses against him and present a theory of defense. Darby, 302 Ill.App.3d at 874 (citing Sandoval, 135 Ill.2d at 175). Defendant points to the comments of two legislators during the debates on the subsequent amendment that added to the Act the exception for constitutionally required evidence. (Def. Br. at 71). He notes that one of the comments mentions the right to a defense and the other

spoke of the federal exception which specifically mentions the constitutional rights of a defendant. (Id.); *see also* Fed. R. Evid. 412(b)(1)(c) (allowing "evidence the exclusion of which would violate the constitutional rights of the defendant"). Therefore, Defendant asserts, the exception should not be applied to the People.

This assertion is without merit. First, Defendant has cited no case holding that the exception is not applicable to the People. Sandoval, Darby and People v. Starks, 365 Ill.App.592, 600 (2d Dist. 2006), also cited by Defendant, do not so hold. Again, Sandoval was decided before the amendment in question. Moreover, to the extent those cases speak of a defendant's rights, each did so when addressing a defendant's attack on the Act or the preclusion of evidence he proffered. Sandoval, 135 Ill.2d at 172-94; Starks, 365 Ill.App.3d at 600; Darby, 302 Ill.App.3d at 872-77. Those courts did no more than address the issue before them. The same is true of the additional cases cited by the amici. People v. Summers, 353 Ill.App.3d 367, 372-74 (2d Dist. 2004); People v. Anthony Roy W., 324 Ill.App.3d 181, 185-87 (3d Dist. 2001); People v. Hill, 289 Ill.App.3d 859, 860-66 (5th Dist. 1997); People v. Mason, 219 Ill.App.3d 76, 78-80 (4th Dist. 1991).

Also, Defendant's reliance on the legislative comments is inappropriate and unconvincing. The Act declares that evidence of the prior sexual activity or reputation of a victim or corroborating witness is inadmissible except as evidence of past sexual conduct with the accused when the evidence is offered by the accused on the issue of consent, or "when constitutionally required to be admitted." 725 ILCS 5/115-7(a). Thus, the plain language of the statute does not limit the second exception to evidence offered by a defendant. As previously cited, a court will not use other construction aids when the plain

and ordinary language of the statutory language is clear and unambiguous. Hunt, 914 N.E.2d at 482; Sandoval, 135 Ill.2d at 170. Notably, the Illinois Supreme Court held that, according to the plain language of the Act, both the People and a defendant are prohibited from presenting precluded evidence, although it recognized that the policy underling the Act "is to prevent *the defendant* from harassing and humiliating the prosecutrix at trial." Sandoval, 135 Ill.2d at 171, 180 (citing People v. Ellison, 123 Ill.App.3d 615, 626 (2d Dist. 1984) (emphasis added). Additionally, the legislature limited the first exception to circumstances where the accused sought to present evidence on the issue of consent. Thus, the legislature illustrated that it knew how to limit an exception when it so sought. Again, the exception at issue here contains no such limiting language. Defendant's argument highlights further evidence that the legislature did not mean to limit the "constitutionally required" exception to only defendants. Defendant stresses that the federal exception was known to the Illinois legislature when it was debating its amendment to the Act, and that the federal exception is limited to a defendant. (Def. Br. at 71) (citing Ill. Sen. Transcript, 88th Gen. Ass., May 15, 1993 at 48). Nevertheless, the Illinois Legislature chose not to include such limiting language. Thus, Defendant's reference to the comments of two legislators is unavailing. The Act's second exception applies equally to a defendant and the People.

Defendant also claims that the evidence in question should not have been admitted because it was irrelevant. The Act should not be mechanically applied to obscure relevant evidence that bears directly on guilt or innocence. Hill, 289 Ill.App.3d at 862. Therefore, whenever the Act's preclusion of prior sexual conduct is invoked, a question of relevancy arises. Id., at 863. Despite the Act's general prohibition, evidence of a victim's prior sexual

history may be admissible when that history explains some physical evidence, such as semen, pregnancy, or physical indications of intercourse. Anthony Roy W., 324 Ill.App.3d at 186 (citing Sandoval, 35 Ill.2d 159); Hill, 289 Ill.App.3d at 863 (citing Sandoval, 135 Ill.2d at 185). Here, it was obviously important for the People to explain Defendant's evidence that the semen on the vaginal swabs from the victim was not Defendant's. This purpose falls within the permissible reasons outlined in Sandoval, and noted in Anthony Roy W. and Hill. Defendant and the *amici* contend that the evidence was not sufficiently probative because it did not involve intercourse. However, Sandoval explained that evidence of past sexual conduct might be admissible if it were to explain physical evidence *or* where the victim has engaged in a prior pattern of behavior clearly similar to the conduct immediately at issue. Sandoval, 135 Ill.2d at 185; Hill, 289 Ill.App.3d at 863.

Moreover, as cited above, evidence is relevant if it has *any* tendency to make a fact of consequence more or less probable. Evidence that the 11-year-old victim had been exposed to and participated in sexual conduct at the age of eight, albeit unwittingly, was curious about sex, and masturbated certainly meets this standard.[9] Courts have recognized that there is a "natural presumption" or "correctly held and widely accepted notion" that children are sexually innocent. Anthony Roy W., 324 Ill.App.3d 186; Hill, 289 Ill.App.3d at 861. Therefore, it has been held that when knowledge of sexual activities becomes an issue the Act does not apply. Hill, 289 Ill.App.3d at 864 (citing Mason, 219 Ill.App.3d at

[9] The amici incorrectly maintain that the evidence showed only a single instance of masturbation by the victim. (V. Rts. *Amicus* at 10, 21). Heather testified that she and the victim once masturbated in front of one another to find out that they did it differently. (R. 15406-07). Clearly, this indicates that each of the girls also masturbated on their own.

79); *see also* Anthony Roy W., 324 Ill.App.3d at 186-87 (reversing sexual assault convictions where defense counsel did not present evidence of 12-year-old victim's possible prior intercourse to explain damaged hymen). Surely, the victim's early and vivid introduction to sex with others, and her interest in sex sufficiently strong that she masturbated and shared the details of that masturbation with her sister has some tendency to defeat the presumption that an 11-year-old girl would not engage in intercourse.

Defendant also argues that the evidence of specific acts should not have been admitted because character must be proven through reputation evidence. (Def. Br. at 73-75). In support of his argument, Defendant cites to Sandoval and Ellison. However, those cases spoke of the law before passage of the Act. Sandoval, 135 Ill.2d at 167-68 (citing Ellison, 123 Ill.App.3d at 624). In Sandoval, our supreme court noted that the Act departs dramatically from courts' prior position regarding the admissibility of a victim's sexual history. Sandoval 135 Ill.2d at 168. That court then explained that evidence of a victim's prior sexual history may be admissible when that history explains some physical evidence, such as semen, pregnancy, or physical indications of intercourse. Sandoval, 135 Ill.2d at 185; Anthony Roy W., 324 Ill.App.3d at 186; Hill, 289 Ill.App.3d at 863. Therefore, the circuit court properly admitted Heather's testimony.[10]

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[10] Defendant's tardy attempt to rebut the evidence is irrelevant to its admissibility. (Def. Br. at 74-75 n. 38). During a May 15, 2006, interview Heather told members of the defense team that she would have known if the victim had been sexually active because they told each other everything. (C. 5953, 5955, 5957). Had Defendant sought to rebut the inference for which the People offered the evidence in question, they could have asked Heather during cross-examination if she had any knowledge of facts indicating whether the victim was sexually active — for example by seeking a negative answer to whether Heather had ever seen the victim having sex, partially unclothed with a male, or passionately kissing a male. Despite the earlier interview, defendant made no attempt to probe this area. (R.

IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO PERMIT DEFENDANT TO PUT INTO EVIDENCE THE RESULTS OF HIS POLYGRAPHS.

Defendant argues that there is a "grave risk" his jury had an inaccurate belief that his polygraph results implicated him in the rape and murder of his young victim. (Def. Br. at 75). Defendant further asks this Court to believe that "it is impossible to overstate the magnitude of the prejudice" he suffered as a result. (Def. Br. at 75). Unfortunately, defendant's argument in this regard is directly and unequivocally refuted by the record, the relevant portions of which go unmentioned by defendant in his brief. In addition, any error with regard to polygraph evidence was at bare minimum invited, and more likely injected into his trial by defendant himself, who: (1) flatly refused to agree to the People's and the trial court's suggestion that all testimonial evidence be sanitized of reference to defendant's polygraphs; (2) repeatedly over-stepped the trial court's admonishments regarding polygraph evidence; and (3) insinuated himself that he was led to believe he had failed the October 29th polygraph, independent of any evidence or argument offered by the People. Finally, defendant's citation to authority to support his argument quite simply misses the mark.

15411-12). This is probably because Defendant knew that any such testimony would have been impeached by Heather's statements to polygrapher Michael Masokas that, while she was not certain, it was possible that Holly had sex with two boys who talked about sex with the girls and also touched them. (R. 3628). Also, Defendant's complaint that he could not have offered Heather's interview comments because of the rule against hearsay is unavailing. Hearsay is excluded for a purpose — it is generally regarded as unreliable because its value is unproven absent the opportunity for cross-examination. People v. Caffey, 205 Ill.2d 52, 88-89 (2001); People v. Robinson, 73 Ill.2d 192, 200 (1978) and authority cited therein. Thus, Defendant admits the questionable value of the comments he cites to this Court. It is inappropriate for Defendant to attempt to sway this Court with "evidence" that was not presented below and that he knows to be unreliable and improper.

Consequently, the People urge this Court to determine that the trial court did not abuse its discretion by refusing defendant's request to put forth the results of his polygraphs.

STANDARD OF REVIEW

As defendant has neglected to provide this Court with the applicable standard of review for this issue, the People note that a decision regarding whether evidence, such as polygraph evidence, is relevant and admissible is a matter within the sound discretion of the trial court. People v. Clarke, 391 Ill.App.3d 596, 619 (1st Dist. 2009). As such, the trial court's determination regarding the admissibility of evidence will not be reversed on appeal absent an abuse of discretion. People v. Schneider, 375 Ill.App.3d 734, 751 (2nd Dist. 2007). A court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. People v. Illgen, 145 Ill.2d 353, 364 (1991).

ANALYSIS

Prior to analyzing the merits of defendant's argument, the People must address a preliminary concern. As is defendant's wont, he opens his argument on this issue with reference to evidence that was properly excluded by the trial court, namely the proposed expert testimony on polygraphic evidence of Charles Hont. This evidence played absolutely no part in the jury's determination that defendant raped and murdered Holly Staker, and defendant does not challenge in this Court the trial court's decision to exclude the proposed testimony. (Def. Br. at n 39). As is his custom, defendant puts forth his reference to this irrelevant testimony in a footnote apparently believing that such is an appropriate place for inappropriate comment on properly excluded evidence offered only to jaundice this Court's

view of the properly admitted evidence at defendant's jury trial. Realizing that the trial court properly excluded his proposed "expert" testimony regarding the polygraph results, he nonetheless trots out that same proposed testimony before this Court in an unabashed attempt to sway this Court with that very same properly excluded testimony. The People submit that this Court should not countenance such tactics and ask that this Court disregard the inappropriate argument set forth in footnote 39.

Defendant's argument that there is a "grave risk" his jury had an inaccurate belief that his polygraph results implicated him in the rape and murder of his Holly Staker is not supported by the record.

Turning to the merits of defendant's argument, the general rule in Illinois is to preclude the introduction of evidence regarding polygraph examinations and their results. People v. Jefferson, 184 Ill.2d 486, 492 (1998). The rationale behind the rule is that polygraph evidence is not sufficiently reliable for admission and, if admitted, is likely to be taken as determinative of guilt or innocence. Jefferson, 184 Ill.2d at 493. However, there are exceptions to the rule of exclusion. *See* Jefferson, 184 Ill.2d at 493-96 (admission of polygraph evidence admissible for the limited purpose of explaining the circumstances surrounding the defendant's confession after the defendant claimed at trial that her confession was induced by promises from a police officer). In deciding whether to admit polygraph evidence, trial courts "should apply enhanced scrutiny to ensure that any references to a polygraph are necessary" given that "there are no scenarios in which the potential for prejudice would not exist." People v. Anderson, 395 Ill.App.3d 241, 256 (1st Dist. 2009), *quoting* People v. Rosemond, 339 Ill.App.3d 51, 60-61 (1st Dist. 2003).

To be sure, the parties and court alike applied enhanced scrutiny to the issue of whether and to what extent polygraph evidence would be admitted at trial. The People submit that the trial court, after meticulous review, reached the only appropriate decision – to exclude any reference to the results of defendant's polygraph examinations. (R. 12484-12524). While defendant acknowledges that in order to fully understand this issue "it is necessary to revisit [his] polygraph examinations" and the evidence elicited regarding the examinations at his jury trial, defendant stops woefully short of providing this Court with an objective account of the evidence elicited at trial. (Def. Br. at 76-79). As a result, the People now fill in some of the gaping blanks left in Defendant's recitation of facts on this issue.

According to Defendant, the polygraph on October 29th consisted of three questions: (1) Were you present when Holly Staker was stabbed?; (2) On the night of August 17th did you see or talk to Michael Jackson?; and (3) Did you lie to the police about what you did and where you were on the night of August 17th? (R. 12489-90). In his pre-trial argument, Defendant began by contending that the proposed testimony of his polygraph expert, Charles Honts, be admitted at trial on the reliability of his confession and also to rebut any inference the jury might have that Defendant failed the October 29th polygraph. (R. 12491). According to Defendant, the situation here was akin to the situation presented in People v. Melock, 149 Ill.2d 423 (1992), where the Illinois Supreme Court held that the results of a defendant's polygraph should have been admitted where that defendant was lead to believe he had failed the polygraph and the defendant maintained that his being so misled resulted in his contemporaneous confession thereafter. (R. 12497-98).

In partial response, the People suggested, *inter alia*, that a way to cure any potential error would be to sanitize all testimony from reference to polygraphs, to simply refer to Masokas as an outside investigator. (R. 12509). Defendant flatly refused saying that a trial without a reference to polygraphs would be "phony." (R. 12512-13). Defendant then insisted that if the results of the polygraph did not come into evidence before the jury, "[W]e are going to have an infected jury and another risk of a fourth trial in this case." (R. 12515).

In ruling on the issue, the trial court initially noted that there is "great peril" in injecting polygraph examination evidence into a criminal trial. (R. 12517). The court then noted that the results of the polygraph could not come into evidence as those results would take the issue of Defendant's guilt out of the jury's hand. (R. 12517-18). Regarding Melock, the court found the facts of that case markedly different then the facts at hand. (R. 12518). Defendant here was not misled about the results of his polygraph. (R. 12518). While acknowledging that Defendant might not want to sanitize the trial from reference to polygraphs, the court noted that it would be helpful to leave "that dreadful word out of the trial" all together. (R. 12521).

At the close of the hearing, Defendant insisted that the court's ruling "will not put an end to this issue during the trial of this case." (R. 12523). According to Defendant, the court was to "be prepared to hear more about this . . . because Masoukas, Held and Davis are all going to get on the stand and lead that jury to believe that [Defendant] failed the polygraph, and we are entitled to demonstrate that was a false statement." (R. 12523-24).

True to his word, Defendant moved the court to reconsider its ruling on the polygraph issue. (R. 12895-909). Defendant simply rehashed his argument that Melock controlled.

(R. 12895-98). In response, the People began by confirming what Defendant had noted in the initial hearing – the October 29th polygraph began approximately 12:55 p.m. and lasted approximately 45 minutes. (R. 12899-900). The polygraph examination was the first of four separate meetings that Defendant had with Masokas on the 29th. (R. 12899). In the remaining three meetings, Defendant was not being monitored by the polygraph machine. (R. 12899). In the last meeting, Defendant was moved to a larger room and in between the meetings Masokas spent his time attempting to verify the stories Defendant had been telling him. (R. 12900). Defendant was not confronted with being involved in Holly Staker's death until 5:30 p.m. or approximately four hours after his polygraph examination. (R. 12901). In the interim, Defendant was confronted with numerous inconsistent and demonstrably false statements while he was not even being monitored by a polygraph machine. (R. 12901; *see also*, *infra* Section I 6-9). It was based on the multitude of inconsistent and demonstrably false statements that Defendant was confronted about Holly's murder and had nothing whatsoever to do with the polygraph which had occurred hours earlier. (R. 12901). Defendant confirmed that this presentation of facts regarding the October 29th interviews Defendant had with Masokas was accurate. (R. 12905). In the end, the trial court stood by its ruling that polygraph results would not be admitted at Defendant's trial. (R. 12907-09).

The bulk of the evidence relevant to this issue was the testimony of Michael Masokas. One of the initial points made during Masokas's direct examination was that Defendant's first examination on October 27th was as a potential witness to the rape and murder of Holly Staker. (R. 14185). During the first two examinations of Defendant by Masokas, Defendant told Masokas many things about his activities on August 17th that later

turned out to be false. (R. 14185-200; *see also*, *infra* Section I 5-9). Questions of Masokas then turned to October 29th. (R. 14200-26). Just as it was presented in pre-trial hearings, Masokas indicated that he had several separate meetings with Defendant on October 29th. (R. 14204-26).

In the first interview, Defendant's story immediately included two inconsistencies with his story from October 27th. (R. 14205). Unlike his story on the 27th, Defendant this time said that Michael Jackson did not accompany him to the scene of the murder, rather Defendant said Jackson went to a hotel. (R. 14205). The second inconsistency was that on the 29th Defendant acknowledged that he had approached Dawn Engelbrecht and that Engelbrecht was hysterical. (R. 14206). This first interview began at approximately 12:55 p.m. and lasted approximately 45 minutes. (R. 14203, 14207). As noted previously, this was the only interview during which Defendant was being monitored by the polygraph. (R. 12489-90; R. 12899-909).

The second interview began at approximately 2:15 p.m. During this interview, Defendant admitted that he had lied about the party at the Craig's house. (R. 14208). He also changed his story, alleging that he had approached Engelbrecht on the morning of August 18th rather than on August 17th. (R. 14208-09). At this point, Masokas stepped out of the room and attempted to verify this new information with the officers present. (R. 14209). Masokas learned from the officers that Defendant's new story was not true. (R. 14209-10). Engelbrecht had identified Defendant as approaching her on the 17th. (R. 14210). Masokas reentered the room and informed Defendant that Engelbrecht identified him as approaching her on the 17th. (R. 14211).

Masokas continued to question him about the 17th and Defendant now said that he had waited outside the Craig's house for two or three hours waiting for a party and then heard sirens and flashing lights in a reflection in the window and that what caused him to approach the scene of Holly's murder. (R. 14212-13). At that point, according to Defendant, he approached Engelbrecht who was hysterical. (R. 14213). Masokas again left the room to attempt to verify this new information primarily because Masokas was unfamiliar with the geography of the area around the murder scene. (R. 14213-14). Masokas learned from the officers that, due to a jog in the street, it would have been impossible for Defendant to have seen lights reflecting off a window and the murder scene from outside the Craig's house. (R. 14214).

The third interview with Defendant began after Defendant was moved to a larger room to accommodate Masokas, Defendant, Officer Held and Officer Davis. (R. 14214-15). Defendant was immediately confronted with the fact that he could not have seen what he said he had seen from outside of the Craig's house due to a jog in the street. (R. 14215). Defendant initially persisted in his story and then said he had walked around, purchased some marijuana and stole some speakers, rather than standing out in front of the Craig's house for three hours. (R. 14216). He also revealed that he had approached Engelbrecht because he knew Holly was babysitting. (R. 14218). When Officer Held recounted Defendant telling them that he approached Engelbrecht because he knew Holly was babysitting, Officer Held remembered asking how Defendant knew Holly was babysitting. (R. 14318). Defendant's response, in an apparent moment of candor, was that "it just slipped

out." (R. 14318). Defendant was repeatedly asked how he knew Holly was babysitting to which Defendant repeated, "it just slipped out." (R. 14318-19).

After defendant let slip he knew Holly was babysitting, Officer Davis and Masokas left the room and called Commander Fagan. (R. 14220). The officers at that point decided to accuse Defendant of killing Holly in the fourth interview on the 29th. (R. 14220). This accusation came at approximately 5:30 p.m. (R. 14221) or approximately four hours after defendant's polygraph had terminated (R. 14221) and approximately 30 minutes after defendant admitted that he knew Holly was babysitting at the Engelbrecht's. (R. 14220).

Based on the above, the People submit that defendant's argument that his jury had an inaccurate belief that his polygraph results implicated him in the rape and murder of his young victim is not supported by the record. Contrary to defendant's contentions, it was clear to the jury that defendant had told multiple inconsistent versions of his whereabouts on the night he raped and murdered Holly Staker. These stories were systematically discounted by Masokas as he attempted to verify the tales with Officer's Held and Davis. The jury was, thus, immediately aware that Masokas's knowledge that defendant was lying came from his talking to the officers and had nothing whatsoever to do with the polygraph. This is true regardless of whether the jury was aware the polygraph was not being used after the first interview. Masokas continued to check with the officers regarding defendant's ever-evolving stories, and the stories continued to be independently demonstrated false. Accordingly, the trial court did not abuse its discretion in refusing to allow defendant to elicit the results of his polygraph.

Any error with regard to polygraph evidence was at bare minimum invited, and more likely injected into his trial by defendant himself.

Should this Court conclude that there is a possibility that the jury may have inferred that defendant failed his polygraphs, the People submit any error was invited by defendant. A defendant's invitation or agreement to a procedure later challenged on appeal "goes beyond mere waiver." People v. Harvey, 211 Ill.2d 368, 285 (2004), *quoting* People v. Villarreal, 198 Ill.2d 209, 227 (2001). Indeed, Illinois courts sometimes refer to the issue as one of estoppel. *See, e.g.*, People v. Burage, 23 Ill.2d 280, 283 (1961). That is, "[u]nder the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." Harvey, 211 Ill.2d at 285, *quoting* People v. Carter, 208 Ill.2d 309, 319 (2003), *citing* Villarreal, 198 Ill.2d at 227-28. To permit a defendant to use the exact ruling or action procured in the trial court as a vehicle for reversal on appeal "would offend all notions of fair play" (Villarreal, 198 Ill.2d at 227), and "encourage defendants to become duplicitous" (People v. Sparks, 314 Ill.App.3d 268, 272 (4th Dist. 2000)). Illinois courts have applied the invited error doctrine in numerous cases to bar a defendant from claiming error in the admission of improper evidence where the admission was procured or invited by the defendant. *E.g.*, People v. Caffey, 205 Ill.2d 52, 114 (2001); People v. Payne, 98 Ill.2d 45, 49-50 (1983).

Under these standards, the People submit, any portion of a "grave risk" that the jury believed Defendant had failed his polygraphs can only be attributed to Defendant. First of all, Defendant flatly refused the People's and the trial court's suggestion that all testimonial evidence be sanitized of reference to defendant's polygraphs. (R. 12509, 12512-13 and 12521). Calling a polygraph operator a "forensic investigator," however, has been

sanctioned by the Appellate Court. *See* People v. Anderson, 395 Ill.App.3d 241, 260 (1st Dist. 2009). The People submit that Defendant's argument that it would have been "phony" to leave the word "polygraph" out of his latest trial is, therefore, an untenable position.

Second, defendant not only refused to leave the word "polygraph" out of his trial, he also actively invited the jury to impermissibly infer that he had failed his polygraph through his presentation of evidence and in his argument. The first mention of a "polygraph" at trial came from Defendant in his opening argument when he referred to Dion Markadonis refusing to take a polygraph at Reid & Associates (Reid). (R. 13791). Shortly thereafter, Defendant began discussing his own polygraphs at Reid. (R. 13793, 13799-807). A sidebar was quickly called when Defendant attempted to reveal what questions Defendant was asked during the October 29th polygraph and what answers he had given. (R. 13800-03). Defendant also wished to reveal that the results of the initial polygraphs were inconclusive. (R. 13803). The court was forced to again admonish Defendant not to discuss the results of any of the polygraph examinations. (R. 13803-04). When referring to the October 29th polygraph, Defendant argued that sometime in the afternoon of the examination the officers accused Defendant of Holly's murder. (R. 13805-06).

Once the trial started, Defendant began in earnest attempting to plant the seed that Defendant had been led to believe he had failed the polygraph examination on October 29th. For example, Defendant asked Officer Michael Blazincic if Masokas had told him that the polygraph showed no responses. (R. 14088). Defendant also asked the following question of Officer James Held on cross-examination:

> Q (Defense Counsel): Do you remember that later in the month, [Defendant] admitted that [one of his statements about Dawn Engelbrecht] he gave you was incorrect?
>
> A (Officer Held): Yes.
>
> Q: Okay. And that was down at the Reed [sic] Polygraph Institute?
>
> A: Yes. (R. 13995).

Later, Defendant's cross-examination of Officer Held became more pointed on this topic:

> Q (Defense Counsel): There came a time when Mr. Masokas gave an examination, a lie test to [Defendant] that afternoon.
>
> A (Officer Held): Yeah, he did interview him, yes.
>
> Q: Okay. And now I am talking about after that, okay?
>
> A: Okay, before myself and Officer Davis talked to him? That's what I want to make clear. Right?
>
> Q: Right. I'm talking about whether or not you and Officer Davis met and spoke with Mr. Masokas after Mr. Masokas said he had given the test to [Defendant].
>
> A: Yes.
>
> Q: And about how long did that take?
>
> A: Maybe 15 minutes.
>
> Q: Okay. And did there come a time when– and if you don't know this, you can say so, but I just want to – did there come a time when Officer Davis and Mr. Masokas called Sergeant Fagan to talk about confronting [Defendant]? (R. 14341).

Still later in the cross-examination, Defendant again invited the jury to believe that Defendant was led to believe he failed his polygraph:

> Q: I'll ask a different question. You were there when Mr. Masokas, ***the man at Reed*** *[sic]*, made these direct accusations to [Defendant] that he was convinced and there was no doubt in his mind that [Defendant] had killed Holly Staker?
>
> A (Officer Held): Yes. (Emphasis added.)(R. 14346).

When defendant cross examined Masokas, he continued to attempt to lead the jury to believe defendant was told he failed his polygraph. The first wildly inappropriate question occurred when Defendant asked Masokas when he had last looked at the results of the October 27th polygraph. (R. 14249). In the immediate sidebar that followed, Defendant was

vehemently admonished by the court that he had just asked "a terrible question" and the court did not "know why you're asking that." (R. 14250). Thereafter, defendant attempted to again reargue the motion *in limine*. (R. 14250-67). After a considerable amount of time, during which the jury was actually excused, the court quelled Defendant's rehashing of the pretrial argument: "We went down this road in advance and as the [People] point out I ruled on this before. I said the polygraph results are not going in and they're not. (R. 14267).

Defendant's next wildly inappropriate question on this point occurred shortly thereafter. He began questioning Masokas regarding the October 29th interviews again:

> Q (Defense Counsel): . . . Now, on the 29th of October you said that you and Officers Davis and Held was it –
>
> A (Michael Masoka): Yes.
>
> Q: – went back, left [Defendant] with a different– or no, you and Davis went back and left [Defendant] with Officer Held?
>
> A: Yes, sir.
>
> Q: Okay. And then you called Sergeant Fagan?
>
> A: Yes.
>
> Q: And you talked to him about whether you were authorized to make a direct accusation of guilt?
>
> A: I don't know if I would say asked if we were authorized. It was – when Davis called his boss, Officer Fagan, he basically let him know what the status of the case was, what the next step should be and so it was kind of a consensus that the next step should be to accuse him of the crime.
>
> Q: And as I understand it, when you returned to the room with Officer Held and [Defendant] and Officer Davis, you said the words to this effect: At this point in time the investigation clearly indicates that you were involved in this, meaning in this crime?
>
> A: Yes.
>
> Q: All right. Now, apart from [Defendant's] equivocations about his whereabouts on the night of August 17th, did you have any evidence at that time to make an accusation that the investigation showed that he was involved in this crime?
>
> A: When you say evidence, are you – you mean physical evidence?
>
> Q: Yes.
>
> A: Not that I knew of at the time, although I wasn't involved in the entire investigation.

> Q: All right. **But you are the one who made the accusation, you *the operator of the polygraph machine*?**[11] (Emphasis added.) (R. 14273-74).

Defendant revisited this theme in his closing arguing as follows:

> At the Reed [sic] polygraph institute, there was no resistance from [Defendant] to go there. Let's go he said. He goes. At the end, Masokas accuses him of murder. (R. 18090).

It is clear from the above questions and argument that Defendant was attempting to himself raise the impermissible inference that he was led to believe he had failed his polygraph on October 29th. This is true independent of any evidence offered by the People. Defendant's argument was wholly disingenuous, as he was disconnected from the polygraph after his first interview on the 29th, was not even accused until almost four hours later and did not confess until several hours after that (*see*, *infra* Section I 6-12), facts of which defendant is, and was, well aware. In the interim between the termination of the polygraph and Defendant being accused, Defendant was confronted repeatedly with his numerous lies which were discovered to be lies through independent investigation of Michael Masokas with the officers who brought defendant to Reid. Defendant's attempts to place the impermissible inference in the minds of the jurors was in direct contravention of the actual evidence and appears to the People to be an obvious effort to inject reversible error in his own trial.

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[11] Defendant actually cites to this portion of the record in footnote 41 of his brief, (Def. Br. at n 41). Therein, he argues that Masokas indicated he had no "physical evidence" to support his accusation of Defendant, suggesting there was "other evidence" which Defendant argues the jury likely interpreted as a polygraph result. The People believe this is a clear misrepresentation of the record which is shown verbatim above. It is clear that Masokas was directly asked if there was "physical evidence," to which he responded, "not that [he] knew of at the time, [but he was not] involved in the entire investigation." (R. 14274). To intimate that Masokas was somehow covertly referring to polygraph results in his answer to this question is preposterous, even in a footnote.

The trial court correctly concluded that Melock did not necessitate that defendant's polygraph results be admitted.

The basis for defendant's argument that his polygraph results should be admitted was that the Illinois Supreme Court's decision in Melock necessitated that the results be admitted. His argument in this regard is directly contravened by the Melock opinion and is also unsupported by the facts at hand.

In Melock, the court held that polygraph evidence should have been admitted at trial for the limited purpose ***of determining the credibility and reliability of the defendant's confession*** because the exclusion of that evidence deprived the defendant of his fundamental right to a fair opportunity to present a defense. (Emphasis added.) Melock, 149 Ill.2d at 465. As Defendant is well-aware, the defendant in Melock alleged that he was lied to about failing his polygraph and he argued that the jury should have been apprised of that fact as it impacted the credibility or reliability of his confession. Melock, 149 Ill.2d at 453.[12] According to the defendant, after the polygraph, Masokas told him that Masokas was 150% sure that the defendant killed the victim. Melock, 149 Ill.2d at 444. Masokas also admitted that he told the defendant that he had not passed the polygraph. Id. at 446.

In actuality, according to Masokas, no responses from the defendant's polygraph could be read. Id. at 449. Masokas explained that the absence of registered responses results

[12] It is partially unclear from reading Melock whether the trial court had precluded all evidence regarding the polygraph at trial, or simply limited the polygraph evidence. For example, while the court uses the phrase "at trial" when recounting some of the testimony of Masokas about the polygraph examination (149 Ill.2d at 446), that section of the opinion is concerning the pretrial motion to suppress (149 Ill.2d at 432-53). Moreover, in the section of the opinion regarding the trial, the court indicates that defendant is appealing "the preclusion of polygraph evidence," making it sound like polygraph evidence was precluded completely.

from some conduct, such as movement or deep breathing, or a lack of cooperation by the subject. Id. Masokas stated that this conduct usually means that the suspect had lied during the examination. Finally, Masokas admitted that the lack of registered responses in Melock had nothing whatsoever to do with the verbal responses given by the Melock defendant; the defendant's polygraph had simply yielded no results. Id.

In this case, Defendant was unequivocally not lied to or misled about the results of his examination. This fact is made clear by the Masokas Report (Report) to which defendant cites in support of his argument. (C. 3626-43; Def. Br. at 76). The Report recounts the three questions Defendant was asked during the October 29th polygraph: (1) Were you present when Holly Staker was stabbed? Answer: No; (2) On the night of August 17th did you see or talk to Michael Jackson? Answer: Yes; and (3) Did you lie to the police about what you did and where you were on the night of August 17, 1992? Answer: No. (C. 3641-42). According to the Report, Defendant did not tell the truth to one or more of these questions. (C. 3642). However, due to the general nature of Defendant's deceptive reactions, Masokas was unable to isolate the specific area of deception. (C. 3642).

The results of the polygraph were imparted directly to Defendant by Masokas after the polygraph without deception. (C. 3642). In response, Defendant admitted that he lied about being at the Craig's house. (C. 3642). Thus, when Defendant argues in his brief that "[b]ecause the accusation was made by the polygrapher following the review of the polygraph results, there can be no doubt that [Defendant] was led to understand that the polygraph implicated him in the murder" (Def. Br. at 77-78), Defendant himself quite simply must be on that "other spinning planet" he refers to in his brief. (Def. Br. at 79, *quoting*

People v. Daniels, 272 Ill.App.3d 325, 343 (1st Dist. 1994). He was not lied to. He was not misled. He knows he was given the results of the polygraph, and he is fabricating this argument about being misled out of whole cloth. Because Defendant was not lied to or misled, the exception to the prohibition against polygraph evidence in Melock quite simply does not apply. Defendant was not entitled to the admission of any additional polygraph evidence regarding the reliability or credibility of his confession The trial court not only did not abuse its discretion, its decision was exactly right.

On this point, the People further note that Defendant's reliance on Daniels is misplaced. In Daniels, the evidence included that one suspect was given a polygraph, after which he was free to go home and not charged with anything while the defendant was given a polygraph and immediately thereafter arrested and indicted for murder. Daniels, 272 Ill.App.3d at 343. This evidence was directly solicited by the People and argued in closing. Id. at 339. In this case, no such evidence was offered by the People and, if the People would have had their way no evidence would have been introduced regarding defendant's polygraphs.

Even if we all wished to join Defendant on his "other spinning planet," under Melock, none of the testimony or evidence he suggested could have been admitted. At the end of the Melock opinion, the court directed the litigants as follows:

> At retrial, defense counsel, if he so chooses, should be permitted to offer evidence of the fact of the polygraph examination, and the surrounding circumstances, ***as well as the fact of the nonexistence of any results from that examination***.
>
> Our resolution of this issue is not without regard for the potential prejudicial effect of polygraph evidence. Nevertheless, the importance of permitting the jury to weigh the effects of every motivating circumstance surrounding the obtention of defendant's confession outweighs the

> importance of avoiding the possible prejudice. However, because of the potential prejudicial effect, ***any attempt, by either defendant or the State, to explain the nonexistence of the results or to refer to specific questions posed during the course of the examination is barred***. (Emphasis added.) Melock, 149 Ill.2d at 465-66.

The proffers of evidence suggested by Defendant here all fell within the realm of excluded evidence under Melock. Initially, the People must again note that Defendant is not appealing the trial court's decision to bar the testimony of his proposed expert, Charles Honts. Next, Defendant proposed to recount the questions asked during Defendant's polygraph. (R. 13800-03). Next, Defendant proposed that he ask the same question that were (unfortunately) allowed to be asked at the second trial which included details about the specific questions asked during the examination and that Defendant gave deceptive responses to all three questions. (R. 14252-53). Finally, Defendant also proposed that he ask Masokas, "with regard to all three tests you gave were you able to see deception that you could identify as being– able to see deception with respect to the death of [Holly] Staker." (R. 14261). None of these proposals was acceptable under Melock. On this issue, the People would also again note that unlike Melock, Defendant in this case did not confess until hours after the accusation and even more hours after the polygraph. *See*, *infra*, Section I 6-12.

For these reasons, the People submit that the trial court did not abuse its discretion in refusing to allow Defendant to elicit any additional evidence regarding the results of his polygraph.

V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION REGARDING THE ADMISSION OF ELECTRONIC MONITORING SYSTEM EVIDENCE.

Let there be no mistake, in the ever evolving collection of stories offered by defendant (prior to his confession) concerning his whereabouts on the day he raped and murdered Holly Staker, not one tale involved him being at his home on the Lake County Electronic Monitoring System (EMS or System). Not one. (*See infra*, Section I at 4-12, 17-18 and 26-27). Why is this? Because, thankfully, defendant made two fatal mistakes. He both returned to the scene of his brutal and heinous crime and also approached Dawn Engelbrecht, a woman who knew him and remembered him at the scene after Holly Staker's lifeless, stab-riddled body was discovered. (*See infra*, Section I at 11-12). Moreover, defendant freely admitted that the System "was a joke" and that he routinely left his home while wearing his EMS transmitter. (R. 14224-25, 14321, 15422 *quoting* 9615 and 15861). In addition, the jury also had before it evidence that defendant had stretched the band which secured his transmitter to his ankle and slipped off his transmitter. (R. 15869-70 and15875-76). Indeed, according to this Court initial Rule 23 Order, the band was loose, "possibly loose enough to remove." People v. Rivera, 2–94–0075 at 6 (1996)(unpublished order pursuant to Illinois Supreme Court Rule 23). Accordingly, defendant's argument that this Court must reverse defendant's conviction if it determines that the trial court erred regarding its admission of EMS evidence is ill-conceived. The People submit that the trial court did not err in its evidentiary decisions on this issue, and, even if it did, any error was harmless.

STANDARD OF REVIEW

While defendant attempts to classify this issue as one involving whether the trial court obeyed this Court's mandate (Def. Br. at 87) arguing for a *de novo* review, the People disagree with that assessment. At this third trial, the People did not attempt to introduce the type of evidence adduced at the first trial addressed by this Court in its 1996 Rule 23 Order. Rather, as discussed below, the People simply elicited testimony from Judy Kerby regarding the fallibility of the System components which included the portion of the System used to monitor defendant. (R. 17684-89). As such, the People submit that this Court should review the trial court's evidentiary decision, as it does any other evidentiary decision, for an abuse of discretion. People v. Schneider, 375 Ill.App.3d 734, 751 (2nd Dist. 2007). A court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. People v. Illgen, 145 Ill.2d 353, 364 (1991).

ANALYSIS

Defendant's pretrial motion *in limine* to exclude certain EMS evidence was argued on April 9, 2009. (R. 12839-80). At the argument, the People made clear that they were not going to seek to admit any of the memos this Court held inadmissible after the first trial. (R. 12850). Rather, the People intended to solicit testimony concerning defendant's "equipment that would show he was or was not at home," or, in other words, evidence concerning the unreliability of the System that would affect defendant's EMS monitor. (R. 12845-46). As discussed below, the People did exactly what they said they would do.

It is no accident that defendant does not discuss at length the language of the cross-examination of Kerby which he alleges was objectionable. The challenged cross-

examination comprises just a few lines of the 73-page cross-examination. (R. 17616-17689). A closer look at the cross-examination, demonstrates that defendant's argument must fail.

The first question asked by the People was, regarding the same generation of equipment defendant was using, whether the business records failed to show violations for two individuals who were actually seen walking around outside of their homes while wearing their EMS transmitters. (R. 17684; R. 5992). Kerby answered "yes." (R. 17685). In answering the follow-up question, Kerby admitted that just because there was no violation noted in the business record did not mean that an individual had not left their home. (R. 17685-86). This is the precise argument that the People made regarding defendant. Just because no violation was shown for the day of the murder on the business record, does not mean defendant had not left his home. On this point, the People further note defendant's assertion in his brief that the lack of a violation notice shows "he did not leave his home" on the day he raped and murdered Holly Stalker is, therefore, demonstrably false. (Def. Br. at 84). Other individuals on EMS left their homes without a violation appearing on the business records. Moreover, the challenged cross-examination did not refer to the specific units or equipment that the individuals who were seen outside of their homes were using, but rather to the part of the System (and software) that maintained records of violations which applied to both the two individuals and to defendant. (R. 17684-86).

Kerby also admitted generally that client records disappeared as a result of software crashes. (R. 17686). This was software used to monitor everyone on EMS including defendant. While the People also asked about units that were sent back to the manufacturer, it was in an effort to get Kerby to admit there was nothing wrong with those units but rather

the phone lines at use at the time were defective. (R. 17687-89). These phone lines were used to monitor defendant as well as everyone else on EMS. Kerby denied there was anything wrong with the phone lines at the time defendant was on EMS. (R. 17689).

That is the extent of the cross-examination of Kerby that defendant argues was improper. The People disagree with defendant's assessment that the court erred in permitting the cross-examination. The People further note that, contrary to defendant's remarks, they did not pursue the "same course [they] had at the first trial" (Def. Br. at 85) and did not discuss "failures with other equipment . . . [not associated with] the unit assigned to [Defendant]." (Def. Br. at 86). The evidence at the first trial included verbatim accounts of multiple memoranda that in most cases dealt exclusively with the function of equipment wholly unrelated to defendant's equipment. (R. 5969-6008). At this third trial, the People narrowly tailored their cross-examination of Kerby to portions of the System that were directly connected to defendant's EMS unit. The questions asked applied to portions of the System used to monitor defendant including the software, the computer that generated the business records and the phone lines at the EMS facility.

Evidence is admissible when it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. People v. Gonzalez, 142 Ill.2d 481, 487 (1991). Evidence is considered relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence. People v. Morgan, 197 Ill.2d 404, 455-56 (2001). Here, testimony concerning the portions of the System that failed to show violations in the business records for two people who were seen outside of their homes

wearing EMS transmitters was directly relevant as defendant's records depended upon those very same parts of the System as well. The evidence made it more probable that defendant had left his home on the day he raped and murdered Holly, as he freely admitted (R. 15422 *quoting* 9615 and 15861), and that the violation simply did not appear in the business records.

Defendant also maintains that the People emphasized this evidence in closing argument by noting that "people were actually seen out and about, and that there was no paper record of them being gone. * * * Now I ask you if you don't know when people are gone because there's no record of it how can you say because you got no record of it they weren't home?" (Def. Br. at 87). This remark in rebuttal closing was the lone reference to the minor cross-examination that defendant here challenges in the context of 76 pages of closing argument by the People. (R. 18025-63 and 18153-91). That defendant argues the People "emphasized" (Def. Br. at 87) this evidence, therefore, defies explanation and reality. It was approximately seven lines of argument in a closing argument that is approximately 1800 transcribed-lines long.

As part of his argument, defendant also relies on People v. Robinson, 349 Ill.App.3d 622 (1st Dist. 2004). That case involved a breathalyzer unit which the defendant argued had malfunctioned prior to and after it was used on him. Id. at 629. The appellate court held that evidence of the malfunctions was irrelevant, however, because other evidence showed the machine was working properly on the day it was used on the defendant. Id. Thus, Robinson is quite simply not apposite. The facts at hand involve the function of several pieces of equipment, not just a single breathalyzer unit. (R. 17584-87). Defendant's transmitter and

monitor were connected by multiple phone lines to a central computer at EMS. (R. 17584-87). All of the equipment collectively monitored defendant's home detention, as opposed to the single machine in Robinson. A failure in any component of the System, including the portion which recorded violations, is pertinent here. Defendant's difficulty with this issue appears to stem from his inability, or perhaps his unwillingness, to recognize this simple fact.

In sum, the People submit that the trial court did not abuse its discretion in admitting the few lines of testimony regarding the System that defendant now challenges. Should this Court disagree, the People maintain any error in the admission of this evidence was harmless. As this Court knows, when deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. People v. Becker, 239 Ill.2d 215, slip op. at 13 (2010). The People submit that, under any of these approaches, admission of the challenged testimony was harmless.

In this case, defendant gave innumerable explanations of his whereabouts on the day of the rape and murder and none involved him staying at home. (*See infra*, Section I at 4-12). [Add capsule summary from Jay's reasonable doubt section.] He admitted that EMS was "a joke" and that he freely left his home whenever he wanted. (R. 14224-25, 14321, 15422 *quoting* 9615 and 15861). Defendant admitted that he left his home on the day he raped and murdered Holly Staker. (R. 15861). Defendant was asked how he had gone out without getting and trouble, and defendant responded that he just unplugged it when he went out. (R.

15861). In addition, the jury was apprized that defendant had stretched the band which secured his transmitter to his ankle by soaking it in hot water. (R. 15869-70 and15875-76). Defendant had thereafter slipped off his transmitter. (R. 15869-70 and15875-76). Indeed, defendant's transmitter band was replaced just two days after his rape and murder of Holly Staker for being too loose. (C. 5335). Moreover, defendant was identified at the scene of the murder by Dawn Engelbrecht, prior to her being seduced into recanting her identification by defendant's former counsel. (*See infra*, Section I at 11-12). In such a case, the People submit that the jury would have concluded that defendant had left his home on the day of the crime, regardless of the challenged EMS testimony. Put another way, the challenged testimony is merely cumulative of other testimony that showed defendant had left his home on the day he raped and murdered Holly Staker.

For these reasons, the People urge this Court to conclude the trial court did not abuse its discretion in admitting evidence regarding the the Lake County Electronic Monitoring System. In the alternative, the People submit any error by the trial court in the admission of such evidence was harmless in light of the substantial evidence that defendant left his home on the day he raped and murdered Holly Staker.

VI.

THE CIRCUIT COURT PROPERLY BARRED DOCUMENTARY EVIDENCE OFFERED BY DEFENDANT TO REBUT THE PEOPLE'S CLAIM THAT HE TOLD THE POLICE FACTS THAT ONLY THE MURDERER COULD KNOW.

Defendant asserts that the circuit court erred when it barred certain evidence he sought to present in response to the People's evidence showing that Defendant knew certain facts that he could not have known had he not murdered the 11-year-old victim. (Def. Br. at 92-99). In response, the People assert both that the circuit court's rulings were correct and, in the alternative, that any error was harmless.

STANDARD OF REVIEW

Recent cases represent a split of opinion regarding the appropriate standard of review for a trial court's determination of whether a statement is hearsay. It has recently been held that both a trial court's decision of whether a statement is hearsay and whether it is admissible under an exception to the hearsay rule will be reviewed for an abuse of discretion. Piser v. State Farm Mut. Auto. Ins. Co., 405 Ill.App.3d 341, 938 N.E.2d 640, 651 (1st Dist. 2010); People v. Hammonds, 399 Ill.App.3d 927, 941-42 (1st Dist. 2010) (citing People v. Dunmore, 389 Ill.App.3d 1095, 1106 (2d Dist. 2009). However, some older cases hold that the initial determination of whether a statement is or is not hearsay is a legal determination that is reviewed *de novo*, and the circuit court exercises its discretion as to admissibility only after it has determined whether a statement is hearsay. Halleck v. Coastal Building Maintenance Co., 269 Ill.App.3d 887, 891 (2d Dist. 1995) see also People v. Gilmore, 356 Ill.App.3d 1023, 1034 (2d Dist. 2005) (decision to admit hearsay may be reviewed *de novo* when the decision does not involve fact-finding or weighing the credibility of witnesses).

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence. People v. Garcia-Cordova, 392 Ill.App.3d 468, 487 (2d Dist. 2009). It is within a trial court's discretion to determine whether evidence is relevant and admissible, and the trial court's decision on the issue will not be reversed absent an abuse of that discretion. Garcia-Cordova, 392 Ill.App.3d at 487. A trial court abuses its discretion where its determination is arbitrary, fanciful, unreasonable, or where no reasonable person would take the trial court's view. Id. at 487-88.

Where evidence is erroneously excluded, a defendant must establish that its exclusion prejudiced him or her in some way before the error warrants reversal. People v. Singmouangthong, 334 Ill.App.3d 542 (2d Dist. 2002). Thus, the erroneous exclusion of evidence is harmless where, either: (1) the error did not contribute to the conviction; (2) the other evidence presented overwhelmingly supports the conviction; or (3) the excluded evidence was duplicative or cumulative. People v. Tabb, 374 Ill.App.3d 680, 690 (2007).

ANALYSIS

Defendant asserts that the circuit court erred when it ruled inadmissible four pieces of documentary evidence he sought to admit to show that his accurate knowledge of the crime might have come from sources other than his direct participation in the sexual assault and murder: (1) a Waukegan Police Department press release about the crime from August 18, 1992 (the day after the crime) (Def. Ex. 22); (2) a series of newspaper articles published in northern Illinois from August 18, 1992, through October 1, 1992 (Def. Ex. 97); (3) an August 25, 1992, investigative report by evidence technician Bert Foster that was typed on

September 11, 1992 (Def. Ex. 40), and; (4) a November 5, 1992, letter from polygrapher Michael Masokas to Sargent Lou Tessman (C. 3626-43).[13] The circuit court found that the documents were inadmissible hearsay. (R. 15548-51, 17118-20, 17755-70, 17789-800). The circuit court also found that the newspaper articles were irrelevant because there was no evidence that Defendant or any police officers had read the articles. (R. 17767-68). It similarly found that Masokas' letter was irrelevant because it is dated after Defendant gave his confessions. (R. 17800).

The circuit court correctly found that the documents were inadmissible hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in that statement. Dunmore, 389 Ill.App.3d at 1106. Thus, there is no doubt that the documents in question are hearsay if used to establish the truth of what is contained in them. *See, e.g.* Hubbert v. Dell Corp., 359 Ill.App.3d 976, 985 (5th Dist. 2005) (newspapers and letters are hearsay); People v. Long, 316 Ill.App.3d 919, 928 (1st Dist. 2000) (police reports are hearsay); *see also* People v. Lawler, 142 Ill.2d 548, 557 (1991) (presence or absence of in court of declarant of out-of-court statement is irrelevant to a determination of whether the statement is hearsay). Defendant claims that the documents were admissible because they were offered not to show the truth of their contents, but to show that he could, conceivably, have had notice of some of the facts of the crime that he correctly recounted. *See* Dunmore, 389 Ill.App.3d at 1106 (statement offered to prove something other than the matter asserted

[13] Defendant refers to this document as his Exhibit 31. (Def. Br. at 96). The People have been unable to locate any such Exhibit in the record delivered to them. However, this letter was also used as an exhibit to a motion filed by the People and can be found at the pages cited above.

is not generally hearsay and, therefore, generally admissible). However, a statement not technically offered to prove the truth of the matter asserted can still be inadmissible as hearsay when the ultimate focus is on that truth. People v. Thomas, 178 Ill.2d 215, 237 (1997); People v. Roman, 232 Ill.App.3d 988, 998 (1st Dist. 2001). Defendant's entire purpose for offering the documents was to suggest some alternate way he might have acquired accurate information about the crime. Thus, absent the truth of the various matters for which Defendant sought to admit the documents, there was no relevance to the documents and no purpose for their admission. This is highlighted by the fact that, when the People pointed out that several matters in Masokas' letter were not supported by the evidence, Defendant agreed to redact those matters out of the letter. (R. 17793-98). Therefore, the circuit court's ruling should be affirmed.

The circuit court was also correct in its determinations of relevance. Defendant argues that Masokas' letter should have come in to bolster Masokas' testimony that, on October 27, 1992, Tessman told him about the connection between the blue mop and the damage to the back door of Engelbrecht's apartment and to impeach Tessman's testimony that he did not discuss the matter with Masokas on October 27. (Def. Br. at 95-96, 98). However, as the circuit court noted (R. 17800), the letter was written after defendant's confessions (as well as after the dates on which Masokas interviewed Defendant). Further, the letter gives no indication at all when or how Masokas acquired the information about the mop. (C. 3626-27). In particular, it says nothing about being given any information by Tessman or anyone else who questioned Defendant. (Id.). Therefore, the letter was also correctly excluded on this second ground.

Defendant asserts that the circuit court incorrectly found the newspaper articles irrelevant because there was no evidence that he or the police had read the articles. Defendant relies to Woods v. State, 696 P.2d 464, 470 (Nev. 1985), in which the Nevada Supreme Court held that a defendant should have been allowed to offer newspaper articles containing facts of the charged crime even though there was no evidence to show the defendant had read the articles. (Def. Br. at 98). However, as the circuit court found, that out-of-state case is not binding in Illinois. Notably, in the 25 years since it was decided, no published case in Nevada or any other state or federal jurisdiction has cited to Woods for either of the propositions at issue here: (1) that newspaper articles are not inadmissible hearsay when used merely to show that certain facts were published; and (2) the lack of evidence showing the defendant had read the articles was not determinative regarding their admission. *See* Woods, 696 P. 2d 464: Westlaw Citing References.

In addition, Defendant has cited no Illinois case, and the People have found none, in which evidence of newspaper articles, or any other type of fact publication, has been admitted to show notice absent evidence that the relevant party received that notice. For instance in Deerhake v. Duquoin State Fair Ass'n, Inc., 185 Ill.App.3d 374, 381 (5th Dist. 1989), in a civil suit arising out of a death during an unauthorized car race on the defendant's property, an article about a prior accident during an unauthorized car race on the same road on the defendant's property was admitted to show the defendant had notice of such unauthorized races. Similarly, in each of the cases cited in Deerhake, that deal with evidence admitted to show notice, there was at least some reason to believe that the party in question had received the notice admitted into evidence. *See* Ballweg v. City of Springfield, 114 Ill.2d

107, 114-15 (1986) (evidence of prior similar accidents to show defendant boat manufacturer had notice of dangerous conditions); Smith v. Solfest, 65 Ill.App.3d 779, 782-83 (2d Dist. 1978) (fact that police officer warned defendant driver she was driving improperly admissible to show that plaintiff passenger had notice defendant was having difficulty driving); *see also* Piser, 938 N.E.2d 652-53 (reciting that a statement offered to prove the listener had notice of the information contained therein is not hearsay, and holding that a letter sent to the plaintiff by the defendant's attorney was admissible to show the plaintiff's notice of information in the letter); Kochan v. Owens-Corning Fiberglass Corp., 242 Ill.App.3d 781, 806 (5th Dist. 1993) (writing offered to prove that the recipient had notice of the information contained therein rather than the truth of the matter asserted is admissible), overruled on other grounds, Nolan v. Weil-McLain, 233 Ill.2d 416 (2009). Thus, in Illinois, the rule allowing the admissibility of statements or documents to show notice seems to require evidence that the party in question indeed had notice. Here, there was no such evidence. Therefore, the circuit court properly found that the newspaper articles were irrelevant. And, for the same reason, the press release was also irrelevant. While the circuit court did not exclude the press release on this ground, as appellee, the People can argue for affirmance on any grounds supported by the record. People v. P.H., 145 Ill.2d 209, 220 (1991); People v. Garcia-Cordova, 392 Ill.App.3d 468, 488 (2d Dist. 2009).

Finally, any error in excluding the evidence in question was harmless. First, the circuit court did not exclude evidence of Foster's report. While the court ruled that the report itself could not be put into evidence, it instructed Defendant that he would be allowed to examine Foster about the report itself and ask other witnesses whether they had seen the

report. (R. 15548-51). Thus, Defendant was not foreclosed from exploring whether other officers knew of the facts contained in the report.

More importantly, as set forth above, there were numerous facts about the crime contained in Defendant's confessions that are not contained in any of the documents Defendant contends were improperly excluded. *See* Argument I, *Infra*. Absent allegations of a complete conspiracy between all of the many investigating officers, Defendant cannot explain how he knew, among other matters, the floor plan of the apartment, the location of the couch and television, the presence and location of a rocking chair with a seat-pad, the fact that the knife was taken from and washed off in the kitchen, the fact that the knife was broken in two before being discarded outside the apartment, and the sparse and thin nature of the victim's pubic hair. Even if Defendant had never mentioned any of the facts contained in the documents Defendant claims were improperly excluded, the jury would not have acquitted him in light of the other facts known to him and the inculpatory development of his lies, which adjusted for each fact he discovered was known by the police until, despairing of success with further denials, he voluntarily confessed.

VII

THE TRIAL COURT'S DECISION TO ALLOW DEFENDANT'S CONFESSION TO BE ADMITTED AT TRIAL IS LAW OF THIS CASE.

As noted by Defendant, the trial court's refusal to suppress his confessions is law of the case by virtue of this Court's review and affirmance of the trial court's decision. People v. Rivera, No. 2-94-0075 (1996)(unpublished order under Illinois Supreme Court Rule 23). Defendant has offered no basis for this Court to review its previous decision. No new evidence and no new legal theory is argued, nor could it have been. It appears Defendant is only raising the issue to preserve it for future review. (Def. Br. at 99). Consequently, the People urge this Court to leave its previous decision undisturbed.

CONCLUSION

For the foregoing reasons, the People urge this Court to affirm the convictions of defendant, Juan R. Rivera, Jr., and also request the assessment of statutory State's Attorneys fees pursuant to 55 ILCS 5/4-2002(a) and People v. Nicholls, 71 Ill.2d 166, 174 (1978).

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 85 pages.

Respectfully submitted,

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NO. 2-09-1060

IN THE

APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 19th Judicial Circuit,
Plaintiff-Appellee,	)	Lake County, Illinois.
	)	
-vs-	)	No. 92 CF 2751
	)	
JUAN A. RIVERA, JR.,	)	Honorable
	)	Christopher C. Starck
Defendant-Appellant.	)	Judge Presiding.

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that I have on February 28, 2011, caused to be filed in the Office of the Clerk of the Appellate Court of Illinois, Second District, six copies of appellee's brief and argument in the above entitled cause and hereby serve you with three copies of same.

For the State's Attorney

CERTIFICATE OF ATTORNEY

The undersigned, an attorney, certifies that (s)he served copies of the above-filed document on the person(s) to whom directed above by causing same to be deposited in the United States Mail in Elgin, Illinois, in a properly addressed, stamped and sealed envelope on February 28, 2011.

Jay Paul Hoffmann