SIXTH DIVISION
DECEMBER 21, 2012

No. 1-11-0662



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 08 CR 5425 |
| | ) | |
| DEAROLD WHITE, | ) | Honorable |
| | ) | Charles P. Burns, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE R. GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirm defendant's conviction for aggravated sexual assault finding, first, that the trial court did not abuse its discretion by admitting testimony of defendant's prior criminal assault conviction where defendant asserted a consent defense and the evidence was allowed only in the State's rebuttal case, and where its probative value outweighed its prejudicial effect. We hold, second, that the trial court did not violate defendant's sixth amendment right to confrontation by sustaining objections to eight cross-examination questions of the minor victim about her feelings of embarrassment, where there was already sufficient evidence in the record for defense counsel to argue in closing that the victim's feelings of embarrassment allegedly prompted her cry of rape.

¶ 2 Following a jury trial, defendant Dearold White was convicted of aggravated sexual assault (720 ILCS 5/12-14(a)(2) (West 2006)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2006)) and was found not guilty of aggravated kidnapping. At defendant's sentencing, the trial court merged the aggravated sexual abuse conviction with the aggravated sexual assault conviction, and sentenced defendant to a mandatory term of natural life in the Illinois Department of Corrections, as a result of his prior criminal sexual assault conviction. Defendant's posttrial motion for a new trial was denied, and defendant filed this timely appeal.

¶ 3 At the time of the offense, defendant was 30 years old, and the victim (L.H.) was 13 years old. Defendant impregnated L.H., and DNA testing confirmed his paternity of the fetus. As a result, defendant conceded at trial that he had sex with L.H. Thus, the only issues at trial were defendant's claimed defenses: (1) that L.H. had consented; and (2) that he believed that she was 17 years of age or older at the time of the offense.

¶ 4 The only age-based charge that the State brought against the defendant was that he had committed aggravated sexual abuse by committing "an act of sexual penetration *** with a victim who was at least 13 years of age but under 17 years of age and the accused was at least 5 years older than the victim." 720 ILCS 12-16(d) (West 2010). Although this court has held that mistake of age is not a defense to age-based sex charges *(People v. Raymond*, 404 Ill. App. 3d 1028, 1042-44 (2010) (adopting the reasoning and holding of *People v. Douglas*, 381 Ill. App. 3d 1067, 1081 (2008)), the trial court in the case at bar instructed the jury that it was. Specifically, the trial court instructed the jury that: "It is a defense to the charge of aggravated criminal sexual

abuse that the defendant reasonably believed [L.H.] to be 17 years of age or older." Since neither party has raised this instruction as an issue on appeal, we are not asked to consider it at this time.

¶ 5 The remaining charges against defendant were not age-based. The appellate court has held that, in sex offenses that are not age-based, a victim's age is one factor that a factfinder may consider in determining whether the victim had the ability to give knowing consent. *People v. Lloyd*, 2011 IL App (4th) 100094, ¶ 34. However, the appellate court has stated that "the mere fact [that the victim] was 13 alone is insufficient to prove 'the accused knew that the victim *** was unable to give knowing consent.' " *Lloyd*, 2011 IL App (4th) 100094, ¶ 34 (qutoing 720 ILCS 5/12-13(a)(2) (West 2008)). Also, the State does not ask us on appeal to find, as a matter of law, that the victim's age alone established that she lacked the ability to consent.

¶ 6 There are only two claims raised on this appeal for our consideration, and they are both raised by defendant. Defendant claims: (1) that the trial court erred in admitting other-crimes evidence because its prejudicial effect outweighed its probative value; and (2) that the trial court violated defendant's constitutional right to confront the witnesses against him when it made evidentiary rulings during the cross-examination of L.H. which precluded eight questions about her motive or interest in testifying.

¶ 7 For the following reasons, we affirm.

¶ 8 BACKGROUND

¶ 9 Defendant's conviction stemmed from sexual acts with a 13-year old girl that occurred on Labor Day of 2006. Defendant was arrested six months later, and charged with one count of aggravated criminal sexual assault. The indictment also charged three counts of aggravated

kidnapping, one count of criminal sexual assault, one count of kidnapping, and one count of aggravated criminal sexual abuse. The indictment alleges that, on September 4, 2006, defendant "committed an act of sexual penetration upon [L.H.], to wit: contact between [defendant]'s penis and [L.H.]'s vagina, by use of force or threat of force, and [defendant] caused bodily harm to [L.H.], to wit: a pregnancy." 720 ILCS 5/12-14(a)(2) (West 2006).

¶ 10 I. The State's Pretrial Motion *In Limine* to Allow Other-Crimes Evidence

¶ 11 Prior to trial, the State moved *in limine* to allow other-crimes evidence under section 115-7.3 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-7.3 (West 2006)) to show propensity to commit sexual assault or, at minimum, a lack of consent. The State sought to introduce evidence of a March 1991 conviction in which defendant, at the age of 16, had pled guilty and was convicted of criminal sexual assault. In a signed statement, defendant had admitted to having forcible vaginal intercourse with his eight-year-old half-sister, D.M.

¶ 12 In its brief and in oral argument supporting its motion, the State noted the similarities between the two offenses. Defendant told both L.H. and D.M. not to tell anyone what happened, and threatened to hurt both if they did not obey. Both girls were young African-Americans who were either family members or family friends. The State theorized that defendant sought out youthful, vulnerable victims who would be too embarrassed to cry out. Defense counsel argued for barring the other-crime evidence, because the dissimilarities between the two incidents that increased the evidence's prejudicial effect over its probative value, namely: (1) defendant's statement indicated that he had intercourse with D.M. at least twice, whereas L.H. alleged only one incident; (2) defendant did not beat L.H. as he had D.M.; (3) defendant did not offer an

inducement or payment to D.M. as he did with L.H.; (4) defendant used a condom with D.M. but not with L.H.; and (4) the 15-year lapse of time between the two incidents made the prior conviction too remote. The defense argued that, as the number of dissimilarities increased, so did the prejudicial effect of the other-crimes evidence.

¶ 13 The trial court reviewed the police reports, the relevant statutes and the case law, and the file from the previous incident. The trial court noted that, under the balancing test enumerated in subsection (c) of section 115-7.3 (725 ILCS 5/115–7.3(c) (West 2008)), it was required to weigh the prejudicial effect against the probative value:

> "I do know that this is a balancing test and I do understand that there would [be] prejudicial effect towards the defendant with the admission of this, but the question is not whether it's prejudice, it's whether or not the probative value outweighs the prejudicial effect."

The trial court also detailed the three statutory factors that it could consider: (1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; and (3) other relevant facts and circumstances. 725 ILCS 5/115-7.3(c) (West 2010). The trial court mentioned that 15 1/2 years was a "substantial period of time" between the offenses, but noted that defendant was incarcerated for at least one of those years.

¶ 14 The trial court found: (1) that the prior offense could not be introduced for propensity purposes, because of "sufficient differences" between the two cases, and (2) that the State would not be allowed to use the evidence in their case-in-chief, but could use the evidence in rebuttal. The trial court observed that the prior offenses:

> "very well could be relevant to the issue of consent if the defendant is claiming at some point and time which he very well could *** that the act was consensual despite the age of the victim, I will allow this evidence to be introduced into evidence if, in fact, there is a claim of consent, particularly in the defense case."

The trial court ruled that the testimony of D.M. would be allowed into evidence, and said that there would be a sidebar outside the presence of the jury prior to any cross-examination to confirm that there was no compelling reason not to allow the testimony.

¶ 15 II. L.H.'s Mother's Testimony at Trial

¶ 16 The State's first witness was Ms. H., L.H.'s mother.

¶ 17 A. Ms. H.'s Direct Examination

¶ 18 On direct examination, Ms. H. testified as follows: She was 31 years old at the time of trial and had two children. At the age of 14, Ms. H. had given birth to her daughter, L.H. In 2005, she and her children had moved from Chicago to DuPage County. Prior to the move, Ms. H. and her children lived in a home in Chicago with Tatiana G. ("Ms. G."). Ms. H. and Ms. G. had been "best friends, like sisters," for over 17 years.

¶ 19 In the summer of 2006, Ms. H. and her children lived in DuPage County, but nearly every weekend, the family visited Ms. G. at her home in Chicago. Defendant was Ms. G.'s boyfriend and, at some point in the summer, he moved into her home. Since Ms. H. did not own a motor vehicle, she paid defendant $20 to drive the family to Chicago on Friday afternoons and paid him another $20 to drive them back to DuPage County on Sunday evenings.

¶ 20 L.H. was 13 years old in the summer of 2006. Ms. G. had a son who was roughly six or seven years old, and a daughter who was three years old. While Ms. H., Ms. G., and defendant socialized, the children played. L.H. sometimes spent parts of her weekend playing with her godmother's grandchildren, ages 9 to 13, at their home two blocks away.

¶ 21 On September 4, 2006, Labor Day, the families "got food" and were planning to barbeque together. Ms. H. was on the front porch, having problems igniting the charcoal grill for the barbeque. Defendant helped her start the fire, and then asked if he could take L.H. to the "driving range" to teach her to drive his Cadillac, and Ms. H. consented.

¶ 22 Defendant and L.H. were gone for about two hours when Ms. H. asked Ms. G. to call defendant's cellular telephone, but there was no answer. When defendant returned, L.H. was not with him, and defendant stated that L.H. exited the vehicle and went to her godmother's home. L.H. often stayed at her godmother's home, which was located two blocks from Ms. G.'s home. At around 9 p.m., Ms. H. called the godmother's home and told L.H. to come home, and she returned. Defendant then drove Ms. H. and her children home. Defendant stopped coming to pick up Ms. H. and her family after that weekend.

¶ 23 Three weekends after Labor Day, Ms. H. was able to arrange other transportation to Ms. G.'s home. When they arrived, Ms. H. and her children were each greeted and hugged by Ms. G., her children, and her mother. Then defendant entered, wearing a t-shirt and jogging pants, and went straight toward L.H. Defendant hugged L.H, but not Ms. H. or her son. Ms. H. noticed that, when defendant stopped hugging L.H., his penis was hard, and he was aroused.

¶ 24 In October of 2006, approximately four weeks after the Labor Day barbeque, someone from L.H.'s school called to say that she had been sick at school. Ms. H. took her to a hospital, where she received a pregnancy test in the emergency room, and the results were positive. When Ms. H. found out L.H. was pregnant, she started questioning her to determine the father of her fetus, but she would not answer at the hospital or on the walk home.

¶ 25 When they arrived home from the hospital, Ms. H. began telephoning her friends and Ms. H.'s father. At some point during the telephone calls, L.H. "broke down and got on her knees and was like, Mama, I can't take it. It was [defendant]." Ms. H. hung up the telephone and asked her what had happened, and L.H. told her. Ms. H. called the police near her home, and was referred to a police station located near the incident. That day, an aunt drove Ms. H. and L.H. to the Chicago police station where they spoke with several officers and an assistant State's Attorney (ASA).

¶ 26 B. Ms. H.'s Cross-Examination

¶ 27 On cross-examination, Ms. H. testified as follows: she admitted that she allowed defendant to take L.H. driving even though she was only 13 years old and even though she knew that the legal driving age in Illinois was 16. She testified that when L.H. returned, Ms. H. thought that "something was wrong." Ms. H. did not notice any scratches or bruises on L.H., or notice whether L.H. had changed clothes. L.H. was not crying or visibly upset, but appeared to be avoiding defendant.

¶ 28 III. L.H.'s Testimony at Trial

¶ 29 A. Direct Examination

¶ 30 On direct examination, L.H. testified as follows: she was 17 years old at the time of trial and she was currently a junior in high school, earning A and B grades. In the summer of 2006, she was 13 years old and was about to begin eighth grade when she met defendant.

¶ 31 On Labor Day, defendant and L.H. drove to a store together to buy aluminum pans for barbequing, but there "wasn't really any contact" between them. Later that day, they left together again to go driving. He stopped at a parking lot next to a park, which he said was a driving practice course because it had orange cones around the lot. There were no other vehicles in the parking lot. There were bushes in front of the parking spot, and there was a basketball court "a distance away," where she could observe people playing basketball. The park had a grassy area, but no picnic tables. Aside from the people at the basketball court, there were no other people nearby.

¶ 32 Once parked in the lot, defendant told her that he had left something in the bushes, and asked her to "come to the bush" with him. When she asked him why, defendant replied, "stop acting like a little girl. Be a big girl," and told her to "grow up." She then told defendant that she did not want to go in the bushes, and asked defendant what was back there. Defendant stated that he had left some things behind the bushes and wanted her to help him retrieve them, and she refused.

¶ 33 Defendant then "got to touching her" with his hands on her inner thighs. She asked him to stop and to take her home to her mother. She repeatedly told defendant: "Can you take me

home? I want to go home. I want my mama." Defendant told her, "Stop being a little girl. Act like a big girl." and "stuff like that." She persisted in asking for her mother despite him trying to tell her to "[a]ct like a big girl." Defendant then turned the vehicle off, and lifted the arm rest on the front seat, which turned the front seat into a continuous bench. He set a $50 bill on the front seat, and told her, "if you keep your mouth closed about this, more of this will come *** your way." L.H. continued asking for her mother, and defendant put the $50 bill back in his pocket. He started the vehicle's engine, and she thought that they were going to leave, so she climbed over the front seat and sat in the back seat on the passenger side of the vehicle. Defendant then turned the vehicle off again, exited, opened the rear driver's side door, and entered the back seat. Defendant grabbed her by the shirt near her neck, and she cried, "let me go, let me go," but defendant held on, and her shirt began to rip. L.H. testified that she was "fighting, screaming, pushing, kicking, fighting, everything." As she tried to fight, defendant grabbed both of her hands and held them together so that she could not fight. When she started kicking, defendant shoved his knees into her inner thigh to immobilize her.

¶ 34 Defendant tore the belt from her pants and pulled down her blue jeans and underwear to her knees, and pulled one of her legs out of her pants. She testified that "[h]e didn't *** unfasten[] my clothes. He just pulled my clothes apart and my button broke and my belt broke." Then, defendant "raped" her. Her head was jammed against the door, just below the window. As defendant looked down at her, he pulled down his pants, and "stuck his penis in my vagina." As defendant forced himself inside of L.H., he told her, "This is so good. I appreciate this." She had

not had sex prior to that day, and defendant was moving "[u]p and down, in and out," and "it hurt real bad."

¶ 35 Eventually defendant stopped and lifted himself off her. She was bleeding and had "white stuff" on her. Defendant kissed her forehead and said, "thank you." Defendant then exited the back seat and stood up in the parking lot, with his pants and underwear still off. Before defendant put on his pants, she noticed that there was "white stuff" on his penis. She asked defendant what the white stuff was, and defendant responded by asking her, "Did you come? Did you nut?" At the time, she did not understand the meaning of defendant's questions.

¶ 36 Defendant re-entered the front driver's seat, and she remained in the back seat. Blood ran down her legs, and she noticed that her clothes were also bloody. L.H. testified that she was "hurting" and "in pain." From the front seat, defendant told her, "Don't move. Stay on the floor. Don't look out the window. I don't want nobody to see you." She acquiesced to defendant's demands and sat on the floor behind the passenger's seat. As they drove, defendant told her, "Don't tell nobody. If you tell somebody, I'm going to hurt you and your family. I know where you live. I know what school you go to." She testified that "[h]e was basically *** threatening me telling me if I say something, this was going to happen."

¶ 37 Defendant eventually stopped his Cadillac in a tunnel, under a viaduct, halfway between Ms. G.'s home and her godmother's home. When L.H. exited the vehicle, defendant instructed her not to return to Ms. G.'s home, and to go to her godmother's home instead. She walked to her godmother's home, but no one was home, so she let herself in with a spare key. She changed into clean stretch pants and a t-shirt that she kept in her godmother's room, and threw her bloody,

"messed up" clothes in a garbage can in the alley behind the building. Around 9 p.m., when her mother called, she was instructed to return to Ms. G.'s for dinner, and did so.

¶ 38 When defendant drove her and her family home, she sat in the back seat with her mother and brother. On the ride home, defendant did not say anything to her, but he made faces at her in the mirror. This was the last time that defendant drove her family to or from Ms. G.'s home. The next time that she went to Ms. G.'s home, defendant gave her a hug and told her that he was happy to see her.

¶ 39 Sometime during October 2006, L.H. started feeling sick and nauseous. She went to the school nurse, and then her mom met her and took her to a hospital emergency room. At the hospital, they gave her a pregnancy test, and it came back positive. They stayed at the hospital for less than 10 minutes. When her mother was told of the pregnancy, her mother started "going off on" L.H., asking who the father was. L.H. had never observed her mother that upset before. Ms. H. was "saying all these people's name that used to be around [Ms. G.'s] home and started saying boys' names," asking, "is it him, is it him, is it him?"

¶ 40 When they returned home, her mother first called Ms. G., and then called somebody else. L.H. could hear her mother "saying all this stuff that I didn't want to hear *** [so I] told her that it was [defendant]." That night, they went to Chicago and spoke with police officers. The next day, she, Ms. H., Ms. G., and her aunt returned to the police station. Later that month, L.H. went to another hospital and had an abortion.

¶ 41 B. L.H.'s Cross-Examination

¶ 42 On cross-examination, L.H. acknowledged that the windows on defendant's vehicle were not tinted or blocked. The park in which defendant's vehicle was parked included a basketball court, and people were playing basketball on the court. The basketball court was "a distance" away from the parking area, but was close enough that she could observe people playing. Despite the fact that it was Labor Day, nobody was in the park barbequing.

¶ 43 She admitted that her godmother returned home between 4 and 5 p.m., but she did not tell her what had happened. Instead, L.H. was "just laying around," because she did not want to go back to Ms. G.'s home.

¶ 44 L.H. testified that, when she became sick in school, the school nurse did not initially ask her if she was pregnant. The following week, she threw up in school, and the nurse asked if she thought she was pregnant, and she replied in the negative. She did not tell the nurse that she had sex with defendant. Defense counsel asked, "It was the nurse's idea to call your mom, not yours?" and "You didn't want the nurse to call your mom, did you?" The State objected to both questions, and the trial court sustained the objections. In response to a different question, L.H. testified that she was afraid of what her mom would say if she found out that L.H. was pregnant.

¶ 45 At the hospital, the nurse asked her if she had been sexually active. Defense counsel asked, "And you told her that you and [defendant] had sex?" and she testified, "No, sir." The State objected, and, after a lengthy sidebar outside the presence of the jury, the trial court sustained the objection. Defense counsel asked L.H. whether the encounter with defendant on Labor Day was the first time she and defendant had sex. L.H. testified that it was. She denied

telling a nurse in October 2006 that she and defendant had sex previously. L.H. was impeached when she testified that she did not talk to the nurse at all, and that the nurse did not ask her any questions.

¶ 46 When the nurse told her mother the results of the pregnancy test, her mother was "very upset." L.H. had never observed her mother that upset before. Ms. H. was shouting "I can't believe you did it" and that it was "like, I made the same mistake as her. She was just upset, just mad." Her mother started naming names of high school boys from Ms. G.'s neighborhood. At that time, L.H. did not tell her mother that defendant was the father.

¶ 47 When Ms. H. picked up the telephone and started calling people, she was still loud and upset. She called various people for at least half an hour and told them that L.H. was pregnant. Defense counsel's next three questions faced objections by the State: "And how did you feel about that? Were you embarrassed at all?", "How did you feel about that?" and "Did you necessarily want everyone in your family to know that you were pregnant?" The State objected to each question, and the trial court sustained the objections.

¶ 48 L.H. testified that, after about an hour of her mother calling people, L.H. went into her mother's bedroom and told her that the father was defendant, and that he forced her to have sex. Defense counsel asked whether that was because she "didn't want to admit that sex was consensual," and L.H. said no. Then, defense counsel asked the following questions with objection by the State: (1) "it upset you because your mom thought you got pregnant voluntarily, right?" and (2) "prior to telling her about [defendant], she thought that you had sex voluntarily

with some boy in the neighborhood?" The trial court sustained the objections, noting that, "[h]er mother's state of mind is not competent testimony for this witness."

¶ 49 C. Redirect Examination

¶ 50 On redirect examination, L.H. testified that she did not tell anybody what defendant had done because she did not think they would believe her. She had never had sex before Labor Day 2006.

¶ 51 IV. ASA Nancy Wilder's Testimony at Trial

¶ 52 A. ASA Wilder's Direct Examination

¶ 53 On direct examination, Wilder testified as follows: she spoke with defendant on October 11, 2006, about the alleged rape. Wilder had previously spoken with Ms. H. and L.H. During her October 11, 2006, interview of defendant, Wilder read defendant his *Miranda* rights and asked him if he wanted to tell her what happened. Defendant replied that "nothing happened" on the day of the alleged rape. Wilder asked defendant to explain why, then, L.H. had said otherwise. Defendant replied that L.H. was probably mad because he would not take her driving on Labor Day. When Wilder confronted defendant with L.H.'s statement that defendant *had* taken her driving, defendant reiterated, "Well, everyone was partying and I didn't go anywhere with her."

¶ 54 Wilder informed defendant that L.H.'s fetus's DNA was being tested. In response, defendant stated that he never had sex with L.H., and told Wilder that he had low sperm count, so he could not be the father of her baby, anyway. Wilder asked defendant if he knew L.H.'s age, and defendant replied, "Yeah, she's like 12 or 13." When Wilder asked whether L.H. was in high

school, defendant replied, "No, she's not in high school yet." Wilder told defendant that, if he was not telling the truth, she would contact him later when the DNA results came back.

¶ 55 B. Cross-Examination Testimony

¶ 56 On cross-examination, Wilder testified that she did not make a video recording of her interview of defendant, but that she "created a brief summary" of the conversation afterward in her written report. She prepared her testimony from the report. The original report was not allowed into evidence.

¶ 57 She testified that the State did not yet charge defendant with any crimes directly after Wilder's interview, and the State's Attorney's office designated the case a "continuing investigation" until the DNA test on L.H.'s fetal tissue was completed.

¶ 58 V. ASA Annemarie Sullivan's Testimony at Trial

¶ 59 The State then called ASA Annemarie Sullivan, who testified that she conducted a "very short interview" of defendant on March 1, 2008. Sullivan created notes concerning the conversation once it was over. The notes were not allowed into evidence, but Sullivan's testimony was based on her review of the notes. During the interview, defendant asked Sullivan what L.H. had told her. Sullivan explained "only briefly" that L.H. had stated that defendant had offered to take her on a driving lesson, that they went to a park, and that, once there, defendant wanted to take her into some bushes. Sullivan told defendant that L.H. said that when she said no, defendant tried to have sex with her. L.H. had said that she was scared and crawled into the back seat. Sullivan told defendant that the results from the crime lab report indicated that he was

the father of the fetus that L.H. had terminated. Defendant then admitted to Sullivan that he had sex with L.H., but denied assaulting her, saying that the sex was consensual and initiated by L.H.

¶ 60 VI. State's Evidence of Defendant's Paternity

¶ 61 Following Sullivan's testimony, the State called: Officer William Purvis, an evidence technician who collected buccal swabs from L.H. and defendant; Jennifer Yager, a registered nurse at the University of Chicago who collected fetal tissue and assisted L.H. with a "D&C" surgery to terminate L.H.'s pregnancy; Illinois State Police forensic scientist Pauline Gordon, an expert in the field of forensic DNA analysis who generated DNA profiles from the fetal tissue sample as well as from defendant's buccal swab sample; and Shawn Weiss, an expert in the field of forensic DNA analysis who had experience in "interpreting DNA profiles for paternity." Shawn Weiss opined that defendant was 847,000 times more likely to be the true biological father than an unrelated person chosen at random in the African-American population. Weiss opined that defendant "could not be excluded as the biological father" of L.H.'s fetus, and that she was 99.99% confident that defendant was the father. The State also offered various pieces of evidence, including certified birth certificates for L.H. and defendant, which were admitted into evidence without objection. The State rested, and defendant's motion for a directed verdict was denied.

¶ 62 VII. Defendant's Testimony

¶ 63 A. Direct Examination

¶ 64 On direct examination, defendant testified as follows:

¶ 65 In the summer of 2006, he lived with Ms. G., his girlfriend at the time. He met L.H. in approximately August 2006, when she and Ms. H. visited Ms. G. about five or six times on the weekends. Defendant went out to their home in DuPage County, picked them up, and drove them back to Ms. G.'s home. Ms. H. paid defendant $20 to drive them between DuPage County and Chicago.

¶ 66 On Labor Day weekend of 2006, defendant was with Ms. G. and her children with Ms. H. and L.H. They listened to music and "[w]e would just have fun." Ms. G., Ms. H., and defendant drank liquor and smoked cigarettes and marijuana throughout the weekend, and L.H. would "on regular occasion" have a drink, too. Defendant recalled that the first time he observed her drink alcohol was sometime in August in Ms. G.'s kitchen. Roughly two weeks later, defendant said that he observed L.H. standing on the corner with four males, holding a beer. Defendant said that once he observed her drinking Seagram's gin with the boyfriend of Ms. G.'s mother, who lived in Ms. G.'s home. Defendant also lived in Ms. G.'s home, but claimed he did not know the name of Ms. G's mother's boyfriend. Defendant stated that he heard L.H. slur her words that day, but could not recall any statements that she made.

¶ 67 Defendant denied taking L.H. driving that weekend, but admitted that they had sexual intercourse. He admitted taking her to the grocery store on Labor Day, and having sexual intercourse with her on the way back. Defendant stopped his vehicle between two homes around 2 p.m. There, he and L.H. moved to the back seat. Defendant knew that she was a willing participant because "she initiated the sexual acts between her and I, and she willingly took off her clothes. And after we were done, she put her clothes back on, and we left to go back to the

house." Defendant claimed that he did not know how old L.H. was at the time this was happening, nor did he know what grade she had attained in school. Defendant testified that L.H. was approximately 5'6" or 5'7" in September 2006.

¶ 68 B. Cross-Examination

¶ 69 On cross-examination, defendant testified that he had witnessed L.H. drink beer and other alcoholic beverages on "regular occasions." When defendant and L.H. had sexual intercourse on their way back from the store, it was around 2 or 3 p.m. After they had sex, she returned with him to Ms. G.'s home. At some point, she left Ms. G.'s home and later returned to it. A couple of weeks after Labor Day, defendant was with L.H. again, when he drove her, her mother, and Ms. G. to a beauty parlor. That was the last time defendant had contact with L.H.

¶ 70 Defendant denied telling ASA Wilder that nothing happened. She informed him that "this girl claims that you took her into a park and you sexually assaulted her," and defendant " told her that did not happen." He did not deny having sexual intercourse with L.H., or tell ASA Wilder that he knew that L.H. was only 12 or 13 years old and not yet in high school.

¶ 71 Defendant also admitted to meeting with ASA Sullivan, at which time he admitted to engaging in sexual intercourse with L.H. Defendant claimed that he told ASA Sullivan that L.H. had initiated the sexual intercourse. With regard to that statement, defendant was asked, "would it be fair to say that that's a completely different statement from what you told ASA Nancy Wilder back in 2006?" Defendant replied, "yes."

¶ 72 Defendant admitted that he wrote Ms. H. and L.H. a nine-page letter roughly a week before trial. Part of the letter read:

> "This is not a bribe, but I still have a car *** And a van left out there. They both run good, too *** You can have either one if you choose. I have the titles and all they may need is oil changes; Like I said, this is not a bribe; however, this is a peace offering *** I won't be upset or mad at either of you if you allow the devil to use you. God is in control and you, too, will be judges *** I will never be this stupid again in my life, I promise."

The letter also instructed Ms. H. to call defendant's cousin to arrange things. Defendant claimed that he did not write the letter hoping to convince L.H. and her mother not to testify.

¶ 73 On redirect examination, defendant testified that he believed that L.H. was around 18 or 19 years old when he had sex with her. His belief was based on "the way she would dress, her mannerisms, the fact that she stays out until twelve, one at night. Sometimes she doesn't come in at all. The fact that she would drink and smoke marijuana and cigarettes, I just thought that she was 18 or 19 years old."

¶ 74 VIII. Ms. G's Testimony

¶ 75 The defense's next witness was defendant's girlfriend, Ms. G., who testified that Ms. H. was her best friend, and that in the summer of 2006, they hung out almost every weekend. Defendant would sometimes hang out with them if he was around. During the Labor Day weekend of 2006, Ms. H. and her children were at her home. Ms. G. remembered that, at some point, L.H. asked her mother if she could go driving with defendant. Later that day, defendant came back, and that evening, L.H. also came back. When she came back, L.H. seemed "fine." She seemed happy and told Ms. G. how hungry she was, and Ms. G. did not notice anything unusual about her. Ms. G. had known L.H. since she was a baby, so she knew that she was 13

years old in 2006. In September of 2006, L.H. was a little taller than 5'4". She weighed about 140 pounds.

¶ 76 Ms. G. testified that she recalled receiving a telephone call from Ms. H., who was upset. Ms. G. testified that she was with L.H. once after she found out that she was pregnant. When asked if she was hurt by defendant cheating on her, Ms. G. replied, "Not exactly. It was the fact that it was the person who it was."

¶ 77 IX. Other-Crimes Evidence

¶ 78 After the defense rested, the State informed the trial court outside the presence of the jury that it wished to rebut defendant's claim that L.H. had consented and to introduce evidence of defendant's prior sexual assault conviction to undercut his credibility. The State requested to put on one or two rebuttal witnesses who could testify to the prior conviction: (1) D.M., defendant's half-sister and the victim in the prior assault, and (2) ASA Mike Holzman, who took defendant's statement about the assault in 1992. However, the State stated that they could not anticipate D.M.'s testimony, because she was refusing to speak with the ASAs. In the event that she did not admit to the assault, the State would then call ASA Holzman, in order to testify to the contents of the written confession signed by defendant in that case. Defense counsel expressed concern that D.M. might take the stand and deny her sexual encounters with defendant. Defense counsel argued that, if D.M. were to deny the incident in front of the jury, she should not take the stand in the first place.

¶ 79 The trial court had an *in camera* hearing to ascertain D.M.'s testimony. At the *in camera* hearing, D.M. testified that defendant never sexually assaulted her. She admitted that she told

her teacher at some point that her brother was sexually abusing her. Although she was being sexually abused, it was not by defendant. The abuse came from"[s]omebody that my mother was messing with, and I blamed it on my brother because that person told me that he was gonna kill my whole family."

¶ 80 After the *in camera* hearing, defense counsel asked the trial court to revisit its ruling on the State's other-crimes motion, and to preclude any testimony about the prior matter. The trial court ruled that the testimony was still admissible to rebut defendant's consent defense.

¶ 81 The State requested that it be allowed to call ASA Mike Holzman to testify. As noted, ASA Holzman had taken a handwritten statement from defendant, in which he admitted to sexually abusing D.M. Defense counsel asked the trial court to reconsider its ruling to allow other-crimes evidence. The trial court then asked to review the specific statement which the State sought to introduce. The trial court held that it would allow ASA Holzman to testify to an oral summary of the statement, but that it would not allow the physical document to be received into evidence. Defense counsel informed the trial court that she would likely be calling D.M. in sur-rebuttal.

¶ 82 Before the jury, ASA Holzman testified that he was an ASA in 1992. On October 23, 1992, he went to Area One police headquarters on assignment for an "aggravated criminal sexual assault involving a child victim." There, he interviewed defendant, who was 16 years old at the time. During his interview of defendant, Holzman took a handwritten statement from defendant, which defendant signed. The statement disclosed that, in March of 1991, defendant was living with his mother, her boyfriend, and defendant's half-sister, D.M. One afternoon in March,

defendant and D.M. were alone in the home. On that day, defendant was on the couch with D.M., and he became sexually aroused. Defendant removed a condom from his wallet and opened it up. He told D.M. to lie down on the couch and remove her pants and underwear, and that if she did not do so, then he would beat her. He then pulled down his own pants and underwear, put the condom on his penis, and had vaginal intercourse with her. D.M.'s vagina was "tight," but he stopped before ejaculating. Defendant also told Holzman that he had sexual intercourse with D.M. on a prior date as well. This happened approximately one month earlier, and defendant told her on that occasion that if she told anyone, he would beat her. In the past, defendant had beaten D.M. with his hands and with a belt.

¶ 83 The State also called D.M. as a witness. She testified that defendant was her brother. At some point when she was between 7 and 10 years old, she reported to a teacher that defendant had sexually assaulted her.

¶ 84 On cross-examination, D.M. testified that between the ages of 8 and 10, she was being sexually assaulted, but not by defendant. She told people it was her brother because "the person that was doing it said that he would harm my whole family if I said it was him."

¶ 85 Defendant challenged the other-crimes evidence in sur-rebuttal. Defendant testified that he was arrested in October of 1992 and brought to a police station, where he was interviewed by ASA Holzman. Neither a lawyer nor his parents were present. There, he was handcuffed to a wall in a room and told that a teacher at his sister's school said that D.M. had reported that defendant was having sexual relations with her. Defendant testified that Holzman and two other individuals told defendant that he had to sign something if he wanted to go home. Defendant

asked what it was, and ASA Holzman said it was "basically a statement," and that "if [defendant] signed the statement that [he would] go home that day and [he] will just stay out of trouble, please don't do anything again." Defendant denied reading the statement, and signed it because he wanted to go home, not understanding that it asserted that he had engaged in sexual intercourse with D.M. Defendant testified that he never engaged in any sexual relations with D.M.

¶ 86 On re-cross-examination, the State then questioned defendant line-by-line about his handwritten statement, eliciting the same facts that Holzman testified to on direct examination. At first, defendant claimed that he signed only one page. However, after the prosecutor showed him the document, defendant acknowledged that his signature was on the bottom of each of the six pages, and that his initials appeared next to various changes, at least half a dozen times.

¶ 87 In sur-sur-rebuttal, the State recalled ASA Holzman, who testified that no one told defendant that he had to sign the statement in order to go home. Holzman stated that he read the entire statement out loud to defendant, and that defendant never said it was untrue or that he was signing it only because officers said that he could go home.

¶ 88 The defense then rested, and closing arguments followed. Jury instructions included a limiting instruction that evidence for incidents other than those charged in the indictment have "been received only on the issue of consent and may be considered by you only for that limited purpose."

¶ 89 X. Conviction, Posttrial Motions and Sentencing

¶ 90 During the jury's deliberations, the jury asked to view the letter that defendant wrote to Ms. H. and D.H., as well as defendant's handwritten statement in the 1992 case. The trial court

informed the jury that neither the letter nor the statement had been received into evidence, and thus they could not be sent back to the jury.

¶ 91 The jury found defendant guilty of aggravated criminal sexual assault and aggravated criminal sexual abuse, and found defendant not guilty of aggravated kidnapping. Defendant filed a posttrial motion making several claims, including that the trial court erred in allowing the introduction of other-crimes evidence. In denying the motion for a new trial, the trial court stated:

> "With regard to the specific allegations, particularly the testimony of [D.M.], I did feel that I allowed it for a limited purpose. The jury did receive a limiting instruction. The jury was the sole judge of the believability of the witnesses and the weight to be given to the testimony of each witness. They could have chosen to discredit that particular witness or to believe that witness based on the totality of the circumstances here. I do believe that it was material to an issue in the case. I do recall weighing the evidence and being very careful no[t] only with my words, but also with the weighing process, and I determined that the probative value outweighed the prejudicial effect of the defendant. I do not believe that there is any meritorious reason to grant a motion for a new trial in this matter."

¶ 92 At sentencing, the trial court merged defendant's aggravated criminal sexual abuse conviction with his aggravated criminal sexual assault conviction and, after hearing factors in

aggravation and mitigation, sentenced defendant to natural life in prison. Defendant filed a motion to reconsider the sentence, which was also denied, and this appeal followed.

¶ 93 ANALYSIS

¶ 94 I. Other-Crimes Evidence

¶ 95 The first issue is whether the trial court erred in admitting evidence of defendant's prior conviction for aggravated criminal sexual assault.

¶ 96 A. Standard of Review

¶ 97 A decision to admit evidence of a prior criminal offense ("other-crimes evidence") rests within the sound discretion of the trial court, and we will not reverse its decision unless there was a clear abuse of discretion. *People v. Wilson*, 214 Ill. 2d 127, 136 (2005). We will find an abuse of discretion only when a trial court's decision is "arbitrary, fanciful or unreasonable" or "where no reasonable man would take the view adopted by the trial court." *People v. Donoho*, 204 Ill. 2d 159, 182 (2003).

¶ 98 B. Admissibility of Other-Crimes Evidence

¶ 99 Evidence concerning other crimes is inadmissible when its purpose is to demonstrate a propensity to commit a crime. *Donoho,* 204 Ill. 2d at 170, Ill. R. Evid. 404(a) (eff. Jan. 1, 2011). The evidence is not considered irrelevant; rather, it is considered likely to persuade the jury to convict the defendant based on his past bad behavior. See, *e.g., Michelson v. United States*, 335 U.S. 469, 476 (1948) (noting that barring other-crimes evidence "tends to prevent confusion of issues, unfair surprise and undue prejudice"). However, other-crimes evidence can be admissible to prove certain facts, such as "intent, *modus operandi,* identity, motive, [and] absence of

mistake." *Donoho,* 204 Ill. 2d at 170, 173 (citing *People v. Illgen*, 145 Ill. 2d 353, 364-65 (1991)). The Illinois Rules of Evidence provides that other crimes evidence can be used for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011)

¶ 100 The Illinois legislature has made an exception to the common law bar against the use of other-crimes evidence to show propensity in cases where, as here, a defendant is accused of criminal sexual assault. Section 115–7.3 of the Code of Criminal Procedure of 1963 provides:

> "(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, child pornography, aggravated child pornography, or criminal transmission of HIV;
>
> ***
>
> (b) If the defendant is accused of an offense set forth in paragraph (1) or (2) of subsection (a) or the defendant is tried or retried for any of the offenses set forth in paragraph (3) of subsection (a), evidence of the defendant's commission of another offense or offenses set forth in paragraph (1), (2), or (3) 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.

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

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

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

(3) other relevant facts and circumstances." 725 ILCS 5/115–7.3 (West 2008).

Our Illinois Supreme Court held that this statute allows evidence of other-crimes to show other relevant matter, including a defendant's propensity to commit sex offenses. *Donoho,* 204 Ill. 2d at 176. Under this interpretation, other-crimes evidence is probative to rebut a defendant's claim of consent. *People v. Boyd*, 366 Ill. App. 3d 84, 93 (2006). Section 115–7.3 also requires that the evidence be "otherwise admissible under the rules of evidence," meaning that evidence that is normally inadmissible under the rules of evidence, such as certain hearsay evidence, remains inadmissible. *People v. Childress*, 338 Ill. App. 3d 540, 551, 789 (2003).

¶ 101 Where the evidence meets the threshold statutory requirement of relevance and contains probative value, it is presumed to be admissible if its probative value is not substantially outweighed by its prejudicial effect. *Donoho*, 204 Ill. 2d at 182–83.

¶ 102 Section 115-7.3 controls the admission of other-crimes evidence against a defendant. Here, defendant was charged with criminal sexual assault and aggravated criminal sexual abuse, which are both listed as offenses to which section 115–7.3 applies. 725 ILCS 5/115–7.3(a) (West 2008). In addition, defendant pled guilty in 1992 to criminal sexual assault, which is a prior

offense where evidence is potentially admissible under this section. 725 ILCS 5/115–7.3(a)(3), (b) (West 1998). Defendant does not dispute that the other-crimes evidence here satisfied the statutory requirements for admissibility under section 115-7.3(b). Defendant additionally does not contest the relevance of other-crimes evidence to the consent defense, nor that it contains some probative value. See *Donoho,* 204 Ill. 2d at 176. The question for us on appeal is whether the trial court abused its discretion when it determined that the prejudicial effect of the evidence of defendant's prior offense was not *substantially* greater than its probative value. 725 ILCS 5/115-7.3(c) (West 2008).

¶ 103 Defendant claims that the trial court erred in its application of the balancing test prescribed by section 115-7.3(c).

¶ 104 C. Defendant's Claims on Appeal

¶ 105 Defendant argues that that the trial court abused its discretion: (1) because the 15 ½ year gap[1] between the events reduced the probative value of the evidence, and (2) the facts of the prior conviction caused a "mini trial" on the past offense, which in itself created undue prejudice that substantially outweighed the probative value of that evidence

¶ 106 1. The Balancing Test

¶ 107 In section 115-7.3 cases, the key concern is that the trial court "avoid admitting evidence that entices a jury to find defendant guilty '*only* because it feels he is a bad person deserving

[1] The incident with D.M. occurred in March 1991, and L.H.'s allegations arise out of a September 2006, incident, thus giving rise to an over 15-year lapse in time.

punishment.' " (Emphasis in original.) *People v. Holmes*, 383 Ill. App. 3d 506, 515 (2008), *vacated on other grounds*, 235 Ill. 2d 59 (2009) (quoting *Childress,* 338 Ill. App. 3d at 548.) Thus, trial courts must weigh carefully the probative value against the prejudicial impact of other-crimes evidence. *Donoho*, 204 Ill. 2d at 186. In the past, we have found error where the trial court failed to conduct a "meaningful analysis" of the prejudicial effect of the other-crimes evidence in light of "significant dissimilarities" between the two crimes. *People v. Johnson*, 406 Ill. App. 3d 805, 812 (2012) (finding error where the trial court considered the probative effect of the other-crimes evidence, but not its prejudicial impact where the other-crimes evidence involved two perpetrators and the charged crime involved only one defendant).

¶ 108 In the case at bar, the trial court properly conducted an analysis of the three factors listed in the statute for weighing the probative value of other-crimes evidence against the danger of unfair prejudice, namely: (1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; and (3) other relevant facts and circumstances. 725 ILCS 5/115–7.3(c) (West 2008).

¶ 109 The trial court in the case at bar considered and weighed both the probative value of the evidence as well as its prejudicial effect. At the pretrial hearing, the trial court noted: "I do know that this is a balancing test and I do understand that there would [be] prejudicial effect towards the defendant with the admission of this, but the question is not whether it's prejudice, it's whether or not the probative value outweighs the prejudicial effect." The trial court acknowledged the prejudicial effect when it denied the State's motion to present other-crimes evidence during its case-in-chief, when it decided not to allow defendant’s previous confession

into evidence in the other case, and when it restricted the material to the rebuttal only if defendant claimed consent.

¶ 110 Nonetheless, defendant contends that the trial court erred: (a) because of factual dissimilarity, and (b) because the proximity in time precluded the trial court from properly admitting the evidence.

¶ 111 a. Degree of Factual Similarity

¶ 112 Other-crimes evidence must have " 'some threshold similarity to the crime charged' " to be admissible. *Donoho,* 204 Ill. 2d at 184 (quoting *People v. Bartall,* 98 Ill. 2d 294, 310 (1983)). As factual similarities increase, so does the relevance, or probative value, of the other-crimes evidence. *Donoho,* 204 Ill. 2d at 184 (citing *Bartall,* 98 Ill. 2d at 310). Conversely, as the number of dissimilarities increase, so does the prejudicial effect of the other-crimes evidence. *Johnson*, 406 Ill. App. 3d at 811.

¶ 113 However, our supreme court has instructed that " 'mere general areas of similarity will suffice' to support admissibility" where such evidence is not being offered under the *modus operandi* exception. *Donoho,* 204 Ill. 2d at 184 (quoting *Illgen,* 145 Ill. 2d at 372–73). Some differences between the offenses do not defeat admissibility "because no two independent crimes are identical." *Donoho,* 204 Ill. 2d at 185, 273 (citing *Illgen,* 145 Ill. 2d at 373).

¶ 114 A trial court may admit other-crimes evidence despite significant factual dissimilarities if the trial court properly determines that the prejudicial effect of the evidence does not substantially outweigh its probative value. For example, the victim in *People v. Ross,* 395 Ill. App. 3d 660, 664 (2009), woke up in her home to find the defendant, her boyfriend's brother,

holding her down to engage in sexual intercourse with her. The trial court allowed the State to introduce trial testimony of the victim from the defendant's prior aggravated sexual assault conviction 17 years earlier. *Ross*, 395 Ill. App. 3d at 673. In the earlier assault, the defendant cut the victim with a carpet cutter and threatened her and her children, kidnapped her and her children and took them to his home, and raped her several times. We determined that the trial court did not abuse its discretion by admitting that testimony because consent was at issue. *Ross*, 395 Ill. App. 3d at 674-77. Even though the prior crime involved a kidnapping and violence with a weapon and the charged crime did not, we found that the prior crime was relevant because of the relationship between the defendant and the victims and because the defendant was asserting a defense of consensual sex. Evidence of the defendant's prior conviction in the case at bar similarly involved sex coercion of young victims over which defendant had a position of authority. Like *Ross*, the other-crimes evidence is probative and relevant to the issue of consent because of the similarities in defendant's prior relationship with each victim, and because defendant used or threatened force to the victims if they told others of the rape.

¶ 115 Defendant argues that we should follow *People v. Johnson*, (1) where we held that it was error for the trial court not to conduct a "meaningful analysis" of the prejudicial effect of other-crimes evidence and (2) where there were "significant dissimilarities" between the two crimes. *Johnson*, 406 Ill. App. 3d at 812. The *Johnson* trial court considered the probative effect of the other-crimes evidence, but not its prejudicial impact, thereby circumventing the test urged by our supreme court in *Donoho*. *Johnson*, 406 Ill. App. 3d at 812.

¶ 116 In addition, *Johnson* rests on factual circumstances not present in defendant's case. In *Johnson*, the victim in the prior offense was assaulted by defendant and another perpetrator, while the charged offense involved the defendant alone with the victim. *Johnson*, 406 Ill. App. 3d at 811. According to the testimony in the prior case, defendant forced cocaine and alcohol on the previous victim and anally penetrated her, which was conduct absent from the current case. *Johnson*, 406 Ill. App. 3d at 808, 811. These differences both in the number of perpetrators and in defendant's conduct during the assaults weighed against the relevance of the prior assault to the charged offense. *Johnson*, 406 Ill. App. 3d at 812.

¶ 117 In the case at bar, the prior crime contains only minor factual dissimilarities: D.M. was 8 while L.H. was 13 at the time of the assault; the assault against D.M. happened inside a home while the assault against L.H. happened inside a motor vehicle; one incident involved a condom while the other did not; and the D.M. assault included the threat of a beating with a belt, while the L.H. assault involved defendant vigorously holding his victim down in the vehicle.

¶ 118 Defendant contends that, given these dissimilarities, the similarities between the assaults were insufficient because they were generic and common to many sexual crimes: they both took place when the victim and the defendant was alone; they both involved vaginal penetration; they both took place around mid-day; the victims were both African-American; the victims were both children; defendant allegedly threatened them both if they told anyone; and both victims were close to defendant: one, a family friend; and the other his half-sister.

¶ 119 However, our supreme court interprets the statute to require only "mere general areas of similarity" between crimes. *Donoho,* 204 Ill. 2d at 184 (quoting *Illgen,* 145 Ill. 2d at 372–73).

The similarities above, particularly the age of victims, the position of influence that defendant held over both victims, and defendant's admonishments of secrecy to both girls, are enough to fall within the requisite "general areas of similarity." *Donoho,* 204 Ill. 2d at 184. The dissimilarities are not enough to disqualify this evidence. The admissible prior crimes evidence in *Ross* involved the defendant's use of a carpet cutter on the victim while the charged crime did not involve a weapon. *Ross*, 395 Ill. App. 3d at 666. The prior assault in *Ross* involved kidnapping and assault in two locations while the charged crime took place only in the victim's bed. *Ross*, 395 Ill. App. 3d at 666. Although defendant threatened D.M. with a belt and did not use any implement to threaten L.H., the degree of dissimilarity in the amount of force used in the assaults is less than the dissimilarity in *Ross* and does not render the evidence inadmissible. See *Ross*, 395 Ill. App. 3d at 666. Similarly the difference in location is not enough to defeat a finding of "general areas of similarity." See *Ross*, 395 Ill. App. 3d at 666.

¶ 120 Unlike the trial court in *Johnson*, here the trial court carefully and explicitly weighed both the probative value and the prejudicial impact of the evidence. See *Johnson*, 406 Ill. App. 3d at 812. The trial court did not err in its consideration of the factual dissimilarities.

¶ 121 b. Proximity in Time Between the Charged and Predicate Offenses

¶ 122 The 15 1/2 year time difference between the crimes also does not require us to reverse. Our supreme court held in *Illgen* that:

> "As a general rule, other offenses which are close in time to the charged offense will have more probative value than those which are remote. Nevertheless, the admissibility of other-crimes evidence should not, and indeed cannot, be

> controlled solely by the number of years that have elapsed between the prior offense and the crime charged. The decision whether to admit or exclude such evidence must be made on a case-by-case basis by the trial judge responsible for evaluating the probative value of the evidence." *People v. Illgen*, 145 Ill. 2d 353, 370 (1991).

¶ 123 In *People v. Ross*, the prior sexual assault occurred 17 years before the charged crime. *Ross*, 395 Ill. App. 3d at 673. We found: (1) that time defendant served by being incarcerated for 5 years mitigated the 17-year time gap; and (2) that a 12-to-15-year time lapse between offenses was insufficient to find an abuse of discretion. *Ross*, 395 Ill. App. 3d at 677 (citing *Donoho*, 204 Ill. 2d at 184). The appellate court has upheld other-crimes evidence that was more than 20 years old. *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994) (holding that 20-year-old testimony of defendant molesting a 14-year-old-boy was sufficiently credible and probative to defendant's current charges of criminal sexual assault of young members of the church where defendant was a pastor).

¶ 124 In the case at bar, the record demonstrates that the trial court weighed the proximity in time between the prior conviction and the charged offense, and found that (1) the State would not be able to use the evidence to demonstrate defendant's propensity to commit sex crimes, and (2) the State would be barred from using the evidence in its case-in-chief. In considering the 15 ½-year gap between the crimes, the trial court agreed that it was significant, while agreeing with the State that the time was partially mitigated by defendant's incarceration for over one year between the crimes. However, the trial court noted that the other-crimes evidence:

> "very well could be relevant to the issue of consent if the defendant is claiming at some point and time which he very well could *** that the act was consensual despite the age of the victim, I will allow this evidence to be introduced into evidence if, in fact, there is a claim of consent, particularly in the defense case."

¶ 125 The time gap in the case at bar, standing by itself, is not exceptional under Illinois case law, considering the trial court's careful analysis of the potential prejudicial impact of the evidence and its limits on its scope of admissibility.

¶ 126 In sum, the trial court properly weighed both the prejudicial impact and the probative value of the other-crimes evidence, and neither the gap in time between the crimes nor the degree of factual dissimilarity in this case bar its admissibility.

¶ 127 2. Other-Crimes Evidence as Focal Point of Trial

¶ 128 Defendant also argues that the other-crimes evidence created a mini-trial that distracted the jury with conflicting stories of the 1991 sexual assault conviction. It is well established that other-crimes evidence must not become the focal point of the trial. *Ross*, 395 Ill. App. 3d at 674. The trial court "should not permit a 'mini-trial' of the other, uncharged offense, but should allow only that which is necessary to 'illuminate the issue for which the other crime was introduced.' " *People v. Bedoya,* 325 Ill. App. 3d 926, 938 (2001) (quoting *People v. Nunley,* 271 Ill. App. 3d 427, 432 (1995)). "Courts' disinclination toward 'mini-trials' of collateral offenses is *** another application of the principle that evidence should not be admitted where it causes unfair prejudice, jury confusion, or delay." *People v. Walston*, 386 Ill. App. 3d 598, 619 (2008). The danger of a

"mini-trial" is risking putting on a "trial within a trial," "with detail and repetition greatly exceeding what is necessary to establish the particular purpose for the evidence." *People v. Boyd*, 366 Ill. App. 3d 84, 94 (2006). However, as our Second District observed, "while a 'mini-trial' of a collateral offense can cause undue prejudice in a section 115–7.3 case, it is not necessary in such a case that a court *** [carefully limit the evidence] to the extent required in common-law other-crimes cases." *Walston*, 386 Ill. App. 3d at 620.

¶ 129 In the case at bar, the State requested a sidebar outside the presence of the jury to introduce other-crimes evidence, only after defendant testified that the sexual intercourse was consensual. The trial court recognized the potential for prejudice, because the content of D.M.'s testimony was unknown, so it held a hearing without the jury to determine the nature of her testimony. After it became clear that D.M. would deny the previous sexual assault, the State called ASA Holzman to testify to the contents of defendant's prior statement admitting to the sexual assault. The trial court ruled against admitting the statement into evidence. Defense counsel advised that he would call D.M. to rebut the other-crimes evidence, but the State called her first and elicited only her admission that she told a teacher at her school that she had been sexually assaulted by her brother. On cross-examination, the defense elicited D.M.'s denial of the assault with defendant. On sur-rebuttal, defendant testified on his own behalf that he had not read the statement, had signed it only out of the belief that he could leave, and had signed it only once. The State impeached defendant by showing him the statement with his signature on each page and with his initialed corrections throughout the statement. Finally, the State recalled ASA

Holzman, who denied that defendant was pressured to sign the statement or promised that he could leave.

¶ 130 The record fully supports the State's position that other-crimes evidence was presented in a limited manner and only in rebuttal to defendant's claim that L.H. consented. Defendant's prior signed confession was never entered into evidence. Jury instructions included a limiting instruction that evidence for incidents other than those charged in the indictment could be considered "only on the issue of consent." The trial court instructed the jury to determine whether defendant was involved in the other offense and, if so, what weight should be given to the evidence on the issue of consent. Other-crimes evidence was never mentioned in the State's case-in-chief, which included eight witnesses, in contrast to its two rebuttal witnesses.

¶ 131 The trial court possesses broad discretion under section 115-7.3. *Walston*, 386 Ill. App. 3d at 620. Neither the introduction of the evidence nor the subsequent rebuttals and sur-rebuttals created an atmosphere that shifted the focal point of the trial. See, *e.g.*, *People v. Boyd*, 366 Ill. App. 3d 84, 94 (2006) (holding that admitting evidence of only one of two prior offenses was was "sufficiently tailored to fulfill its purpose" of demonstrating striking similarities between the two crimes.) Although the other-crimes evidence was disputed at trial, it was not retried beyond the extent contemplated and implicitly permitted by statute. 725 ILCS 5/115–7.3(b) (West 2006). The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Donoho*, 204 Ill. 2d at 171. Legislative intent is best understood from the plain language of the statute itself. *Donoho*, 204 Ill. 2d at 171. We interpret the statute according to its the plain and ordinary meaning. *Donoho*, 204 Ill. 2d at 171. Rebuttal of other-crimes evidence is

contemplated by the plain statutory language, which permits admission of both evidence of "defendant's commission of another [enumerated] offense or offenses" and "evidence to rebut that proof or an inference from that proof." 725 ILCS 5/115–7.3(b) (West 2006); *Walston*, 386 Ill. App. 3d at 620.

¶ 132 Defendant placed his credibility at issue when he took the stand and denied the assault and denied reading the 1992 statement despite his signature and initials on every page, and his initials on corrections. The Illinois Supreme Court has stated that it is the duty of a prosecutor to use other-crimes evidence to impeach a defendant's credibility when a defendant has raised an issue in his testimony:

> "The State had the right and the obligation to use all of the impeaching evidence it possessed in order to destroy the credibility of the defendant if he were to testify. After compiling such a record, the defendant should not now expect the court to prevent the State from showing to the jury that he is utterly unworthy of belief. *** this is a consequence of his own wrongdoing." *People v. McKibbins*, 96 Ill. 2d 176, 189 (1983) (discussing the admission of previous theft convictions that discouraged defendant's testimony).

¶ 133 In sum, the trial court properly allowed both defendant's rebuttal and the State's subsequent impeachment. After weighing the probative value of other-crimes evidence against any prejudicial effect, the trial court did not abuse its discretion by admitting the other crimes evidence for the limited purpose of rebutting defendant's consent defense and its use for impeachment purposes.

¶ 134 II. Right to Confront Witnesses

¶ 135 Defendant also argues that the trial court erred when it precluded defense counsel from asking L.H. eight questions about her motive or interest in testifying. Specificaly, during cross-examination of L.H., defense counsel asked (1) whether it was the school nurse's idea to call L.H.'s mother, (2) whether she wanted to prevent the nurse from calling her mother; (3) whether L.H. was embarrassed by her mother calling and "telling everyone" that L.H. was pregnant; (4) how L.H. felt about her mother's reaction; (5) whether she wanted everyone in her family to know that she was pregnant; (6) whether her mother used derogatory terms or names about L.H.; (7) whether L.H. was upset because her mother thought she became pregnant voluntarily; and (8) whether her mother thought L.H. had voluntary sex with some boy in the neighborhood prior to L.H. telling her mother about defendant. The State objected to each question, and the trial court sustained the objections.

¶ 136 As a threshold matter, in order to preserve the issue for appeal, defendant was required to raise the issue by objecting at trial and in a posttrial motion. *People v. Martinez,* 242 Ill. App. 3d 915, 925 (1992). Defendant failed to object at the time and in a posttrial motion, and therefore has waived his right to raise this claim on appeal. *People v. Daniels,* 331 Ill. App. 3d 380, 389 (2002). Nevertheless, defendant urges us to review this claim for plain error. "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's

trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski,* 225 Ill. 2d 551, 565 (2007). Under the plain-error doctrine, the burden of persuasion remains with defendant. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 137 However, before we reach the issue of plain error, we must first determine whether any error occurred at all. *People v. Walker,* 392 Ill. App. 3d 277, 294 (2009) ("[i]n a plain error analysis, 'the first step' for a reviewing court is to determine whether any error at all occurred").

¶ 138 Defendant's sixth amendment right of confrontation includes the right to cross-examine witnesses, but that right does not extend to matters which are irrelevant or have little or no probative value. *People v. Sandoval*, 135 Ill. 2d 159, 178 (1990). A trial court may exclude repetitive or cumulative testimony, and the extent to which cumulative testimony is received is in the trial court's discretion. *People v. Hermann*, 180 Ill. App. 3d 939, 945-46 (1998). Testimony may also be excluded as irrelevant when it is remote, uncertain, or conjectural. *People v. Flores*, 269 Ill. App. 3d 196, 202 (1995). "The activities under scrutiny by a trial court in a case alleging sexual assault must relate to the exchange between the complainant and the person accused, that is, whether the sexual attentions were forced upon another without consent." *People v. Sandoval*, 135 Ill. 2d 159, 176 (1990). "Both the legislature and the courts have found that a complainant's prior sexual history is irrelevant in a trial for sexual assault, *** [thus] the witness may not be impeached on irrelevant or collateral matters." *Sandoval*, 135 Ill. 2d at 182.

¶ 139 To determine the constitutional adequacy of cross-examination, we consider whether the trial court allowed defendant to fully argue his theory of the case. *People v. Wilson*, 254 Ill. App. 3d 1020, 1045 (1993). The latitude on cross-examination is a matter within the sound discretion

of the trial court. As stated above, we will find an abuse of discretion only when a trial court's decision is “arbitrary, fanciful or unreasonable" or “where no reasonable man would take the view adopted by the trial court." *Donoho*, 204 Ill. 2d at 182.

¶ 140 The record here does not support a claim of error. The jury heard testimony from L.H. and from her mother that 13-year-old was too embarrassed to talk about the rape until after her mother found out about her pregnancy. L.H. testified that she was afraid of what her mom would say if she found out that she was pregnant. This testimony allowed defense counsel to argue in closing about L.H.’s embarrassment as a possible motive for claiming rape:

> "[L.H.] didn't tell anyone about the pregnancy until the pregnancy test came back positive and she heard her mother talking about her on the phone. You can only imagine what that must have been like, to have your own mother thinking that you've been sleeping around. And that's what her mother assumed. Her mother was going through the names of boys, who is the father, who is the father, going down these names of boys.
>
> It didn't even occur to her that her own 13 year old daughter was raped. She made the assumption that her daughter was engaging in consensual sex. She was just going down the list of who could do that *** So after [L.H.] hears her mother very upset on the phone, she doesn't say [defendant] raped me. She says it was [defendant.]"

How L.H. felt when her mother speculated about her daughter’s possible impregnation by other boys is irrelevant because L.H. accurately named defendant as the father of her fetus. When

asked about her mother's state of mind after discovering that L.H. was pregnant, the trial court recognized that Ms. H.'s state of mind was "not competent testimony for this witness." Additionally, this testimony was repetitive and thus irrelevant, because Ms. H. had already admitted that she was angry when she discovered L.H.'s pregnancy. The objections kept the witnesses to the testimony actually at issue in the case. We cannot say that the trial court's decision was "arbitrary, fanciful or unreasonable" or that no reasonable person "would take the view adopted by the trial court." *Donoho*, 204 Ill. 2d at 182.

¶ 141 In sum, the trial court properly exercised its discretion to balance defendant's right to confront witnesses while protecting a young sexual assault victim from harassment.

¶ 142 CONCLUSION

¶ 143 For the foregoing reasons, we affirm defendant's conviction. We find that, first, it was not an abuse of discretion to allow testimony of defendant's prior criminal assault conviction because probative value exceeds its prejudicial impact. Second, the trial court did not err in sustaining the State's objections to eight cross-examination questions of the rape victim where defendant otherwise had ample opportunity to support his theory of the case.

¶ 144 Affirmed.