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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2016

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, |
| Plaintiff-Appellee,                  | ) |  |
| v.                                   | ) | Appeal No. 3-14-0211   |
|                                      | ) | Circuit No. 04-CF-232  |
| ANDREW GRANT,                        | ) | Honorable  |
| Defendant-Appellant.                 | ) | David A. Brown,<br>Judge, Presiding.   |

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JUSTICE CARTER delivered the judgment of the court, with opinion.  
Presiding Justice O'Brien and Justice McDade concurred in the judgment and opinion.

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**OPINION**

¶ 1 Defendant, Andrew Grant, appeals from the trial court's order denying his motion for forensic testing. We reverse the judgment of the trial court and remand for forensic testing on the evidence identified in defendant's motion.

¶ 2 **FACTS**

¶ 3 Defendant was charged by indictment with aggravated criminal sexual assault (720 ILCS 5/12-14(a)(6) (West 2004)) and criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2004)).

The indictment alleged that defendant knowingly committed an act of sexual penetration upon

Z.G. by force or threat of force, knowing Z.G. to be a physically handicapped person. Evidence adduced at trial established that Z.G., defendant's niece, had cerebral palsy and was legally blind, though she was able to see some shapes and colors. At the time of the alleged offense, Z.G. lived in a house with her parents, her brother Jeremy, her sister, and defendant.

¶ 4 At trial, Z.G. testified that on the night in question, she and defendant had an argument over the remote control. Z.G. eventually relented, giving defendant the remote control and saying good night. Z.G. testified that she went to her bedroom and began changing into her nightgown. According to Z.G., defendant then "busted in the door," pushed her to the floor, and raped her. Defendant did not say anything, but Z.G. knew it was him because she had been around him a lot. Z.G. testified that defendant penetrated her both vaginally and anally. Jeremy then entered the room and asked "What ya'll doing?" Defendant pulled up his pants and left the room with Jeremy. Z.G. testified that later that night, her father kicked defendant out of the house. Z.G. went to the hospital the next day, and hospital personnel notified the police.

¶ 5 Z.G.'s younger brother, Jeremy, testified that defendant was cooking chicken on the night in question, and Z.G. was "around him." He also testified that Z.G. was in her nightgown, doing laundry in the basement, while defendant was on the couch in the living room. The living room was also where defendant slept. At some point that evening, Jeremy walked around the house looking for defendant but could not find him. He eventually "heard some bumping" from Z.G.'s room. Jeremy explained: "I got the knife because I knew something was going on. The door was locked. I got a knife and I unlocked the door." When Jeremy opened Z.G.'s bedroom door, he saw defendant pulling up his pants. Z.G. was in her bed with the covers over her and she was not wearing any clothes. Jeremy testified on cross-examination, however, that Z.G. was wearing

a nightshirt. Though defendant told Jeremy not to tell anyone, Jeremy immediately told his father.

¶ 6 Jeremy testified that defendant told Z.G.'s father to call the police because Z.G. was accusing him of rape. Z.G.'s father did not call the police. Eventually, Z.G.'s older brother came to the house. Defendant was then kicked out of the house.

¶ 7 Cathy Jackson Bruce testified that she was the sexual assault nurse examiner at St. Francis Hospital in Peoria. She performed the forensic evaluation on Z.G., utilizing a standardized testing kit provided by the Illinois State Police. In the course of the genital examination, Jackson Bruce identified redness, which can be indicative of forced trauma. She also found a hair which was collected for evidence. Further, Jackson Bruce took a number of swabs, including one from Z.G.'s cheek, because Z.G. said she had been licked on the cheek. Those items were all sent out for testing. The parties stipulated that a forensic scientist with the Morton Crime Lab would testify that no semen was identified from the vaginal, oral, or rectal swabs. The hair, along with scrapings from underneath Z.G.'s fingernails, were not tested for DNA.

¶ 8 After the State rested its case in chief, defendant testified in his own defense. He testified that he had always gotten along well with Z.G. On the night in question, he and Z.G. ate some chicken wings, then defendant went to lay down on the living room couch. Defendant eventually fell asleep, but Z.G. woke him up around 10:30 or 11 p.m. She told him that there was something in her bed "sticking her." Defendant, who had broken the globe around the light over Z.G.'s bed earlier in the day, used a wet towel to make sure there was no more fine glass on the bed, while Z.G. stood in the doorway. Defendant testified that Z.G. closed the bedroom door when she heard Jeremy coming. Jeremy attempted to open the door without knocking. When

defendant asked Z.G. why she would not let Jeremy in, Z.G. replied: "I had sex with him and now he want me to suck his old nasty thing."

¶ 9 Defendant testified that Jeremy eventually got into the room. Defendant recalled that Jeremy said to him, "You nasty," to which defendant replied, "No, you the one nasty, trying to have sex with your own sister." Jeremy woke up everyone in the house and told them defendant was having sex with Z.G. Defendant implored Z.G.'s father to call the police, but he did not acquiesce. Instead, Z.G.'s father kicked defendant out of the house. Z.G.'s father did not allow defendant to call the police. Later, Z.G.'s older brother, along with two other men, caught up to defendant and beat on him with a baseball bat. Several days later, when defendant found out he was wanted by the police, he turned himself in.

¶ 10 The jury found defendant guilty on both charged offenses. The court entered a judgment only on the more serious offense of aggravated criminal sexual assault, and sentenced defendant to a term of 14 years' imprisonment. The conviction and sentences withstood a number of subsequent challenges, through direct appeal and postconviction proceedings. At each stage of the appeals and postconviction processes, defendant maintained his innocence.

¶ 11 On June 5, 2013, the Illinois Innocence Project filed a motion for forensic testing on defendant's behalf. The motion requested testing on forensic evidence collected but not previously tested, namely: the apparent hair found in Z.G.'s vagina and Z.G.'s fingernail scrapings.<sup>1</sup> The motion asserted that the absence of defendant's DNA from these items would impeach Z.G.'s testimony and weaken the State's case against defendant. The motion further averred that the Innocence Project had secured a grant to pay for the costs of testing, at a lab

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<sup>1</sup>At the subsequent hearing on defendant's motion, defense counsel stated that defendant was removing the request for testing on the fingernail scrapings.

approved by the Illinois State Police and utilizing a methodology approved by the Illinois State Police.

¶ 12 On February 11, 2014, the trial court filed a written order denying defendant's motion. In its order, the court noted: "[T]here is unrecanted eyewitness testimony in this case that sets it apart from this Court's recent decision in *People v. Savory*."

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues that the trial court erred in denying his motion for forensic testing. Specifically, defendant maintains that he has satisfied each element of section 116-3 of the Code of Criminal Procedure of 1963, which governs postconviction motions for forensic testing. 725 ILCS 5/116-3 (West 2012). We review the denial of a section 116-3 motion *de novo*. *People v. Stoecker*, 2014 IL 115756, ¶ 21.

¶ 15 Section 116-3 provides that "[a] defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of \*\*\* forensic DNA testing." 725 ILCS 5/116-3(a) (West 2012). To prevail on his or her motion, a defendant must present a *prima facie* case that:

"(1) identity was the issue in the trial which resulted in his or her conviction; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect." 725 ILCS 5/116-3(b)(1), (2) (West 2012).

If a defendant succeeds in making the *prima facie* case, the trial court shall allow the testing upon a determination that "the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even

though the results may not completely exonerate the defendant." 725 ILCS 5/116-3(c)(1) (West 2012). The trial court must also determine that "the testing requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3(c)(2) (West 2012).

¶ 16 The State concedes that defendant in the present case made a *prima facie* showing that the chain of custody was sufficient. The State also does not contest that the testing would employ an acceptable scientific method. Instead, the State argues that: (1) the perpetrator's identity was not an issue at defendant's trial; and (2) the testing would not have the potential to uncover evidence materially relevant to defendant's claim of innocence. Upon review we find that defendant has satisfied each element of section 116-3, and we remand the matter for further forensic testing.

¶ 17 I. Identity

¶ 18 Identity is "at issue" in a criminal trial when the perpetrator's identity is disputed or in question. See Black's Law Dictionary 151 (10th ed. 2014). Put another way, in the context of a section 116-3 motion, "a defendant must make a *prima facie* showing that there was an issue at trial as to whether the defendant or somebody else committed the crime." *People v. Hockenberry*, 316 Ill. App. 3d 752, 756 (2000). A defendant makes a sufficient showing that identity was an issue at trial when he denied committing the crime at trial. *People v. Urioste*, 316 Ill. App. 3d 307, 316 (2000) ("[O]ur legislature wanted postconviction forensic testing to occur only in those cases where such testing could discover new evidence at sharp odds with a previously rendered guilty verdict *based upon criminal acts that the defendant denied having engaged in.*" (Emphasis in original.)).

¶ 19 In *People v. Price*, 345 Ill. App. 3d 129 (2003), three witnesses—including the victim and a codefendant—testified that the defendant sexually assaulted the victim. *Id.* at 130-31. A fourth witness testified that he saw the defendant enter the victim's cell just prior to the sexual assault. *Id.* at 131. The next day, in an interview with a correctional officer, the defendant denied sexually assaulting the victim. *Id.* A rectal swab containing spermatozoa was procured as evidence, but not tested. *Id.* at 132. After being convicted for aggravated criminal sexual assault, the defendant filed a section 116-3 motion, seeking forensic testing on that swab. *Id.* The appellate court found that identity was a central issue at trial, stating: "While the occurrence witnesses testified that defendant sexually assaulted the victim, defendant maintained that the witnesses were lying and that he did not engage in any sexual acts with the victim." *Id.* at 141. See also *People v. Shum*, 207 Ill. 2d 47, 64-66 (2003) (identity an issue at trial—despite testimony of an eyewitness familiar with the defendant—where defendant had "consistently denied involvement in the crimes").

¶ 20 Like the defendant in *Price*, defendant here put identity at issue at trial. Defendant testified that he did not have sex with Z.G. Indeed, defendant explicitly testified that it was Jeremy who had sex with Z.G. Defendant continued to maintain his innocence well after his conviction.

¶ 21 The State argues that the identity of the perpetrator was not at issue in defendant's trial because the evidence that defendant was the perpetrator was overwhelming. Specifically, the State notes that two eyewitnesses, including the victim, identified defendant as the perpetrator, and that each of the witnesses was familiar with defendant. Contrary to the State's position, however, the question of whether identity was at issue at trial is not tied to the amount of evidence the State presents against a defendant. See *Urioste*, 316 Ill. App. 3d at 316. Although

the State argues that identity was not disputed at trial; in actuality, its argument is that defendant is not entitled to forensic testing because the State prevailed at trial given the evidence presented on the disputed issue of identity. That is not the test here. See *id.*

¶ 22 To be sure, the eyewitness testimony of Z.G. and Jeremy was sufficient to convict defendant of the charged offenses. However, the present question is not whether the evidence was sufficient, or even if the evidence was closely balanced as to the issue of identity. The only question is whether defendant disputed being the person who committed the crime. By denying that he committed the offense—and, indeed, by stating that it was Jeremy who had sex with Z.G.—defendant put the question of identity squarely at issue at trial.

¶ 23 

## II. Material Relevance of Testing

¶ 24 Section 116-3 was originally enacted in 1998. 725 ILCS 5/116-3 (West 1998). At that time, subsection (c)(1) provided that the court shall allow testing upon a determination that "the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence." 725 ILCS 5/116-3(c)(1) (West 1998). In *People v. Savory*, 197 Ill. 2d 203, 214 (2001), our supreme court held that "section 116-3 is not limited to situations in which scientific testing of a certain piece of evidence would completely exonerate a defendant." The legislature subsequently amended subsection (c)(1) to include the phrase "even though the results may not completely exonerate the defendant." 725 ILCS 5/116-3(c)(1) (West 2012).

¶ 25 The question of whether forensic testing has the potential to produce evidence materially relevant to a defendant's claim of actual innocence cannot be answered in the abstract; it requires consideration of the evidence adduced at trial, as well as the evidence a defendant seeks to test. *Savory*, 197 Ill. 2d at 214. Evidence is "materially relevant" if it will significantly advance

defendant's claim of actual innocence. *Shum*, 207 Ill. 2d at 65; see also *People v. Gibson*, 357 Ill. App. 3d 480, 489 (2005) ("Thus, although the evidence against defendant may be strong and compelling, his claim of actual innocence will nevertheless be significantly advanced by a favorable DNA test result.").

¶ 26 The testing sought by defendant in the present case has the potential to be materially relevant to a claim of actual innocence. No physical evidence was introduced at defendant's trial that directly linked defendant to the sexual assault of Z.G. The redness discovered by Bruce Jackson only indicated that there had been some trauma. Thus, if the hair found in Z.G.'s vagina did not match defendant's DNA, that result would stand alone, rather than being weighed against other forensic evidence against defendant. Moreover, defendant testified that Z.G. told him that Jeremy had sex with her. If the hair was found to match Jeremy's DNA, such a result would severely undermine Jeremy's credibility while bolstering that of defendant.

¶ 27 The State argues that a nonmatch to defendant—or even a match to Jeremy—would "not show that the defendant did not sexually assault Z.G." The State suggests that defendant may still have committed the sexual assault without leaving any sort of DNA. The hair then, the State contends, could have come in contact with Z.G.'s vagina via the laundry. Alternatively, the State further opines it is possible that both defendant *and* Jeremy sexually assaulted Z.G. However, the State's position ignores the standard set forth in section 116-3. Although the State is correct that a nonmatch would not completely exonerate defendant of the sexual assault, it is arguable that such a result could advance defendant's claim that he is innocent of the crime.

¶ 28 While we find that further testing has the potential to uncover evidence materially relevant to defendant's claim of actual innocence, we need not express an opinion as to whether such a claim would ultimately be meritorious. When a claim of actual innocence, supported by

newly discovered evidence, is brought in a postconviction petition, a new trial will be granted if the new evidence is " ' " 'of such conclusive character' "as would" 'probably change the result on retrial.' " ' " *People v. Coleman*, 2013 IL 113307, ¶ 84 (quoting *People v. Washington*, 171 Ill. 2d 475, 489 (1996), quoting *People v. Silagy*, 116 Ill. 2d 357, 368 (1987), quoting *People v. Molstad*, 101 Ill. 2d 128, 134 (1984)). While defendant's claim could potentially be bolstered by a favorable forensic testing result, whether the claim would be bolstered enough to meet that standard is ultimately a question for a future trial court.

¶ 29

#### CONCLUSION

¶ 30

The judgment of the circuit court of Peoria County is reversed, and the cause is remanded for the trial court to enter an order for further forensic testing.

¶ 31

Reversed and remanded with directions.