

NOTICE  
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2013 IL App (4th) 120105-U  
NO. 4-12-0105  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

**FILED**  
October 23, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ROBERT T. JONES,	)	No. 09CF1621
Defendant-Appellant.	)	
	)	Honorable
	)	Harry E. Clem,
	)	Judge Presiding.

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JUSTICE POPE delivered the judgment of the court.  
Justices Appleton and Holder White concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* (1) The evidence was sufficient to convict defendant.
- (2) The trial court did not abuse its discretion in admitting other-crimes evidence.
- (3) The prosecutor's opening remarks and closing argument were not improper.
- (4) Void fines imposed by the circuit court must be vacated.
- ¶ 2 Following a July 2011 jury trial, defendant, Robert T. Jones, was found guilty of four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)). In August 2011, the trial court sentenced him to 15-year prison terms for each of the four convictions, with counts I and II to be served consecutively and counts III and IV to be served concurrently with counts I and II.

¶ 3 Defendant appeals, arguing (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt; (2) the trial court abused its discretion in admitting evidence of alleged after-the-fact conduct in Arizona; (3) the prosecutor's opening statement and closing argument vouched for the victim's credibility and deprived him of a fair trial; and (4) certain fines imposed upon him are void. We affirm in part as modified, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In September 2009, the State charged defendant by information with four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)) based on allegations of sexual penetration committed against H.T. (born February 1, 1994) between January 1998 and December 2005. Each count alleged a different type of anatomical penetration.

A. Motion To Admit

¶ 6 In November 2010, the State filed a notice of intent and a motion to admit evidence under section 115-7.3 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/115-7.3 (West 2010)). Specifically, the motion requested the trial court allow H.T. to testify to incidents of sexual abuse that occurred in Arizona, which were "part of an on-going pattern of conduct involving the same victim and same defendant," and which had been previously summarized in discovery provided to defense counsel.

¶ 7 Directly prior to the commencement of defendant's July 2011 jury trial, the trial court conducted a hearing on the State's motion to admit evidence. The State announced it intended to elicit testimony from H.T. regarding sexual abuse that occurred in Arizona when she was 10 or 11 years old. The State asserted the sexual abuse in Arizona was relevant, highly

probative, and necessary for the victim to be able to testify in a coherent manner. H.T. first disclosed the sexual assaults while in Arizona. Defense counsel objected, contending (1) the prejudicial value far outweighed the probative value and (2) the acts the State wished to elicit through H.T.'s testimony were not prior bad acts—but post-acts—that would put defendant in the position of having to defend himself against uncharged crimes. The court allowed the State's motion, finding (1) the evidence was otherwise admissible; (2) the evidence pertained to a continuing course of conduct; and (3) the probative value of the evidence outweighed any prejudicial effect.

¶ 8

## B. Jury Trial

¶ 9

### 1. *Prosecutor's Opening Remarks*

¶ 10

During the State's opening remarks, the prosecutor stated as follows:

"[H.T.] appears to be a bright, and funny, incredibly smart, and outgoing 17-year-old girl. In growing up, she was very sweet, but not so innocent, because this defendant, Robert Jones, took that from her.

[H.T.] will tell you that [defendant] began stealing her innocence from her as far back as she can remember, between ages [4] and 13."

The prosecutor explained H.T. eventually moved to Arizona with her mother and defendant, but "the abuse didn't stop there." Further, the prosecutor stated:

"Now although today [H.T.] is doing well, she has suffered, and she'll tell you how she has suffered. She was hospitalized

three different times throughout this incident for cutting herself. She'll tell you that she cut herself so that she could feel that pain, rather than the pain of how all the adults in her life had let her down. She's going to have a real difficult time today sitting on that stand, speaking the words she's going to have to, to all of these strangers. But she's here, she's ready to do it. She's ready to put this behind her, and she's ready for this defendant to be found guilty of predatory criminal sexual assault for the years and years of abuse that he put her through."

¶ 11 Immediately after the prosecutor gave her opening statement, defense counsel requested a side-bar conference, where he objected to any reference to H.T.'s hospitalizations or any attempt to link H.T.'s cutting to sexual abuse. The court ruled the State could elicit the fact H.T. received treatment but no details about the treatment.

¶ 12 *2. H.T.'s Testimony*

¶ 13 At the time of defendant's jury trial, H.T. was 17 years old. H.T. identified defendant as her mother's boyfriend (when H.T. was younger) and eventual husband. H.T. testified she lived on South Cottage Grove in Urbana until she was 11. She met defendant when she was approximately two or three years old. Defendant often stayed at their house in Urbana and moved in when she was eight or nine years old. H.T. recalled she lived with her father for a short time when she was three years old because her mother and defendant moved to Arizona for six months. When she was 11 years old, H.T. moved to Arizona for two years with her mother and defendant because defendant got a nursing job there, then to Florida for one year, and then

back to Illinois. H.T. explained she was sexually abused by defendant both in Urbana and Arizona.

¶ 14 Between the ages of four and eight, H.T. had a Barbie-theme bedroom and it was in this room H.T. said defendant sexually abused her. According to H.T., defendant was the person to put her to bed at night, and while she did not remember her mother ever putting her to bed, she stated, "I mean at four years old, I suppose she would have." H.T. testified she would usually wear a T-shirt and underwear to bed and defendant would wear a T-shirt and boxers or a robe and boxers when he put her to bed. Her mother was usually already in bed at this time. Defendant would sit or lie next to her and would lift her shirt and massage her stomach. Defendant would then move his hands lower to her underwear, put one hand inside her underwear and touch her vagina. This usually went on for 20 to 30 minutes and happened almost every night.

¶ 15 H.T. explained defendant would slide down lower on the bed, pull her underwear down, and put his mouth on her vagina. This happened about half the time. H.T. recalled one occasion when she was four years old when defendant pulled her on top of him and told her "it would be a good idea if I put my mouth on his penis." H.T. explained she did not want to do this, but defendant insisted so she "put [her] tongue on [his penis]." H.T. stated defendant would often take his penis out through his boxers, pull her leg off to the side, put his penis on her vagina, and move it around with his hands. During all of these incidents, H.T. stated the lights were off, the bedroom door was always open and neither her mother nor sister ever walked in. The abuse usually happened underneath a blanket.

¶ 16 According to H.T., her mother's bedroom was located "across the whole house"

from her Barbie room. To get to her mother's bedroom, H.T. explained, you had to walk from her Barbie room through the living room and the back room before you reached her mother's room. H.T.'s sister's bedroom was next door to her Barbie room and the bedroom across the hall was used for storage.

¶ 17           When H.T. was approximately nine years old, Suzette Flaschens and her two daughters moved in with them. The two girls slept in the bedroom next to H.T.'s (where her sister's room had been) and Suzette stayed in the bedroom across the hall (which eventually became H.T.'s room). H.T. also recalled other lodgers who had stayed at her house for a time.

¶ 18           Once H.T. moved bedrooms at about nine years of age, defendant stopped sexually abusing her in her bedroom but began abusing her in the living room. The living room was located just inside the front door and approximately 15 feet from H.T.'s bedroom. H.T. stated the same type of abuse would happen on the living room couch, and defendant would begin by giving her a back massage and lifting her shirt. H.T. explained defendant would abuse her in the evening when he had the opportunity and during these times, her mother was either at work or "busy somewhere else" in the house. Suzette and her daughters were not at home during these times and H.T. believed her sister had moved out by then.

¶ 19           H.T. testified the sexual abuse continued, but decreased in frequency, when they moved to Arizona. She described an incident when they were staying at the hotel (where they lived for two weeks to one month before moving into a house) when she was sick with the flu. Her mother had left to get groceries and defendant started massaging her shoulders as she was lying down on the bed with her head on his lap. Defendant pulled her shirt up and put his hands under her training bra. H.T. stated the same type of abuse continued when they moved into a

house. She recalled two incidents when she was 11 years old where defendant massaged her shoulders and lifted her shirt.

¶ 20 It was shortly after they moved to Arizona when H.T. started realizing what defendant was doing was wrong. Prior to this time, H.T. did not think defendant's conduct was wrong. H.T. recalled an incident where she found pornography on defendant's computer. She told her mother about the pornography. Her mother asked her if defendant had ever touched her and H.T. told her he had not.

¶ 21 During a telephone call to her friend, Allie, H.T. disclosed the sexual abuse. Allie told H.T. she had also been sexually abused, the perpetrator had gone to prison, and encouraged H.T. to tell her mother "to get justice." Later that day, H.T. told her mother. Five days later, H.T. and her mother moved to Florida. H.T. did not talk to anyone about the actual sexual acts defendant had performed on her. When they came back to Illinois, H.T. began looking at websites about child abuse because she was curious and wanted more information. The day after her fourteenth birthday, H.T. cut herself because she was really upset and the following day, she told her best friend, Carolyn, of the abuse. Carolyn took her to the school counselor and H.T. told the counselor of the abuse and the police were called. H.T. recalled speaking with Detective Mark Huckstep and a woman named Heather Forrest.

¶ 22 H.T. did not recall telling Detective Huckstep defendant "wouldn't have me give him oral sex at all." She explained she thought oral sex was "putting [her] whole lips and mouth around his penis," which she never did; so in her mind, she did not consider the act of her licking defendant's penis to be "oral sex." H.T. further testified during the interview she "could hardly breathe the whole time" and was "very upset" throughout the entire interview.

¶ 23

*3. H.T.'s Mother's Testimony*

¶ 24 Defendant's ex-wife and H.T.'s mother, Kristine, testified she first met defendant in 1996, when H.T. was two years old, and he came to stay with them as a lodger in their house. She and defendant moved to Arizona for nine months in 1997 so she could attend massage school, during which time H.T. lived with her father. When they returned to Urbana, she and defendant slept in the bedroom directly next door to H.T.'s and across the hall from Lauren's, H.T.'s sister. This sleeping arrangement continued until H.T. was in second or third grade.

¶ 25 Kristine worked several jobs but was home at night. Kristine was the person who put H.T. to bed every night, not defendant. H.T. would often get up and watch television or go to the bathroom and if she had fallen asleep by then, defendant would probably help put H.T. back to bed. She never witnessed anything odd between defendant and H.T.

¶ 26 Several people stayed as lodgers in a storage room on the other side of the house (the room that was later remodeled and turned into a bedroom). In 2002, defendant moved into his own house in Champaign and attended nursing school. Kristine could not remember whether she had moved into the new bedroom by the time Suzette and her daughters had moved in.

¶ 27 Kristine and defendant had an on-and-off relationship (mostly on) between 1996 and 2000 and defendant lived in his own home most of the time he was in nursing school, moving back in with her in 2004. Two or three years before selling the house, Kristine moved into the remodeled bedroom.

¶ 28 When they moved to Arizona with H.T., they stayed in a hotel for two weeks before closing the sale on the house. In Arizona, H.T. told her about the sexual abuse. Kristine confronted defendant, who denied the accusations. Kristine did not contact the police or the

Department of Child and Family Services regarding H.T.'s accusation, but instead moved the two of them to her mother's house in Florida.

¶ 29 Kristine told Detective Huckstep she had not reported H.T.'s allegations because she did not know the specifics of what happened because H.T. never told her. Kristine believed H.T.'s accusations and denied ever telling Detective Huckstep she did not believe them.

¶ 30 *4. Detective Mark Huckstep's Testimony*

¶ 31 Detective Huckstep testified H.T. was initially very tense and nonverbal during the interview, but she eventually relaxed. Huckstep acknowledged this was a case of "he said she said" as no scientific evidence was available to aid the police in their investigation. Huckstep asked H.T. twice whether she had engaged in oral sex with defendant and H.T. responded in the negative both times. Huckstep and H.T. did not come to an agreement on what H.T. believed oral sex entailed and H.T. never offered her belief.

¶ 32 Detective Huckstep testified Kristine told him at first she had doubts about the accusations, but only at first. His report, however, reflected Kristine said to him "[s]he always had her doubt, and wanted to believe that it had never happened."

¶ 33 *5. Defendant's Testimony*

¶ 34 Defendant testified he met Kristine in 1996 when he was looking for a room to rent, and moved into Kristine's house around Thanksgiving of that year. In 1997, he and Kristine moved to Arizona for a short time and Kristine's daughters stayed behind with their respective fathers. They moved back to the Urbana house in 1998 and H.T. moved back in with them a couple months later. Defendant also purchased the Champaign house in 1998. They rented a room in the house to one man for 1 1/2 years, then to another for approximately six to nine

months, and then to another man for a time.

¶ 35 A floor plan of the house was published to the jury. Defendant had added a note to the document to show the bathroom next to the garage was added in 2001. Defendant explained his and Kristine's bedroom was directly next to the Barbie room (H.T.'s room) and directly across the hall from Lauren's room. The room they rented out was on the far corner of the house.

¶ 36 In 2002, defendant was visiting his sister in Arizona when he heard Kristine was seeing another man romantically. Shortly thereafter, defendant bought another house in Champaign, moved out of the house he shared with Kristine (which he sold to her), and attended nursing school. In 2005, defendant and Kristine reconciled, sold their respective homes, and moved to Arizona. When they arrived in Arizona, they stayed at a hotel for a couple weeks until the closing on the new home they were purchasing.

¶ 37 Defendant denied ever putting his mouth, fingers, or penis on H.T.'s vagina or requesting her to put her tongue on his penis.

¶ 38 *6. Prosecutor's Closing Remarks*

¶ 39 During her closing argument, the prosecutor stated, in part, as follows:

"[H.T.] wasn't copying [Allie], and in fact, if she was copying someone, and she was making up this big, elaborate lie, she wouldn't have held it together for all of these years.

Four years have gone by since she moved back to Illinois and finally started talking to investigators. She still wouldn't have been here on the stand, doing and saying the things that she did if

she's fabricating this whole thing.

There was some talk about her being upset that she missed her fifth[-]grade graduation. I really don't think someone would make up an allegation of sexual abuse over that, and at that young of an age. \*\*\*.

So do you believe her, or do you not believe her? That's the only real issue in this case. Could a 17[-]year[-]old sit on the stand for two hours, endure cross-examination, and talk about intimate details about sex in front of all of these strangers if she were fabricating that? She couldn't.

\* \* \*

\*\*\* Everything that the victim told you yesterday was reasonable, and it makes sense. Everything she told you there is an explanation for. She had a reason why she remembered it. And I would suggest to you that she could not come in here and fabricate a story, and talk for that many hours, endure cross-examination and hold this lie up for this many years if this didn't really happen.

She wouldn't do that. No one would want to do that."

¶ 40

In rebuttal, the prosecutor further stated:

"And then three years after [she disclosed the abuse] she had to come into court in front of strangers and talk about sex. And she is 17 years old, and she did that. What else could she

have done? There was nothing else for her to do. And why else would she put herself through this? There's no other reason, other than what she said yesterday was the truth, and this defendant is guilty of exactly what she said he did to her."

Defense counsel did not object during either argument.

¶ 41 C. The Verdict and Posttrial Motions

¶ 42 The jury convicted defendant on all four counts.

¶ 43 In August 2011, defense counsel filed a motion for a new trial alleging, in part, (1) the trial court erred in admitting the propensity evidence alleging defendant had committed acts of sexual abuse in Arizona because the probative value of the evidence was outweighed by the prejudice to defendant and (2) the evidence was insufficient to convict. Before a hearing on this motion occurred, trial counsel was replaced and new posttrial counsel filed an amended and supplementary motion for a new trial which included the arguments made in the original motion and added claims (1) the State failed to provide proper notice under section 115-7.3 of the Procedure Code (725 ILCS 5/115-7.3 (West 2010)) of the specific instances of conduct and (2) the prosecutor made improper remarks during closing argument.

¶ 44 At the January 2013 combined posttrial and sentencing hearing, posttrial counsel argued both the original and amended motions. The trial court denied the motions and sentenced defendant to 15-year prison terms for each of the four convictions, with counts I and II to be served consecutively to each other and counts III and IV to be served concurrently with counts I and II.

¶ 45 This appeal followed.

¶ 46

## II. ANALYSIS

¶ 47 On appeal, defendant asserts (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt; (2) the trial court abused its discretion in admitting evidence of alleged after-the-fact conduct in Arizona; (3) the prosecutor's opening statement and closing argument vouched for the victim's credibility and deprived him of a fair trial; and (4) certain fines imposed upon him are void.

¶ 48

### A. Sufficiency of the Evidence

¶ 49 Defendant asserts H.T.'s testimony was so lacking in credibility no rational trier of fact could have found him guilty of the charged offenses. Specifically, defendant argues H.T.'s testimony—on which the State's entire case relied—was implausible, inconsistent, uncorroborated, and contradicted by other evidence.

¶ 50

When the sufficiency of the evidence for a criminal conviction is in dispute, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is not the appellate court's function to retry the defendant. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-225, 920 N.E.2d 233, 240-41 (2009). Determinations of the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are the responsibility of the trier of fact. *People v. Furby*, 138 Ill. 2d 434, 455, 563 N.E.2d 421, 430 (1990). The testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). A reviewing court will not set aside a criminal conviction on grounds of

insufficient evidence unless the evidence submitted was "so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008).

¶ 51 To support his claim of implausibility, defendant argues it would have been impossible for him to sexually abuse H.T. without Kristine or Lauren noticing because H.T.'s bedroom door was always open, and although H.T. testified the bedroom light was always off, the hallway light was always on. According to defendant, because Kristine's bedroom was next door to H.T.'s bedroom, while Lauren's bedroom and the bathroom were across the hall, it would have been impossible for them not to notice, at least once, nightly abuse in compromising positions such as defendant putting his mouth or penis on H.T.'s vagina. Further, he argues the allegations of sexual abuse in the living room are implausible because the living room was the access point to the house and was highly exposed as no wall separated the kitchen and living room, and such abuse surely would have been noticed by Kristine, Lauren, or a lodger. We are not persuaded.

¶ 52 The mere fact H.T.'s bedroom door was open, or Kristine and Lauren's bedrooms were nearby, or the living room was a highly exposed area of the house does not make it impossible for defendant to commit the sexual acts alleged by H.T. without being noticed by someone. H.T. testified the lights in her bedroom were off, the abuse occurred underneath a blanket, and neither her mother nor her sister ever walked into her bedroom. According to H.T., the abuse in the living room took place when her mother was at work or "busy somewhere else" in the house, Suzette and her daughters were not home, and her sister had moved out. It is plausible defendant took these opportunities—when no one else was present in the room—to

engage in these acts with H.T. Indeed, this type of sexual abuse often occurs where others, although present in the area, do not see the abuse occurring. See, e.g., *People v. Kelchner*, 221 Ill. App. 3d 25, 31, 581 N.E.2d 793, 798 (1991). These activities are committed surreptitiously. Further, we note defendant raised the plausibility of H.T.'s claims in the trial court but the jury nevertheless found him guilty. We will not second-guess the jury on this question of fact.

¶ 53 Defendant also suggests H.T.'s allegations cannot be believed because her testimony was not corroborated by other evidence and certain parts of her testimony were contradicted by the testimony of others. First, we note the mere facts no one else witnessed the sexual abuse and no scientific evidence was available to corroborate H.T.'s allegations does not mean she was not believable. Further, "[a] complainant's testimony need not be unimpeached, uncontradicted, crystal clear, or perfect in order to sustain a conviction for sexual abuse. [Citations.] Where minor inconsistencies or discrepancies exist in a complainant's testimony but do not detract from the reasonableness of her story as a whole, the complainant's testimony may be found to be adequate to support a conviction for sexual abuse. [Citations.]" *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 84, 981 N.E.2d 1025 (citing *People v. Soler*, 228 Ill. App. 3d 183, 200, 592 N.E.2d 517, 529 (1992)).

¶ 54 In this case, defendant points to the following discrepancies in the testimony at trial: (1) H.T. testified defendant put her to bed at night, but defendant and Kristine testified Kristine was the person to put her to bed; (2) H.T. testified Kristine's bedroom was located across the house, whereas Kristine and defendant said it was next door to H.T.'s; (3) H.T.'s and defendant's testimony regarding when defendant lived with her did not match up; and (4) H.T. testified she "was very upset throughout the whole interview" with Detective Huckstep, whereas

Huckstep testified H.T. eventually relaxed. Further, defendant argues H.T. gave inconsistent statements because she told Huckstep defendant "wouldn't have me give him oral sex at all," but then testified on one occasion she put her tongue on defendant's penis at his insistence.

¶ 55 Defendant asserts the evidence in this case is as weak as that deemed insufficient in *People v. Smith*, 185 Ill. 2d 532, 708 N.E.2d 365 (1999). We disagree. In *Smith*, the supreme court reversed the defendant's murder conviction, finding the evidence was insufficient. In that case, only one witness identified the defendant as the shooter. *Smith*, 185 Ill. 2d at 542, 708 N.E. 2d at 370. However, the witness's testimony conflicted with the testimony of other witnesses deemed more reliable and she was repeatedly impeached with prior inconsistent statements, was a habitual drug user, her activities directly following the murder were inconsistent with her having witnessed the crime, and she had motive to lie because her sister was being questioned regarding her involvement in the murder. *Id.* At 542-44, 708 N.E.2d at 370-71. The supreme court found her testimony so implausible and tainted by bias that no reasonable trier of fact could have believed it. *Id.* at 545, 708 N.E.2d at 371.

¶ 56 Our review of the record in this case reveals the following. While Kristine testified she normally put H.T. to bed, she also stated H.T. would often get back up and defendant would put her back to bed. Further, Kristine testified she moved into the bedroom across the house two or three years before moving to Arizona, and may have moved to the new bedroom before Suzette moved in. While H.T. testified defendant "basically lived with us the whole time," she acknowledged he had another house but did not recall him staying at the other house very often. Additionally, it is reasonable for H.T. to have been "very upset throughout the entire interview" with Detective Huckstep, but appear to relax as the interview progressed. Last,

although H.T. did not recall telling Detective Huckstep she never performed oral sex on defendant, she explained any discrepancy between her statement to Huckstep and her testimony because she did not consider the incident where she touched her tongue to defendant's penis to be oral sex. Rather, she viewed oral sex as putting mouth and lips around the penis, something she never did.

¶ 57 It was within the province of the jury to determine the credibility of H.T. and the other witnesses and the weight to be given to their testimony. *Furby*, 128 Ill. 2d at 455, 563 N.E.2d at 430. Defendant attacked H.T.'s testimony in the trial court as being incredible, inconsistent, and contradicted by other evidence, and the jury still convicted him. Unlike the witness's testimony in *Smith*, which was not believable and was irreconcilable with the testimony of the other witnesses, a reasonable person could have believed H.T.'s account. We will defer to the jury's determination regarding this credibility issue. We find the evidence presented at trial was sufficient to convict defendant of predatory criminal sexual assault of a child.

¶ 58 B. Propriety of the Evidence of Sexual Abuse in Arizona

¶ 59 Next, defendant asserts the trial court abused its discretion in admitting evidence of alleged after-the-fact sexual abuse in Arizona. Specifically, defendant argues the prejudice he suffered as a result of the trial court admitting such evidence far outweighed the probative value and, as a result, his convictions must be vacated.

¶ 60 Pursuant to section 115-7.3 of the Procedure Code (725 ILCS 5/115-7.3 (West 2010)), uncharged sex offenses are admissible to prove a defendant's propensity to commit the charged sex offense if the uncharged offense is otherwise admissible under the rules of evidence and if the probative value of the evidence outweighs its undue prejudice. "[R]elevant evidence is

inadmissible only if the prejudicial effect of admitting that evidence *substantially outweighs* any probative value." (Emphasis in original.) *People v. Pelo*, 404 Ill. App. 3d 839, 867, 942 N.E.2d 463, 487 (2010). " 'Prejudicial effect' in this context of admitting that evidence means that the evidence in question will somehow cast a negative light upon a defendant for reasons that have nothing to do with the case on trial. [Citation.] In other words, the jury would be deciding the case on an improper basis, such as sympathy, hatred, contempt, or horror." *Id.*

"In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(1) the proximity in time to the charged or predicate offense;

(2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances." 725 ILCS

5/115-7.3(c) (West 2010).

Whether a trial court erred in admitting evidence of uncharged sex offenses is reviewed under an abuse of discretion standard. *People v. Donoho*, 204 Ill. 2d 159, 182-83, 788 N.E.2d 707, 721-22 (2003).

¶ 61 Defendant first asserts the "[trial] court's cursory (one paragraph) analysis on the probity-versus-prejudice issue [on the State's motion *in limine*] did not discuss either the prejudicial impact or any of the facts underlying the proposed other crimes evidence" and, thus, failed to conduct a meaningful assessment of the prejudicial impact of the evidence. In allowing the State's motion, the court found as follows:

"[T]he evidence is, first of all, admissible under general evidentiary rules, [in] that it would be testimony by the witness as to something that occurred to her and which she would be relating her own perceptions of the event in—of the event in question. The evidence would be as to a continuing course of conduct. And the court believes that with the other evidence that would have preceded it, that is, evidence that a young person was assaulted in Illinois before this occurred in Arizona, the prejudicial value is not outweighed by the—the probative value outweighs the prejudicial value, and the court, in the exercise its discretion, will allow the testimony."

The record is devoid of any indication the court used the wrong standard in determining whether the Arizona crime evidence could be admitted as propensity evidence in this case. Further, contrary to defendant's assertion, the court did discuss the prejudicial impact, albeit briefly, finding any potential prejudice did not outweigh the probative value.

¶ 62 Pursuant to the trial court's ruling, H.T. testified the sexual abuse continued, but decreased in frequency, when they moved to Arizona. She recalled a specific incident in a hotel room where defendant lifted her shirt and put his hands under her training bra. She also recalled two situations after they moved into a house, one where she was lying on the couch and defendant was massaging her shoulders and lifted her shirt and another in his bedroom where she was lying down and defendant was massaging her again.

¶ 63 In a posttrial motion, defendant asserted the trial court erred in allowing the

propensity evidence. The court reiterated its initial findings on the motion *in limine*, acknowledged the evidence was prejudicial to defendant but noted it had determined any prejudice to defendant was outweighed by the probative value.

¶ 64 Defendant admits the alleged conduct in Arizona was part of a continuing course of conduct proximate in time to when charged offenses occurred. He asserts, however, (1) the events in Arizona occurred after the charged offenses, and (2) the retroactive propensity evidence is far less probative than evidence the defendant behaved in a similar manner with a different victim prior to the charged offenses would be. Defendant cites no authority for his proposition evidence he acted in a similar manner with a *different victim* would be more probative than the Arizona evidence introduced at trial. In response to defendant's argument, the State cites *People v. Failor*, 271 Ill. App. 3d 968, 971-72, 649 N.E.2d 1342, 1344 (1995), which held in sexual abuse cases, evidence of a defendant's prior sexual activity with the same child is admissible to show the defendant's intent, design, or course of conduct and to corroborate the victim's testimony. In his reply brief, defendant argues *Failor* does not support the State's contention because *Failor* dealt with *prior* sexual acts with the same victim and defendant, rather than the later acts at issue here. However, the fact the Arizona offenses occurred after the charged offenses does not automatically preclude their admission. See *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 35, 964 N.E.2d 1174 (" 'Other-crimes evidence' " includes misconduct or criminal acts that occur both before and after the charged crimes.).

¶ 65 Next, defendant argues the degree of similarity between the uncharged and charged offenses is slight because H.T.'s testimony consisted only of general assertions defendant committed the same kinds of acts in Arizona as he did in Illinois. The only specific instances of

conduct H.T. testified about in Arizona pertained to defendant putting his hand underneath her bra—which did not match any of the acts underlying the charged conduct. While we agree the charged and uncharged offenses are not exactly the same, they are similar as they involve allegations of ongoing sexual abuse between the same defendant and victim.

¶ 66 Further, defendant asserts it was not necessary to elicit the Arizona other-crimes evidence as a way of explaining how H.T. eventually reported the abuse because H.T. testified she began to realize what was happening between herself and defendant was wrong around the time they moved to Arizona. According to defendant, rather than allowing H.T. to testify about continued abuse in Arizona, the State could easily explain H.T.'s delay in reporting the abuse by stating she was too young to understand the acts were wrong. While it is possible the reporting delay could be explained as defendant posits, he cites no authority to support a finding the Arizona evidence should not have been admitted because the State *could have* taken another approach.

¶ 67 Last, defendant cites *People v. Stanbridge*, 348 Ill. App. 3d 351, 358, 810 N.E.2d 88, 95-96 (2004), to support his assertion reversal is required. In *Stanbridge*, this court noted as follows:

"Although there was some circumstantial evidence, the crux of this case is who should be believed about what happened in defendant's bedroom. Where the determination of a defendant's guilt or innocence depends on the credibility of the defendant and the accuser, error is particularly likely to be prejudicial." *Id.*

However, in *Stanbridge*, this court determined the trial court erred in admitting evidence of a

prior conviction for criminal sexual abuse and an uncharged sex offense where the State sought to use these prior incidents to prove *modus operandi* and absence of mistake, where neither the defendant's identity nor his intent was in issue. *Id.* at 353, 810 N.E.2d at 91. In this case, the State sought to introduce the Arizona acts as propensity evidence—a ground not raised in *Stanbridge*.

¶ 68 In sum, we find the trial court properly weighed the probative value of the other-crimes evidence against the prejudice to defendant and did not abuse its discretion in admitting such evidence.

¶ 69 C. Propriety of Comments Made By the Prosecutor During  
Opening Statement and Closing Argument

¶ 70 Defendant next asserts comments made during the prosecutor's opening statement and closing argument deprived him of a fair trial. Specifically, defendant asserts the prosecutor improperly (1) expressed her personal opinion by (a) telling the jury H.T. was "a bright, and funny, incredibly smart, and outgoing 17-year old girl" in her opening statement and (b) vouching for H.T.'s credibility during closing and rebuttal closing arguments by stating on four separate occasions H.T. would not have subjected herself to having to testify for two hours about sexual matters if she was fabricating or lying about what happened; (2) commented defendant stole H.T.'s innocence for the sole purpose of inflaming the jury; and (3) commented H.T. had been hospitalized three times for cutting herself "so that she could feel that pain, rather than the pain of how all the adults in her life had let her down," when that evidence was not introduced during trial. While conceding he did not make or preserve an objection to the prosecutor's statements, defendant contends the statements rise to the level of plain error.

¶ 71 Under the plain-error doctrine, we may review an "unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). Prior to conducting a plain-error analysis, we first determine whether any error occurred at all. *People v. Meeks*, 382 Ill. App. 3d 81, 87, 887 N.E.2d 870, 876 (2008).

¶ 72 The parties disagree on the proper standard of review on this issue. Defendant quotes *Wheeler*, 226 Ill. 2d at 121, 871 N.E.2d at 744, for the proposition, "Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue" and is reviewed *de novo*. The State cites *People v. Hudson*, 157 Ill. 2d 401, 441, 626 N.E.2d 161, 178 (1993); *People v. Smith*, 2012 IL App (1st) 102354, ¶ 47, 978 N.E.2d 324; and *People v. Dinwiddie*, 299 Ill. App. 3d 636, 715 N.E.2d 640, 646 (1998), for the proposition a trial court's determination regarding the propriety of a prosecutor's remarks will not be reversed absent a clear abuse of discretion. Here, the trial court was not called upon to make a ruling on the propriety of the prosecutor's statements because no objection was made, so the court did not exercise its discretion. We note regardless of the standard of review, the result would be the same.

¶ 73 We first address defendant's assertion the prosecutor's comment regarding defendant taking H.T.'s innocence—which he argues amounts to an emotional conclusion unrelated to the evidence or H.T.'s credibility—was improper. Defendant contends the sole

purpose of this comment was to inflame the jury so it would convict defendant out of sympathy for H.T. However, it is acceptable for a prosecutor to " 'denounce a defendant's behavior, engage in some degree of invective and draw [reasonable] inferences unfavorable to the defendant if such inferences are based upon the evidence.' " *People v. Gonzalez*, 388 Ill. App. 3d 566, 595, 900 N.E.2d 1165, 1189 (2008) (quoting *People v. Aleman*, 313 Ill. App. 3d 51, 66, 729 N.E.2d 20, 34 (2000)). Further, it is proper for a prosecutor to refer to the trauma a victim suffered. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 73, 963 N.E.2d 430. Thus, we find the prosecutor's comments in this regard were not improper.

¶ 74 Next, defendant argues the prosecutor improperly referenced evidence not introduced at trial in her opening statement. "The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove. [Citation.] An opening statement may include a discussion of the expected evidence and reasonable inferences from the evidence." *People v. Kliner*, 185 Ill. 2d 81, 127, 705 N.E.2d 850, 874 (1998). Defendant cites *People v. Bunning*, 298 Ill. App. 3d 725, 729, 700 N.E.2d 716, 720 (1998), for the proposition, "[i]t is impermissible for a prosecutor to comment during opening statement upon what testimony will be introduced at trial and then fail to produce that testimony since such an argument is, in effect, an assertion of the prosecutor's own unsworn testimony in lieu of competent evidence." However, while it is improper to fail to produce evidence referenced in an opening statement, "it is not always grounds for reversal when an opening statement refers to evidence that later turns out to be inadmissible. Reversible error occurs only where the prosecutor's opening comments are attributable to deliberate misconduct \*\*\* and result in substantial prejudice to the defendant" (Emphasis in original.) *Kliner*, 185 Ill. 2d at 127, 705 N.E.2d at 874.

¶ 75 In this case, the prosecutor's opening remarks were within the proper bounds of comment as the record shows the prosecutor intended to offer the evidence of H.T.'s cutting and hospitalization to show the victim's state of mind, how she was affected by the abuse, and the circumstances leading to her disclosure. Here, the evidence was not introduced during trial because immediately following the prosecutor's opening statement, defense counsel objected, and outside of the jury's purview, the trial court ruled against the admissibility of such evidence. Additionally, we note the jury was later instructed remarks made in opening and closing statements were not evidence and it should therefore disregard any statement not based on the evidence.

¶ 76 We now address defendant's contention the prosecutor improperly expressed her personal opinion by (1) telling the jury H.T. was "a bright, and funny, incredibly smart, and outgoing 17-year-old girl" in her opening statement and (2) vouching for H.T.'s credibility during closing and rebuttal closing arguments by stating on four separate occasions H.T. would not have subjected herself to having to testify for two hours about sexual matters if she was fabricating or lying about what happened.

¶ 77 In regard to the prosecutor's opening statement, defendant asserts it is improper for an attorney "to vouch for the credibility of a witness or to express a personal opinion on a case." *People v. Emerson*, 122 Ill. 2d 411, 434, 522 N.E.2d 1109, 1118 (1987). According to defendant, the prosecutor's statement, "H.T. appears to be a bright, and funny, incredibly smart, and outgoing 17-year-old girl" was an expression of the prosecutor's personal opinion. However, the prosecutor did not say H.T. *had* these characteristics, but rather she *appeared* to have them. Because H.T. testified, the jury had the opportunity to determine for itself whether H.T. pos-

sessed these characteristics.

¶ 78 In regard to the prosecutor's closing argument, defendant asserts the prosecutor improperly vouched for H.T.'s credibility on numerous occasions. During argument, a prosecutor may refer to the credibility of witnesses and to their demeanor on the stand, especially when based on the evidence or reasonable inferences drawn from the evidence. See *Emerson*, 122 Ill. 32d at 434, 522 N.E.2d at 1118; *People v. Jackson*, 391 Ill. App. 3d 11, 43, 908 N.E.2d 72, 100-01 (2009); *People v. Pope*, 284 Ill. App. 3d 695, 706-07, 672 N.E.2d 1321, 1328-29 (1996); *People v. Nolan*, 291 Ill. App. 3d 879, 885-86, 684 N.E.2d 832, 836 (1997). In reviewing whether comments made during closing argument are proper, courts must view the closing argument in its entirety and remarks must be viewed in context. *People v. Sims*, 403 Ill. App. 3d 9, 20, 931 N.E.2d 1220, 1231 (2010). For a prosecutor's closing argument to be improper, he must explicitly state he is asserting his personal views. *Jackson*, 391 Ill. App. 3d at 43, 908 N.E.2d at 100; *Pope*, 294 Ill. App. 3d at 707, 672 N.E.2d at 1329. A witness's credibility is the proper subject of closing argument when it is based on the evidence or reasonable inferences drawn from the evidence. *People v. Drescher*, 364 Ill. App. 3d 847, 859, 847 N.E.2d 662, 672 (2006).

¶ 79 During H.T.'s testimony, defense counsel sought to impeach H.T. based on her prior statements and the testimony of other witnesses, and to elicit a motive for falsely accusing defendant. During closing arguments, the prosecutor made the following comments: (1) "*I really don't think* someone would make up an allegation of abuse over [missing her fifth-grade graduation], and at that young of an age"; and (2) "Could a 17[-]year[-]old sit on the stand for two hours, endure cross-examination, and talk about intimate details about sex in front of all of

these strangers if she were fabricating that? *She couldn't.*"; and (3) "*I would suggest* to you that she could not come in here and fabricate a story \*\*\*." (Emphases added.) During rebuttal, the prosecutor further opined, "There's no other reason [H.T. would put herself through this], other than what she said yesterday was the truth, and this defendant is guilty of exactly what she said he did to her."

¶ 80 The prosecutor's statements in this case were prefaced by the following:

"The real and only issue in this case is whether you believe [H.T.].  
If you believe [her], all of those propositions are proven, this  
defendant is guilty. It is as simple as that.

And the judge is going to give you an instruction that will  
describe for you the different things you can take into account  
when judging the credibility of the witnesses who sit on this wit-  
ness stand. And that's what I'm asking you to base your decision  
on.

You saw [H.T.] testify \*\*\*. \*\*\* your life experiences come  
into this as well. \*\*\* So you got to observe what she looked like,  
what she said, and the things she said. Do they make sense to you?

\* \* \*

You can judge her credibility by the way she acted in telling  
you what she had to tell all of you strangers yesterday."

The prosecutor then mentioned and dismissed defendant's suggestions (1) H.T.'s allegations were implausible because someone would have caught defendant in the act of abusing H.T.; (2) H.T.'s

allegations only came after her friend told her about the sexual abuse she endured; and (3) H.T. was upset about missing her fifth-grade graduation.

¶ 81 We further note the jury was given Illinois Pattern Jury Instructions, Criminal Nos. 1.02, 1.03 (4th ed. 2000), instructing them only they "are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them," and "Neither opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded."

¶ 82 While the prosecutor used phrases such as, "I really don't think" and "I would suggest," after placing the entire closing and rebuttal argument in context, we find the prosecutor was not expressing her personal opinion. Further, even if she did express her personal opinion, the jury instructions given by the trial court were enough to cure any error in this case and, thus, the scales of justice were not tipped against defendant. Because we find the prosecutor's statements were not error, we need not conduct a plain-error analysis.

¶ 83 D. Fines and Fees

¶ 84 Last, defendant asserts (1) the circuit court imposed nine void fees for each of his four convictions where only one fee was authorized and (2) the drug court and juvenile expungement fines must be vacated because they were imposed *ex post facto*. The State concedes these issues. We accept the State's concession.

¶ 85 This case involved four separate counts charged in a single case. At sentencing, the trial court stated defendant must pay all of the statutorily required fines, fees, and costs, but did not specify any particular fines, fees, or costs with the exception of the \$200 deoxyribonucleic acid (DNA) fee. The record contains printouts of the fines, fees, and costs imposed on each

of the four counts. The following fees were imposed on each count: a \$5 document storage fee; a \$10 automation fee; a \$100 circuit clerk fee; a \$25 court security fee; a \$10 arrestee's medical fee; a \$50 court finance fee; a \$40 State's Attorney fee, a \$20 Violent Crime Victims Act (VCVA) fee on one count and \$4 on the other three counts; and a \$10 fee for state police operations. Additionally, a \$5 drug court fine and a \$30 juvenile expungement fine were imposed on each count.

¶ 86 We review *de novo* whether a trial court was authorized to impose these fees. *People v. Marshall*, 242 Ill. 2d 285, 292, 950 N.E.2d 668, 673 (2011). "When a court enters an order that it lacks the inherent power to enter, the order is void and may be attacked at any time." *People v. Watson*, 318 Ill. App. 3d 140, 142, 743 N.E.2d 147, 149 (2000). This court has previously held, "Although a defendant may be charged with multiple counts within the same case number, the defendant may only be assessed (1) *one* document-storage fee, (2) *one* automation fee, (3) *one* circuit-clerk fee, (4) *one* court-security fee, (5) *one* arrestees'-medical assessment, (6) *one* court-finance fee, (7) *one* State's Attorney assessment, (8) *one* VCVA fine, and (9) *one* drug-court fee." (Emphases in original.) *People v. Alghadi*, 2011 IL App (4th) 100012, ¶ 22, 960 N.E.2d 612. Thus, these multiple fees must be vacated so only one of each remains.

¶ 87 Further, section 27.3a(1) of the Clerks of Courts Act (705 ILCS 105/27.3a(1) (West 2010)) authorizes the collection of *one* automation fee per case. Subsections 1.5 and 5 authorize the clerk to collect "an additional fee in an amount equal to the amount of the fee imposed pursuant to subsection 1 of this Section," for deposit into the State Police Operations Assistance Fund. 705 ILCS 105/27.3a(1.5), 27.3a(5) (West 2010). Because the subsection 1.5

fee is to be equal to the amount of the automation fee, it follows it is authorized only when an automation fee is also collected. Because only one automation fee can be collected per case, only one subsection 1.5 fee can be collected. Thus, three of the four \$10 State Police Operation fees must be vacated.

¶ 88 Additionally, defendant notes the drug court and juvenile expungement fines (see *People v. Graves*, 235 Ill. 2d 244, 250, 919 N.E.2d 906, 909 (2009); 730 ILCS 5/5-9-1.17 (West 2010) were improperly imposed *ex post facto*. We agree. The drug court fine was not added to section 5-1101(d-5) of the Counties Code (55 ILCS 5/5-1101(d-5)(West Supp. 2007) until 2006, after the offenses were committed in this case. Likewise, the juvenile expungement fine was not added to section 5-9-1.17(a) of the Unified Code of Corrections (730 ILCS 5/5-9-1.17(a) (West 2010) until 2010. These fines must be vacated.

¶ 89 III. CONCLUSION

¶ 90 For the reasons stated, we affirm in part, vacate in part, and remand with directions to the Champaign County circuit court to amend its fines, fees, and costs associated with this cause. We note only the trial court, and not the clerk, is authorized to impose fines and fees that are considered to be fines. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 91 Affirmed in part as modified and vacated in part; cause remanded with directions.