2014 IL App (5th) 120520-U

NO. 5-12-0520

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Saline County.
	)	
v.	)	No. 11-CF-22
	)	
BRIAN K. BOWLBY,	)	Honorable
	)	Todd D. Lambert,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Cates and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant was not denied a fair trial by introduction of uncharged prior sexual assaults, we affirm the verdict. Where the defendant was not denied a fair trial by comments made by the prosecutor in opening statement and closing argument, we affirm the verdict.

¶ 2 The defendant seeks a new trial. The jury convicted the defendant of 18 counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)) and 1 count of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)). He raises two issues on appeal. The first issue involves the State's introduction of uncharged prior sexual assaults. The defendant claims that the trial judge should not have allowed this evidence because the alleged prior sexual assaults were too remote in

time and too dissimilar to the crimes charged in this case, and therefore, the evidence was more prejudicial than probative. The defendant also argues that he is entitled to a new trial because the prosecutor made inflammatory and prejudicial comments during opening statement and closing argument. We affirm.

¶ 3 FACTS

¶ 4 A.B. was born in August 1994. A.B. is the defendant's biological daughter. She lived with her father and her mother, Victoria Zappa, from August 1994 until February 2003 in Eldorado. The family moved to Dale, Illinois, in 2003.

¶ 5 The defendant and Victoria separated in May 2010, and were divorced shortly thereafter. In December 2010, A.B. told her mother that the defendant had been sexually abusing her from when she was approximately 6 years old until she was 11 years old. Victoria reported this information to the local police department. Victoria testified that she never suspected the defendant of abusing their daughter.

¶ 6 Agent Rick White is a special agent with the Illinois State Police. He investigated the allegations A.B. reported to Victoria. He interviewed the defendant in late December 2010. Because of A.B.'s allegations, and the State's investigation, the State arrested the defendant.

¶ 7 The State charged the defendant with 20 counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse.

¶ 8 After the defendant's arrest, the defendant's first cousin, Stacy Allen, came forward to claim that when she was a child, the defendant sexually abused her also.

¶ 9 Just before the defendant's February 2012 trial, the State dismissed 1 of the 20 counts of predatory criminal sexual assault–a count where the alleged assault occurred during the six weeks A.B. and her siblings were in foster care and not living with the defendant.

¶ 10 Before trial, the State filed a notice of its intent to introduce other-crimes evidence by calling Stacy Allen to testify, and the defendant filed a motion *in limine* seeking to bar this evidence. By docket order dated January 25, 2012, the trial court denied the defendant's motion stating:

> "The court has weighed the probative value of the State's evidence against the undue prejudice to the [defendant]. The Court has considered the factors set forth subsection (c) [725 ILCS 5/115-7.3(c) (West 2008)].
>
> The court therefore will allow evidence of the other offenses evidence sought to be introduced by the State so long as said evidence is otherwise relevant and the alleged offenses would have constituted one of the offenses set forth in 725 ILCS 5/115-7.3(a)(1), (2) or (3) of charged."

¶ 11 Opening Statement

¶ 12 In the State's opening statement to the jury, the prosecutor stated:

> "I expect to prove through the evidence that Mr. Bowlby is a sexual predator. Brian Bowlby, you will hear, committed the most horrendous crime imaginable. It's hard really to imagine anything worse than having sexual intercourse with your biological daughter, but that's what the evidence will be; penal/vaginal intercourse

with his daughter when she was six or seven years of age and continuing for years."

¶ 13 Testimony of A.B.

¶ 14 A.B. testified that she was 17 years of age and a high school student. The defendant is her dad. She stopped living with her dad in May 2010. She has an older half-brother from her mom's first marriage, a younger sister, and two younger brothers. She testified that she was in court to testify because her dad "raped" her. She defined rape as her dad putting his penis in her vagina. She testified that he starting "raping" her when she was 6 or 7 years old, and stopped "raping" her when she was around 11 years of age. She testified that she really did not remember the first assault, but that she had trouble remembering when he was not assaulting her. The defendant "raped" her when her mom was at work or at a store. The defendant would direct her siblings to go to their grandmother's house, or to stay outside. The assaults occurred at least once per month either in her bedroom or in her parents' bedroom. On one notable occasion around Christmas in 2002, right after A.B.'s youngest brother was born, the defendant "raped" her. Each time, the defendant touched A.B.'s breasts and her vagina. Each time, the defendant put his penis in A.B.'s vagina. The defendant told A.B. not to tell anyone about the assaults. The abuse ended when A.B. was approximately 11 years old, and told the defendant to stop.

¶ 15 At Christmas in 2010, the defendant asked A.B. to bring her siblings over to his home. She testified that this request resulted in an argument because she did not want to comply with this request. After the argument with the defendant, A.B. told her mother

about the years of sexual abuse. She testified that part of the reason she told her mother was out of fear that her father would do the same thing to her younger sister and to a niece.

¶ 16 Testimony of Victoria Zappa

¶ 17 Victoria Zappa testified at trial that she was married to the defendant at the time of all of the alleged crimes. She explained that the Department of Children and Family Services (DCFS) removed the children from her home for a brief period of time because she did not know how to manage the diabetes of one of her children. After training, DCFS returned the children. DCFS raised no other issues of concern regarding the children. After she and the defendant separated, A.B. came to her and said that she had something to tell her. A.B. made her promise that Victoria and the defendant would not get back together. A.B. told Victoria that the defendant sexually abused her between the ages of 6 and 11 at times when Victoria was away from the home. Victoria confirmed that between 2000 and 2003 she worked outside the home, that the defendant did not work most of those years, and that when the defendant was not working, he stayed home with the children. She also testified that between 2000 and 2003, if she left the home to do shopping, A.B. stayed home with the defendant. Victoria testified that she was not aware of what was going on at home when she was away.

¶ 18 Testimony of Stacy Allen

¶ 19 After the defendant's arrest, Stacy Allen, the defendant's first cousin came forward. She told the police that the defendant also molested her between the ages of 6 and 10. The incidents occurred at their grandmother's home where the defendant lived

and later at his own home. The molestation also occurred at the home of Stacy's father, whom the defendant knew. On one occasion, right after A.B. was born and Victoria went to a store, the defendant took Stacy to his bedroom and molested her. This was the final incident. She and her mother moved away from the town where the defendant lived. The molestations involved sexual touching of her vagina with the defendant's penis, but did not culminate in penetration. The defendant is 11 years older than Stacy. Stacy was 26 years old when she testified.

¶ 20 Testimony of Agent Rick White

¶ 21 At trial, Agent White testified that after he was assigned to the case, he first observed A.B.'s interview, and then arranged to meet with the defendant at the Salem police department office. The defendant voluntarily submitted to an interrogation with Agent White.

¶ 22 The defendant initially denied sexual contact with A.B. He claimed that she and her mother were making false claims because he could not afford expensive clothing that A.B. wanted, and because Victoria wanted the defendant to buy her a vehicle.

¶ 23 As the interview progressed, the defendant admitted to having rubbed A.B.'s vagina one time on a camping trip. Later in the interview, the defendant admitted to Agent White that he had rubbed A.B.'s vagina "a few" other times in their Hamilton County home, but that he never penetrated her, and that after he stopped rubbing her vagina, he masturbated. The defendant also admitted that he had ejaculated in front of A.B. while masturbating. Agent White asked the defendant if he had touched A.B. in their Saline County home, and he admitted to one occasion shortly after his son was born

around Christmas. On that occasion, he had been rubbing A.B.'s vagina but stopped when he heard his wife in the living room. That incident occurred at a time when Victoria was recovering from her c-section delivery of their son. The defendant claimed that A.B., who was then eight years old, had initiated that incident by kissing him. He told Agent White that he stopped sexually touching A.B. when he stopped seeing her "in that way." He also told Agent White that after he stopped touching A.B., she would frequently show him her breasts in order to get privileges or money. He claimed that he stopped her from continuing that behavior by refusing the rewards A.B. sought.

¶ 24 The defendant told Agent White that he had never sexually touched any other child, other than his daughter, A.B. The defendant denied being attracted to his other daughter, or to other young girls.

¶ 25 The defendant wrote out a statement after the interview. In the statement, the defendant admitted:

> "I know I have done wrong, and I am sorry for that. I realize I need to apologize to [A.B.] for the things I have done, and I do not see her or any other kid or child in that way. I just want to get my life straightened out, get treatment, and get this behind me and get on with my life. I'm truly sorry for what I put [A.B.] through. I wish I could remember more, but with everything that has gone on I'm having a tough time remembering a lot of things. But I do know I love them and miss them."

¶ 26 Agent White interviewed the defendant a second time about one month after the first interview. Agent White testified that the defendant changed some of his story in this

interview. The defendant was upset about the number of charges in light of his admission to having touched A.B.'s vagina on only two occasions. The defendant denied touching A.B.'s vagina around Christmas when his son was born. Agent White advised him that A.B. claimed vaginal penetration approximately once per month during the time that they lived in Saline County, and that the State had charged the defendant with a separate crime for each incident of abuse. The defendant denied touching A.B. in a tent while camping, claiming that the tent they had was not usable. Instead, he acknowledged touching her vagina in a building behind the house where he lived. The defendant also claimed that the other time he touched A.B.'s vagina that the touching was accidental. The defendant told Agent White that he had been sleeping and apparently moved his hand under A.B.'s clothing to her vagina while asleep. Once he woke up, he immediately removed his hand. Agent White asked the defendant again about whether he had intercourse with A.B. on the night that his son was born, and his answer was that "it wasn't that night."

¶ 27 Agent White also asked the defendant whether he sexually touched his first cousin Stacy Allen. The defendant did not respond definitively, but stated that it had been so long ago that he could not remember.

¶ 28 Testimony of Brian Bowlby

¶ 29 The defendant testified that he first learned of A.B.'s allegations when she called him in late December 2010 and accused him of molesting her. A couple of days later, Agent White contacted him to set up an interview. On the morning of the interview, he took two prescription pain pills and four prescription muscle relaxers. He testified that after taking all of this medication, he was extremely tired. He claimed that he

remembered nothing that happened that day, including his police interview. He testified that he does not remember writing out his statement, but admitted that his signature was on the bottom of the statement.

¶ 30 The defendant testified that after he was arrested, he spoke with Agent White again. He claimed to not remember much about that conversation either, but stated that he was not on any medication on the date of the second interview.

¶ 31 The defendant testified that he believed his daughter was angry with him, but he did not know why. On cross-examination, he claimed she was mad at him because he slapped her after learning that she was sexually active with her boyfriend. He testified that he was also concerned about her hanging out with an older cousin who had already been married, had a child, and was divorced. He claimed that he had heard that many boys wanted to "get her in bed." He denied telling Agent White that he rewarded her for flashing her breasts.

¶ 32 The defendant denied having any sexual contact with his daughter. The defendant specifically denied putting his hand on A.B.'s bare vagina. He testified that on the date that his youngest son was born–on December 24, 2002–he left the children at his sister's home before taking Victoria to the hospital for an induction of labor. She had a cesarean section at about 6 p.m. The defendant then stayed with Victoria and his newborn son at the hospital until about 10:30 p.m., after which he returned home. He testified that A.B.'s story about what happened that night was false because she was at his sister's home, and that he did not pick up the children until late on December 25. Later, he testified that he did not pick up the children for two days. He testified that after the cesarean, the hospital

released his wife after 24 hours, that a visiting nurse came to their home and removed her incision staples on December 25 or 26, that her incision reopened, and that the defendant had to rush her back to the hospital. The defendant testified that his wife then had to spend the night in the hospital on December 26.

¶ 33 The defendant acknowledged that Stacy Allen was his first cousin. He testified that he could not recall if he had been around Stacy during the early to mid-1990s.

¶ 34 He testified on cross-examination that he was at home with the children for some periods of time during the time frame of the alleged crimes. However, the defendant denied keeping A.B. home with him when the other children would go shopping with Victoria. The defendant testified that he had never before had memory lapses, and had not experienced any since the two interviews with Agent White. The defendant later contradicted that testimony and stated that he had experienced more than those two memory lapses but the lapses stopped after he discontinued the prescription pain and muscle relaxant pills.

¶ 35 Closing Argument

¶ 36 In closing argument, the State argued:

> "I told you, first of all, the defendant, Brian Bowlby is a sexual predator. He committed [*sic*] that Brian Bowlby committed the most unnatural acts imaginable.
>
> * * *

Think about [A.B.] on that witness stand. Were those real tears? Were [A.B.]'s tears real? That's your job to determine. I maintain that they were real, so real, so full of emotion and despair that it's clear.

* * *

He is a predator. He is a sexual predator."

¶ 37 Jury Verdict and Sentence

¶ 38 At the conclusion of the trial on February 2, 2012, the jury convicted the defendant of 19 counts of predatory criminal sexual assault of a child and 1 count of aggravated criminal sexual abuse. The trial court sentenced the defendant to 19 consecutive 15-year terms of imprisonment for the predatory criminal sexual assault convictions and a concurrent 6-year term for the aggravated criminal sexual abuse.

¶ 39 Posttrial Motions

¶ 40 The defendant filed two motions seeking a new trial. The trial court denied both motions. The trial court also denied the defendant's motion to reconsider his sentence.

¶ 41 The defendant files this direct appeal from his convictions.

¶ 42 LAW AND ANALYSIS

¶ 43 The defendant raises two issues on appeal. First he argues that the trial court committed error in allowing his first cousin, Stacy Allen, to testify to uncharged, remote, and dissimilar prior sexual assaults. He argues that the alleged assaults occurred 20 years before the present trial. He contends that the testimony of his cousin was more prejudicial than probative, and that the court denied his right to a fair trial. The defendant also argues that the State's prosecutor made improper and prejudicial comments about his

character during opening statement and closing argument, and that those comments denied his right to a fair trial. Specifically, the prosecutor referenced the defendant as a sexual predator, bolstered A.B.'s credibility by opining that A.B.'s pain, despair, and tears were "real," and described the alleged sexual acts as unnatural and horrible.

¶ 44 Admission of Other-Crimes Evidence

¶ 45 The State is generally prohibited from using other-crimes evidence to show the defendant's propensity to commit a charged offense. *People v. Donoho*, 204 Ill. 2d 159, 170, 788 N.E.2d 707, 714 (2003). However, section 115-7.3 of the Code of Criminal Procedure of 1963 permits the admission of other-crimes evidence to show propensity to commit specified sex offenses. 725 ILCS 5/115-7.3(a) (West 2008). The Illinois Supreme Court has upheld the constitutionality of section 115.7.3. *Donoho*, 204 Ill. 2d at 182, 788 N.E.2d at 721.

¶ 46 We review the admission of other-crimes evidence under an abuse of discretion standard. *Id.* We will not reverse the trial court unless the trial court's decision is " ' "arbitrary, fanciful or unreasonable" ' or ' "where no reasonable man would take the view adopted by the trial court." ' " *Id.* (quoting *People v. M.D.*, 101 Ill. 2d 73, 90, 461 N.E.2d 367, 375 (1984) (Simon, J., dissenting), quoting *Peek v. United States*, 321 F.2d 934, 942 (9th Cir. 1963)).

¶ 47 In this case, the State charged the defendant with predatory criminal sexual assault of a child and aggravated criminal sexual abuse; both listed as applicable offenses under section 115-7.3. 725 ILCS 5/115-7.3(a) (West 2008).

¶ 48 Section 115-7.3 specifies the factors the court must consider when weighing whether the prejudicial effect of admitting other-crimes evidence outweighs the probative value:

"(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 2008).

¶ 49 Remoteness and Similarity

¶ 50 The court in *People v. Donoho* explained that there is no bright-line rule controlling when prior offenses are too old to be admitted under section 115-7.3. *Donoho*, 204 Ill. 2d at 183-84, 788 N.E.2d at 722. The trial court must base its decision upon the facts of each case, and the appellate court may not simply substitute its judgment for that of the trial court. *People v. Illgen*, 145 Ill. 2d 353, 371, 583 N.E.2d 515, 522 (1991). While the passage of a number of years may lessen the probative value of the other-crimes evidence, the passage of years alone does not determine its admission. *Id.* at 371, 583 N.E.2d at 522-23; *Donoho*, 204 Ill. 2d at 186, 788 N.E.2d at 723-24.

¶ 51 Based on A.B.'s testimony, her molestation started somewhere between 2000 and 2001 and ended in 2005. Stacy Allen testified that the defendant molested her from 1991 up until 1994 or 1995. The gap in time between the sexual molestations of Stacy Allen and A.B. was at least five years, and at most seven years.

¶ 52 In *People v. Donoho*, our Illinois Supreme Court found other-crimes evidence admissible after a 12- to 15-year time lapse. In *Donoho*, the defendant was charged with criminal sexual assault and aggravated criminal sexual abuse of his two minor

stepchildren, occurring between 1995 and 1998. *Donoho*, 204 Ill. 2d at 162, 788 N.E.2d at 710. The trial court allowed the State's request to introduce evidence of the defendant's 1983 conviction for indecent liberties with two other children. *Id.* The appellate court reversed. *Id.* at 168, 788 N.E.2d at 713. The Illinois Supreme Court reinstated the verdict, finding that the admission of other-crimes evidence was not an abuse of discretion as it was not "arbitrary, fanciful or unreasonable." *Id.* at 186, 788 N.E.2d at 723; see also *People v. Davis*, 260 Ill. App. 3d 176, 631 N.E.2d 392 (1994) (where the appellate court affirmed the trial court's admission of 20-year-old other-crimes evidence, finding it to be credible and probative).

¶ 53 The defendant cites to cases finding that a 10-year lapse is too long. We review the facts and analysis of those cases.

¶ 54 In *People v. Stanbridge*, the jury convicted the defendant of aggravated criminal sexual abuse of a minor during late November 1999. *People v. Stanbridge*, 348 Ill. App. 3d 351, 352, 810 N.E.2d 88, 90-91 (2004). In *Stanbridge*, the State was allowed to present other-crimes evidence involving convictions of criminal abuse of a minor 10 years before the incident at issue, and an uncharged sexual offense from 12 years prior. *Id.* at 353, 810 N.E.2d at 91. The defendant filed a pretrial motion *in limine* to bar this evidence. *Id.* The trial court granted the motion, finding that the risk of prejudice was significant. *Id.* On the first day of trial, the State filed its own motion *in limine* seeking to bar the defendant from claiming that he was heterosexual as a defense to the crime charged which involved a same-sex offense. *Id.* The court denied the motion but cautioned the defendant that he should not open the door to the topic, because the court

would then reverse its ruling and allow in evidence of the other conviction and charges. *Id.* at 353, 810 N.E.2d at 91-92.

¶ 55 During opening statements, defense counsel explained that the victim lived with the defendant for about one year between 1998 and 1999 and that there were no similar allegations during that year. *Id.* at 353-54, 810 N.E.2d at 92. After defense counsel's opening statement, the State argued that statements that the defendant was a father and a veteran opened the door to other-crimes evidence. *Id.* at 354, 810 N.E.2d at 92. The trial court seized upon the "similar allegations" language used by defense counsel, and reversed its ruling on the evidence of prior bad acts. *Id.* The State presented evidence about the 10-year-old conviction, and the 12-year-old uncharged allegation. *Id.*

¶ 56 Unlike in the instant case, in *Stanbridge*, the State did not seek admission of the prior bad acts as propensity evidence, instead arguing that the evidence was admissible because of *modus operandi* and absence of mistake. *Id.* at 355, 356, 810 N.E.2d at 93, 94. On appeal, the court concluded that the evidence was inadmissible to prove propensity because of the 10-year time difference and unspecified similarity issues and inadmissible as *modus operandi* and absence of mistake. *Id.* at 356-57, 810 N.E.2d at 94.

¶ 57 We are unable to discern the appellate court's reasoning on similarity in *Stanbridge*. However, the appellate court was predominantly concerned that the court reacted too soon in allowing the one comment in opening statement to justify admission of the other-crimes evidence in the State's case in chief. *Id.* at 358, 810 N.E.2d at 95. The court stated its opinion that the court should have considered the evidence the

defendant presented and based on his defense determined whether to allow the other-crimes evidence in rebuttal. *Id.*

¶ 58 The defendant also cites to the case of *People v. Childress*, 338 Ill. App. 3d 540, 789 N.E.2d 330 (2003), in support of his position. However, we find that the facts of *Childress* are more supportive of the trial court's decision in this case. In *People v. Childress*, the defendant was charged with aggravated criminal sexual assault, criminal sexual assault, aggravated kidnapping, kidnapping, aggravated battery and unlawful restraint in connection with an incident in 1999. *Id.* at 543, 789 N.E.2d at 332. The defendant filed a motion *in limine* to bar use of other-crimes evidence, while the State sought leave to admit evidence of prior sexual offenses pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963. *Id.* The two prior crimes occurred in 1986 and 1993. *Id.* at 544, 789 N.E.2d at 334. The trial court granted the defendant's motion *in limine*, finding that both charges were not similar enough in facts, while not addressing the time span between the crime charged and the other crimes. *Id.*

¶ 59 On appeal, the court agreed that the 1986 crime was dissimilar and affirmed that portion of the order. *Id.* at 545-46, 789 N.E.2d at 335. However, the court found that the 1993 crime was very similar and the time span of six years between that crime and the charged offense (which the appellate court said was really only one year because the court did not count the intervening five years when the defendant was incarcerated for the 1993 crime) was short enough. *Id.* at 546, 789 N.E.2d at 335. The appellate court noted that both the 1993 crime and the charged offense involved forced vaginal penetration and forced performance of oral sex; that both involved confinement of the victim to an

abandoned building; that the buildings involved in both offenses were only a quarter of a mile apart; that there was only a one-year time difference not counting the period of the defendant's incarceration; and that both offenses occurred during the summer months. *Id.* at 553, 789 N.E.2d at 340-41. The court concluded that any prejudicial effect did not outweigh the evidence's probative value of the defendant's propensity to commit a sexual offense. *Id.*

¶ 60 Both A.B. and Stacy Allen provided approximations of the years during which the defendant began and ended their sexual abuse/assaults. Those approximations give a time lapse between five and seven years. The defendant's complaint that the alleged offenses occurred 20 years apart is factually in error. We do not find that the allegations of Stacy were too remote in time. Case law amply supports introduction of other-crimes evidence in similar time frames. See *People v. Davis*, 260 Ill. App. 3d 176, 190, 192, 631 N.E.2d 392, 403, 404 (1994) (where the court allowed evidence of sexual acts 20 years prior to the charged offenses); *People v. Smith*, 406 Ill. App. 3d 747, 954, 941 N.E.2d 419, 425-26 (2010) (where the court disallowed evidence of other sexual crimes ranging from 25 to 42 years before the charged offense, but allowed the admission of uncharged abuse allegations 5 years prior).

¶ 61 Other-crimes evidence must also have " 'some threshold similarity to the crime charged.' " *Donoho*, 204 Ill. 2d at 184, 788 N.E.2d at 722-23 (quoting *People v. Bartall*, 98 Ill. 2d 294, 310, 456 N.E.2d 59, 67 (1983)). However, the facts do not have to be identical to be admissible because crimes are rarely the same. *Id.* at 185, 788 N.E.2d at 723 (citing *Illgen*, 145 Ill. 2d at 373, 583 N.E.2d at 523-24).

¶ 62 Here, in both situations, the defendant sexually assaulted family members. While Stacy did not live with the defendant as A.B. did, he sought opportunities to isolate Stacy. His attacks upon her occurred in their grandmother's home, in the home of Stacy's father, and in the defendant's marital bedroom. On one occasion when the defendant was married to Victoria, the defendant took advantage of his wife's going to a store and promptly took Stacy into his bedroom and abused her. With A.B., he also took advantage of opportunities when Victoria was away from home. In addition, he would send the other children either to his mother's home, or simply to go outside. The attacks on both girls occurred in homes familiar and accessible to the defendant. Stacy alleged vaginal touching, as well as penile-vaginal contact, but no intercourse. A.B. alleges vaginal touching, and that the touching progressed to vaginal intercourse. We also note the similarity of the ages of both girls when the defendant allegedly abused them. A.B.'s abuse began when she was 6 or 7 and ended when she was 11, while Stacy's abuse began when she was 6 and ended when she was 10.

¶ 63 We conclude that the probative nature of the evidence is supported by the similarities in the allegations of Stacy Allen and in the crimes charged in this case. We find that the testimony of Stacy was more probative than prejudicial on the issue of the defendant's propensity to commit a sexual offense upon a minor. We do not find any basis in law or in the record to find that the trial court abused its discretion in admitting Stacy's testimony.

¶ 64 Prosecutorial Comments in Opening Statement and Closing Argument

¶ 65 The defendant alleges that the prosecutor made several improper and prejudicial comments in both her opening statement and in closing argument, designed to inflame the passions of the jury and to dehumanize and vilify him. In opening statement, she referred to the defendant as a sexual predator and accused him of committing the most horrendous crime imaginable. In closing argument, she characterized the defendant as a sexual predator three more times. The defendant claims that the prosecutor played on the jury's sympathies by giving her own opinion that A.B.'s pain and tears during her court testimony was real, and that she would continue to suffer throughout her life. In addition to playing to the sympathy of the jury members, the defendant contends, by arguing that the tears were real, the prosecutor was bolstering A.B.'s credibility. He asks this court to find that these comments prejudiced his right to a fair trial, and to reverse his convictions.

¶ 66 Where there is no dispute as to what the prosecutor said in opening statements and closing arguments, appellate review of whether those statements were so egregious that a new trial is necessary is *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 744 (2007).

¶ 67 The purpose of an opening statement is to provide the jury with an outline of what each party anticipates the evidence will show. *People v. Kliner*, 185 Ill. 2d 81, 127, 705 N.E.2d 850, 874 (1998); *People v. Richmond*, 341 Ill. App. 3d 39, 47, 791 N.E.2d 1132, 1139 (2003). The statement can include a discussion of the anticipated evidence and any reasonable inference that may be drawn from the evidence. *Kliner*, 185 Ill. 2d at 127, 705 N.E.2d at 874. Prosecutors are allowed substantial latitude in opening

statements. *Richmond*, 341 Ill. App. 3d at 47, 791 N.E.2d at 1139 (citing *People v. Pasch*, 152 Ill. 2d 133, 184, 604 N.E.2d 294, 315 (1992)). Any improper statement made in an opening statement must be tied to the prosecutor's deliberate misconduct, and the defendant must also be substantially prejudiced. *People v. Wills*, 153 Ill. App. 3d 328, 342, 505 N.E.2d 754, 763 (1987). The test to determine if the prosecutorial comment resulted in substantial prejudice is whether the statement was a material factor in the defendant's conviction or whether the jury would have reached a different result but for the statement at issue. *Wheeler*, 226 Ill. 2d at 123, 871 N.E.2d at 745; *People v. Figueroa*, 381 Ill. App. 3d 828, 849, 886 N.E.2d 455, 475 (2008).

¶ 68 In this case, defense counsel failed to object to the prosecutor's comment that the defendant was a "sexual predator." The defendant also failed to include this argument in his posttrial motion. To preserve the issue for appeal, the defendant is required to object at trial and raise the issue in a written posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247, 256-57 (2005); *People v. Mulvey*, 366 Ill. App. 3d 701, 713, 853 N.E.2d 68, 78 (2006). The defendant has forfeited this issue because he did not object during trial nor did he raise the issue in a posttrial motion. *Id.*

¶ 69 Even if we did not conclude that the issue was forfeited, the defendant has not been able to establish that the sexual predator comment was inappropriate. The jury heard from his daughter, A.B. She told the jury what her father did to her. She explained that her father was able to molest her without anyone's finding out because he waited until her mother left the home and sent her siblings outside or to a relative's home. Additionally, the jury heard the compelling testimony of the defendant's first cousin

Stacy Allen. From her testimony, the jury could safely conclude that the defendant had a propensity to sexually abuse minor female relatives. Upon review of cases cited by the defendant, we find that they are inapposite. While a prosecutor may not refer to a defendant as an animal (see *People v. Caballero*, 126 Ill. 2d 248, 271-72, 533 N.E.2d 1089, 1097 (1989); *People v. Alexander*, 127 Ill. App. 3d 1007, 1014, 470 N.E.2d 1071, 1077 (1984)), the term "predator" can also describe a person. See Webster's New Universal Unabridged Dictionary 1417 (2d ed. 1983). As the term "predator" has human applications, we conclude that use of that term was factually accurate in light of the charges and allegations. Because the majority of the charges against the defendant include the term "predatory"–predatory criminal sexual assault, the State's use of that term was appropriate and in keeping with the charges filed. Finally, the trial court properly instructed the jury members that they should not consider the opening statements to be evidence. We find that the defendant was not prejudiced by the prosecutor's use of the term "sexual predator" in opening statement.

¶ 70 We also find no harm in the prosecutor's characterization of the alleged crimes as being horrendous, egregious, and unimaginable. The defendant repeatedly fondled his biological daughter's vagina and breasts and had sexual intercourse with her. The actions taken by the defendant were incestuous, and society typically characterizes such behavior as abhorrent. Even so, the trial court instructed the jury that it should not treat the opening statement as evidence, and that it should consider the evidence in light of each member's own experiences and observations in life. Furthermore, we find no basis to

conclude that the use of these adjectives was a material factor in the defendant's conviction.

¶ 71 Courts give prosecutors wide latitude in closing arguments, but prosecutors are not allowed to make improper and/or prejudicial arguments. *People v. Williams*, 181 Ill. 2d 297, 330, 692 N.E.2d 1109, 1126-27 (1998); *People v. Hudson*, 157 Ill. 2d 401, 441, 626 N.E.2d 161, 178 (1993). The State must limit its arguments to the reasonable inferences related to the evidence introduced at trial. *Id.* Prosecutors may not make arguments that could incite the jury to act out of passion rather than from reason and deliberation. *People v. Liner*, 356 Ill. App. 3d 284, 297, 826 N.E.2d 1274, 1287 (2005). If the closing arguments go beyond the fairness and impartiality required of our judicial system, then the appellate court must reverse the verdict. *People v. Clark*, 114 Ill. App. 3d 252, 255-56, 448 N.E.2d 926, 928-29 (1983).

¶ 72 The defendant here did not object to any of the prosecutor's claimed improper arguments. He also did not raise any of these arguments in his posttrial motion. Consequently, he has forfeited this issue on appeal. *Woods*, 214 Ill. 2d at 470, 828 N.E.2d at 256-57; *Mulvey*, 366 Ill. App. 3d at 713, 853 N.E.2d at 78.

¶ 73 We have already stated that use of the term "sexual predator" was proper. A prosecutor may refer to the credibility and demeanor of a trial witness in closing when asking the jury to judge a witness's truthfulness based on the evidence presented and the witness's demeanor. *People v. Emerson*, 122 Ill. 2d 411, 434-35, 522 N.E.2d 1109, 1118 (1987); *People v. Jackson*, 391 Ill. App. 3d 11, 43, 908 N.E.2d 72, 101 (2009); *People v. Nolan*, 291 Ill. App. 3d 879, 886, 684 N.E.2d 832, 836 (1997). In this case, the

prosecutor did not explicitly assert her personal view to this jury about A.B.'s demeanor, which would have been improper. See *Jackson*, 391 Ill. App. 3d at 43, 908 N.E.2d at 101; *People v. Montgomery*, 373 Ill. App. 3d 1104, 1119, 872 N.E.2d 403, 416 (2007). Furthermore, we reviewed the entirety of the State's closing argument in this case and find that the prosecutor advised the jury of its own duty to determine the credibility of the witnesses who testified. Overall, we conclude that there is no basis to conclude that the prosecutor's "opinion" on A.B.'s credibility was a material factor in the defendant's conviction, in light of the evidence against the defendant in this case, and because the jury was instructed to make its own credibility determinations.

¶ 74 CONCLUSION

¶ 75 For the foregoing reasons, we affirm the convictions and sentences of the Saline County circuit court.

¶ 76 Affirmed.