STATE OF ILLINOIS)
) SS
COUNTY OF MCLEAN)

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT

THE PEOPLE OF THE STATE OF ILLINOIS)
VS.)
BARTON MCNEIL))

NO. 98 CF 633

McLEAN FILED
DEC 28 1998
CIRCUIT CLERK

NOTICE

TO: Barton McNeil, c/o McLean County Jail, 104 W. Front St., Bloomington, IL 61701
Tracy Smith, Public Defender's Office, 104 W. Front St., Bloomington, IL 61701

YOU ARE HEREBY NOTIFIED that you have been charged in the Circuit Court of McLean County in the above-entitled cause with the offense(s) of first degree murder (2 counts). The Court has ordered that you be given notice that the matter is set for **motion hearing** at **2:30 PM** on **January 7, 1999**, in Judge Prall's Courtroom on the 5th floor of the McLean County Law and Justice Center, 104 West Front Street, Bloomington, Illinois, at which time and place you must be present.

Date at Bloomington, Illinois, this 22nd day of December 1998.

Stephen M. Alley
(Assistant) State's Attorney

CERTIFICATE OF SERVICE

Tanya Murphy, being first duly sworn on oath, says that she served the foregoing Notice in the above-entitled cause by:

____ Depositing a true and correct copy of the same in the U.S. Post Office or post office box in the City of Bloomington, Illinois, enclosed in an envelope, with postage fully prepaid to same as above, plainly addressed as indicated in the above notice on,

AND/OR

__V__ Hand delivering a true and correct copy of the same on the addresses listed above on,

the ~~22nd~~ 24th day of December 1998.

Tanya Murphy

Subscribed and sworn to before me this 24 day of Dec, 1998

Virginia Bicknell
NOTARY PUBLIC

"OFFICIAL SEAL"
VIRGINIA BICKNELL
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6/8/99

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	)	
BARTON MCNEIL	)	

MEMORANDUM OF LAW CONCERNING ADMISSIBILITY OF EVIDENCE WHICH SUGGESTS GUILT OF ANOTHER

Now come THE PEOPLE OF THE STATE OF ILLINOIS, by Charles G. Reynard, through Assistant State's Attorney Stephanie M. Wong, and file this memorandum of law in support of its Motion in Limine.

FACTS:

On June 16, 1998 at 7:40 a.m. the defendant reported the victim, his 3 year old daughter Christina McNeil, to be deceased. The defendant recounts the events preceding the victim's death as follows:
On June 15, 1998 at approximately 7:00 p.m. the defendant picked up Christina from Tita McNeil, Christina's mother and the defendant's former wife, and took her to McDonalds. Defendant and Christina arrived back at defendant's one bedroom apartment at approximately 8:00 p.m. where they ate dinner. The defendant put the victim to sleep in the bedroom at approximately 10:30 p.m. At 12:00 a.m. he heard Christina singing to herself and looking at books, at which time he again told her to go to sleep. He returned to his computer until about 2:00 a.m. when he decided to go to sleep, at which time he checked on Christina and saw her sleeping. The defendant then laid down on the couch located in the living room but did not fall asleep until about 2:45 a.m. due to the severe thunder and lightening. No other persons were in the apartment with the victim and defendant. When the defendant went to sleep, he left the front door open so he could hear the thunder and lightening but locked the screen door. When he went to wake the victim up at 7:40 a.m. he found her in a deceased condition. Police officers have not found any evidence of unauthorized entry.

In a series of interviews, the defendant asserted that Misook Nowlin, his on again, off again girlfriend, was the murderer. The defendant claims that Misook Nowlin was obsessed with the defendant, resentful of defendant's relationship with Christina and the child support being paid to Christina. Defendant claims that Misook murdered Christina to be alone with defendant and he reports at length the domestic problems between himself and Misook, none of which involved Christina.

The defendant then told officers that Misook Nowlin crawled through the bedroom window during the night, strangled the victim and then left again through the window. When confronted with evidence that no one could have gained entry in that manner, defendant then asserted that Misook Nowlin came in through the front door. When reminded that the screen door was locked, defendant then asserted that some person might have come through another window in the apartment. None of the windows or the area below the windows showed any signs of disturbance and there is no evidence showing unauthorized entry into the apartment.

ADMISSIBILITY OF EVIDENCE SUGGESTING GUILT OF ANOTHER

The appellate courts and the Illinois Supreme Court have established and applied a clear standard for the admissibility of evidence suggesting guilt of another. If evidence that another person committed the crime charged against the defendant is too remote or speculative or if it fails to link a third person *closely* with the commission of the crime, the

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trial court should exclude it. Peo v. Howard, 147 Ill. 2d 103, 1991, Pe v. Bruce 185 Ill. App. 3d 356, 541 NE2d 708 (1989 5th Dist), People v. Columbo, 118 Ill. App. 3d882, 455 N.E2d733 (1st Dist. 1983). Evidence that someone else committed the crime is relevant and admissible only if and when *a close connection* can be demonstrated between the third person and the commission of the crime. People v. Maberry, 193 Ill. App 3d 250, 549 NE2d 974 (4th Dist. 1990). Evidence of motive, without more, is insufficient to require admission of the evidence. People v. Whalen , 238 Ill. App.3d 994, 605 N.E2d 604 (4th Dist. 1992).

A review of the facts of the fourth district and Illinois Supreme Court cases indicate that the defendant must be able to demonstrate the third person's connection to the crime charged. In People v. Maberry , the victim was sexually assaulted on 8/1/86 by a person wearing a mask and armed with a knife. The victim provided a physical description and further indicated that it was the defendant. The victim was acquainted with defendant from having attended school with him and working with him at the same retail store.

Defendant attempted to show that on the evening before the attack, the victim had reported her former boyfriend to authorities on a charge of burglary and requested extra police patrol after making this report. The former boyfriend was also seen in the area on the evening of 7/31/86. The trial court precluded the introduction of this evidence and on appeal defendant argued that the former boyfriend had a motive to commit the crime and was in the general area shortly before the attack. The appellate court affirmed the ruling of the trial court and held that this evidence was insufficient to establish any link between the boyfriend and the attack that occurred on 8/1/86 and therefore inadmissible.

People v. Whalen stands for the proposition that motive alone is insufficient to require admission of evidence to show that a third person may have committed the crime for which defendant is charged.

In Whalen, the defendant was charged with the murder of his father after the victim's body was found in the victim's tavern. Evidence showed that the tavern safe was found open and empty. Furthermore, the defendant had an expensive cocaine habit, had been recently ejected from the family residence and one month prior to the murder, defendant and victim had been involved in a fight. The defense sought to introduce evidence that a patron, Robert McElvany may have murdered the victim. The defense argued that McElvaney had motive as he had been asked by the decedent to leave the tavern shortly before the murder after McElvaney had a confrontation with other patrons. When detectives interviewed McElvaney shortly after the murder, they discovered that he was fully dressed which was unusual based on their prior contacts with McElvaney. Furthermore, when advised that there was a disturbance at the tavern, McElvaney replied "I wouldn't hurt Bill Whalen, Bill Whalen is my buddy. What did I do?".

The appellate court affirmed the trial court's refusal to allow this evidence, finding that motive alone was insufficient to allow the introduction of this evidence.

People v. Howard also supports the proposition that evidence of motive alone is insufficient to allow its introduction. In this case the victim was shot while he was sitting in his car. His passenger escaped injury and was able to identify the shooter in a lineup and also at trial. Prior to trial, the court granted the State's motion in limine to preclude cross examination of whether the witness had a romantic relationship with the victim. The defense argued that both victim and the witness were married to other people at the time of the offense and during the initial stages of the investigation, the police had investigated the shooting as a family related homicide. Police also questioned the witness' husband and subjected him to a lie detector test. The defense argued that the cross examination was relevant because it suggested that the witness's husband, or even the victim's wife had a motive to commit the offense charged. The Court affirmed the trial court's ruling on the ground that the information would have been completely speculative. Furthermore, the defendant's theory was groundless in that they provided no evidence linking either spouse to the murder.

The appellate court and Illinois Supreme Court has refused the admission of evidence which suggests guilt of another where the facts were much more compelling than in the case at bar. In this case, the defendant's assertions against Misook are founded entirely on speculation and unsupported by the evidence. Applying the principles set forth in

Maberry, Whalen and Howard, t[illegible]court must exclude any evidence, w[illegible] tends to suggest that Misook was involved in the murder of Christina McNeil.

Respectfully submitted,

Stephanie M. Wong

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing said envelope in a U. S. Post Office mail box in Bloomington, Ill. 61701, on the 24 day of December 1998

Tanya Murphy

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me say that I hope that we really don't have to do this in another ten years." (Emphasis added.)

For the reasons stated above, I believe that the tie-breaking procedure set forth in article IV, section 3(b), of the Illinois Constitution of 1970 violates the due process clause of the fourteenth amendment to the United States Constitution. Any redistricting plan produced as a result of the tie-breaking procedure is therefore unconstitutional and invalid.

There is no need to delay the primary election. The candidates can run in the existing legislative districts and serve until a constitutional map is adopted. This procedure was recently approved by the United States Supreme Court for elections in the State of Mississippi. *Watkins v. Mabus* (1991), — U.S. —, 112 S.Ct. 412, 116 L.Ed.2d 433.

We should not hasten to gamble away the government "of the People, by the People, and for the People" on the turn of a card, roll of the dice, or even random selection.

CLARK and FREEMAN, JJ., join in this dissent.

147 Ill.2d 103
167 Ill.Dec. 914

The PEOPLE of the State of Illinois, Appellee,

v.

Stanley HOWARD, Appellant.

No. 65473.

Supreme Court of Illinois.

Dec. 19, 1991.

Rehearing Denied March 30, 1992.

Defendant was convicted in the Circuit Court of Cook County, John J. Mannion, J., of murder and attempted armed robbery, and sentenced to death. Defendant appealed. The Supreme Court, Miller, C.J., held that: (1) corpus delicti of armed robbery was established; (2) defendant's inculpatory statements were not the products of physical coercion; (3) jury selection process was proper; (4) prosecutor did not make improper comments during opening statements in guilt-innocence phase; (5) it was appropriate for State to establish defendant's alias; (6) trial judge did not abuse his discretion in denying defendant's motion for mistrial following outburst by courtroom spectator; (7) prosecutor's comment on defendant's failure to testify was harmless; (8) trial judge did not improperly limit defense counsel's opening statement and closing argument during eligibility stage of bifurcated sentencing hearing; (9) victim impact evidence was admissible; (10) evidence of prior break-in was admissible at sentencing hearing; (11) prosecutor's closing argument did not mislead jury regarding its function in sentencing hearing; and (12) death sentence was not excessive.

Affirmed.

Freeman, J., filed specially concurring opinion.

1. Criminal Law ⇐412(6)

Proof of corpus delicti must rest on evidence apart from defendant's own statements that tends to show commission of the offense and that corroborates facts related in the statement.

2. Criminal Law ⇐535(2)

Eyewitness' testimony and physical evidence sufficiently corroborated defendant's declarations in his oral and signed confessions that he intended to commit armed robbery and that he was attempting to do so when he shot victim, and defendant's statements and the independent evidence established corpus delicti of armed robbery.

3. Criminal Law ⇐412(6)

Evidence corroborating statement of accused need not independently establish offense beyond reasonable doubt; rather, it

is sufficient if corroborating evidence tends to show commission of the offense.

4. Criminal Law ⇐414

Evidence did not establish that defendant was injured while in police custody or that his inculpatory statements were the products of physical coercion; rather, evidence supported inference that defendant sustained leg and chest injuries while he was attempting to elude arresting officers.

5. Jury ⇐131(13)

Trial judge did not abuse his discretion in denying defendant's request that each prospective juror be examined separately, apart from remainder of venire.

6. Jury ⇐131(10)

Trial judge did not abuse his discretion in declining to permit attorneys to question prospective jurors themselves. S.H.A. ch. 110A, ¶¶ 234, 431.

7. Jury ⇐131(8)

Trial judge did not abuse his discretion in refusing defense request that prospective jurors be questioned about their attitudes toward handguns.

8. Jury ⇐33(2.1)

Court was not required to inquire into prosecutor's decision to peremptorily challenge prospective jurors who expressed disapproval of death penalty but were not excludable for cause.

9. Criminal Law ⇐730(2)

Prosecutor's improper comment in opening statement in guilt/innocence stage, describing State's witnesses as "[c]ommon day people who have the courage to come in here and tell you what they heard and saw" did not require reversal, where trial judge properly sustained defendant's objection.

10. Criminal Law ⇐703

Prosecutor's comment in opening statement was merely a neutral reference to fact that prosecution of case had been commenced by indictment, and did not suggest that return of indictment constituted evidence of guilt.

11. Criminal Law ⇐339.5

It is proper to show that accused is same person as that named in an indictment.

12. Criminal Law ⇐345

It was appropriate for State to establish defendant's alias, where indictment identified defendant by both his actual name and his alias.

13. Criminal Law ⇐632(4)

Trial judge properly granted State's motion in limine and refused to permit defendant to cross-examine prosecution witness on subject of her marriage and nature of her relationship with victim, on ground that defendant's theory that witness' husband or victim's wife may have been involved in the murder, was speculative.

14. Criminal Law ⇐659

Trial judge did not abuse his discretion in denying defendant's motion for mistrial following outburst by courtroom spectator; outburst was an isolated incident occurring in course of lengthy trial and there was no indication that the jury would not have been able to heed trial judge's admonition and erase incident from their minds during their deliberations.

15. Criminal Law ⇐721(5)

Prosecution may remark on uncontradicted character of evidence of defendant's guilt, and not every such reference must necessarily be construed as impermissible comment on accused's failure to testify. U.S.C.A. Const.Amend. 5.

16. Criminal Law ⇐721(3)

In determining whether improper comment has been made on defendant's assertion of his right not to testify in his own behalf, court will consider whether reference was intended or calculated to direct attention of jury to defendant's neglect to avail himself of his legal right to testify; in making that determination, reviewing court will examine challenged comment in context of entire proceeding. U.S.C.A. Const. Amend. 5.

17. Criminal Law ⇐721(5)

Prosecutor's reference to absence of anything "from the witness stand" to contradict statements appearing in defendant's confessions was an impermissible comment on defendant's failure to testify. U.S.C.A. Const.Amend. 5.

18. Criminal Law ⇐919(4)

Although comment on defendant's failure to testify is constitutional error, error does not inevitably require that defendant be granted new trial. U.S.C.A. Const. Amend. 5.

19. Criminal Law ⇐1162

Notwithstanding occurrence of constitutional error at trial, criminal conviction may be affirmed if reviewing court is able to conclude, upon examination of entire record, that error was harmless beyond reasonable doubt.

20. Criminal Law ⇐730(10)

Trial court's error in failing to sustain defense objection to prosecutor's comment on defendant's failure to testify was harmless, in view of overwhelming evidence of defendant's guilt and jury instruction that closing arguments were not evidence. U.S.C.A. Const.Amend. 5.

21. Criminal Law ⇐726

Prosecutor's remark that defense counsel was attempting to "throw a little mud on" prosecution witness was a proper response to and was invited by defense counsel's comments in summation suggesting that witness had a relationship with victim.

22. Criminal Law ⇐717

Prosecutor's closing argument that defendant, in arming himself, in locating intended victims, and in approaching their car and engaging driver in conversation, had taken substantial step toward committing armed robbery, correctly stated the law. S.H.A. ch. 38, ¶ 8–4(a).

23. Criminal Law ⇐1037.1(2)

Any error in prosecutor's closing argument regarding law of attempt was not plain error, where jury received standard instruction concerning role and purpose of opening statements and closing arguments and was properly instructed on law of attempt. S.H.A. ch. 38, ¶ 8–4(a).

24. Criminal Law ⇐730(1)

Trial court's initial restrictions on defense counsel's argument that jury could consider any lingering doubts concerning guilt for underlying offense in determining whether murder defendant should be sentenced to death did not prejudice defendant, where trial judge permitted defense counsel to thoroughly explore the same issue in her closing argument during first stage of sentencing hearing.

25. Criminal Law ⇐726

Prosecutor's comment, in response to defense counsel's opening statement in capital sentencing hearing, stating that "she is trying to re-open and pry into your minds from yesterday. That's improper" was invited by defense counsel's preceding argument stressing to jury counsel's contention that there remained residual doubt of defendant's guilt for attempted armed robbery on which defendant's eligibility for death penalty was dependent; even assuming that capital defendant could make such an argument, prosecutor's comment did not interfere with exercise of that right.

26. Criminal Law ⇐1042, 1063(1)

Supreme Court would decline to consider whether trial judge abused his discretion in failing to grant jury's request, during deliberations at eligibility stage of capital sentencing hearing, for copy of defendant's formal confession, where defense counsel made no contemporaneous objection to trial judge's handling of the request and did not raise issue in posttrial motion, suggesting that counsel was satisfied with way in which inquiry was handled.

27. Criminal Law ⇐1208.1(4)

Capital sentencing determination requires, as a constitutional matter, an individualized consideration of offense and offender.

28. Criminal Law ⇐1208.1(6)

Victim impact evidence is relevant to consideration of appropriate punishment for capital defendant, and there is no state

prohibition against admission of such evidence at capital sentencing hearing.

29. Criminal Law ⇐1208.1(6)

To be admissible at capital sentencing hearing, evidence must be relevant and reliable.

30. Homicide ⇐358(1)

Although charges against murder defendant arising out of residential break-in committed by unknown, masked intruder were dismissed because residents were unable to identify defendant as intruder, inference that defendant committed the break-in was supported by sufficient evidence to allow admission of evidence of the break-in at capital sentencing hearing.

31. Homicide ⇐358(1)

Officer's testimony that he arrested murder defendant after defendant threw away envelope containing small quantity of marijuana was admissible at capital sentencing hearing; report of marijuana selling was offered merely to show why officer went to particular location at that time, and jurors were informed that defendant was charged with and convicted of misdemeanor possession offense in connection with the incident.

32. Criminal Law ⇐722½

Prosecutor's remark in closing argument at second stage of capital sentencing hearing, which allegedly suggested that murder defendant's prior conviction was for selling, rather than possession of, marijuana did not have any effect on jury's deliberations, since comment was so fleeting and competent evidence so aggravating.

33. Homicide ⇐343

Testimony of outstanding warrant for defendant's arrest on charge of obstructing a police officer was not so prejudicial that murder defendant was denied fair capital sentencing hearing, in view of minor nature of the charge and gravity of offenses properly introduced into evidence in aggravation.

34. Homicide ⇐358(1)

Witness' opinion that murder defendant should not be sentenced to death is not admissible at capital sentencing hearing.

35. Criminal Law ⇐723(1)

Prosecutor's scattered references in closing argument at conclusion of second stage of capital sentencing hearing to the sentencing determination as a "recommendation" did not mislead jurors regarding their roles, where trial judge did not endorse prosecutor's misstatements, but rather fully and accurately instructed jurors on their role. S.H.A. ch. 38, ¶ 9–1(g).

36. Criminal Law ⇐723(1)

Prosecutor's comments did not mislead jury on proper role of mercy in capital sentencing proceeding; rather, jurors would have properly understood prosecutor's argument as a reminder that they were to make their sentencing determination on basis of evidence presented at the hearing, not on extraneous considerations divorced from that evidence.

37. Criminal Law ⇐723(1)

Prosecutor's rhetorical question during rebuttal argument in capital sentencing hearing asking "Is this a crime, a series of crimes that were done out of passion, jealously, revenge?" would have been interpreted by jury as comment on absence of any extenuating circumstances surrounding commission of the murder and did not mislead jury concerning applicability of death penalty in homicide cases.

38. Criminal Law ⇐720(5), 1171.3

Prosecutor's comment concerning testimony of defense witness who provided favorable testimony with respect to defendant's conduct while incarcerated was not improper, but if any error occurred, it was harmless, in light of fleeting nature of comment and strength of prosecution's evidence in aggravation.

39. Criminal Law ⇐726

Prosecutor's comment that murder defendant might be later released on parole if he was not sentenced to death was invited by defense counsel's erroneous argument in summation that defendant, if not sentenced to death, could not later be released

from prison except through executive clemency.

40. Criminal Law ⇐723(1), 726

Trial judge did not abuse his discretion in overruling defense objections to prosecutor's rebuttal argument in capital sentencing hearing that jurors should equate their imposition of death penalty with military service in World War II or Vietnam and that they must similarly protect society, that jury should not forgive defendant for what he had done to victims of his offenses, that jury was to impose death penalty for sake of community at large, and that failure to do so would mean that society did not care about victims; comments were mainly in response to, and invited by, defense counsel's own comments in summation.

41. Criminal Law ⇐1037.1(2)

Prosecutor's observation in capital sentencing hearing that jury instructions would not contain particular phrase favored by defense counsel did not suggest that jurors should disregard defense evidence and did not rise to level of plain error.

42. Homicide ⇐311

Murder defendant's requested instruction that defendant might be sentenced to term of natural life imprisonment if he was not sentenced to death was potentially misleading, and was properly refused, because it highlighted one sentencing alternative without mentioning any of the other dispositions possible. S.H.A. ch. 38, ¶ 1005–8–1(a)(1).

43. Homicide ⇐357(7)

Death sentence for cold-blooded murder of victim in aborted attempt at armed robbery was not excessive, particularly in view of defendant's extensive history of violent criminal activity and absence of evidence in mitigation. S.H.A. ch. 38, ¶ 9–1(b), par. 6.

44. Homicide ⇐351

Death penalty statute does not unconstitutionally cast on defendant the burden of establishing that sentence other than death should be imposed in his case, nor is statute invalid for failing to require [illegible] to carry burden of persuasion at second stage of sentencing hearing. S.H.A. ch. [illegible] ¶ 9–1.

45. Homicide ⇐351

Death penalty statute is not invalid for failing to require sentencing authority to make separate, additional finding that death is appropriate penalty. S.H.A. ch. 38, ¶ 9–1.

Randolph N. Stone, Public Defender, Chicago, (Kyle Wesendorf and Rita A. Fry, of counsel), Chicago, for appellant.

Neil F. Hartigan, Atty. Gen., Springfield, Cecil A. Partee, State's Atty., Chicago, (Terence M. Madsen, Asst. Atty. Gen., Chicago, and Renee Goldfarb and James S. Veldman, Asst. State's Attys. of counsel), for the people.

Chief Justice MILLER delivered the opinion of the court:

Following a jury trial in the circuit court of Cook County, the defendant, Stanley Howard, was convicted of murder and attempted armed robbery. At a separate sentencing hearing, the same jury found the defendant eligible for the death penalty on the ground that the murder was committed in the course of an attempted armed robbery, a statutory aggravating circumstance (Ill.Rev.Stat.1983, ch. 38, par. 9–1(b)(6)). The jury concluded that there were no mitigating circumstances sufficient to preclude imposition of the death penalty, and the trial judge therefore sentenced the defendant to death. The judge also sentenced the defendant to 15 years' imprisonment on the attempted armed robbery conviction. The defendant's death sentence has been stayed pending direct review by this court. (Ill. Const.1970, art. VI, § 4(b); 134 Ill.2d Rules 603, 609(a).) For the reasons set out below, we affirm the judgment of the circuit court.

The facts surrounding the defendant's commission of the present offenses may be stated briefly. Around 4 a.m. on May 20, 1984, Oliver Ridgell was shot as he sat in a car parked on 92nd Street between Loomis

and Ada Streets, in Chicago. Ridgell died several hours later as a result of the gunshot wound. A passenger in the car, Tecora Mullen, was unharmed, and she testified in behalf of the prosecution at the defendant's trial. Mullen, who had known Ridgell for about 15 years, lived around the corner from where Ridgell parked. Mullen testified that it was raining lightly at the time of the shooting but that the windows on the driver's side of the car were unobscured. Mullen said that while she and Ridgell were sitting in the car talking, she saw a man approach the car from the opposite side of the street. At a police lineup conducted in November 1984, and later, at the defendant's trial in April 1987, Mullen identified the defendant as the offender.

According to Mullen, the defendant came up to the driver's side of the car and knocked on the driver's window. In response, Ridgell lowered the left rear window several inches, using the electric window opener. According to Mullen, the defendant then "asked for a light, or a match," to which Ridgell responded, "No, man, go ahead." The defendant stepped back five or six feet from the car, stamped his foot, and said, "All right, then, godammit." The defendant drew a gun from his jacket pocket, pointed the weapon at Ridgell, and fired. According to the autoptic and forensic evidence introduced at trial, the bullet shattered the left rear window of the car and struck Ridgell in the back.

Mullen dropped to the floor of the car after the shot was fired, and she was therefore unable to see in what direction the defendant fled following the incident. Mullen briefly left the car to summon help but, fearing that the gunman might still be in the vicinity, she quickly returned to the vehicle. With Ridgell still sitting in the driver's seat, Mullen then drove several blocks until she was able to stop a passing police car. Mullen reported the shooting to the officer, and paramedics were called to the scene. Ridgell died around 7:30 that morning. Mullen was later questioned by the police, and she provided officers with a description of the gunman.

A nearby resident also testified as an occurrence witness. Marilyn McDuffy lived in the building in front of which Ridgell had parked the car. McDuffy testified that she heard a commotion in the street around 4 a.m. on May 20, 1984. She then looked out a window and saw a woman running around a car shouting that someone had been shot. McDuffy did not witness the shooting and did not see anyone else in the street, but she believed she heard someone leave the scene on foot.

Investigating officers subsequently found a shell casing from a 9–millimeter semiautomatic pistol at the scene of the shooting. The murder weapon was never recovered. The defendant remained at large until November 1, 1984, when he was arrested by Chicago police officers on an unrelated warrant. Following the arrest, investigating officers discovered that the defendant matched the description provided by Tecora Mullen; in a lineup conducted on November 2, Mullen identified the defendant as the person who had shot and killed Ridgell. The defendant was questioned about the present offenses on November 3. After waiving his *Miranda* rights, the defendant initially denied having any information about the Ridgell murder. When the defendant learned that he had been identified as the gunman, he admitted his responsibility for the shooting. The defendant told officers that he had been walking around with a gun "looking for someone to rob." After providing an oral confession to the crimes, the defendant directed several police officers to the crime scene and reenacted his commission of the offenses.

The defendant later agreed to make a formal statement in the presence of a court stenographer, and the statement was introduced into evidence at trial. In the statement, the defendant said that he was at his girlfriend's house during the evening of May 19, 1984, until 11 o'clock. At that time the defendant went to the house of a friend, Byron, to "pick up a gun." Asked why he needed a gun, the defendant explained, "So I could try to get me some money." The defendant said that he left Byron's house around midnight and "wandered around for a little while * * * [t]ry-

ing to find me a victim to stick up." Around 4:30 or 5 o'clock that morning the defendant saw two people sitting in a parked car near 92nd and Loomis Streets. The defendant walked up to the car and asked the driver for a cigarette; the driver replied that he did not have any. The defendant then said that he had his own cigarettes and asked the driver for a light. As the defendant reached into his pocket, he saw the driver reaching into his own pocket "like he was going for a gun." The defendant said that he backed away from the car, fired two or three shots at the driver, and then ran to his girlfriend's house, located one-half block away. The defendant said that he later returned the borrowed gun to his friend. In the statement, the defendant replied affirmatively to the assistant State's Attorney's question whether he intended to rob the occupants of the car when he approached the car.

Defense counsel presented evidence contradicting several facts related in the defendant's oral and signed statements. The defendant's girlfriend, Terry Jones, testified that she was living in a distant part of the city at the time of the offenses. Jones also stated that her mother, with whom she resided, did not permit the defendant to stay overnight. Byron Hopkins, the person identified in the defendant's statements as the source of the murder weapon, failed to respond to a defense subpoena to testify. His testimony was therefore introduced into evidence by way of stipulation. According to the stipulation, Hopkins, if called to testify, would have denied that he supplied the defendant with a weapon and would have stated that he did not own a 9–millimeter gun of the type used by the defendant.

Following the close of evidence, the jury found the defendant guilty of murder and of attempted armed robbery, and judgment was entered on the verdicts. A separate sentencing hearing was then conducted before the same jury to determine whether the defendant would receive the death penalty for the murder conviction. In the first stage of the sentencing hearing, the prosecution presented evidence that the defendant, born in November 1962, was 21 years old at the time of his commission of the murder charged here and thus was of death-eligible age (see Ill.Rev.Stat.1983, ch. 38, par. 9–1(b)). The prosecution also introduced into evidence the verdict forms reflecting the defendant's convictions for murder and attempted armed robbery. Following deliberations, the jury found the defendant eligible for the death penalty on the basis of his commission of murder during the course of attempted armed robbery (see Ill.Rev.Stat.1983, ch. 38, par. 9–1(b)(6)), the sole statutory aggravating circumstance alleged by the prosecution in the present case.

During the second stage of the sentencing hearing, the State presented detailed evidence of the defendant's extensive criminal history, comprising nearly a dozen separate occurrences. For the most part, this information was introduced through the testimony of the victims of the defendant's prior offenses. The evidence is summarized below in chronological order.

On March 9, 1981, the defendant was convicted of theft and was sentenced to serve two days in jail and one year's conditional discharge. According to the certified copy of conviction for the offense, that charge was brought against Don Sanders, also known as Stanley Howard.

During the evening of March 13, 1983, the defendant accosted a woman and her young son outside their home. Armed with a pistol, the defendant forced the woman and the child into their car and then drove off. As they were driving, the defendant demanded the woman's jewelry and threatened to rape her. The woman directed the defendant to her mother's house, where she said she could obtain some money. The woman's mother refused to let them inside but did give her daughter $20. The defendant then drove the woman and her child back to their apartment. The defendant ransacked the premises, looking for valuables. He eventually left with the woman's car, which was recovered several days later.

Also during the night of March 13–14, 1983, the defendant, while armed with a

pistol, entered a vehicle in a restaurant parking lot and demanded money from the two occupants, off-duty police officers. The defendant threatened to rape the woman in the back seat of the vehicle. The woman was able to kick the defendant as he was exiting the vehicle, and the defendant then fled. The male officer and the defendant exchanged gunfire. The officers identified the defendant as their assailant in a lineup conducted on November 2, 1984, and the defendant was later convicted of the armed robbery of the two officers.

On May 27, 1983, the defendant accosted a female deputy sheriff as she was getting into her car to drive to work. The defendant put a gun to the woman's side, pushed the woman into the car, and drove off. The defendant eventually drove the deputy to the home shared by the deputy's 45-year-old sister-in-law and the sister-in-law's 53-year-old male cousin. There, the defendant ransacked the premises, tied up the cousin, raped the deputy, forced the deputy to perform oral sex on him, and then forced the deputy and her sister-in-law to perform oral sex on the cousin. Afterwards, the defendant took money and jewelry from the house and forced the two women into the car. The sister-in-law managed to escape from the vehicle. The defendant drove the deputy to another location, where he raped her again and then released her. The deputy identified the defendant as the assailant in a lineup conducted on November 2, 1984. The defendant was later convicted of the aggravated kidnapping, kidnapping, armed robbery, rape, and deviate sexual assault of the deputy, of home invasion, and of the deviate sexual assault of the deputy's sister-in-law.

On May 29, 1983, a police officer found the defendant in possession of a small quantity of marijuana. The defendant was later charged with and convicted of a misdemeanor for that offense, and he was fined a small amount and was sentenced to serve two days in jail.

Over the defendant's objection, the State also presented evidence of a break-in at a private residence in Chicago on June 20, 1983. On that occasion, an intruder wearing a ski mask entered a house sometime after midnight, confronted the female occupant, and threatened to kill her if she screamed. The intruder held something metallic to the woman's neck. The intruder then removed several pieces of jewelry from around the woman's neck. The intruder fled when the woman's husband returned home. The defendant was found five days later in possession of certain items of jewelry taken during the break-in. The defendant was initially charged with the offense, but the charges were dismissed when the victims were unable to identify the defendant as the intruder.

On October 28, 1983, the defendant stole a car from a woman in a parking lot. Around 9:30 that evening the owner was standing next to her car when the defendant ran up, pushed the woman aside, jumped into the vehicle, and drove off. The car was recovered several hours later, and the defendant was taken into custody at that time. The defendant was charged with robbery and was later released on bond. The case had not come to trial by the time of the present sentencing hearing.

In December 1983, the defendant stole a purse from a woman standing outside her home. The purse contained $700 the woman had won that night while bowling. The defendant was later charged with felony theft; the case had not come to trial by the time of the present sentencing hearing.

The prosecution also introduced evidence of offenses committed by the defendant at a home in Blue Island on June 21, 1984. The defendant entered the home around 11:30 that night, surprising the two occupants, a man in his sixties and a woman who was about seven years younger. The defendant tied the man's hands and covered him with an afghan. The defendant then sexually assaulted the woman. The defendant took about $800 in cash from the man and drove off in the man's car. Viewing a photographic array several weeks later, the two victims identified the defendant as the assailant. The victims identified the defendant once again in a lineup conducted on November 2, 1984.

reasons having nothing to do with any real procedural protections afforded to defendants in criminal cases. We also note that because the prosecutor in this case failed to seek the forfeiture of defendant's $5,000 cash bond, he thereby ignored a sum that could have been obtained to help reduce the burden on the taxpayers of Logan County of supporting the local criminal justice system. In order to obtain defendant's cash bond, the prosecutor would of necessity have complied with section 32–10 of the Code—which requires such a forfeiture as a necessary condition in order to bring a bond jumping charge—thereby avoiding any procedural problems in prosecuting defendant for jumping bond once he was apprehended.

III. CONCLUSION

For the reasons stated, we reverse the judgment of the circuit court.

Reversed.

KNECHT and GREEN, JJ., concur.

238 Ill.App.3d 994
178 Ill.Dec. 810

The PEOPLE of the State of Illinois, Plaintiff–Appellee,

v.

Donald J. WHALEN, Defendant–Appellant.

No. 4–91–0974.

Appellate Court of Illinois, Fourth District.

Dec. 10, 1992.

Defendant was convicted in the Circuit Court, McLean County, Wayne C. Townley, Jr., J., of two counts of first-degree murder. Defendant appealed. The Appellate Court, Lund, J., held that: (1) defendant waived issue that preclusion of witness testimony as discovery sanction violated his right to present witness; (2) evidence of [illegible] purchase and use of cocaine was admissible; and (3) evidence which defendant claimed tended to show that another committed crime was inadmissible.

Affirmed.

Knecht, J., concurred in part and dissented in part, with opinion.

1. Criminal Law ⇐627.8(6)

Correct sanction to be applied for violation of discovery rule is left to trial court's discretion, and judgment of trial judge is given great weight, and this rule is balanced against principle that few rights are more fundamental than that of accused to present witnesses in his own behalf.

2. Criminal Law ⇐627.8(6)

Exclusion of evidence as sanction for discovery violation is drastic measure, applicable to flagrant violations where uncooperative party demonstrates deliberate, contumacious or unwarranted disregard of court's authority.

3. Criminal Law ⇐629.5(2)

Factors to consider before witness preclusion sanction is employed to enforce discovery rules are effectiveness of lesser sanctions, materiality of testimony to outcome of case, prejudice to other party caused by testimony, and evidence of bad faith in violation of discovery rules.

4. Criminal Law ⇐1035(2)

Defendant's refusal of offer to continue trial to later date when defendant made late disclosure of his expert fingerprint witness eight days before trial and stated that it would need more than eight days to prepare for witness effectively waived for purposes of review issue that preclusion of testimony was too harsh a sanction.

5. Criminal Law ⇐609

Trial court was not required to admonish defendant that if he decided to proceed to trial and refused continuance which would allow state to prepare for witness whom defendant did not disclose until eight days before trial, he would waive right

complain that trial court's preclusion of witness' testimony violated his right to present witnesses.

6. Criminal Law ⇐371(4, 12)
Homicide ⇐166(10)

Testimony that defendant purchased cocaine shortly after his father's murder was admissible to show motive and intent; victim was murdered at his tavern and money was missing from safe, state was attempting to show that defendant needed money to satisfy his cocaine habit and that since he had worked part-time in family-owned tavern, he would know that large sum of money would be on hand and that defendant had closer relationship with mother and it would be easier for him to get money from her with father out of way.

7. Criminal Law ⇐369.2(1)

Evidence of other crimes is admissible if it is relevant for any purpose other than to show defendant's propensity to commit criminal offense.

8. Homicide ⇐166(1)

Generally, while any evidence which tends to show that accused had motive for committing murder is relevant, to be competent, it must, at least to slight degree, tend to establish existence of motive relied on.

9. Criminal Law ⇐371(12)

In some circumstances it is possible for state to offer evidence tending to establish defendant's motivation even though it involves potential of disclosing defendant's prior immoral or improper conduct.

10. Homicide ⇐162

Testimony of detective and patron of tavern whose owner was murdered was far too uncertain to establish that patron may have committed the murder and was inadmissible; only evidence linking patron to crime scene was fact that one of a number of empty beer cans found at scene was same brand that patron drank and there was no evidence that patron had ever touched that can nor was there evidence of animosity between patron and victim.

11. Criminal Law ⇐359

Defendant may prove any fact or circumstance tending to show that crime was committed by person other than himself, but that right is not without limitations.

12. Criminal Law ⇐338(1)

Trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or if it is speculative in nature.

13. Criminal Law ⇐338(1), 382, 1153(1)

Trial judge has wide scope of discretion in ruling on issues of relevancy and materiality and its ruling should not be reversed absent clear showing of abuse of that discretion.

George F. Taseff, Bloomington, for defendant-appellant.

Charles G. Reynard, State's Atty., Bloomington, Norbert J. Goetten, Director, State's Attys. Appellate Prosecutor, Springfield, Robert J. Biderman, Deputy Director, David E. Mannchen, Staff Atty., for plaintiff-appellee.

Justice LUND delivered the opinion of the court:

Following a jury trial in the circuit court of McLean County, defendant Donald J. Whalen was convicted of two counts of first degree murder, in violation of section 9–1(a)(1) of the Criminal Code of 1961 (Code) (Ill.Rev.Stat.1991, ch. 38, par. 9–1(a)(1)), and sentenced to a term of 60 years' imprisonment.

On appeal, defendant contends it was reversible error to (1) exclude his expert witness because of late disclosure; (2) admit evidence of his purchase and use of cocaine; and (3) exclude evidence tending to show that another committed the crime. We disagree and affirm.

On the morning of April 6, 1991, the body of William Whalen was discovered at the Twenty Grand Tap in Bloomington, Illinois. Police arrested his son, defendant Donald Whalen, and charged him with two counts of first degree murder. The decedent had been struck 39 times with blunt

instruments and stabbed over 30 times with several sharp instruments. In its initial discovery response, the State disclosed evidence of an alleged match between a bloody latent palm print found on a broken pool cue and inked palm prints of defendant.

Defendant filed his discovery response on September 30, 1991, and provided notice of an intended alibi defense. No mention was made of an intent to seek an expert witness. Defendant then filed a supplementary discovery response on October 21, 1991, that listed 24 additional witnesses, but made no mention of seeking an expert witness.

On November 4, 1991, eight days before trial, defense counsel filed another supplemental discovery response disclosing his intent to call an expert witness, Dr. Zeldes. Zeldes' resumé was attached to the discovery response, but there was no indication of the nature or content of his proposed testimony. The State telephoned Zeldes the same day and learned that he was not certain what he would be asked to testify about, although he did indicate that one area of his expertise is in fingerprint analysis.

The next day, November 5, 1991, a hearing was held on the State's motion to strike the supplemental discovery and bar the testimony of Zeldes. The State argued that as recently as October 28, 1991, defense counsel advised them that the only evidence he had was his alibi evidence and character witnesses. No mention was made of finding an expert witness in fingerprint analysis. The State's trial strategy focused on its expert testimony versus defendant's alibi. This last-minute revelation of expert testimony supporting defendant's position represented a major change in the trial strategy which the State claimed would require more than a single week for adequate preparation. The State argued that the situation was further aggravated by the fact that it was given no information regarding Zeldes' findings.

Defense counsel contends the delay in hiring Dr. Zeldes was caused by lack of funds. The funds allegedly became available approximately 10 days before the November 5, 1991, hearing. The prints were faxed to Zeldes approximately seven days prior to the hearing, and defense counsel was unable to speak to Zeldes personally because defense counsel was involved with a family matter regarding surgery on his father.

The State questions the credibility of defense counsel's argument on lack of funds. It questions why defendant never filed a motion for the appointment of an expert alleging an inability to pay. Defense counsel offered to set up a phone conference between Zeldes and the assistant State's Attorney on the following day. The trial court found this solution to be insufficient, claiming defense counsel had had plenty of time to get the job done. The trial court granted the State's motion to bar the expert's testimony.

On November 6, 1991, defense counsel filed a motion to reconsider the court's ruling barring Dr. Zeldes' testimony. Attached to the motion was a letter from defense counsel's private investigator, who had spoken with Zeldes on the telephone and summarized the proposed testimony. At a hearing held the following day, defense counsel stated that he was prepared to have Zeldes issue a report and have it faxed to the court immediately. He argued that there was no undue delay on the part of the defense from the point in time when the witness first became available to him and when he formed the intent to call him as a witness.

Defense counsel argued that Zeldes' testimony would cast doubt upon the only physical evidence linking defendant to the crime and to exclude this testimony would deprive him of a fair trial. The State argued that it was now three days since the name of the expert had been disclosed and it still did not have any type of report indicating the basis for the expert's determination. Before a decision could be made to reconsider, the State argued that defendant should produce Dr. Zeldes, in person, along with whatever he used to make the comparison.

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The trial court noted that defense counsel had not brought to the court's attention any problems concerning disclosure of expert witnesses, and that a firm trial date had been set for over 60 days. Before issuing its ruling on the motion to reconsider, the court engaged in the following dialogue with defense counsel:

"[THE COURT:] I can only think of one possible mitigation in this matter and that is if you want a continuance is the only possible situation we can run into.

[Defense counsel]: Could—If we did move for a continuance would we still be able to try it this calendar?

THE COURT: No way it can be tried this calendar with a continuance.

[Defense counsel]: When would the next available trial—

THE COURT: January.

[Defense counsel]: May I have a moment to discuss it with my client?

[Defendant]: Don't need a moment.

[Defense counsel]: My client indicates, Your Honor, that he does not desire a continuance.

THE COURT: Well, that's entirely up to you. I would afford a continuance potentially you see—

[Defense counsel]: I understand.

THE COURT: Seems to me that's the only way we can cure the problem we have, and even that imposes considerable difficulty on the State because they have at least an out-of-state witness that's been subpoenaed. They have a witness out of the penitentiary, don't you, that's been [']writted out[']?

[Prosecution]: Yes.

THE COURT: And we have, you know, we've set aside the time for this.

[Defense counsel]: Could we have—Could we have one more minute?

* * * * * *

[Defense counsel]: My client wishes to proceed to trial on the 12th, Your Honor."

Motion to reconsider was denied, and the action proceeded to trial on November 12, 1991.

[1, 2] The correct sanction to be applied for violation of a discovery rule is left to the trial court's discretion, and the judgment of the trial judge is given great weight. (*People v. Morgan* (1986), 112 Ill.2d 111, 135, 97 Ill.Dec. 430, 439, 492 N.E.2d 1303, 1312.) This rule is balanced against the principle that few rights are more fundamental than that of an accused to present witnesses in his own defense. (*Taylor v. Illinois* (1988), 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798.) The exclusion of evidence is a drastic measure, applicable to flagrant violations where the uncooperative party demonstrates a " 'deliberate contumacious or unwarranted disregard' " of the court's authority. *People v. Rayford* (1976), 43 Ill.App.3d 283, 286, 1 Ill.Dec. 941, 944, 356 N.E.2d 1274, 1277, quoting *Schwartz v. Moats* (1971), 3 Ill.App.3d 596, 599, 277 N.E.2d 529, 531.

Even so, the Supreme Court rejected the argument that preclusion of evidence is *never* a permissible sanction for a discovery violation:

"[I]t is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case. It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests." *Taylor*, 484 U.S. at 414, 108 S.Ct. at 656, 98 L.Ed.2d at 814.

[3] The principal reason for notice rules is prevention of surprise to the opposing party, not punishment of the proponent of the evidence for mere technical errors or omissions. Other factors considered before a witness preclusion sanction is employed to enforce discovery rules are effectiveness of less severe sanctions, materiality of the testimony to the outcome of the case, prejudice to the other party caused by the testimony, and evidence of bad faith in the violation of the discovery rules. *United States ex rel. Enoch v. Hartigan* (7th Cir.1985), 768 F.2d 161.

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[4] Defendant contends that the preclusion of relevant defense testimony is too harsh a sanction where there is no evidence that defense counsel willfully violated discovery rules in order to obtain a tactical advantage. The State counters that there is more than sufficient evidence of willful behavior designed to obtain a tactical advantage. Furthermore, the State argues that eight days would be insufficient time to investigate Zeldes' background, potential bias, and qualifications while simultaneously reworking their entire trial strategy. We need not address these arguments, since we find that defendant's refusal of an offer to continue the trial to a later date effectively waived this issue for purposes of review.

The Supreme Court in *Taylor* acknowledged that a sanction less drastic than evidence preclusion is always available. "Prejudice to the prosecution could be minimized by granting a continuance or a mistrial to provide time for further investigation * * *." (*Taylor*, 484 U.S. at 413, 108 S.Ct. at 655, 98 L.Ed.2d at 813.) The trial court offered a continuance of approximately two months and, after consulting with defendant, the offer was refused. Defendant cannot be permitted to complain of an alleged error which was invited by his behavior and preserved through his rejection of the only reasonable solution. See *People v. Moore* (1988), 178 Ill.App.3d 531, 127 Ill.Dec. 591, 533 N.E.2d 463.

Defendant argues the court gave no assurance that the expert would be allowed to testify, even if the continuance was requested. Furthermore, he argues that the court gave no assurance that the continuance would be granted if it was requested. Appellate counsel is ignoring the clear interpretation of the evidence as shown by the transcript quoted above. No other reasonable interpretation can be given to this discussion but that defendant was offered the use of Dr. Zeldes' testimony in exchange for a continuance. The fact that the continuance would delay the trial until January did not prevent waiver. Defendant's claim that the trial court might have refused to grant the continuance, after suggesting that counsel should request one, is unconvincing.

[5] Alternatively, defendant argues that he was never admonished that his decision to proceed to trial on the scheduled date effectively waived his right to present a witness in his defense. Consistent with waivers in other sixth amendment contexts, defendant contends that the court is required to determine whether defendant knowingly, intentionally, and voluntarily relinquished his constitutional right to compulsory process and to present witnesses in his defense. In support, defendant cites *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562, and *Patterson v. Illinois* (1988), 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261. Both cases involve waiver of the sixth amendment right to counsel. We find no support in these cases for defendant's argument.

[6] Next, defendant claims the court committed reversible error in allowing the State to present testimony that defendant purchased cocaine in Chicago shortly after the death of his father. At trial, William Craig Elliott testified that defendant was involved in a $3,000 purchase of cocaine on April 9 and 10, 1991, three days after his father's death. The State maintains that evidence of the cocaine purchase tended to establish a motive for the murder. Defendant claims there was insufficient evidence to establish the cocaine purchase as motive and that proof of defendant's need for money could have been established without reference to the actual cocaine purchase. Accordingly, the evidence is claimed to have been grossly prejudicial and should have been excluded.

The State theorized that defendant had a poor relationship with his father and killed him, in part, to support his cocaine habit. The State presented evidence that defendant had a $100-per-day cocaine habit. One month prior to the murder, defendant became involved in a fight with his father at the tavern. His father had also kicked him out of the family residence. A police investigator testified that defendant told him that he owed his father $350 and was trying to avoid seeing him. This conflicts

with defendant's testimony that he worked at his father's tavern the night before his murder and was also scheduled to work the following day. Evidence also established that defendant was an unemployed laborer who tended bar on a part-time basis. He had no checking or savings account. On the morning of the day before the murder, defendant borrowed $50 from his mother.

When police arrived at the scene of the crime, the door to the safe was open with no money inside. Evidence was heard that as much as $900 could have been taken in during the previous day's business. Two hundred and forty dollars in small bills were left in the cash register. No evidence established the actual amount in the safe on that day.

Over defense counsel's objection, William Elliott testified that on April 9, 1991, defendant told him he had approximately $5,000 and wanted to go to Chicago to buy cocaine. Defendant allegedly purchased four ounces of cocaine for $3,000 and then returned to Bloomington with Elliott. The jury was properly instructed to consider evidence of the cocaine purchase solely in terms of the issues of intent and motive. Defendant denied these allegations, claiming that he had never met Elliott, and never possessed $5,000 in cash nor purchased any cocaine with Elliott.

The State then produced evidence that a few weeks later defendant sold his family's lawn mower for $500. The lawn mower was later reported stolen by his brother and mother. Defendant also sold his car. Between the time of his father's death and the time he was arrested, defendant cashed checks from his mother totalling nearly $5,000.

Defendant claims there is no direct link between his alleged purchase of cocaine shortly *after* his father's death and his alleged motive for murdering him a week earlier. Defendant testified that he never had a drug problem until after his father died. A few weeks after his father's death, he admitted himself into a drug rehabilitation center.

Defendant points out three inconsistencies in the murder-for-drug-money theory: (1) no one knew how much, if any, money was in the safe; (2) there was no explanation for the $240 left in the cash register; and (3) no evidence that he knew how to open the safe. Defendant sees the alleged purchase of cocaine as separate and distinct from the charge of murder. Furthermore, defendant claims that evidence of his possession of a large sum of cash could have been accomplished without mentioning that the money was used to purchase cocaine.

The State's theory of defendant's motive is comprised of two elements. First, he needed money to satisfy his cocaine habit. Since he had worked part-time in the family-owned tavern before, he would know that a large sum of money would be on hand at the close of business late Friday night. Second, the State sought to establish that defendant had a much closer relationship with his mother and would be able to get money from her to satisfy his cocaine habit much more easily if his father was out of the way. The significance of the evidence showing that he received large amounts of money from his mother and sold several items after the homicide is unclear, the State argues, without the drug sale and drug use providing the necessary attitude of desperation required to kill his own father.

[7-9] Evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit a criminal offense. (*People v. McKibbins* (1983), 96 Ill.2d 176, 182, 70 Ill.Dec. 474, 477, 449 N.E.2d 821, 824.) Generally, while any evidence which tends to show that an accused had a motive for committing murder is relevant, to be competent, it must, at least to a slight degree, tend to establish the existence of the motive relied on. (*People v. Stewart* (1984), 105 Ill.2d 22, 56, 85 Ill.Dec. 241, 258, 473 N.E.2d 840, 857.)

"The admissibility of evidence at trial is a matter within the sound discretion of the trial court, and that court's decision may not be overturned on appeal absent a clear abuse of discretion. [Citations.] Such an abuse of discretion will be found

only where the trial court's decision is ' "arbitrary, fanciful or unreasonable" ' or ' "where no reasonable man would take the view adopted by the trial court." ' " (*People v. Illgen* (1991), 145 Ill.2d 353, 364, 164 Ill.Dec. 599, 603, 583 N.E.2d 515, 519, quoting *People v. M.D.* (1984), 101 Ill.2d 73, 90, 77 Ill.Dec. 744, 752, 461 N.E.2d 367, 375, quoting *Peek v. United States* (9th Cir.1963), 321 F.2d 934, 942.)

Evidence of a defendant's uncharged misconduct undermines the presumption of innocence. (*People v. Hendricks* (1990), 137 Ill.2d 31, 52, 148 Ill.Dec. 213, 222, 560 N.E.2d 611, 620.) But motive, although not an element of murder, may be a material factor in establishing guilt, particularly when the only evidence is circumstantial. In some circumstances "it is possible for the State to offer evidence tending to establish a defendant's motivation even though it involves the potential of disclosing a defendant's prior immoral or improper conduct." (*Hendricks*, 137 Ill.2d at 53, 148 Ill.Dec. at 223, 560 N.E.2d at 621.) We find no abuse of discretion in the admission of William Elliott's testimony.

[10] Next, defendant claims the court committed reversible error in excluding the testimony of Robert McElvaney and Detective Richard Davis which tended to show that another person committed the offense with which defendant was charged and of which he was convicted. Following the State's objection, defendant was allowed to make an offer of proof to determine whether the jury would be allowed to hear the testimony of McElvaney and Davis. The following facts were elicited.

The night before Bill Whalen's murder, Robert McElvaney was at the Twenty Grand Tap drinking Pabst Blue Ribbon beer. As a result of a confrontation between McElvaney and two other customers, the decedent asked McElvaney to leave the tavern. McElvaney was a friend of the victim, and he left without argument. No evidence was presented that any force was used to eject him from the tavern. This was not the first time he had been asked to leave and, when asked if he was upset with the decedent, he replied that he was not. Before leaving, he told Bill Whalen that he would see him again the next day.

Upon learning of McElvaney's ejection from the tavern the night before, two detectives went to McElvaney's residence at 7 a.m. on the day of the murder. McElvaney was fully dressed, except for being barefoot, and the detectives found this unusual based on their prior contacts with him. After telling McElvaney there had been a disturbance at the Twenty Grand Tap, McElvaney stated that, "I wouldn't hurt Bill Whalen. Bill Whalen is my buddy. What did I do?" Defendant stresses the fact that at the time the statement was made, no news reports had been released concerning Whalen's murder. Also noted is the fact that a number of empty beer cans were found at the crime scene, and one of them was a Pabst Blue Ribbon can. The trial court barred the evidence on grounds that there was no evidence of animosity between McElvaney and the deceased. Defendant contends that his constitutional right to present witnesses in his defense has been violated.

[11–13] A defendant may prove any fact or circumstance tending to show that the crime was committed by a person other than himself, but that right is not without limitations. (*People v. Nitti* (1924), 312 Ill. 73, 90, 143 N.E. 448, 454; *People v. Enis* (1990), 139 Ill.2d 264, 281, 151 Ill.Dec. 490, 499, 564 N.E.2d 1155, 1161.) A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or if it is speculative in nature. (*Enis*, 139 Ill.2d at 281, 151 Ill.Dec. at 499, 564 N.E.2d at 1161; *People v. Howard* (1991), 147 Ill.2d 103, 143, 167 Ill.Dec. 914, 930, 588 N.E.2d 1044, 1060.) The trial judge has a wide scope of discretion in ruling on issues of relevancy and materiality and its ruling should not be reversed absent a clear showing of abuse of that discretion. *Enis*, 139 Ill.2d at 281, 151 Ill.Dec. at 499, 564 N.E.2d at 1161; *People v. King* (1978), 61 Ill. App.3d 49, 55, 18 Ill.Dec. 371, 375, 377 N.E.2d 856, 860.

The State argues persuasively that McElvaney's testimony would provide nothing more than a possible motive for committing the murder. *People v. Columbo* (1983), 118 Ill.App.3d 882, 74 Ill.Dec. 304, 455 N.E.2d 733, is cited for the principle that evidence of possible motive, without more, is insufficient to require admission of the evidence.

In *Columbo*, defendant subpoenaed two business acquaintances of the victim in an effort to show that they harbored animosity toward him and, therefore, had motive to murder him. Both witnesses were questioned outside the presence of the jury, and both indicated that, if called to testify, they would invoke their privileges under the fifth amendment. Defense counsel requested the court's permission to ask the questions before a jury anyway, but the court refused. On appeal, the trial court's refusal to allow testimony regarding the witnesses' relationships with the decedent was upheld. The evidence was found to be purely speculative and lacking the requisite specificity required by law so as to ensure that extraneous and irrelevant matters are excluded from the jury.

In support, the *Columbo* decision cited *People v. Dukett* (1974), 56 Ill.2d 432, 308 N.E.2d 590, where the trial court refused to allow testimony of a witness who had threatened the murder victim. The witness, James Basford, testified outside the presence of the jury that several months prior to the murder he had fired a blank cartridge in the direction of the victim, burning his jacket. Three months before the murder, he told the victim that he should have his "block knocked off." (*Dukett*, 56 Ill.2d at 448, 308 N.E.2d at 599.) When someone asked him whether he committed the murder, he told the person that he did not know if he did or not. This was later explained as a smart remark. The chief of police also testified outside the presence of the jury that Basford had inquired about developments in the case on three or four occasions, asking whether he had been cleared of suspicion.

The supreme court found the evidence was properly excluded, as it merely showed that Basford disliked the victim and was concerned that he would be accused of the crime. As such, evidence of this possible motive, without more, was held to be entirely speculative.

In *Howard*, defendant was denied the opportunity to question the sole eyewitness to a murder on the question of whether she was involved in a romantic relationship with the victim. According to statements of counsel at the hearing on the State's motion *in limine*, both the witness and the victim were married at the time of the murder. Defense counsel represented that the police had initially investigated the case as a family-related homicide and had questioned the witness' husband and given him a lie detector test. Defendant asserted that evidence that the witness was romantically involved with the victim suggested that the witness' husband, or the victim's wife, had motive to commit the murder. Additionally, the love affair provided motive for the witness to misidentify the actual offender.

The supreme court found no error in the trial court's exclusion of evidence on the subject of her marriage and the nature of her relationship with the decedent. Evidence of a possible motive, without evidence linking either spouse to the murder, was held to be groundless and based upon speculation.

In the present case, the only evidence linking McElvaney to the crime scene is the fact that one of a number of empty beer cans found at the scene was the same brand that McElvaney drinks. No evidence was presented that McElvaney had ever touched this can, nor is there any evidence of animosity between McElvaney and the deceased. To the contrary, all evidence points to a conclusion that their relationship was amicable. Finally, we are left with McElvaney's outburst to detectives that he would not hurt Bill Whalen, at a time when he had no reason to know of any injury to the deceased. This evidence is far too uncertain to form the basis for finding that the trial judge abused his discretion in excluding McElvaney's testimony.

Affirmed.

GREEN, J., concurs.

KNECHT, J., concurs in part and dissents in part.

Justice KNECHT, concurring in part and dissenting in part:

I agree with the majority opinion it was not an abuse of discretion to admit evidence of defendant's purchase and use of cocaine. This evidence arguably supported the State's murder-for-drug-money theory, and the trial judge appropriately exercised his discretion.

Defendant should have the same latitude in presenting evidence to support his theory of the case. Evidence that someone other than the defendant may have committed the offense is relevant and admissible when a close connection is demonstrated between the third person and the commission of the offense. (*People v. Maberry* (1990), 193 Ill.App.3d 250, 263, 140 Ill.Dec. 323, 331, 549 N.E.2d 974, 982; *King*, 61 Ill.App.3d at 52, 18 Ill.Dec. at 374, 377 N.E.2d at 859.) It is properly excluded if it is remote or speculative. (*Howard*, 147 Ill.2d at 143, 167 Ill.Dec. at 930, 588 N.E.2d at 1060; *People v. Ward* (1984), 101 Ill.2d 443, 455, 79 Ill.Dec. 142, 148, 463 N.E.2d 696, 702.) Defendant should have been permitted to introduce evidence which allegedly linked a third person to the victim's murder.

His offer of proof shows a patron of the Twenty Grand Tap was ejected from the tavern just hours before the murder. The victim asked this patron to leave because of a confrontation between the patron and two other customers. While the patron did not argue and did not appear upset, he *was* ejected.

On the early morning of April 6, just a few hours after the crime was discovered and before any information had been released to the media, two police detectives sought out the patron at his home. When advised there had been trouble at the tavern, the patron responded, "I wouldn't hurt Bill Whalen. Bill Whalen is my buddy. What did I do?"

Police sought out the patron precisely because he had a drunken encounter with another customer and had been ejected from the tavern. They found him fully dressed and awake. The detectives thought this was unusual because of what they knew about his habits. The patron then responded in a manner which suggested he knew Bill Whalen had been harmed. This evidence tended to show someone other than defendant committed the murder.

None of the cases cited by the majority address the issue presented here. The offer of proof goes beyond establishing a possible motive for someone else to murder Bill Whalen. The majority infers the patron was not affronted by the ejection because he had been ejected before, and there was an amicable relationship between the patron and the victim. This analysis ignores the fact the patron had been at the scene of the crime just hours before the murder, was ejected from the tavern by the victim, was a regular customer who would know the closing routine, and responded to a police visit by denying he would ever hurt Bill Whalen at a time when *only* the authorities, and the guilty party or a witness, would know Bill Whalen had been murdered. This interpretation of the evidence, which defendant is entitled to suggest, is not extraneous or irrelevant.

I am confident the State could have presented evidence to undercut this theory on rebuttal, just as the evidence already presented during its case in chief would likely have overcome this theory. The point is, defendant ought to be given the chance to advance the theory, and he was denied that chance.

The importance of this error is enhanced by the exclusion of defendant's expert witness because of late disclosure. The trial judge carefully considered this issue and even suggested a continuance as a practical solution. The majority relies on the refusal of a continuance as a waiver of the issue. The record suggests defendant was offered the use of Dr. Zelde's testimony in exchange for a continuance, but the issue is not whether *we* understand the court's suggestion, but whether defendant understood the offer and its consequences.

The compulsory process clause of the sixth amendment of the United States Constitution ensures a criminal defendant "the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." (*Taylor*, 484 U.S. at 408, 108 S.Ct. at 652, 98 L.Ed.2d at 810, quoting *Pennsylvania v. Ritchie* (1987), 480 U.S. 39, 56, 107 S.Ct. 989, 1000, 94 L.Ed.2d 40, 56.) The majority rejects defendant's argument that just as waiver of a sixth amendment right to counsel must be made knowingly, intentionally, and voluntarily, waiver of his right to compulsory process and to present witnesses in his defense must be made knowingly, intentionally, and voluntarily.

The right of a defendant to present evidence "stands on no lesser footing than the other Sixth Amendment rights." (*Washington v. Texas* (1967), 388 U.S. 14, 18, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1023.) A constitutional protection can be waived only if it is made knowingly and intelligently. *People v. Lester* (1988), 165 Ill.App.3d 1056, 1058, 116 Ill.Dec. 912, 914, 519 N.E.2d 1127, 1129; *People v. Jackson* (1982), 105 Ill.App.3d 750, 758, 61 Ill.Dec. 57, 63, 433 N.E.2d 1385, 1391.

The record does not show defendant understood he was being asked to weigh the right to a prompt trial with the right to present a witness on his behalf. For an issue this important the trial court could and should have explicitly stated to *both* defendant and his attorney that defendant's expert would be permitted to testify *only* if the case were continued; and if the defendant did not agree to a continuance, then the court would not permit his expert to testify. The preclusion of defendant's expert would have been proper had the court clearly presented the alternatives to defendant and he then elected to proceed to trial and reject a continuance. The alternatives were not clearly presented and this record does not show waiver. If there was no waiver, then defendant's arguments on the preclusion of his expert witness should be addressed.

The less severe sanction of a continuance was available but was not properly explained to defendant. The likely testimony of the expert would have challenged the reliability of the bloody palm print comparison and was thus material to the outcome of the case. Since the State intended to establish defendant's presence at the scene by the palm print, a defense expert's challenge to the reliability of its palm print comparison would not necessitate reworking its entire trial strategy. The trial judge granted the State's motion to bar the expert's testimony, but nothing in the record suggests the trial court found that defense counsel wilfully violated the rules of discovery to gain an advantage. Considering these factors, as relied on by the majority citation to *Enoch*, I believe the preclusion of the defense expert witness was too drastic in these circumstances.

I would reverse and remand for a new trial and accordingly dissent on this issue.

238 Ill.App.3d 958
178 Ill.Dec. 819

SARAH BUSH LINCOLN HEALTH CENTER, Plaintiff–Appellee,

v.

Suzanne S. PERKET, Defendant–Appellant.

No. 4–92–0448.

Appellate Court of Illinois, Fourth District.

Dec. 17, 1992.

Rehearing Denied Jan. 19, 1993.

Hospital sued its former director of physical medicine and rehabilitation to enforce restrictive covenant in employment contract precluding director from accepting similar employment with competitor in same county within one year of termination of director's employment. The Circuit Court, Coles County, Paul C. Komada, J.,

closing argument defendant was lying. The trial court correctly denied this motion. The prosecutor's comments simply were not improper under the circumstances presented here.

[4] Defendant also argues on appeal the court erred in considering good-time credit in fashioning his sentence. Defendant believes the legislature already considered the effect of good-time credit in establishing the range of penalties for all offenses, and therefore, when the court took this factor into consideration, defendant contends his actual sentence was, in effect, doubled, thereby subjecting him to disparate treatment. Defendant refuses to acknowledge, however, that the trial court made no mention of good-time credit until after pronouncing defendant's sentence and after informing him of his right to appeal. The court's comments exhibit no intention to double defendant's sentence but rather appear to be an attempt to explain the entire process and to lessen the impact of the sentence imposed on defendant. While the court believed the minimum sentence was inappropriate in light of defendant's shooting a defenseless man merely because he was unable to open the cash register, the court also believed the maximum sentence possible was inappropriate because defendant's prior criminal history involved no violence. The court therefore chose to sentence defendant to 12 years' imprisonment. The court simply considered no improper factor in the fashioning of defendant's sentence in this instance. The trial court sitting both through the trial and the sentencing hearing had a far superior opportunity to make a sound determination as to what defendant's punishment should be. (See *People v. Perruquet* (1977), 68 Ill.2d 149, 154, 11 Ill.Dec. 274, 276, 368 N.E.2d 882, 884; *People v. Peter* (1976), 43 Ill.App.3d 1068, 1070, 3 Ill.Dec. 31, 33, 358 N.E.2d 31, 33.) It is not our function to serve as a sentencing court, and absent any abuse of the trial court's discretion, we will not alter the sentence imposed. (*Perruquet*, 68 Ill.2d at 153–56, 11 Ill.Dec. at 275–77, 368 N.E.2d at 883–85.) We see no reason here to disturb defendant's sentence. See *People v. Meeks* (1980), 81 Ill.2d 524, 537, 44 Ill.Dec. 109, 411 N.E.2d 9, 15.

For the aforementioned reasons, we affirm the judgment of the circuit court of St. Clair County.

Affirmed.

LEWIS, P.J., and CHAPMAN, J., concur.

WEST KEY NUMBER SYSTEM

193 Ill.App.3d 250
140 Ill.Dec. 323

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Scott MABERRY, Defendant-Appellant.

No. 4–88–0652.

Appellate Court of Illinois, Fourth District.

Jan. 18, 1990.

Defendant was convicted in the Court, Morgan County, Richard E. J., of aggravated criminal sexual and home invasion, and he appeals. Appellate Court, McCullough, J., held (1) evidence that victim's former boyfriend had been seen in the area on the evening the attack was not admissible to show he was the perpetrator; (2) evidence sustained finding that dangerous weapon used, so as to sustain conviction for invasion; and (3) aggravated criminal sexual assault is a general intent crime for which a mental state of intent, knowledge or recklessness is implied.

Affirmed.

1. Criminal Law ⇐1036.5, 1044.1(6)

Failure to object at trial to a question calling for hearsay response and failure to ask that the answer be stricken from

record resulted in waiver of the issue on review.

2. Criminal Law ⇐1063(1)

Failure to raise challenge to hearsay statement in posttrial motion results in a waiver of the issue on review.

3. Rape ⇐48(1, 2)

Complaints of rape victims are admissible as corroborative statements, but the statements are limited to the fact of the complaint, and the identity of the assailant is not admissible under that exception to the hearsay rule.

4. Criminal Law ⇐366(4)

Victim's statements to police identifying defendant as her attacker were admissible as excited utterances or spontaneous declarations where the victim was hysterical at the time that she made the statements.

5. Criminal Law ⇐1037.1(1), 1063(5)

Failure to object to closing argument and to raise the issue in posttrial motion waived the issue for review.

6. Criminal Law ⇐1030(1)

Plain error exists where a substantial right of the defendant to a fair trial is affected or the evidence in the case is closely balanced.

7. Criminal Law ⇐1171.3

Defendant was not prejudiced by one sentence in prosecutor's closing argument to the effect that the victim had told "them" who it was that had attacked her, even though the evidence showed that she had not told the people in question who her attacker was but had merely told them that she had been raped.

8. Witnesses ⇐2(1)

Right of compulsory process is not unlimited, and defendant must comply with established rules or evidence and procedure designed to ensure both fairness and reliability in ascertaining guilt or innocence. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐338(1), 385

Defendant does not have a right to offer incompetent or irrelevant evidence.

10. Criminal Law ⇐359

Evidence that someone other than defendant may have committed the crime is relevant and admissible only if and when a close connection can be demonstrated between the third person and the commission of the offense.

11. Criminal Law ⇐359, 1153(1)

Admission of evidence that someone other than the accused may have committed the offense is within the sound discretion of the trial court and its ruling should not be reversed absent a clear showing of abuse of that discretion.

12. Criminal Law ⇐359

Evidence that victim's former boyfriend had been seen in the area where she was raped on the evening of the rape and that he had clothes similar to those described by the victim was not relevant to show that the former boyfriend was the victim's attacker where the victim stated that he was not her attacker, he had never been a suspect, and his physical description deferred from the detailed description of the attacker given by the victim.

13. Trespass ⇐82

In view of testimony of victim that defendant ordered her into the bedroom while holding a knife and ordered her to remove her clothes at knifepoint and held the knife on her while ordering her to move outside after the attack, jury could find that the weapon was a "dangerous weapon," so that defendant could be convicted of home invasion. S.H.A. ch. 38, ¶¶ 12–11(a), 33A–1.

14. Criminal Law ⇐847

Any error contained in jury instructions is waived if not objection to at trial or if no alternative instructions are offered.

15. Rape ⇐5

Aggravated criminal sexual assault is a general intent crime for which a mental state of intent, knowledge, or recklessness is implied to satisfy the general intent requirement.

Daniel D. Yuhas, Deputy Defender, Office of State Appellate Defender, Springfield, Lawrence J. Essig, Asst. Defender, for defendant-appellant.

Charles Colburn, State's Atty., Jacksonville, Kenneth R. Boyle, Director, State's Attys. Appellate Prosecutor, Springfield, Robert J. Biderman, Deputy Director, David E. Mannchen, Staff Atty., for plaintiff-appellee.

Justice McCULLOUGH delivered the opinion of the court:

Following a jury trial, defendant Scott Maberry was found guilty of aggravated criminal sexual assault and home invasion and sentenced to concurrent 12-year prison terms for each offense with three years' supervisory release. Defendant raises five issues on appeal: (1) whether the trial court erred in admitting statements of identification of the defendant by the victim and the police as corroborative complaints and thereby denied defendant a fair trial; (2) whether the prosecutor's repeated misstatements of the evidence during closing argument denied defendant a fair trial; (3) whether various evidentiary rulings denied defendant the right to present a defense and thus, violated the compulsory process clause of the sixth amendment; (4) whether defendant's conviction for home invasion must be vacated because defendant's knife was not a "dangerous weapon" as defined by section 33A-1 of the Criminal Code of 1961 (Ill.Rev.Stat.1987, ch. 38, par. 33A-1); and (5) whether the jury instructions for aggravated criminal sexual assault were deficient because no mental state was included in the instructions. We affirm.

On February 9, 1987, the defendant was charged by indictment with two counts of aggravated criminal sexual assault (Ill.Rev.Stat.1987, ch. 38, par. 12-14(a)(1)) and one count of home invasion (Ill.Rev.Stat.1987, ch. 38, par. 12-11). The defendant pleaded not guilty, and a jury trial commenced on June 15, 1988.

I. REVIEW OF EVIDENCE

A. *State's Case*

The victim testified that on July 31, 1986, she stayed overnight at the home of a friend in Jacksonville, Illinois. At appr mately 11:30 p.m. on July 31, the fr noticed the victim's ex-boyfriend, Leonard, driving past the home on n than one occasion. The friend told victim and both decided to call the Sc Jacksonville Police Department and quest extra patrols because the victim afraid of Leonard. Although Leonard never actually observed near the home night by the victim and he was not s again by the friend, the victim testified and her friend decided not to sleep a that evening "in case Bob decides that h going to come back and do somethi They then moved their belongings from bedrooms into the living room and prep to sleep on the living room floor.

According to the victim, at approxima 12:30 a.m. on August 1, 1986, she and friend were still awake when the defen knocked at the front door. The victim gone to school with the defendant for t to four years and worked with him local retail store. All three sat and ta for approximately 30 minutes in the ho The defendant left the residence at a 1:08 a.m. after being asked to leave sev times. After defendant left, the victin called telling her friend that it was a funny "that defendant lied to them" "that he was even there in the first pla

(1) *Assault and Initial Statement Identifying Defendant as Assailant*

(a) Victim

According to the victim, at approxim 4:45 a.m., she was awakened by a n man wearing a white mask. He woke up by poking her in the right breast w knife. The mask was circular with mond-shaped holes for each eye, and c ed the face of the perpetrator comple She stated the knife was about five t inches long with a shiny silver blade; tip looked as if it had been bro.en off. described the perpetrator as having b hair, standing five feet five inches tall, "kind of a husky build"; that she s five feet two inches in height, and

perpetrator was "a little taller than I am." The victim stated she grabbed the perpetrator's arms and asked who he was and what he wanted. The perpetrator told her to be quiet and directed her into the bedroom with the knife, then ordered her to take off her clothes. After removing her clothes, the perpetrator engaged in vaginal and oral sex with the victim. The attack lasted about five minutes, during which time the perpetrator held the knife or had it nearby on the bed. The perpetrator then unsuccessfully attempted to use a towel to gag the victim. He then ordered her to leave the bedroom through the hallway and to walk into the kitchen. She stated the perpetrator picked up some keys or coins that were on an ironing board in the kitchen and led her out onto the back porch, where he stopped briefly, apparently looking for something on top of the refrigerator. There was nothing on the ironing board when she went to bed. The perpetrator had brown straight hair that was "choppy looking, like it was uneven."

The vietim and the perpetrator went outside, where he ordered her to lay face down in the grass. He then threw the knife in the ground next to her leg. As she lay face down in the grass, the perpetrator began putting on some clothes he retrieved as they exited the house. Her assailant withdrew the knife from the ground, ordered her to get into the car parked in the front driveway, and to wait 15 minutes until he was gone. She watched the perpetrator leaving the yard until she could not see him anymore, went back inside the house, locked the back door, and woke up her friend "after a few minutes of beating on her." She identified the clothes the perpetrator wore as: "blue jeans, tennis shoes, and a shirt that kind of had three-quarter sleeves that had stripes on the sleeve, was darker on the top and light in the stomach area."

She testified she had only a sheet wrapped around her when she tried to wake up her friend. She called her boyfriend, while she was trying to wake her friend, because she did not know what to do. While the victim was talking to her boyfriend about the attack, there was a knock at the front door. The boyfriend told the victim he would call the police. The police arrived at the residence within three minutes of the victim's telephone call with her boyfriend.

South Jacksonville police officers Mark Aydelott and Theresa Daniels responded to the call. The victim told Officer Daniels that she had been attacked and she was 99.9% certain it was the defendant who attacked her. She was certain the defendant was her attacker because of his voice, hair, and build; she became 100% certain about one month after the attack when she saw the defendant walking at school. She identified the defendant by his gait which, the victim stated, was the same one she had seen at the time of the attack.

(b) Friend's Testimony

The friend testified the victim was staying at her house the evening of July 31 to August 1 because she, the friend, did not want to be alone in the house. She and the victim talked for a while before preparing to go to sleep. The victim ironed a shirt on the ironing board in the kitchen while they were talking.

She saw Bob Leonard drive by the house on July 31, 1986, and she and the victim decided to call the police. The defendant was a friend of the victim and, when he arrived at the house at 12:30 a.m. on August 1, she let him in the house to talk for a while. The defendant had two quarts of beer with him when he arrived. She further testified that after the defendant left the house early on the morning of August 1, 1986, she checked the doors and windows to be certain they were locked. She recalled telling the victim how she thought it was strange the defendant came to her house that night because he had never been there before and she did not think the defendant knew where she lived. She also stated there was nothing on the ironing board when she checked the doors.

The friend testified she was awakened at about 5 a.m. on August 1 by the victim standing above her, kicking her, and screaming that she had been raped. She stated the victim had a blanket wrapped

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around her and was very hysterical; the victim told her she was 99.9% sure the defendant was her attacker because of his build, the way his hair was cut, his height, and the way he talked in a low, rough whisper. The victim said her attacker was five feet five inches, or five feet six inches in height.

She testified the defendant was probably close to five feet six inches tall. In describing Bob Leonard, she stated Leonard had dark brown hair and a mustache, was about six feet tall, slender, and weighed 160 to 170 pounds.

(c) Officer Daniels

Officer Theresa Daniels testified she went to the friend's residence at 4:53 a.m. on August 1, 1986, and met the victim, who was very hysterical. After the victim calmed down enough to speak, Officer Daniels testified the victim told her she had been raped by the defendant.

(2) *Police Activity at the Scene and Evidence Discovered*

Officer Aydelott testified he arrived at the scene at approximately 5:15 a.m. He observed the screen above the sink in the kitchen was ripped, and discovered a basement window broken and ajar. Subsequently, he and additional officers found the defendant asleep in a car parked in the driveway of the home. When discovered, the defendant's clothing was disorderly; the inseam of the pants was off to one side; his shirt was not tucked in; and his hair was disarranged. The defendant was taken to the Jacksonville Police Department, where Officer Aydelott took custody of the defendant's tennis shoes, Wrangler blue jeans, and gray and black shirt with red stripes. The clothing was soiled and wet with perspiration. The defendant did not have any underwear or socks on at the police station. Fifteen or twenty minutes had elapsed between the time Officer Aydelott arrived at the residence and searched the house and the time the defendant was discovered in the car. No mask was found by the police. Defendant told police he had been visiting the house earlier in the evening, but denied any involvement in the attack. After giving a statement to the police, the defendant was released witho charge. Defendant was later arrested February 9, 1987.

According to Officer Aydelott, during pat-down search of the defendant at t scene, they discovered a penknife and box-cutter in the pocket of defendan pants. The penknife had a two-inch blac The owner of the house testified that pri to August 1, 1986, she had a utility knife box opener on the ledge of the windc above the kitchen sink. This window w the same window which had the screen to on August 1. The utility knife was disco ered missing in September 1986. The ow er identified the utility knife taken fro the defendant at the time of his arrest the type of utility knife missing from h kitchen.

Larry Hood, a crime scene technici with the Illinois State Police, testified t basement window of the residence h been broken from the outside. The dust top of the deep freeze beneath this windo was disturbed and two unsmoked Marlbo cigarettes were on the floor near the de freeze. The friend testified the defenda was smoking Marlboro cigarettes when visited the house at 12:30 a.m. on the nig of the attack.

Hood further testified the screen on t back door had been cut in the area by t door handle. A pair of white jockey short size 34–36, was found behind a refrigerat located immediately to the right of t back door. A pair of men's socks w found on the ironing board in the kitche

Hood testified the pocket knife take from the defendant had two blades. T end of the larger blade had been sharpene and had been "peened," or hit with a ba peen hammer, to enlarge the blade so th it would fit tighter in the pocket. The t of the knife was different from the rest the blade. David Metzger, a forensic scie tist with the Illinois State Police, later test fied that the tip of the defendant's knif appeared to be damaged.

(3) *Forensic Evidence*

A forensic examination was done on t victim's underwear, the bed clothing in t

bedroom, the socks found on the ironing board, and on the men's underwear found behind the refrigerator on the back porch. Examination of the pubic hair found in the men's underwear revealed it was Caucasian, but did not originate from the defendant or the victim. The head hair found in this underwear matched the defendant's hair in 16 out of 18 characteristics.

Phillip Sallee, the forensic serologist with the Illinois State Police who tested the hairs on the underwear, also tested four fibers on the socks and the bedclothes in the bedroom. Sallee found the same fiber, yellow cotton polyester thread, on the socks and on the sheet from the bedroom. Sallee also tested a head hair found on the socks and concluded it did not come from the defendant or the victim.

Blood-typing was conducted by Sallee on seminal material recovered from two cervical swabs used in the standard Vitullo Kit, and the seminal material on the panties recovered from the victim. According to Sallee, the seminal material from the swabs evidenced the following blood-type: ABO type A and H/PGM 2-1. The blood type of the defendant was determined as follows: ABO type A/PGM 1. The victim's blood type was determined to be ABO type O/PGM 2-1. Sallee explained that the PGM system is a separate blood-grouping system. The PGM is tested separately and under separate conditions. Sallee testified that the PGM is based upon enzymes found in all human beings. Sallee found the seminal stain on the panties to have type A and H activity present. Sallee was unable to get any PGM results from the victim's panties.

Sallee testified the defendant was a secretor whose blood type is present in his body fluids. The semen stains on the victim's panties and the seminal materials found on the vaginal swabs taken from the victim were consistent with the defendant's blood type and could have come from the defendant. Sallee also testified that approximately 32% of the male population in Jacksonville have the same blood type as the defendant. Sallee further testified that there was no question in his mind that the blood type in the semen stains was the same as the defendant's.

Sallee also tested several hairs recovered with the Vitullo Kit which were sealed in four envelopes and labeled: "Head hair combings, pulled head hair, pubic hair combings, pulled pubic hair." According to Sallee, there were two additional hairs found loose in the kit. Sallee determined that none of the hairs found in the kit could have come from the defendant.

B. *Defendant's Case*

(1) *Offers of Proof Outside the Jury re: Robert Leonard*

Police chief Richard Evans, of the Jacksonville Police Department, testified Leonard was arrested on August 1, 1986, on a burglary warrant. The warrant was issued after the police received a telephone call from the victim and her friend on July 31. At that time, the victim reported Leonard had stolen property from a local department store and was seen driving in the vicinity of the house where she was staying. According to Evans, the victim asked for extra police patrols after reporting the burglary. Some of the property allegedly stolen in the burglary was found in Leonard's car at the time of his arrest. A knife with a total length of 9½ inches was also found in the trunk of Leonard's car, along with Levi blue jeans and a cloth belt with gold buckle. This knife did not match the victim's description of the knife used by her assailant, since Leonard's knife was bigger and the end of the knife was not damaged.

Chief Evans testified that Leonard did not match the victim's description of the assailant since Leonard was 5 feet 9 inches or 5 feet 10 inches tall, weighed 140 pounds, and was very thin, the exact opposite of the assailant. Chief Evans testified Leonard was not a suspect in this case and that the police investigation could not place him anywhere near the scene of the rape. Chief Evans testified that he may have told Leonard's attorney, Ed Parkinson, that Leonard's clothing was being held for testing in this case. Evans stated it was police department policy not to release evidence without a court order and no court order

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had been issued regarding Leonard's clothing.

In his offer-of-proof testimony, attorney Ed Parkinson testified that he had represented Leonard from August 1986 to February 1987. Mr. Parkinson and Leonard's mother had made numerous requests to retrieve Leonard's personal items and clothing from the police. Mr. Parkinson stated he was told the clothing was being held for possible testing in this case. Parkinson testified that it was his understanding that two knives were found in Leonard's car and both may have been kept by the police. Parkinson stated that, according to Leonard, he had two knives when he was arrested. Leonard did not tell his attorney how long the blades on these knives were.

(2) *Alibi Evidence*

Officer Brad McElfresh testified regarding the alibi defendant gave to the police on August 2, 1986, regarding his activities on the evening of July 31 to August 1, 1986. McElfresh stated defendant said that at about 12:30 a.m. on August 1, after he left the friend's house, he went to another friend's house and, from there, walked to a nearby park known as Nicholas Park. Inside the park, the defendant saw a number of cars and people on the east side parked off the roadway. The defendant described one of the cars as a white, older model Cutlass that had two blue stripes and an "applied for" license sticker. The defendant said that he had talked with this group of people and then walked into a cornfield with one of the girls from this group and had sexual intercourse with her. According to the defendant, he was in the park sometime between 1 a.m. and 5 a.m. on August 1, 1986. After he left the park, defendant told police he walked back to the residence where the victim was staying, saw a light on inside and knocked at the door. After receiving no response, the defendant stated he climbed into the car in the driveway and fell asleep. Officer McElfresh testified his investigation found defendant's statement to be false. McElfresh testified that Nicholas Park closes at midnight and that the gates to the park a locked at that time.

In rebuttal, Officer Aydelott testified h closed Nicholas Park and locked all th gates at 11:58 p.m. on July 31, 1986. The was no one left in the park after he locke the gates. Officer Aydelott patrolled th park every 30 to 45 minutes on August He did not see any cars or people on th east side of the park that night after it wa closed. Officer Aydelott testified that ca cannot drive into the park after the gate are locked.

The State presented the testimony c several persons who were in Nicholas Par on the night of July 31, including the owne of the Cutlass described by the defendan While all stated they did not know th defendant, they testified they were all to gether in a group in the park and did no recall any strangers walking up to thei group. Several of these persons, includin the owner of the Cutlass, also testified the left the park before it closed at midnight o July 31 because it is difficult to exit th park with a car after the park gates ar locked.

(3) *Other Defense Evidence*

The defendant introduced the testimon of Joye Sweetin to refute the victim's iden tification of the defendant. Sweetin testi fied she talked with the victim a few day after the attack and the victim told Sweeti she was raped in Springfield but did no know her attacker.

On cross-examination, Sweetin admitte she was a close friend of the defendant an did not talk to the police regarding he conversation with the victim. When calle in rebuttal by the State, the victim state she told Sweetin the defendant raped her.

II. ANALYSIS

Initially, defendant argues the identifica tion statements the victim gave to the po lice when they first arrived at the house were improperly admitted under the "prompt" or corroborative complaint excep tion to the hearsay rule. Defendant also contends these statements do not qualify as spontaneous declarations, which are ad missible as exceptions to the hearsay rule;

The defendant maintains the admission of these statements denied him a fair trial because the State repeatedly referred to these statements and actually misstated this evidence during closing argument.

As to the victim's statements to her friend and Officer Daniels on August 1, the State urges the defendant has waived this issue because no objection to the testimony of the victim, her friend, or Officer Daniels was raised at trial or in a post-trial motion. On the merits, the State agrees the statements of identification are not admissible under the corroborative complaint exception. However, the State maintains these statements are admissible as spontaneous declarations. Even if not so admissible, any error, according to the State, was harmless.

[1, 2] The record reveals the defendant did not object to the identification statements of victim at issue on appeal. Failure to object at trial to a question calling for a hearsay response and failure to ask that the answer be stricken from the record results in waiver of the issue on review. (*People v. Stewart* (1984), 105 Ill.2d 22, 56, 85 Ill.Dec. 241, 258, 473 N.E.2d 840, 857.) Likewise, failure to raise the issue in a post-trial motion results in waiver of the issue on review. (*People v. Enoch* (1988), 122 Ill.2d 176, 186, 119 Ill.Dec. 265, 270, 522 N.E.2d 1124, 1129.) We find this issue is waived.

[3] On the merits, complaints of rape victims are admissible as corroborative statements, but the statements are limited to the *fact* of the complaint. (*People v. Damen* (1963), 28 Ill.2d 464, 473, 193 N.E.2d 25, 30–31.) The identity of the assailant is not admissible under this exception. (*People v. Robinson* (1978), 73 Ill.2d 192, 199–200, 22 Ill.Dec. 688, 692, 383 N.E.2d 164, 168.) It is clear the statements regarding the identity of the defendant in this case were not admissible under this exception.

[4] However, the statements qualify as excited utterances or spontaneous declarations and, thus, were admissible. The evidence established that the victim reentered the house after her assailant was out of view, tried to wake her friend, and called her boyfriend. The boyfriend testified the victim was hysterical on the phone. Her friend testified that before the police arrived and while the victim was hysterical, shaking, and crying, she said her attacker was the defendant and she was 99.9% sure. Officer Daniels testified the victim was hysterical when she arrived a few minutes later. In view of the victim's extreme emotional upset at the time the statements were given to her friend and Officer Daniels, the possibility of fabrication is nonexistent. *People v. Poland* (1961), 22 Ill.2d 175, 174 N.E.2d 804.

[5] With respect to defendant's assertion of the prosecutor's misstatement of evidence during closing argument, the record also demonstrates that no objection to the remarks was raised at trial nor was this issue raised in the post-trial motion. Therefore, the waiver doctrine is also applicable to these statements (*People v. Hall* (1986), 114 Ill.2d 376, 418, 102 Ill.Dec. 322, 340, 499 N.E.2d 1335, 1353), unless plain error was committed.

[6] Plain error exists where a substantial right of the defendant to a fair trial is affected or the evidence in the case is closely balanced. *People v. Bradley* (1988), 172 Ill.App.3d 545, 549, 122 Ill.Dec. 523, 526, 526 N.E.2d 916, 919; *People v. Sexton* (1987), 162 Ill.App.3d 607, 615, 114 Ill.Dec. 88, 94, 515 N.E.2d 1359, 1365.

The misstatement of the evidence about which the defendant complains is that where the prosecutor stated: "She told *them* who it was and that's very important." (Emphasis added.) The defendant urges "them" refers to the doctor who examined the victim in the hospital and the boyfriend as well as the police officer and her friend. This is a misstatement of the evidence. The boyfriend and the examining physician were not told by the victim of the identity of her assailant, only that she was raped. However, later on during closing, the prosecutor referred to the fact that the victim told only her friend and Officer Daniels that she was 99.9% sure it was the defendant who raped her.

[7] We conclude the prejudicial impact of this portion of one sentence during closing argument is negligible in this case. There were no repeated instances of misconduct in this case as in *People v. Whitlow* (1982), 89 Ill.2d 322, 60 Ill.Dec. 587, 433 N.E.2d 629. Nor is this a close case on the evidence or one involving remarks in closing which were severely prejudicial to the defendant as in *People v. Eddington* (1984), 129 Ill.App.3d 745, 84 Ill.Dec. 887, 473 N.E.2d 103. Defendant relies on *Bradley* and *Sexton* in support of his plain error argument. Both cases are also sufficiently distinct from this case as to not be persuasive authority.

We conclude no plain error was committed in this case. Thus, we find any error during closing argument was waived. The evidence establishing defendant's guilt is not closely balanced, but is overwhelming. The victim testified she was 99.9% sure her assailant was the defendant based on his voice, hair, build, and gait. The victim had known the defendant for four years prior to the incident, having sat next to him in school and worked with him in a local retail store. The identification was corroborated by clothing found in the house, the forensic tests on the clothes, the knife found in defendant's possession and defendant's alibi later proved to be false.

Defendant next urges he was denied the right to present criminal defense evidence to the jury in violation of the compulsory process clause of the sixth amendment. (U.S. Const., amend. VI.) Defendant specifically refers to the evidence presented in two offers of proof regarding the clothing and weapons taken from Leonard when he was arrested on August 1, 1986, on an unrelated warrant. Leonard's clothing was similar in some respects to the clothing the victim described her assailant as wearing. The knife taken from Leonard was 9½ inches in total length and "shiny silver." The offers of proof were denied.

Initially, the State urges the defendant did not raise this precise issue at trial or in his post-trial motion and, thus, the issue was waived. On the merits, the State urges the trial court properly exercised its discretion in excluding the evidence as speculative and remote.

The record reflects defendant strenuc ly argued for the admission of his offers proof on Leonard. However, the compu ry process clause was not raised at tria in a post-trial motion. It is generally h that constitutional issues raised for first time on appeal are waived unless t pertain to the jurisdiction of the co *People v. Amerman* (1971), 50 Ill.2d 1 279 N.E.2d 353; *People v. McGeo* (1987), 156 Ill.App.3d 860, 110 Ill.Dec 510 N.E.2d 1032.

[8, 9] The compulsory process clause the sixth amendment of the United Sta Constitution affords a criminal defend "the right to the government's assista in compelling the attendance of favora witnesses at trial and the right to put fore a jury evidence that might influe the determination of guilt." (*Taylor v. nois* (1988), 484 U.S. 400, 408, 108 S 646, 652, 98 L.Ed.2d 798, 810, quot *Pennsylvania v. Ritchie* (1987), 480 U 39, 56, 107 S.Ct. 989, 1001, 94 L.Ed.2d 56.) This right is not unlimited and a fendant must comply with established r of evidence and procedure designed to sure both fairness and reliability in as taining guilt or innocence. (*Chamber Mississippi* (1973), 410 U.S. 284, 302, S.Ct. 1038, 1049, 35 L.Ed.2d 297, 313– A defendant does not have the right offer incompetent or irrelevant evide *Taylor*, 484 U.S. at 411, 108 S.Ct. at 653 L.Ed.2d at 811–12.

[10, 11] The evidence excluded in case was offered to establish that Rol Leonard, someone other than defend may have committed the crime. Such dence is relevant and admissible only if when a close connection can be demonst ed between the third person and the c mission of the offense. (*People v. K* (1978), 61 Ill.App.3d 49, 52, 18 Ill.Dec. 374, 377 N.E.2d 856, 859.) The admis of evidence that someone other than accused may have committed the offens within the sound discretion of the court and its ruling should not be reve absent a clear showing of abuse of

discretion. *People v. Ward* (1984), 101 Ill.2d 443, 455–56, 79 Ill.Dec. 142, 148, 463 N.E.2d 696, 702.

[12] We find no abuse of discretion. We disagree with defendant's contention that the Leonard evidence was relevant. Defendant points to the fact that Leonard was seen in the area on the evening on July 31; that he had clothes similar to those described by the victim; that he resembled the physical description given by the victim; and he may have had a motive to harm the victim (because she turned him in to the police for burglary). This evidence fails to establish any link between Leonard and the attack which occurred in the early morning on August 1. (*People v. Smith* (1984), 122 Ill.App.3d 609, 77 Ill.Dec. 911, 461 N.E.2d 534; *People v. King* (1978), 61 Ill.App.3d 49, 18 Ill.Dec. 371, 377 N.E.2d 856.) Moreover, the victim stated Leonard was not her attacker; she never thought he was; the police stated Leonard was never a suspect in this case; and they could not place Leonard at the scene at the time of the attack. (*People v. Thomas* (1986), 145 Ill.App.3d 1, 99 Ill.Dec. 192, 495 N.E.2d 639.) Further, Leonard's physical description differs from the detailed description given by the victim of her attacker whom she described in terms of his voice, gait and husky build.

[13] Defendant next contends his conviction of home invasion must be vacated because he was not armed with a "dangerous weapon" as defined in the armed-violence statute. (Ill.Rev.Stat.1987, ch. 38, par. 33A–1.) The State urges, initially, that defendant has waived this issue because it was not raised at trial. Alternatively, the State contends the length of the knife blade is irrelevant because case law and the statutes focus on the manner in which weapons are used to determine whether they fit the category of a "dangerous weapon."

Section 12–11(a) of the Criminal Code of 1961 (Code) defines home invasion:

> "(a) A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present and
>
> (1) While armed with a dangerous weapon uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or
>
> (2) Intentionally causes any injury to any person or persons within such dwelling place." (Ill.Rev.Stat.1987, ch. 38, par. 12–11(a).)

"Dangerous weapon" is defined in the armed-violence statute:

> "(a) 'Armed with a dangerous weapon'. A person is considered armed with a dangerous weapon for purposes of this Article, when he carries on or about his person or is otherwise armed with a category I or category II weapon. (b) A category I weapon is a pistol, revolver, rifle, shotgun, spring gun, or any other firearm, sawed-off shotgun, a stun gun or taser as defined in paragraph (a) of Section 24–1 of this Code, knife with a blade of at least 3 inches in length, dagger, dirk, switchblade knife, stiletto, or any other deadly or dangerous weapon or instrument of like character." (Ill.Rev.Stat.1987, ch. 38, par. 33A–1.)

Defendant points out the knife found on his person had a less than three-inch blade and, therefore, it is not a "dangerous weapon" as defined in section 33A–1(b) of the Code.

Defendant has waived this issue because it was not raised in the trial court. (*Enoch*, 122 Ill.2d 176, 119 Ill.Dec. 265, 522 N.E.2d 1124.) On the merits, defendant's argument has been rejected in numerous cases involving various offenses. (See *People v. Carter* (1951), 410 Ill. 462, 102 N.E.2d 312; *People v. Hall* (1983), 117 Ill.App.3d 788, 73 Ill.Dec. 192, 453 N.E.2d 1327; *People v. Samier* (1985), 129 Ill.App.3d 966, 85 Ill.Dec. 233, 473 N.E.2d 601.) The reasoning of these cases is applicable here. The victim testified the defendant ordered her into the bedroom while holding a knife, ordered her to remove her clothes at knifepoint and held the knife on her while ordering her to move outside after the attack. The defendant clearly

had the knife while in the house and held it in a threatening manner on the victim.

Defendant next contends the jury was not properly instructed on aggravated criminal sexual assault because no mental state was included in the instructions. The State argues the defendant has waived this issue for failure to tender any alternative instructions or object to the instructions at trial or in a post-trial motion. On the merits, the State maintains aggravated criminal sexual assault is a general intent crime, not requiring jury instructions on a mental state and this precise argument has been previously rejected by the courts.

[14] The record reflects that the defendant did not object to the instructions given to the jury. Any error contained in jury instructions is waived if not objected to at trial or where no alternate instructions were offered. (*People v. Avant* (1989), 178 Ill.App.3d 139, 145, 127 Ill.Dec. 312, 316, 532 N.E.2d 1141, 1145; *Enoch*, 122 Ill.2d 176, 119 Ill.Dec. 265, 522 N.E.2d 1124.) We find defendant waived this issue.

[15] On the merits, aggravated criminal sexual assault is a general intent crime, for which a mental state of intent, knowledge, or recklessness is implied to satisfy the general intent requirement. (*People v. Leonard* (1988), 171 Ill.App.3d 380, 385, 122 Ill.Dec. 138, 140, 526 N.E.2d 397, 399.) Defendant urges the failure to include the mental state in the instructions allows a presumption of a mental state to exist, which presumption runs afoul of the due process clause because it relieves the State of its burden to prove each element of an offense beyond a reasonable doubt. Defendant cites *Sandstrom v. Montana* (1979), 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39, *Francis v. Franklin* (1985), 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344, and *Yates v. Aiken* (1988), 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546, in support.

Initially, we point out these cases are inapposite to the case before us. In all three cases, the particular mental state of the defendants was contested at trial and essential in the jury's deliberations as to the guilt or innocence of the defendant. Here, defendant argued at trial and now does similarly on appeal that he was not the perpetrator of the rape. Defendant has never asserted he lacked the requisite mental state for this offense, but nonetheless argues it must be included in the jury instructions. We find no merit in defendant's due process claim.

The elements of aggravated criminal sexual assault are a criminal sexual assault committed when the accused displayed a dangerous weapon. (Ill.Rev.Stat.1987, ch. 38, par. 12–14(a)(1).) A criminal sexual assault includes sexual penetration by use of force or threat of force. (Ill.Rev.Stat.1987, ch. 38, par. 12–13(a)(1).) The State must prove all the elements of aggravated criminal sexual assault beyond a reasonable doubt. (Ill.Rev.Stat.1987, ch. 38, par. 3–1.) A mental state is implied in aggravated criminal sexual assault. Thus, jury instructions need not set forth a specific mental state. *Leonard*, 171 Ill.App.3d at 385, 122 Ill.Dec. at 140, 526 N.E.2d at 399.

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

Affirmed.

KNECHT, P.J., and STEIGMANN, J., concur.

193 Ill.App.3d 304
140 Ill.Dec. 333

Gary TRACY, Plaintiff–Appellant,

v.

MONTGOMERY WARD & CO., a Corporation, and HCI Heinz Construction, Inc., a Corporation, Defendants–Appellees.

No. 4–89–0334.

Appellate Court of Illinois,
Fourth District.

Jan. 18, 1990.

Injured construction worker brought action against owner and general contrac-

C-175

STATE OF ILLINOIS)
)
COUNTY OF McLEAN)

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT

THE PEOPLE OF THE)
STATE OF ILLINOIS)
)
vs.)
)
BARTON MCNEIL)

98 CF 633

MOTION IN LIMINE

Now come the People of the State of Illinois by Stephanie M. Wong, Assistant State's Attorney for the County of McLean and respectfully move this Honorable Court for an Order in Limine excluding from introduction at trial certain evidence as set forth herein and in support thereof states as follows:

1. The defendant has asserted that a third person, Misook Nowlin is responsible for the murder of Christina McNeil.
2. That the State believes defendant will attempt to introduce evidence through direct examination, cross examination and argument, that Misook Nowlin was involved in, or committed the murder for which defendant is charged.
3. That defendant's assertions are founded only on speculation and completely unsupported by any evidence.
4. That any evidence suggesting guilt of another cannot be introduced at trial unless supported by evidence of a close connection between the third person and the crime for which defendant is charged. (Memorandum of law attached).

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WHEREFORE, the People respectfully request an Order in Limine excluding any and all evidence or suggestion that Misook Nowlin was involved in, or committed the murder of Christina McNeil

Respectfully submitted,

Stephanie M. Wong
Assistant State's Attorney

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing [illegible] was mailed to [illegible] 06701, on the 24 day of December 1998

Tanya Murphy

C-143

C-139

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF MCLEAN

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
PLAINTIFF,	)	
VS.	)	NO. 98 CF 633
BARTON M. MCNEIL,	)	
DEFENDANT.	)	

MOTION IN LIMINE

Now comes the Defendant, Barton M. McNeil, by his attorneys, Assistant Public Defenders, Tracy A. Smith and Kim Campbell, and moves this Court enter an order prohibiting the State from introducing or attempting to introduce at trial certain evidence specified below, and in support of his motion, states as follows:

1. Prior Convictions of Defendant. Defendant has prior convictions in McLean County Cases #80 CF 128, Delivery of Controlled Substances, and #95 CM 987, Violation of Order of Protection. Neither prior conviction is permitted for impeachment purposes under the holding of People v. Montgomery, 47 Ill 2d 510, or any other case or statute. The victim in #95 CM 987 is not the same person as the alleged victim in this cause.

2. Evidence of Defendant's Computer Files. Materials supplied to the defendant by way of discovery indicate that a police search of his computer files revealed that pornographic photographs of adult women had been downloaded into his computer. Such evidence is irrelevant to the issues at bar in this cause,

C-302

has no probative value as regards such issues, and would be highly prejudicial to defendant. Such evidence therefore should be barred. People v. Wilson, 400 Ill 2d 603 (1948).

3. Evidence of Prior Sexual Abuse of Victim. Materials supplied to defendant by way of discovery, and in particular the autopsy report on the victim, note possible prior sexual abuse of the victim. Nothing in the autopsy report or in any other discovery materials indicates when the suspected abuse occurred or by whom it was perpetrated. The autopsy report clearly indicates that the evidence of sexual abuse consisted of old, healed tears and lacerations. Any such evidence is irrelevant to the issues in the case at bar, has no relevance as regards such issues, and would be highly prejudicial to defendant. Such evidence therefore should be barred. People v. Wilson, 400 Ill 2d 603 (1948).

4. Autopsy Photos. Autopsy photographs supplied to defendant by way of discovery include many photographs showing autoptic incisions and dissections to the body of the alleged victim. Such photographs are inadmissible under the holding of People v. Lefler, 38 Ill 2d 216, and should be barred.

WHEREFORE, defendant, Barton M. McNeil, prays this Court enter an order preventing the State from introducing, eliciting, or attempting to introduce or elicit as evidence at the trial of this cause any and all evidence of the defendant's prior criminal convictions, the pornographic photographs found in his computer files, the actual or suspected prior sexual abuse of the victim, and any and all autopsy photographs displaying autoptic incisions

or dissections or of the body of the victim otherwise made gruesome by the autopsy procedure.

Respectfully submitted,

Barton M. McNeil, Defendant

By: Tracy A Smith
one of his attorneys

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorney of record of all parties to the above cause by delivering such to their offices on the 1st day of March, 1999.

Deborah K. Millios

Tracy A. Smith
Kim Campbell
Assistant Public Defenders
104 W. Front, Room 603
Bloomington, Illinois 61701
Phone: (309) 888-5235

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