2016 IL App (2d) 150552-U
No. 2-15-0552
Order filed May 10, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CF-1419
FLOYD N. HOSKINS,	)	Honorable Robert G. Kleeman,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion in not instructing the jury on defendant's affirmative defense of parental discipline, as there was at least slight evidence to support the instruction, and it was the jury's role to determine the necessity for and reasonableness of the alleged punishment. Accordingly, we reversed defendants' convictions and remanded for a new trial. We also addressed defendant's argument that the trial court abused its discretion in allowing in evidence of prior bad acts, as the issue was likely to recur on remand. We concluded that the trial court acted within its discretion in allowing the evidence, though it was not bound by its ruling on remand.

¶ 2 Following a jury trial, defendant, Floyd Hoskins, was convicted of two counts of domestic battery (720 ILCS 5/12-3.2(a)(1), 12-3.2(a)(2) (West 2014)) and sentenced to three

years' imprisonment. On appeal, he argues that the trial court abused its discretion by: (1) refusing to instruct the jury on his affirmative defense of reasonable parental discipline of a child, even though there was evidence to support the instruction; and (2) allowing the State to introduce evidence of defendant's prior bad acts, where the prejudicial impact of the evidence substantially outweighed its probative value. We agree with defendant's first argument and therefore reverse and remand. We also address defendant's second argument, as it is likely to reoccur on remand, and we conclude that the trial court acted within its discretion in allowing evidence of defendant's prior bad acts.

¶ 3 I. BACKGROUND

¶ 4 On August 14, 2014, defendant was charged by indictment with two counts of domestic battery against A.F., a household or family member, on July 23, 2014. The first count alleged that defendant had been previously convicted of domestic battery and that he grabbed A.F. by the neck knowingly and without legal justification, causing A.F. bodily harm. 720 ILCS 5/12-3.2(a)(1) (West 2014)). The second count was identical except that instead of alleging bodily harm, it alleged physical contact of an insulting or provoking nature. 720 ILCS 5/12-3.2(a)(2) (West 2014)).

¶ 5 On October 6, 2014, defendant filed a notice stating that he intended to assert the affirmative defense of parental discipline.

¶ 6 The same day, the State filed an amended motion *in limine* seeking to, *inter alia*, introduce evidence of defendant's other crimes and bad acts. Specifically, on August 4, 2013, defendant was convicted of domestic battery against his girlfriend, Brett Schmitz, who was A.F.'s mother. Defendant came home drunk, accused her of cheating on him, and choked her with his hands. Schmitz broke free and ran to a neighbor's house for assistance. The responding

officers noticed the smell of alcohol when speaking to defendant. Defendant was arrested and taken to the police station, at which point he spit on an officer and threatened officers. The State argued that the prior offense was similar to the instant offense in that defendant grabbed both victims with his hands around their necks; the responding officers noted the indicia of alcohol when speaking to defendant; and defendant was highly agitated and uncooperative when speaking with the officers.

¶ 7 The State also sought to introduce evidence that in January or February 2014, defendant yelled profanities at A.F. and grabbed A.F.'s face with his hand. Defendant then pushed A.F.'s head, causing a bruise on A.F.'s face. The State argued that the incident was similar to the instant offense in that it involved the same victim and demonstrated a continuing pattern of abuse toward him, and it occurred close in time. The State argued that the conduct showed defendant's propensity, motive, intent, and lack of mistake in committing the present offense.

¶ 8 On October 7, 2014, the trial court granted the State's request to introduce the evidence of the other bad acts, citing the proximity in time and the degree of factual similarity between the prior acts and the current offense.

¶ 9 We next summarize the evidence from defendant's trial. According to the evidence presented by the State, on July 23, 2014, defendant lived with his girlfriend, Schmitz, and her two sons, A.F. (age 13 at the time) and K.F. (age 15 at the time). Defendant and Schmitz also had a daughter together who lived with them (age 4 at the time). The biological father of A.F. and K.F. was Jose F.

¶ 10 Two Lombard police officers testified that at about 8 p.m. on the night in question, they were dispatched to a home. When they approached, defendant began screaming at them, asking why they were on "f*cking private property." He had an odor of alcohol on his breath but

denied drinking alcohol. A.F. was visibly shaken and was crying. He had red marks on the sides of his neck, underneath his ears. However, he did not have any marks across the front of his neck or bruising along the sides of his neck. An officer identified photographs of A.F.'s neck. Schmitz gave the officers a cell phone with a smashed screen, and defendant admitted breaking it. Defendant was arrested and taken to the police station. While there, he said, "[S]o what. I grabbed him by the back of the neck and threw him aside."

¶ 11 K.F. testified as follows. The morning of July 23, 2014, defendant told K.F. that there was nothing that he liked about A.F. and that he hated him with a passion. A.F. was sometimes uncontrollable and sometimes did not listen when K.F. or Schmitz told him to stop doing something. Later that day, K.F. was just inside A.F.'s bedroom, and they argued about candy for three or four minutes. The argument became somewhat loud. A.F. grabbed a badminton racquet and tried to hit K.F. with it but missed. Defendant came in and put his hand in front of A.F. to get him to stop. A.F. slapped defendant's hand away. Defendant grabbed A.F. by the neck, using both of his hands, and lifted him up to the top of the door frame. A.F. tried to hold on to the side of the door frame. Defendant held him there about 15 seconds, and A.F.'s face got red. Defendant then pulled him off the door frame and took him inside the A.F.'s bedroom, and K.F. heard A.F. hit the ground. Defendant stormed out of the room and slammed the door.

¶ 12 At that moment, Schmitz came home, and she and defendant yelled at each other. Defendant went back into A.F.'s room; A.F. was under the bed, talking on the phone. Defendant threw the mattress off the bed and grabbed the phone. Defendant told the person on the phone that his "crack baby [was] acting up again." K.F., A.F., and Schmitz went outside, and defendant came out and handed Schmitz the phone. He went back in, and Schmitz gave A.F. the phone. Defendant came back outside a second time, took the phone, and threw it in a kiddie pool.

Defendant then took it out of the pool and threw it on the ground several times, shattering the phone and bending its frame.

¶ 13 A.F. provided the following testimony. He was arguing with K.F. on the day in question because K.F. was being stingy with his candy. However, he did not swing a badminton racquet at K.F. Defendant came in and tried to separate them; he did not seem angry at the time. He put his arm around A.F. and said, "[A]re you done[?]" A.F. slapped defendant's hand, and defendant lifted him up by his neck using two hands. Defendant looked angry. He lifted him to the top of the doorway in his bedroom for about 15 seconds, and A.F. held on to the doorframe because he thought defendant was going to throw him. It hurt his head and his neck "a little bit." A.F. could not breathe or talk. Defendant then threw him on the floor of his room, "[s]ort off [*sic*]" hard. Defendant then asked if he was done and left. A.F. felt scared, so he got his phone, went under his bed, and called his dad. He asked his dad to call the police. Schmitz came home, and then defendant returned to A.F.'s room. He took the mattress off A.F.'s bed. He took defendant's phone and yelled and swore at A.F.'s dad. A.F. provided consistent testimony with K.F. regarding defendant subsequently damaging the phone.

¶ 14 A.F. agreed that he (A.F.) sometimes had a bad temper. Defendant treated A.F. worse than his siblings and called him names, though he also called K.F. some of the same names. A.F. identified a picture of himself with a "thumb bruise" on his cheek from defendant. He testified that he did not remember when the picture was taken, but then agreed that it might have happened around the time of the winter Olympics, in January or February 2014. Defendant came into A.F.'s room, and A.F. asked what he wanted. After more conversation, defendant got mad, grabbed his face, and pulled him down on the floor. Defendant turned A.F.'s face so that it hit the bed's metal railing. Sometime after that, his grandmother took a picture of his face.

¶ 15 A.F.'s grandmother testified that she took the picture of A.F. in January or February 2014.

¶ 16 Schmitz testified as follows. When the incident took place, defendant had been living with the family for about three years. On that day, Schmitz took their daughter to the park while A.F. and K.F. stayed home with defendant. Defendant was allowed to discipline the boys by grounding them, yelling at them, and taking things away. Schmitz set the rules regarding the children, and she never affirmatively gave defendant permission to physically discipline them. She sometimes used physical discipline with A.F. when he became uncontrollable, but she never choked him.

¶ 17 About one year prior, on August 4, 2013, defendant came home looking angry. He had been drinking. Defendant accused her of cheating, and they argued. Defendant then grabbed her neck with one hand, squeezed her neck, and pushed her down. Schmitz agreed that defendant treated A.F. differently than the other children and that she still had feelings for defendant.

¶ 18 Jose F., A.F.'s and K.F.'s father, testified as follows. Jose saw his sons every other week, but they were otherwise with defendant. Jose had bought cell phones for the boys. On July 23, 2014, A.F. called him, upset and crying. Jose learned that there had been a physical altercation between defendant and A.F., and he called the police. While he was calling, defendant left a voicemail message on his phone. Later, Jose called A.F.'s phone back, and defendant answered. Defendant said, "[W]hat, you have something to say to me?", and Jose asked what was going on. Defendant started talking about A.F., calling him names like Jose's "f*cking crack son." Defendant yelled at Jose some more, and Jose hung up. Defendant called back and left another voicemail message. The messages were played for the jury. In both of them, defendant swore at Jose. Jose agreed that he also swore at defendant during their conversations that day.

¶ 19 Defendant's biological son, Brandon Hoskins, provided the following testimony. He was 16 at the time of trial. He did not live with defendant and his half-sister on a full-time basis, but on July 23, 2014, he had been visiting them for about one week. Defendant acted as a stepfather to A.F. and K.F. and played games and watched movies with them. Brandon was in the house and saw A.F. and K.F. physically fighting. A.F. had a badminton racquet and was hitting K.F. with it.

¶ 20 In discussing the jury instructions, the State argued that there was no evidence warranting a parental discipline defense. The trial court stated that if it were to give the instruction, the instruction would state that a parent is legally justified in using reasonable force when necessary as part of reasonable discipline of a child. The trial court stated that there was more than slight evidence that defendant was a parental figure who would be authorized in using reasonable force when necessary as part of reasonable discipline of a child. It continued:

> "If there was evidence the defendant merely placed his hands on [A.F.], pushed him, or grabbed him by the arm and led him into another room, my judgment might be different.
>
> But the only evidence I have is that this defendant placed two hands around the neck of a teenage boy, lifted him off the ground for 15 seconds, prevented him from breathing. And I cannot find that any rational trier of fact could find that that is reasonable force as part of reasonable discipline of a child.
>
> I don't know if that happened or not. That's the jury's call. But if it happened, there is no rational person, in my view, that could say that that's part of parental discipline. If that happened, the jury finds that that's been proved beyond a reasonable doubt, again, I think it would be an irrational conclusion that that's reasonable force as part of a reasonable discipline of a child."

Defense counsel stated that the jury did not have to believe that defendant held A.F. up for 15 seconds, as it could determine otherwise based on pictures or even without controverted testimony. The trial court responded that regardless of the length of time, the evidence was that defendant put his hands around A.F.'s neck and lifted him off the ground. The trial court stated that the jury could determine that it did not happen, but no rational trier of fact could say that it believed that it occurred but that it was justified as reasonable force administered in the course of reasonable discipline. The trial court therefore denied defendant's request for the jury instruction and removed the "without legal justification" phrase from the definition and issues instructions.

¶ 21 The jury found defendant guilty of both counts of domestic battery.

¶ 22 On November 6, 2014, defendant filed a motion for a new trial. He filed an amended motion for a new trial on March 12, 2015. As pertinent here, he argued that the trial court erred in granting the State's amended motion *in limine* to introduce evidence of other crimes and bad acts and by denying his jury instruction on the parental discipline defense.

¶ 23 On March 26, 2015, the trial court denied defendant's motion for a new trial. On April 27, 2015, it sentenced him to three years' imprisonment. Defendant timely appealed.

¶ 24 II. ANALYSIS

¶ 25 Defendant first argues that the trial court abused its discretion by not giving the jury a parental discipline instruction despite evidence supporting it.

¶ 26 Even slight evidence of an affirmative defense is sufficient to entitle a defendant to an instruction. *People v. Graves*, 133 Ill. App. 3d 546, 549 (1985). The trial court may not weigh the evidence in deciding whether an issue has been raised entitling the defendant to an instruction. *Graves*, 133 Ill. App. 3d at 549. "The failure to instruct the jury on an affirmative defense and on the State's burden of proof for that defense constitutes serious error." *People v.*

Gonzalez, 385 Ill. App. 3d 15, 21 (2008). The trial court may deny an instruction on an affirmative defense only where the evidence is so clear and convincing as to permit the court to find as a matter of law that there is no affirmative defense. *People v. Uptain*, 352 Ill. App. 3d 643, 647 (2004). A trial court's refusal to give a particular jury instruction is reviewed under an abuse-of-discretion standard. *People v. Couch*, 387 Ill. App. 3d 437, 444 (2008).

¶ 27 The parental right to discipline is not a statutory affirmative defense but is instead derived from the common law rule that parents may take reasonable steps to discipline their children. *People v. Green*, 2011 IL App (2d) 091123, ¶ 14. It creates a legal justification for an otherwise criminal act, similar to the assertion of self defense. *Id.* When such a defense is present, the State must prove the defendant guilty beyond a reasonable doubt of all of the elements of the offense as well as that the discipline used exceeded the standards of reasonableness. *Id.* In other words, whether a parent's use of corporal punishment was reasonable and thereby legally justified is a question of fact subject to the beyond-a-reasonable-doubt standard. *Id.* ¶ 18. In assessing the reasonableness of the discipline, the degree of injury inflicted upon the child is not the exclusive or determinative factor. *Id.* ¶ 24. Other factors include the likelihood of future punishment that may cause greater injury, the psychological effects of the discipline on the child, and whether the parent was calmly attempting to discipline the child or was lashing out in anger. *Id.* Both the reasonableness of the punishment and the necessity for the punishment are to be determined by the fact finder, under the circumstances of the case. *Id.* A person who is *in loco parentis* is held to the same standard of reasonableness as a parent in disciplining children. *People v. Ball*, 58 Ill. 2d 36, 40 (1974).

¶ 28 Defendant notes that in his opening argument, his attorney argued that he was a parental figure in the home and told A.F. to stop fighting with K.F. His attorney argued that when A.F.

would not stop, defendant stopped the fight by lifting A.F. off K.F. and putting him in his room, a safe location. Defendant also notes that the trial court found that there was sufficient evidence that he was a parental figure who would be allowed to use reasonable force when necessary to reasonably discipline a child. Defendant further points to evidence that: A.F. was sometimes uncontrollable and did not listen when he was told to stop doing something; A.F. and K.F. were fighting; A.F. swung a racquet at K.F.; defendant came into the room and did not seem angry; he tried to separate the boys and put his arm around A.F.; A.F. slapped defendant's hand; and defendant put his hands on A.F.'s neck and moved him into his room. Defendant argues that there was therefore more than slight evidence to support his affirmative defense, and the trial court's refusal to give the jury the parental discipline instruction was an abuse of discretion. Defendant contends that by determining that no rational person could find that defendant's alleged actions could possibly constitute parental discipline and refusing to tender the jury the proposed instruction, the trial court appropriated for itself the jury's fact-finding function.

¶ 29 Defendant argues that the trial court's error was compounded by the fact that it removed the "without legal justification" language from instructions pertaining to the elements of domestic battery, even though this element was alleged in the indictments. Defendant argues that the State aggravated the error by arguing it its rebuttal closing argument that it did not matter why defendant grabbed A.F. by the neck and that there were no jury instructions about parental discipline. Defendant maintains that the State compounded the prejudice even more by arguing that he "choked" A.F. and Schmitz, even though that was not the crime he was charged with nor was there evidence of choking.

¶ 30 The State contrasts this case to *People v. Roberts*, 351 Ill. App. 3d 684 (2004). There, the defendant was charged with the domestic battery of his 16-year-old daughter, in that he allegedly

pulled her hair and struck her face with his hand. *Id.* at 685. The defendant testified that he grabbed the victim's hair and pushed her towards her room after she hit his wife a couple of times. The home's power then went out. The victim testified that the defendant hit her on her head and dragged her across the room; the victim's left eye was swollen. *Id.* at 686. A Department of Children and Family Services Investigator testified that the victim's eye injury was inconsistent with her testimony. *Id.* at 686-87. The trial court denied the defendant's request to instruct the jury on the defense of parental discipline, noting that the proposed instructions were not pattern instructions. *Id.* at 687. The jury found the defendant guilty. *Id.* at 688. The appellate court reversed, stating that although the trial court instructed the jury that a person commits domestic battery when he knowingly causes bodily harm to a family or household member without legal justification (*id.* at 688), it should have also instructed the jury that a parent is legally justified in using reasonable force to discipline his child (*id.* at 690).

¶ 31 The State maintains that there was sufficient evidence in *Roberts* to warrant the parental discipline instruction because there was a dispute between the parent and victim as to what occurred. The State argues that, here, in contrast, there was not even slight evidence to warrant the instruction, as the undisputed evidence showed that defendant picked up A.F. by his neck and threw him into his room. The State argues that, therefore, there was no legal justification for defendant's actions, so the trial court did not abuse its discretion in refusing the instruction, as it determined that no rational trier of fact could believe that defendant's conduct constituted reasonable parental discipline. At oral argument, the State also took the position that there was no evidence of parental discipline, because A.F.'s fight with K.F. had already ended by the time that the incident occurred.

¶ 32 Defendant responds that *Roberts* supports his position, as the trial court there refused to tender the same parental discipline instruction as he proposed below, and the trial court's ruling was reversed on appeal.

¶ 33 We agree with defendant that the trial court abused its discretion in refusing to instruct the jury on his affirmative defense of parental discipline. While the State maintains that there was no evidence of parental discipline, we note that even the trial court recognized that there was more than slight evidence that defendant was a parental figure and was trying to break up a fight between A.F. and K.F. when the conduct at issue occurred. Thus, there was more than sufficient evidence that the boys' fight, defendant's action of trying to separate them, A.F.'s slapping defendant's hand, and defendant's lifting of A.F. by the neck was all a continuous course of events. The trial court stated that if defendant had placed his hands on A.F., pushed him, or grabbed him by the arm and led him into another room, it might have given the parental discipline instruction. However, it then stated that because the evidence was that defendant put his hands around A.F.'s neck and lifted him off the ground, no rational trier of fact could say that it believed that it occurred but that it was justified as reasonable force administered in the course of reasonable discipline.

¶ 34 While there was evidence that defendant held A.F. by the neck to the top of his door frame for 15 seconds, such that he could not breathe or talk, A.F. also testified that it hurt his head and neck only "a little bit." Thus, a rational jury could have determined that the incident did not occur exactly as A.F. had described it. Moreover, in *Hofmann v. Poston*, 77 Ill. App. 3d 689, 693-94 (1979), the appellate court stated that spanking using a stick or a belt for failure to do chores, where there was no resulting injury, was not outside the bounds of normal parental discipline. Thus, reasonable parental discipline can encompass even a significant level of

physicality. Such an instruction is also not limited to "traditional" forms of discipline such as spanking, for in *People v. Warner*, 98 Ill. App. 3d 433, 435-36 (1981), a child was largely confined to an unventilated bedroom for about one month, and the jury was apparently still given the instruction of parental discipline.[1] Our supreme court has stated that the law gives parents large discretion in exercising authority over their children, but they must act without the bounds of reason and humanity, such that "[i]f the parent commits wanton and needless cruelty upon his child, either by imprisonment *** or by inhuman beating, the law will punish him." *Fletcher v. People*, 52 Ill. 395, 397 (1869). By highlighting the very extreme actions of imprisonment or inhuman beating, this language suggests that there is a wide range of lesser conduct that can be considered reasonable parental discipline.

¶ 35 There was at least slight evidence that defendant grabbed A.F. by the neck as a means of breaking up the fight and moving him to his room. The trial court may not weigh the evidence when determining whether a defendant is entitled to an affirmative defense (*Graves*, 133 Ill. App. 3d at 549), and if the defendant is entitled to a parental discipline instruction, both the necessity for and reasonableness of the punishment are to be determined by the fact finder, under the case's circumstances (*Green*, 211 Ill. App (2d) 091123, ¶ 24). In such a situation, the State must prove that the parent's use of corporal punishment was unreasonable beyond a reasonable doubt. *Id.* ¶ 14). However, here the trial court stated that if the jury believed that defendant had lifted A.F. up by the neck, "there [was] no rational person, in [its] view, that could say that that's

[1] The opinion does not specifically state that the jury was given the parental discipline instruction, but it discusses the defense of parental discipline and states that the jury could have concluded that the defendant's conduct was unreasonable, thereby implying that the jury was instructed on the defense.

part of parental discipline," and that it thought that "it would be an irrational conclusion that that's reasonable force as part of a reasonable discipline of a child." By concluding that defendant's action**s** were unreasonable discipline as a matter of law, the trial court applied the wrong legal standard, as the question before it was only whether there was at least slight evidence that defendant was exercising parental discipline over A.F (see *Graves*, 133 Ill. App. 3d at 549), which we have answered in the affirmative. The trial court usurped the jury's role to determine whether a parental figure's use of corporal punishment was reasonable parental discipline, thereby eliminating the requirement that the State prove beyond a reasonable doubt that defendant's actions were not legally justified.

¶ 36 As defendant quotes in his reply brief, in *Green* we stated that: "[j]udges 'must take care not to create a legal standard from our personal notions of how best to discipline a child.' [Citation.] That is best left to the trier of fact under the unique, factual circumstances of the case." We by no means condone defendant's alleged actions in this case, but determining whether those actions were reasonable parental discipline should have been left to the jury to decide, as it did for the elements of the charged crimes. "When the evidence raises the basis for the instruction, a trial court's refusal results in a denial of [a] defendant's due process and entitles a defendant to a new trial." *People v. Hari*, 218 Ill. 2d 275, 297 (2006). Accordingly, we must reverse defendant's convictions and remand for a new trial.[2]

¶ 37 We next address defendant's argument that the trial court abused its discretion in allowing in other crimes evidence, as that issue will probably arise again on remand. *Cf. People v. Johnson*, 2013 IL App (2d) 110535, ¶ 60 (addressing issue likely to arise at trial on remand).

[2] Defendant has not challenged the sufficiency of the evidence, so there is no double-jeopardy impediment to a new trial. *People v. Carballido*, 2015 IL App (2d) 140760, ¶ 93.

The trial court allowed evidence that defendant had previously grabbed A.F.'s face and pushed him down, and that defendant squeezed Schmitz's neck and pushed her down. It stated that it was allowing the evidence to show propensity, intent, motive, and lack of mistake.

¶ 38 Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011) provides that evidence of other crimes or acts is not admissible to prove a person's character in order to show a conforming action except as provided by certain sections of the Code of Criminal Procedure of 1963 (Code), including section 115-7.4 (725 ILCS 5/115-7.4 (West 2014)). Such evidence may be admissible for other purposes, such as evidence of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011).

¶ 39 Section 115-7.4 pertains to domestic violence offenses and states that where a defendant is accused of such an offense, "evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.4(a) (West 2014). Still, the evidence's probative value must not be substantially outweighed by the risk of undue prejudice. *People v. Torres*, 2015 IL App (1st) 120807, ¶ 40. On this subject, section 115-7.4 provides:

> "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 5/115-7.4(b) (West 2014).

Whether to admit other crimes evidence is within the trial court's discretion, and we will not disturb its ruling absent an abuse of discretion. *Torres*, 2015 IL App (1st) 120807, ¶ 40.

¶ 40 Defendant argues that the prior "uncharged incidents"[3] that were introduced were distant in time from the charged offenses, and the facts were substantially different. Defendant argues that in the incident with A.F., A.F. was unclear as to when it occurred, he " 'guessed' " that defendant might have been mad at him, and he could not completely remember what defendant did to him. Defendant points out that he was not alleged to have grabbed A.F.'s throat.

¶ 41 Defendant argues that in the incident involving Schmitz, the act was even more distant in time; it involved a romantic, rather than parental, relationship; and there was evidence of an actual dispute with her about infidelity whereas here there was no alleged dispute with A.F. Defendant argues that Schmitz also testified that their argument became physical, but the State did not present evidence that defendant escalated the argument into a physical confrontation. Last, defendant argues that he was alleged to have choked Schmitz, which is substantially different from grabbing someone.

¶ 42 Defendant argues that these alleged other bad acts, especially the one with Schmitz, had limited probative value and substantially more prejudicial effect on him. Defendant argues that the State also mischaracterized the evidence by arguing in closing that he had choked A.F. and Schmitz, distracting the jury from the evidence at issue and putting in the jurors' minds the notion that he had the propensity to commit crimes.

¶ 43 The State cites *Null*, 2013 IL App (2d) 110189. There, the defendant was convicted of murdering his wife. *Id.* ¶ 1. At trial, nine witnesses were allowed to testify that they saw acts of

[3] Defendant was actually convicted of domestic battery for the incident with Schmitz, but the jury was not told of the conviction. Regardless, a defendant need not have been convicted of an earlier offense in order for other crimes evidence to be admissible. *People v. Null*, 2013 IL App (2d) 110189, ¶ 47.

domestic violence, observed injuries on the victim, or gave her shelter when she fled from defendant. *Id.* ¶ 6. The trial court allowed this evidence to show defendant's intent, motive, and lack of mistake. *Id.* The defendant challenged the admission of this evidence on appeal, and this court affirmed. *Id.* ¶ 47. We stated that a defendant's prior acts of violence against the victim provided evidence of motive, such as a hostility showing that he was likely to do further violence. *Id.* Further, under section 115-7.4 of the Code, such evidence could be considered for its bearing on any matter to which it is relevant, including propensity. *Id.* We stated that the evidence in the case was admissible to show intent, motive, and lack of accident or mistake. *Id.* ¶ 51.

¶ 44 The State argues that the trial court here admitted the prior bad acts for the same reasons. It argues that defendant's prior choking of Schmitz exposed his intent, motive, lack of mistake, and propensity to grab A.F. by the neck, and that in both situations, he had drunk alcohol. The State argues that defendant's prior grabbing and pushing of A.F.'s face similarly showed his intent, motive, lack of mistake, and propensity to grab A.F. by the neck, and it also showed his hostility towards A.F.

¶ 45 We agree with the State that the trial court acted within its discretion in allowing the evidence of other bad acts. Looking at the factors to be considered in weighing the probative value against the potential prejudicial effect (see 725 ILCS 5/115-7.4(b) (West 2014)), we begin with the timing of the prior act against A.F. Although A.F. did not provide unequivocal testimony of when the incident occurred, he testified that it might have happened in January or February 2014, and his grandmother confirmed that she took a picture of his bruise during one of those months. Thus, it was close in time to the charged conduct, which took place in July 2014. As for factual similarity, where evidence is offered for a purpose other than showing *modus*

operandi, mere general areas of similarity are sufficient. *People v. Wilson*, 214 Ill. 2d 127, 142 (2005). Grabbing A.F.'s face and throwing him down is similar to grabbing his neck and throwing him down, especially when considering it was the same victim. It also could show hostility towards A.F. and intent, motive, lack of mistake, and propensity.

¶ 46 For the incident against Schmitz, it was further in the past, taking place one year before, but it certainly was not in the distant past. Moreover, as the State points out, in both incidents defendant had been drinking alcohol and grabbed the victims by the neck before throwing them down. Therefore, it was admissible to show intent, motive, lack of mistake, and propensity. Accordingly, we find no error in the trial court's admission of these prior bad acts. However, this ruling is not binding on remand.

¶ 47 III. CONCLUSION

¶ 48 In sum, we have determined that the trial court abused its discretion in not instructing the jury on defendant's affirmative defense of parental discipline, as there was at least slight evidence to support the instruction, and it was the jury's role to determine the necessity for and reasonableness of the alleged punishment. As such, we must reverse defendant's convictions and remand for a new trial. We have also determined that the trial court acted within its discretion by allowing evidence of prior bad acts, though it is not bound by its prior ruling on this issue on remand. For the reasons stated, the judgment of the Du Page County circuit court is reversed, and the cause is remanded for a new trial.

¶ 49 Reversed and remanded.