FIRST DIVISION
June 3, 2013

No. 1-09-2302

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 06 CR 21369
	)	
	)	
GERSON CARNALLA-RUIZ,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT[*] delivered the judgment of the court.
Presiding Justice Harris and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm the jury's conviction of defendant of three counts of predatory sexual assault of a child. The State established the *corpus delicti* of predatory criminal sexual assault of a child, as the independent corroborating evidence tended to show the commission of similar crimes charged in other counts. The trial court properly admitted other crimes evidence. Defense counsel provided effective assistance. Defendant is entitled to have the mittimus corrected to reflect the correct number of days of presentence credit and the correct sentence imposed for each charge. Finally, defendant is entitled to have several of the fines and fees imposed either vacated or reduced.

¶ 2 Defendant, Gerson Carnalla-Ruiz, was indicted and prosecuted stemming from acts of sexual penetration he committed upon his ten-year-old daughter between May and August 2005. Defendant

[*] Justice Delort replaces Justice Karnezis on the panel. Ill. S. Ct., M.R. 1062 (eff. Dec. 3, 2012).

was convicted of three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2005)), and was sentenced to a total of 40 years' imprisonment. On appeal, defendant argues: (1) the State failed to prove the *corpus delicti* of two of the three counts of predatory criminal sexual assault of a child; (2) the trial court improperly admitted other crimes evidence; (3) trial counsel was ineffective; (4) the mittimus should be corrected to reflect the correct sentence imposed for each count and to correct the number of days of presentence credit; and (4) he is entitled to have his fines, costs and fees either vacated or reduced. On June 30, 2011, this court affirmed in part, reversed in part, and modified in part, the trial court's judgment. *People v. Carnalla-Ruiz*, No. 1-09-2302 (June 30, 2011) (unpublished order under Supreme Court Rule 23). On March 11, 2013, our supreme court denied defendant's petition for leave to appeal but entered a supervisory order, directing this court to vacate our previously entered order and reconsider our decision in light of *People v. Lara*, 2012 IL 112370. We have vacated our previous order and now affirm the judgment of conviction as to count IV, correct the mittimus to reflect the correct sentence imposed for each count and to reflect the correct number of days of presentence credit, vacate the $500 Sex Offender Fine and the $5 Court System Fee and reduce the $25 Violence Crime Victims Assistance Fund fine to $20.

¶ 3 BACKGROUND

¶ 4 Prior to trial, defendant moved to suppress his custodial statement on the grounds that he was not informed of his rights, did not knowingly waive his rights, and was interrogated after requesting counsel. In addition, defendant also claimed that his statement was obtained through coercion. At a hearing on defendant's third amended motion to suppress, the court heard defendant's

testimony, as well as the testimony of three police officers. Based on this testimony, the trial court denied defendant's motion, finding defendant to be incredible and the allegations unsupported by the testimony or the facts.

¶ 5 Also prior to trial, the court heard testimony on the State's motion to allow hearsay statements from D.R., pursuant to section 115-10, which allows the admission of hearsay statements made by victims in cases involving sexual abuse of a child. 725 ILCS 5/115-10 (West 2005). The State sought to admit statements that D.R. made to her mother, a school social worker, Detective Matt Kulak and Bonnie Brunette from the Children's Advocacy Center. Following the evidentiary hearing, the court found the content and circumstances of D.R.'s out-of-court statements to be sufficiently reliable to render them admissible as substantive evidence under section 115-10.

¶ 6 In addition, the State filed a motion for leave to present other crimes evidence pursuant to section 115-7.3 (725 ILCS 5/115-7.3 (West 2005)). Specifically, the State sought to admit evidence of an instance of a penis-vagina contact between defendant and D.R., which occurred in defendant's work garage in Addison, Illinois, as propensity evidence because that incident occurred within weeks of charged offenses, was factually similar and was supported by defendant's confession.[1] The State also argued that the evidence was admissible under common law to show criminal intent, motive, state or mind and *modus operandi*. Defendant objected by filing a motion in *limine* to exclude other crimes evidence. In that motion, defendant argued that the Addison offense had no probative value

[1] This offense was not charged in this case because Addison is in DuPage County.

and would unduly prejudice him. After a hearing on the parties motions, the court determined that the other crimes evidence was admissible.

¶ 7 At trial, Victoria Uribe testified, through an interpreter, that in 2005 she was married to defendant and was living in Des Plaines, Illinois, with their son Hidel and daughter, D.R. D.R. was born with spina bifida and scoliosis, which affected D.R.'s movement and ability to urinate and confined her to a wheelchair. As a result of her medical condition, D.R. must be catheterized every four hours. Uribe explained that before catheterization, D.R's genital area has to be cleaned. Lubricant is used before inserting the catheter into the urethra. Uribe testified that she was the primary individual responsible for catheterizing D.R., although defendant had been trained.

¶ 8 In May 2005, Uribe returned to Mexico after her father's death. During that time, defendant was responsible for caring for and catheterizing D.R. When she returned home in August 2005, she noticed a change in D.R.'s behavior. Uribe testified that D.R. appeared sad and spent a lot of time sleeping.

¶ 9 One year later, on August 23, 2006, after Uribe suggested to D.R. that she should go live with her father, D.R., told Uribe that her father had "kissed her intimate parts" and tried to "sleep with her" at least four times. D.R. later told Uribe that defendant exposed his penis to her during catheterization. After listening to D.R., Uribe contacted the school social worker, Nancy Rock. Rock met with Uribe the next day and made an appointment to speak with D.R. at school the following Tuesday.

¶ 10 D.R. testified that she was born with spina bifida and, as a result, is confined to a wheelchair. She testified that she has feeling in her arms and legs, but that she does not have the same sensitivity

below her chest as she does above it. She relies on a catheter to remove urine from her bladder. At the time of trial, D.R. was 14 years old and was going to be entering high school.

¶ 11 Until she was able to catheterize herself, when she reached sixth grade, she relied on her mother to catheterize her. When her mother left for Mexico in May of 2005, defendant was responsible for catheterizing her. D.R. testified that one time while she was laying on the bed after her father catheterized her, he kissed her vagina two or three times. She was not able to feel defendant's lips very much, but she could see what he was doing in the closet mirror. She demanded that he stop.

¶ 12 Another time, defendant unzipped his shorts and took out his penis. Defendant rubbed lubricant jelly on it and began touching and squeezing his penis. D.R. testified that defendant's penis was erect and hairy and that "white stuff" came out. D.R. told defendant that she didn't "want to see it."

¶ 13 On another occasion, when D.R. was sleeping in bed with defendant following her surgery for a spinal infection, D.R. awoke and saw defendant attempting to remove her diaper and insert his penis in her vagina. D.R. testified that defendant's penis did not touch her body because she did not allow it.

¶ 14 When asked if there was ever a time at her hone that defendant touched his penis to her vagina, "but not entering", D.R. responded "no." Later, D.R. testified that one time, when defendant tried to put his penis in her vagina, it touched only the outside of her vagina. She also testified that when defendant was licking and kissing her vagina that she could not tell if he was putting his tongue inside of her.

¶ 15 D.R. testified to incidents of sexual contact that occurred outside of her home. D.R. stated that "other stuff happened" in the garage where defendant worked in Addison, Illinois. D.R. stated that once when she was in the garage with defendant and her brother, defendant asked her brother to leave so he could catheterize her. After he catheterized her, while she was sitting in her wheelchair, defendant unzipped his pants and tried to put his penis in her vagina. She saw defendant's erect penis, which had "white stuff" on it. Defendant's penis made contact with "the top" of her vagina. D.R. stated that she could not feel his penis but could see him doing it. D.R. testified that she did not tell her mother or anyone else about what defendant did to her because she was scared.

¶ 16 About a year after her mother returned from Mexico, after her mother threatened to leave her alone with defendant, D.R. told her mother that defendant kissed her vagina and tried to put his penis in her vagina. D.R. did not tell her mother everything that happened. He mother arranged for her. to speak with the school social worker, Nancy Rock. When D.R. spoke with Rock, she told her that defendant kissed her vagina and tried to put his penis in her vagina. After she talked to Rock, the police came to school and she went to another place and spoke with Bonnie Brunette.

¶ 17 D.R. testified that she gave even more details of defendant's abuse to Brunette. D.R. admitted to Brunette that, while her mother was in Mexico, defendant tried to kiss her vagina and put his penis in her vagina in her home and in Addison. She told Brunette how defendant "tried to do stuff, he tried to lick my vagina; then after that, he tried to kiss my vagina, and how I didn't let him." D.R. testified that she did not tell Brunette that defendant tried to put his penis in her vagina

while she was in her home or in the garage in Addison. D.R. testified on cross-examination that she did tell Brunette that defendant tried to put his penis in her vagina.

¶ 18 Bonnie Brunette testified that she works for the Children's Advocacy Center, which is a non-for-profit organization that assists in the investigation of child abuse and neglect cases. Brunette explained that the Center conducts forensic interviews of children who allege sexual or physical abuse. On August 29, 2006, Brunette was informed that D.R. was going to be brought to the Center by her mother because D.R. alleged that her father had sexually abused her. Brunette did not read any police reports or speak with Uribe to gain any information before the interview.

¶ 19 At the beginning of the interview, D.R. reported that she was eleven-years-old and just started sixth grade. D.R. stated that she lived wither her parents and brother. D.R. also reported that she understood the difference between telling the truth and telling a lie. Brunette asked D.R. if she knew why she was at the Center. D.R. responded with a lengthy narrative of how she developed a spinal infection while her mother was in Mexico for her grandfather's funeral. D.R. explained that she had to go to the hospital for the infection and when she returned home defendant "tried to kiss me right here", and pointed to her vagina, while defendant was catheterizing her in her mother's bedroom. She referred to her vagina as her "private."

¶ 20 Brunette asked D.R. to start from the beginning and describe the incident to the best of her ability. D.R. testified that her pants and pull-up were pulled down and defendant was wiping her in preparation for inserting her catheter. Defendant kissed her private. Brunette asked D.R. what defendant used when he started to kiss her private. D.R. told Brunette that "he used his boy private a little bit." At that point, Brunette believed that D.R. was speaking about two separate incidents so

she asked D.R. what defendant did first. D.R. responded that "he did the kiss first" and demonstrated making a kissing motion on her fist. D.R. offered that defendant kissed her private four or five times.

¶ 21 Brunette asked D.R. what defendant's boy private looked like. D.R. said that defendant had unzipped his pants and pulled out his penis. D.R. described defendant's penis as straight, long and hairy. Once defendant showed her his penis, he grabbed the lubricant jelly, which was normally used to lubricate the catheter before it was inserted. D.R. told defendant no and defendant said, "Let me just put it in a little bit to teach you." D.R. said defendant wanted to put his boy private close to her private and that his boy private touched her private "a little bit, two times, that I think maybe it touched the top of it." She told him no and that she wanted to go to her aunt's house. Defendant took her to her aunt's house and didn't feed her the next day.

¶ 22 Brunette asked D.R. if she ever saw anything come out of defendant's boy private. D.R. told her "[m]aybe the man's dream," which is white. D.R. explained that she learned about "the man's dream" on a field trip for health class. D.R. told Brunette that she was in her mom's room watching tv and defendant had woken up from a nap. She said that defendant showed her the "man's dream", which she did not want to look at. She said, "gross." D.R. explained that the man's dream came out of defendant's penis after he squeezed it in his fist. D.R. also told Brunette that she saw white stuff come out of defendant's penis once in Addison at the garage. She explained that defendant wanted to put his "boy private" close to her private.

¶ 23 On cross-examination, Brunette testified that she asked D.R. whether defendant used his tongue to touch her private part when he was kissing her. D.R. told Brunette that defendant used his

mouth but not his tongue. D.R. also told Brunette, with respect to her question of whether defendant's boy private touched her private, that defendant had touched his boy private to her private "a little bit, two times. I think maybe it touched the top a little bit." Brunette did not ask if defendant ever physically inserted his penis into her vagina. D.R. told Brunette that she decided to tell her mother about what defendant did to her because she was given a Jehovah's Witness book that stated that no one was allowed to touch her private parts, not even her parents.

¶ 24 Detective Scott Moreth testified that at approximately 10:45 p.m. on August 29, 2006, he and Detective Mike Heene arrested defendant at defendant's place of employment. The detectives transported defendant to the Des Plaines police department where Detective Kulak was waiting to interview him.

¶ 25 Detective Matt Kulak of the Des Plaines Police Department testified that he arranged for defendant's arrest after he observed D.R.'s interview with Brunette through a one-way mirror at the Center. After defendant was brought to the station, Detective Kulak approached defendant and told him he was under arrest and advised defendant of his *Miranda* rights using a pre-printed form. Defendant waived his *Miranda* rights. Detective Kulak then told defendant that he had been arrested because his daughter had accused him of performing sexual acts on her. Defendant made an oral statement which lasted about 20 to 30 minutes, wherein he confessed that while his wife was away, he became sexually aroused when catheterizing his daughter and kissed her vagina and rubbed himself. Detective Kulak then contacted the State's Attorney's Office.

¶ 26 An assistant state's attorney (ASA) from the felony review unit arrived, Mirandized defendant again and interviewed him. Defendant gave a written statement, which was memorialized.

The statement included more details than defendant had provided initially to Detective Kulak. Detective Kulak testified that he witnessed defendant read the statement and heard defendant ask the ASA to include that during each sexual encounter with D.R., he was explaining the purpose of sex, marriage and relationships to her. Detective Kulak also saw defendant sign the statement.

¶ 27 Dr. Ruby Roy, testified that she is a pediatrician and a child sexual abuse expert. She examined D.R. on December 5, 2006. D.R. complained of intermittent vaginal pain since the abuse. Dr. Roy testified that D.R.'s vaginal area was normal with no abnormalities for her age. Dr. Roy explained that no physical evidence would be visible on the vagina as a result of kissing, tongue insertion or attempted penile penetration. Dr. Roy testified that there would not necessarily be any physical signs of actual penile penetration because the hymen heals quickly. Dr. Roy also explained the process of catheterization, which involves opening the labia, lubricating the catheter tube and inserting it into the urethra.

¶ 28 ASA Albanese testified that he interviewed defendant on August 30, 2006, at the Des Plaines police department. Defendant waived his Miranda rights and confessed to sexually abusing his daughter. ASA Albanese offered defendant an opportunity to memorialize his statement into a written format. Although ASA Albanese wrote what defendant said, defendant reviewed the statement, made corrections and signed the statement. The statement, which was admitted into evidence and read to the jury, revealed the following.

¶ 29 Defendant stated that he took care of his daughter, D.R., who had spina bifida, while his wife was in Mexico from May to September 2005. D.R. had surgery on her back during that time and when she was released from the hospital, he and D.R. lived alone in their trailer in Des Plaines.

Defendant had to catheterize D.R. Defendant stated that he became sexually aroused while cleaning D.R.'s vaginal area for catheterization and began to kiss and lick her vagina and put his tongue in and out of her vagina for several seconds. This caused him to get an erection so he began masturbating until he ejaculated in front of D.R. D.R. asked defendant what he was doing and if he was doing that because her mother was away. Defendant responded that his testicle hurt and he needed to get the liquid out.

¶ 30 Defendant stated that about a week later, he wiped D.R.'s vaginal area after he was done catheterizing her and then kissed and licked her vagina while masturbating. There was an incident where defendant became aroused around D.R. and she asked defendant what the liquid looked like and wanted to see it. Defendant exposed his bare penis to D.R. and ejaculated in his hand and showed D.R. his semen. A few days later, defendant was sleeping in bed with D.R. when D.R. asked him what he did with mommy. Defendant became aroused and D.R. pointed to his erection in his sweatpants. Defendant pulled off D.R.'s underwear, pulled his sweatpants down and pushed his penis into her vagina. D.R. told him to stop and he did.

¶ 31 Several days later, defendant again became sexually aroused while catheterizing D.R. in the garage. Defendant pulled his pants down and pressed his erect penis against D.R's vagina and legs and then fell back and continued masturbating in front of D.R. until he ejaculated. Defendant told D.R. that this was the last time and she would have to catheterize herself, which she did until her mother returned home. After defendant read the statement, he requested that it include the statement that after each sexual contact with D.R., he explained the purpose of sex, marriage and relationships.

¶ 32 Mary O'Looney testified for defendant. She provided home health care for D.R. after she was released from Loyola University Hospital on July 28, 2008, following surgery. O'Looney testified that she never observed anything unusual between defendant and D.R. during the home visits in August of 2008.

¶ 33 Nancy Rock testified that in 2006 she was the school social worker for School District 62 in Des Plaines, Illinois. She received a telephone call from Uribe shortly after school had resumed after summer break. In response to the phone call,.Rock went to their home and Uribe told Rock that D.R. had informed her that during the summer of 2005, defendant touched and kissed her vagina. Rock spoke with D.R. several days later at school. D.R. told her that during the summer of 2005, defendant had touched her vagina and asked if he could kiss her vagina. D.R. told Rock that she had told defendant that he could not kiss her vagina. Rock remembered that D.R. told her that her father had "backed off and did not do it." D.R. did not tell Rock about any other incidents. Rock felt that the one instance was sufficient to report to the Department of Children and Family Services, which she did right after talking to D.R.

¶ 34 Defendant testified on his own behalf. He testified that he lived with and took care of D.R. from May to September 2005, while his wife was in Mexico. During that time, D.R. underwent surgery to treat a spinal infection.

¶ 35 Defendant was responsible for catheterizing D.R. Defendant recalled an incident when he kissed D.R.'s vagina. He explained that when he was catheterizing her on his bed, D.R. was staring at the ceiling and was not moving. Defendant explained that he was concerned that D.R. had developed encephalitis, a side effect from the shunt in her brain. "Looking lost" is a symptom of

encephalitis, so when D.R. didn't respond to his questions he "just by nerve I kiss [sic] her on the pubic area above the vagina to make it - - it's just my- - my reaction." Defendant explained that D.R. regained consciousness. This was the only instance that defendant could remember where he kissed D.R.'s pubic area.

¶ 36 Defendant testified that D.R. slept on top of him many times so she would be comfortable. Defendant also stated that D.R. must have seen his penis when he urinated in her pull-up. According to defendant, when he slept in bed with D.R. he would urinate in her pull-up so that he would not have to get up and go to the bathroom.

¶ 37 Defendant testified that when he was arrested, he told Detective Moreth he wanted a lawyer. Defendant testified that he was told that once they had a statement in writing he could go home. ASA Albanese asked defendant questions and then wrote out the statement. Defendant read the statement but disagreed with many things that ASA Albanese had written. ASA Albanese said that they could start over, but defendant stated that he wanted to void out the parts that he disagreed with. ASA Albanese told defendant to initial the portions he wanted to void. Defendant initialed next to the "perverted parts."

¶ 38 Defendant testified that he signed the statement in reverse order so that he signed last the Miranda waiver, which was on the first page. He signed all five pages of the statement, but claimed that he was never Mirandized. Defendant denied ever telling detectives that he licked, or inserted his tongue into D.R.'s vagina, that he masturbated and ejaculated in front of her or he attempted to put his penis in D.R.'s vagina.

¶ 39 After hearing all of the evidence, a jury found defendant guilty of three counts of predatory sexual assault of a child. On August 7, 2009, defendant was sentenced to 40 years' imprisonment: 15 years for Count II (penis-vagina contact); 10 years for Count III (mouth-vagina contact); and 15 years for Count IV (tongue-vagina intrusion). Defendant was assessed $1,495 in fines, fees and costs and given 1,073 days of pre-sentence credit.

¶ 40 ANALYSIS

¶ 41 Reasonable Doubt-*Corpus Delicti*

¶ 42 Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt of two of three counts of predatory criminal sexual assault of a child by failing to prove the *corpus delicti* of these counts. Defendant maintains that while his statement to police indicates that he touched D.R.'s vagina with his penis and inserted his tongue into her vagina, the State failed to independently corroborate his statement.

¶ 43 When a defendant is challenging the sufficiency of the evidence, the relevant inquiry is whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). The trier of fact is in the best position to determine the credibility of the witnesses, to resolve any inconsistencies or conflicts in their testimony, to assess the proper weight to be given to their testimony and to draw reasonable inferences from all of the evidence. *People v. Cochran,* 323 Ill. App. 3d 669, 679 (2001).

¶ 44 A defendant commits predatory criminal sexual assault of a child if: "(1) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years

of age when the act was committed." 720 ILCS 5/12-14.1(a)(1) (West 2008). Sexual penetration is defined as:

> "[A]ny contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration." 720 ILCS 5/12-12 (f) (West 2005).

¶ 45 Count II of the indictment against defendant in this case alleged that defendant committed the offense of predatory criminal sexual assault of a child in that there was contact between defendant's penis and D.R.'s vagina (penis-vagina). Count IV of the indictment alleged that defendant committed the offense of predatory criminal sexual assault of a child when there was an intrusion of defendant's tongue into D.R.'s vagina (tongue-vagina).

¶ 46 Illinois law requires proof of two distinct facts in order to prove an offense beyond a reasonable doubt: (1) that a crime occurred, *i.e.*, the *corpus delicti*; and (2) that the crime was committed by the person charged. *People v. Sargent*, 239 Ill.2d 166, 183 (2010). Our supreme court recently considered the issue of *corpus delicti* in *People v. Lara*, 2012 IL 112370. The court first described the *corpus delicti* rule:

> "The *corpus delicti* of an offense is simply the commission of a crime. Along with the identity of the person who committed the offense, it is one of two propositions the State must prove beyond a reasonable doubt to obtain a valid conviction. In

> general, the *corpus delicti* cannot be proven by a defendant's admission, confession, or out-of-court statement alone. When a defendant's confession is part of the *corpus delicti* proof, the State must also provide independent corroborating evidence." *Lara*, at ¶ 17.

¶ 47 However, "the independent evidence need only *tend to show* the commission of a crime. It need not be so strong that it alone proves the commission of the charged offense beyond a reasonable doubt." (Emphasis in original.) *Id*. at ¶ 18. The State need not present independent evidence corroborating every element of the charged offense before a defendant's statement may be used to prove *corpus delicti*. *Id*. at ¶ 30.

¶ 48 Specifically, the *Lara* court examined various cases in which the only evidence of penetration, the key element of criminal sexual assault and related offenses, was the defendant's confession. *Id*. at ¶¶ 31-38. The supreme court concluded that "none of them required clear independent proof of each element, or indeed of any particular element, of the charged offense to satisfy the *corpus delicti* rule. In fact, *despite the absence of any physical evidence or victim testimony*, the court in all four instances found sufficient corroboration to permit an inference of sexual assault or penetration and thereby satisfy the *corpus delicti* rule, upholding the defendants' convictions." (Emphasis in original.) *Id*. at ¶ 39. Consistent with previous Illinois precedent, the court held:

> "[T]he *corpus delicti* rule requires only that the corroborating evidence correspond with the circumstances recited in the confession and tend to connect the defendant with the crime. The independent evidence need not precisely align with the details

of the confession on each element of the charged offense, or indeed to any particular element of the charged offense." *Id*. at ¶ 51.

¶ 49 Thus, a defendant's confession to an element of the charged offense need not be independently and affirmatively verified so long as the independent evidence corresponds with the confession and corroborates some of the circumstances related in the confession. *Id*. at ¶¶ 45, 51.

¶ 50 The State contends that there was ample evidence presented in this case, beyond defendant's confession, which corroborated his statement that he committed predatory criminal sexual assault as charged in Count II and IV.

¶ 51 Count II alleged that defendant committed the offense of predatory criminal sexual assault of a child when there was contact between defendant's penis and D.R.'s vagina. In his statement to police, defendant stated that when he was sleeping in bed with D.R. in their home in Des Plaines, he removed D.R.'s pull-up, took off his own pants and pushed his penis into D.R.'s vagina. Although defendant later retracted this statement at trial, there was more than ample additional evidence, other than defendant's statement, to corroborate that defendant touched his penis to D.R.'s vagina.

¶ 52 D.R. testified that defendant tried to put his penis in her vagina while they were at home in Des Plaines, and his penis touched only the outside of her vagina. Later D.R. explained that defendant's penis "touched the top of [her vagina], like the cover of it." Brunette said that during the interview, D.R. said that defendant wanted to put his boy private close to her private and that his boy private touched her private "a little bit, two times, that I think maybe it touched the top of it."

D.R.'s and Brunette's testimony clearly corroborate defendant's confession, and establish the *corpus delicti* of predatory criminal sexual assault based on penis-vagina contact.

¶ 53 As for Count IV, defendant confessed that he kissed and licked D.R.'s vagina and inserted his tongue in and out of her vagina for several seconds. Again, defendant disavowed his confession at trial. D.R. testified that when defendant was licking and kissing her vagina that she could not tell if he was putting his tongue inside of her.

¶ 54 The *Lara* court also raised the issue of victims who have "inherent limitations on the ability *** to corroborate an act of penetration." *Id*. at ¶ 60 (citing *People v. Bounds*, 171 Ill. 2d 1, 44 (1995)). D.R. testified that she has feeling in her arms and legs, but that she does not have the same sensitivity below her chest as she does above it. Although D.R. could not provide definitive verbal corroboration because she lacked enough feeling to differentiate between merely touching and penetration, her testimony is consistent with defendant's confession. The record shows D.R. testified that she observed defendant licking her vagina. This corroborates with defendant's written confession that he became sexually aroused while cleaning D.R.'s vaginal area for catheterization and began to kiss and lick her vagina and put his tongue in and out of her vagina for several seconds. D.R.'s testimony tends to connect defendant with the crime and tends to prove the *corpus delicti* and correspond with the circumstances related in the confession. See *Lara*, 2012 IL 112370, at ¶¶ 61, 63.

¶ 55 The jury was free to conclude that the State had not sufficiently proven the element of penetration to support the charges alleged in count IV beyond a reasonable doubt, but instead it

reached the opposite conclusion. We find D.R.'s testimony was sufficiently consistent with defendant's confession to satisfy the corroboration rule set forth by the *Lara* court. *Id*. at ¶¶ 51, 61.

¶ 56 Other Crimes Evidence

¶ 57 Defendant next contends that the trial court erred when it admitted evidence that defendant performed an act of sexual penetration of D.R. in his Addison garage. Defendant admits that he forfeited this issue by failing to raise it in his posttrial motion. *People v. Enoch,* 122 Ill. 2d 176, 186 (1988). However, he urges this court to relax the rules of forfeiture and to consider his claim as plain error.

¶ 58 The plain error doctrine allows a court of review to consider a forfeited error when "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Under the first prong of the doctrine, "the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187. With respect to the second prong of the plain error doctrine, "the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187. However, in order to consider defendant's forfeited claim under the plain error doctrine, there must be error. *People v. Harris*, 225 Ill. 2d 1, 31 (2007).

¶ 59 Evidence of other crimes is relevant to prove *modus operandi*, intent, identity, motive, or absence of mistake. *People v. McKibbins*, 96 Ill. 2d 176, 182 (1983). Generally, evidence of other

crimes is inadmissible where that evidence is relevant solely to demonstrate defendant's propensity to engage in criminal activity. *People v. Heard*, 187 Ill. 2d 36, 58 (1999). This is because "[s]uch evidence overpersuades the jury, which might convict the defendant only because it feels he or she is a bad person deserving punishment." *People v. Lindgren*, 79 Ill. 2d 129, 137(1980).

¶ 60 However, an exception to the rule against admitting evidence to show propensity exists with respect to criminal cases, such as this, where a defendant is accused of predatory criminal sexual assault of a child. Section 115-7.3 of the Code of Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3 (West 2005)) governs the admissibility of other crimes evidence in sex offense cases. It reads:

> "(a) This section applies to criminal cases in which:
>
> > (1) the defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, or criminal transmission of HIV;
>
> * * *
>
> (b) If the defendant is accused of an offense set forth in paragraph (1) * * * of subsection (a) * * * , evidence of the defendant's commission of another offense or offenses set forth in paragraph (1) * * * of subsection (a), or evidence to rebut that proof or an inference from that proof may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it

is relevant."

¶ 61 The evidence of uncharged conduct in this case, *i.e.*, the Addison offense, clearly involves additional acts by defendant of the same conduct. It's relevance to establish defendant's propensity to commit the charged offenses is not questioned. The only question here is whether the probative value of the other crimes evidence outweighs the prejudicial effect.

¶ 62 According to section 115-7.3(c), a trial court may admit evidence of another offense of predatory criminal sexual assault of a child to establish a defendant's propensity to commit sex offenses, so long as the probative value outweighs any prejudicial effect. 725 ILCS 5/115-7.3(b)(c) (West 2006). *People v. Donoho*, 204 Ill. 2d 159, 176 (2003). Section 115-7.3 enumerates those factors that should be weighed when considering whether the prejudicial effect of admitted other-crimes evidence substantially outweighs its 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); *People v. Donoho*, 204 Ill. 2d 159, 183 (2003).

¶ 63 As always, the admissibility of other crimes evidence rests within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *People v. Robinson,* 167 Ill. 2d 53, 63 (1995).

¶ 64 Prior to trial in this case, the State was granted leave to admit evidence that defendant, during the period of May to August 2005, took D.R. to a garage that he rented as a workshop in Addison, Illinois, and touched his penis to D.R.'s vagina. At trial, it was established that, on one

occasion in the Addison garage, defendant catheterized D.R., became sexually aroused, touched his penis to D.R.'s vagina, fell back and masturbated to ejaculation in front of her.

¶ 65 Defendant was prosecuted for acts of predatory criminal sexual assault of a child for offenses against D.R. that also occurred during the time period of May to August 2005. The proximity in time of the offenses in Des Plaines and Addison was a matter of days or weeks. See *Donoho*, 204 Ill.2d at 159 (a 1983 conviction for indecent liberties with a child was admissible at trial for aggravated criminal sexual assault which occurred between 1995 and 1998).

¶ 66 Furthermore, the crimes bear a "degree of factual similarity to the charged offense." 725 ILCS 5/115-7.3(c)(2) (West 2000). The crimes in this case were remarkedly similar. Defendant sexually assaulted D.R. either before or after catheterization, when he was alone with her. Defendant would kiss and lick D.R.'s vagina, unzip his pants, expose his penis, touch his penis to D.R.'s vagina and masturbate in front of her until he ejaculated. Finally, defendant confessed to both the charged offense and the Addison crime.

¶ 67 After considering the factors outlined in section 115-7.3(c) in relation to the other crimes evidence presented by the State, we cannot find that the trial court abused its discretion in admitting the evidence. The probative value of the propensity evidence clearly outweighed any prejudicial effect. As no error occurred in this case, we decline to relax the rules of forfeiture and consider defendant's claim as plain error.

¶ 68 Defendant also claims that even if the analysis of other crimes evidence would favor admissibility under 115-7.3(c), the other crimes evidence should be excluded because the

evidence offered to establish the other crimes is more "thorough" than the evidence of the offenses charged.

¶ 69 Other crimes evidence, although relevant, and even admissible, must not become a focal point of the trial. *People v. Thigpen*, 306 Ill. App. 3d 29, 37 (1999). The trial court should prevent a "mini-trial" of a collateral offense. *People v. Nunley*, 271 Ill. App. 3d 427, 432 (1995). This can be accomplished by the careful limitation of the details of the other crimes to what is necessary to "illuminate the issue for which the other crime was introduced." *Nunley*, 271 Ill. App. 3d at 432.

¶ 70 Defendant cites *People v. Cardamone*, 381 Ill. App. 3d 462 (2008), in support of his argument that a large quantity of other crimes evidence may make probative other crimes evidence overly prejudicial. In *Cardamone*, the defendant was convicted of nine counts of aggravated criminal sexual abuse of seven girls. The defendant challenged the other crimes evidence admitted at trial and argued that it was more prejudicial than probative based on the number of uncharged acts testified to by the State's witnesses. Cardamone, 381 Ill. App. 3d at 488-89.

¶ 71 On appeal, the court noted that the "vast majority" of the State's case consisted of other crimes evidence. Of the seven girls upon whose allegations defendant was convicted, they testified that defendant committed between "158 and 257 uncharged acts." *Cardamone*, 381 Ill. App. 3d at 502. Although the trial court properly considered the proximity and factual similarity of the other crimes as required by section 115-7.3(c), the court did not specifically address the "other relevant facts and circumstances" prong. *Cardamone*, 381 Ill. App. 3d at 503.

¶ 72 The *Cardamone* court found other facts and circumstances weighed against the admission of other crimes and remanded for a new trial. Namely, the court found the sheer number of uncharged allegations of misconduct could have persuaded the jury that defendant was guilty of something, even if it could not find defendant guilty beyond a reasonable doubt of the charged offenses. Furthermore, the court found that the jury could have been easily confused and could have easily "used one complainants's credible testimony about uncharged conduct to bolster weak testimony by another complainants concerning the actual charges." *Cardamone*, 381 Ill. App. 3d 495-97.

¶ 73 Defendant's comparison of the other crimes evidence offered in his case with that in *Cardamone* is nothing short of a very long stretch. In the case at bar, the other crimes evidence consisted of testimony regarding one incident involving D.R. and defendant, which occurred in defendant's garage in Addison. In *Cardamone*, the jury heard about at least 257 uncharged acts from 15 alleged victims. Admission of the single incident of other crimes evidence in this case was not an abuse of discretion.

¶ 74 Ineffective Assistance of Counsel

¶ 75 Defendant next claims that he was denied effective assistance of counsel based on a question counsel asked Dr. Roy on cross-examination. When questioning Dr. Roy about the catheterization process, counsel said, "[f]or example, if I was going to catheterize Miss Crowley [the prosecutor] and she's sitting ...." Although Miss Crowley immediately objected and the court sustained the objection and chided defense counsel for making light of the situation, defendant maintains that counsel's distasteful remark reflected badly on him.

¶ 76 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). A defendant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, and (2) there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693-94.

¶ 77 Under the first prong of the *Strickland* test, defendant must overcome a "strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, defendant must overcome the presumption that under the circumstances, the challenged action, 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 2d 83, 94 (1955). A defendant satisfies the second prong of *Strickland* if he can show that a reasonable probability exists that, had counsel not erred, the trier of fact would not have found him guilty beyond a reasonable doubt. *People v. Caballero*, 126 Ill. 2d 248, 260 (1989). Where the defendant fails to prove prejudice, the reviewing court need not determine whether counsel's performance constituted less than reasonable assistance. *Strickland*, 466 U.S. at 697, 104 S .Ct. at 2069, 80 L. Ed. 2d at 699; *People v. Flores*, 153 Ill.2d 264, 284 (1992).

¶ 78 While counsel's question to Dr. Roy may have been inappropriate taken out of context, we are unpersuaded that had it not been asked, the result of defendant's trial would have been different. It has been well-established that allegations of ineffective assistance of counsel based

on counsel's conduct during cross-examination are not subject to review, as they fall within the purview of trial strategy. *People v. Harris*, 123 Ill. 2d 113, 157 (1988).

¶ 79 In response to the court's directive to stop giggling and to ask "serious questions" of the doctor, defense counsel responded that he wanted "to know how catheterization is done" because it's "very important in this case." Defense counsel also stated that he "wasn't trying to joke around with Miss Crowley or anybody else in this courtroom." Defense counsel's next question to Dr. Roy was "[i]f you could explain physically how you would catheterize somebody and how would you position your body when doing the catheterization, please?" Clearly, defense counsel was attempting to elicit an explanation, or perhaps a demonstration of catheterization from Dr. Roy. Defendant suffered no prejudice as a result of this single incident.

¶ 80 Mittimus

¶ 81 Defendant next asks this court to correct the mittimus in this case. At sentencing on August 7, 2009, defense counsel represented that defendant was entitled to 1,093 days of presentence credit. Defendant was sentenced to an aggregate of 40 years' imprisonment with 1,093 days of pre-sentence confinement credit. The mittimus however, reflects that defendant was credited with 1,070 days presentence credit.

¶ 82 The parties agree that the mittimus should be corrected. The State says that defendant is entitled to 1,073 days credit. Defendant claims however, that he is entitled to 1,074 days credit. Defendant was arrested in this case on August 29, 2006, and was sentenced on August 7, 2009. Our calculation shows that defendant is indeed entitled to 1,074 days of presentence credit, excluding the date of sentencing. See *People v. Williams*, 239 Ill. 2d 503 (2011) (the date of

sentencing is not to be included in calculating presentence credit.). We exercise our authority to correct the mittimus to reflect credit for 1,074 days without remanding this cause to the circuit court. See *People v. Magee*, 374 Ill. App. 3d 1024, 1035-36 (2007).

¶ 83 Defendant also contends, and the State agrees, that the mittimus should be corrected to reflect the proper sentence for each count. At sentencing, the court sentenced defendant to 15 years' imprisonment for count II (penis-vagina contact), 15 years' imprisonment for count IV (tongue-vagina intrusion), and 10 years' imprisonment for count III (mouth-vagina contact). The written sentencing order reflects that defendant was sentenced to 15 years on count II, 15 years on count III and 10 years on count IV.

¶ 84 When a judge's oral pronouncement of sentence conflicts with a written sentencing order, the oral pronouncement control. *People v. Lewis*, 379 Ill. App. 3d 329, 837 (2008). Accordingly, we correct defendant's mittimus to accurately reflect a prison term of 10 years for Count III. *Magee*, 374 Ill. App. 3d at 1035-36. The sentencing order should also accurately reflect a prison term of 15 years for count IV, as we have reinstated defendant's conviction as to that count.

¶ 85 Fines and Fees

¶ 86 Defendant is also challenging the court's statutory authority to impose the $500 Sex Offender Fine, $25 Violent Crime Victims Assistance Fund fine, $5 Court System fee and $10 Arrestee's Medical Costs fee.

¶ 87 Defendant argues, and the State agrees that the $500 Sex Offender fine imposed must be vacated because it was not in effect at the time he committed the offense of predatory criminal sexual assault of a child.

¶ 88 We agree. Section 5/5-9.1-1.5(a) of the Code of Criminal Procedure of 1963, went into effect on June 1, 2008. Defendant committed the offenses in this case between May and August 2005. The prohibition against *ex post facto* laws makes the imposition of this fine improper. See *People v. Cornelius*, 213 Ill. 2d 178, 207 (2004). We therefore, vacate this $500 fine.

¶ 89 Defendant next contends that the trial court improperly assessed a $5 court system fee (55 ILCS 5/5-1101(a) (West 2008)), The State concedes, and we agree, that this assessments was improper and should be vacated.

¶ 90 In addition, the State agrees that the trial court improperly imposed a $25 fine under the Violent Crime Victims Assistance Fund. 725 ILCS 240/10(b) (West 2005). The State and defendant agree that this fine should be reduced to $20. *People v. Jones*, 223 Ill 2d 569, 599-601 (2006).

¶ 91 Defendant next challenges the imposition of the Arrestee's Medical Cost Fee. Defendant specifically contends that he was improperly assessed the $10 Fund fee because there is no evidence that he was injured, or that the county incurred medical expenses for him, while he was in the custody of the county (730 ILCS 125/17 (West 2006)).

¶ 92 The statute provides, in relevant part:

> "*** The county shall be entitled to a $10 fee for

> each conviction or order of supervision for a criminal violation, other than a petty offense or business offense. The fee shall be taxed as costs to be collected from the defendant, if possible, upon conviction or entry of an order of supervision. ***
>
> All such fees collected shall be deposited by the county in a fund to be established and known as the Arrestee's Medical Costs Fund. Moneys in the Fund shall be used solely for reimbursement of costs for medical expenses relating to the arrestee while he or she is in the custody of the sheriff and administration of the Fund.
>
> *** For the purposes of this Section, 'medical expenses relating to the arrestee' means only those expenses incurred for medical care or treatment provided to an arrestee on account of an injury suffered by the arrestee during the course of his or her arrest ***." 730 ILCS 125/17 (West 2006); but see 730 ILCS 125/17 (West 2008) (deleting the language, "medical care or treatment provided to an arrestee on account of an injury suffered by the arrestee during the course of his or her arrest").

¶ 93 In *People v. Jones*, 397 Ill. App. 3d 654, 661 (2010), this court considered a similar challenge to the Fund fee statute as defendant raises here. *Jones*, 397 Ill. App. 3d at 661-63. The *Jones* court affirmed the assessment of the Fund fee, rejecting both defendant's contention that there was no evidence of his injury or medical expenses related to his custody. *Jones*, 397 Ill. App. 3d at 661-62. The court noted the language of the statute that the county is entitled to the Fund fee for each conviction other than petty or business offenses. *Jones*, 397 Ill. App. 3d at

662. Because the statute expressly provided that money in the Fund may be used for the arrestee's medical expenses or the administration of the Fund, the Fund functioned as a medical insurance policy for the defendant while in custody and thereby benefitted him even when he required no medical services. *Jones*, 397 Ill. App. 3d at 662. Where a defendant incurred no medical expenses while in custody, the county could comply with the statute by using his Fund fee to pay for Fund administration. *Jones*, 397 Ill. App. 3d at 662; see also *People v. Evangelista*, 393 Ill. App. 3d 395, 399-400 (2009); but see *People v. Cleveland*, 393 Ill. App. 3d 700, 714 (2009) ($10 Fund fee vacated because there was no evidence that defendant received medical treatment for injury during arrest).

¶ 94 In light of *Jones*, we conclude that the trial court did not err in assessing the $10 Fund fee in this case. The Fund fee was properly applied to defendant even though he was not injured or treated in custody.

¶ 95 CONCLUSION

¶ 96 For the foregoing reasons, we affirm counts II and IV of defendant's conviction for predatory criminal sexual assault of child, correct the mittimus to reflect the correct sentence imposed for each count and to reflect that defendant is entitled to 1,073 days presentence credit, vacate the $500 Sex Offender Fine and the $5 Court System Fee, and reduce the $25 Violence Crime Victims Assistance Fund to $20.

¶ 97 Affirmed as modified.