2013 IL App (1st) 110948-U

FOURTH DIVISION
August 15, 2013

No. 1-11-0948

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 2007 CR 24375
	)	
KENNETH SIMS,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction and sentence affirmed, where the trial court properly admitted other-crimes evidence, defense counsel's failure to redact defendant's videotaped interrogation did not cause prejudice, and defendant's sentence was not excessive.

¶ 2 Following a jury trial, Kenneth Sims was found guilty of first degree murder and sentenced to 44 years' imprisonment. He raises three issues on appeal: (1) the trial court erred in

admitting other-crimes evidence; (2) defense counsel provided ineffective assistance where he failed to seek redaction of defendant's videotaped interrogation; and (3) his sentence is excessive. We affirm.

¶ 3 BACKGROUND

¶ 4 In the fall of 2007, defendant lived with his girlfriend, Cassandra Hall, and her four children—Marques Hall (eight), Lei-anna Young (five), James Young (17 months), and Jamesha Young (one month). James died on October 16th, after defendant hit him in the head 12 to 13 times, punched him in the stomach 12 to 13 times, and threw him against a metal bunk bed frame. The primary issue at trial was whether defendant possessed a culpable mental state. This issue turned largely on the content of defendant's videotaped interrogation.

¶ 5 Motion to Suppress Statement

¶ 6 Defendant filed a motion to suppress his statement, arguing that detectives interrogated him after he had elected to remain silent and that his statements were the result of physical and mental coercion. The trial court denied his motion.

¶ 7 Motion to Introduce Other-Crimes Evidence

¶ 8 The State moved *in limine* to allow admission of other-crimes evidence to show, among other things, defendant's intent and absence of mistake. According to the State, Marques[1] would testify that defendant regularly hit him and James with a belt. Further, Cassandra would testify that, approximately one week before James' death, she confronted defendant about a burn on

[1] To avoid confusion, we refer to the given names of witnesses who share the "Hall" and "Young" surnames.

James' heel, but defendant denied knowledge of the injury. Defendant maintained that Marques' claim was uncorroborated and the evidence's prejudicial effect would outweigh its probative value. The trial court granted the State's motion and later instructed the jury that this evidence was "received on the issue[ ] of the defendant's *** lack of mistake and may be considered by you only for that limited purpose."

¶ 9 Jury Trial

¶ 10 *Sergeant David Wright*

¶ 11 Sergeant David Wright testified that he and Detective Michael Qualls interviewed defendant at Area 2 police headquarters on October 17, 2007. The State sought to play a video recording of that conversation, and defendant objected, reiterating the arguments set forth in his motion to suppress. The State responded, "Counsel and I discussed redacting portions [of the videotape]. He said he didn't want anything redacted." Defense counsel replied, "No. That [redaction] is not my issue." The trial court overruled defendant's objection.

¶ 12 The State played a 33-minute video clip time-stamped 5:08 through 5:41 p.m. At the beginning of the video, Detective Qualls stated, "Here's what we're going to do: we're gonna run ya' down to lie detector test, see how truthful you're being, know what I'm saying? Hopefully you've been telling the truth." Defendant responded that he was only "playing with the boy" and noted that he is a "hyperactive person," who takes medication and has a "quick temper." He added that he had "been in about 13 state hospitals," had been strapped to a bed because he was "belligerent," and once, when "down South," hit a man with a piece of wood while in a "rage." At 5:10 p.m., Detective Qualls left the room, leaving defendant and Sergeant Wright alone.

¶ 13 Sergeant Wright encouraged defendant to tell the truth, and defendant responded, "I killed the baby, I killed the baby, I killed the baby." He explained that he had punched James in the stomach and head and "slung" him into the bed. He repeatedly stated that he did not mean to kill him and was merely playing.

¶ 14 Sergeant Wright then asked, "Why would these kids say that you beat them all the time? That's what they're saying. They're saying that you beat them all the time." The Sergeant repeated, "The kids are saying that you beat them, and they're [*sic*] also have told other people in the family; they told their grandfather." Defendant said the children were lying and explained that he and Marques did not "get along." The Sergeant responded, "I could see if one kid was saying that you were hitting them, but you've got all of them saying that." Defense counsel objected and explained his basis during a sidebar:

> Here's the problem with these videos, the cops get up there and hearsay is let in. The kids are saying you beat them. It is not true. It is totally prejudicial. *** I am objecting to continually playing this, Judge. The cop basically is lying, you know, saying the kids and everyone is saying you are beating him. Marques is going to testify he hit him once with a belt. I am just making my record, Judge.

"Judge," the State responded, "I have asked Counsel if there was anything he wanted redacted pre-trial. He said no." The court overruled defendant's objection, noting, "I do remember conversation with the State went in whether or not there was anything that needed to be redacted. And you said, no." [*sic*] Later in the video, Sergeant Wright repeated, "I told you what the kids are saying, that you beat 'em up." Again defendant stated that the kids were not telling the truth.

¶ 15 Near the end of the video, defendant stated that he punched James 12 or 13 times in the stomach, hit him 12 or 13 times in the head, and threw him into a bunk bed, but was "just playing with him." Defendant explained that Cassandra's family "treated [James] like he was a girl, and I was trying to make him be a man."

¶ 16 *Detective Mike Qualls*

¶ 17 Detective Mike Qualls testified that he interviewed defendant at Area 2 on October 16, 2007, but did not record that conversation because defendant had not yet been arrested. The following day, he spoke with defendant at 1:11, 2:34, and 4:37 p.m. and recorded each interview. During these conversations, defendant described to him the nature and cause of several of James' injuries: defendant scratched James' neck while attempting to remove a chicken bone on which James was choking; James later injured his head on a metal bathtub faucet; James further injured his head when defendant threw him "pretty hard" into a bunk bed while the two were playing. Defendant said that Cassandra was aware of these injuries and complained that Cassandra's family "babied" James too much and treated him "like a girl," and that he wanted James to be a "like a man." He added that he and Marques "didn't get along," because they were both "Capricorns." The State then played portions of the 2:34 and 4:37 p.m. interviews that confirmed Detective Qualls' testimony.

¶ 18 *Cassandra Hall*

¶ 19 James' mother, Cassandra Hall, testified that she met defendant in June 2007. In August, he moved into her apartment and began babysitting her children. According to Cassandra, defendant did not abuse her, and she never saw him abuse the children. She confronted

defendant, however, when she noticed an injury to James' heel, but defendant denied knowledge of the injury. On another occasion, her father, Samuel Hall, told her that Marques said that defendant abused him. Samuel and Cassandra each confronted defendant, who denied the allegation. Cassandra noted that defendant and Marques "did not get along," because defendant gave snacks to Lei-anna, but not Marques. In October, defendant called Cassandra at work and told her that he had placed his hands on James' neck and in his throat in an attempt to dislodge a piece of chicken on which James had been choking. Cassandra observed scratches on both sides of James' neck later that day.

¶ 20 On October 16, 2007, Cassandra dropped off Lei-Anna and Marques at school and James and Jamesha at Samuel's house, and went to work. She received a telephone call after 5:00 p.m. and rushed home and then to the hospital. Cassandra subsequently pled guilty to child endangerment and lost custody of her children.

¶ 21 *Marques Hall*

¶ 22 Twelve-year-old Marques Hall testified that he was eight or nine and living with his mother, siblings, and defendant on the day James died. That day, defendant picked him up from his grandfather's house after school, and the two returned to their apartment. Upon their arrival, James was laying in bed, his eyes rolled back in his head, and white foam emanating from his mouth. Marques told his Aunt Arlene, who had recently arrived at the apartment, that James was not breathing, but Arlene did not believe him. After he repeated his claim, she went to see James. Arlene pushed on James' chest, and defendant breathed into his mouth, but they were unable to resuscitate him.

¶ 23 Marques further testified that defendant hit him and James with a belt on multiple occasions and once made him stand in a corner with his hands up. Defendant also hit James on his legs in an attempt to teach him how to walk. On a few occasions, Marques observed defendant take James into his mother's room and close the door. He would then hear James cry. He told his mother and grandmother about being hit with a belt. Finally, Marques said that defendant treated him differently from Lei-anna, giving her more treats.

¶ 24 *Lei-anna Young*

¶ 25 Nine-year-old Lei-anna testified that she recalled living with her mother, her siblings, and defendant. During that time, defendant gave Lei-anna more treats than Marques or James, and that made Marques mad. On the day James died, Lei-anna, James, Jamesha, and defendant were in the house. Marques was not yet home. Lei-anna twice called 911 after she heard James yell and cry. James was no longer crying when defendant laid him on the bottom bunk and left the house. Lei-anna then watched television.

¶ 26 *Betty Wilson*

¶ 27 Cassandra's mother, Betty Wilson, testified that, during Labor Day weekend in 2007, she took Marques and Lei-anna shopping. She spoke with Marques, who appeared concerned. Wilson relayed their conversation to Cassandra's father, Samuel Hall. On October 16, 2007, she went to the hospital after receiving information regarding James.

¶ 28 *Samuel Hall*

¶ 29 Cassandra's father, Samuel Hall, testified that he often babysat his grandchildren, who lived only one block away. In September 2007, after speaking to Wilson, he went to Cassandra's

apartment and asked defendant if he had been "touching" his grandchildren. Defendant denied the allegation. On October 16, 2007, Samuel watched James and Jamesha at his home. At some point, defendant picked them up. Later that day, Marques came to his house after school. At some point, defendant picked up Marques as well.

¶ 30 *Dr. Mitra Kalelkar*

¶ 31 Deputy Cook County Medical Examiner Dr. Mitra Kalelkar was qualified as a forensic pathology expert and testified that, on October 17, 2007, she observed and supervised Dr. John Ralston, who performed James' autopsy. James' body had multiple external injuries, including a bruise to his forehead; abrasions on his cheeks, chest, abdomen, and neck (some of which were healing); and a cigarette burn mark on his left heel. An internal examination revealed a half-cup of blood in James' abdominal cavity, intestinal tissue laceration, hemorrhaging surrounding his kidney and adrenal gland, and a swollen brain. Dr. Kalelkar opined that the injuries to James' internal organs were consistent with being thrown against a wall or metal pole and being punched repeatedly by an adult with a closed fist. She concluded that the cause of death was multiple child abuse injuries, and the manner of death was homicide.

¶ 32 *Erin Hanson*

¶ 33 The parties stipulated that Erin Hanson, Supervisor Operator of Police Communications, would testify that a 911 center received calls from Cassandra's apartment at 1:35, 1:37, and 3:51 p.m. on October 16, 2007. The first was classified as a "child prank," the others as "hang ups."

¶ 34 *Detective Tracey Mathis*

¶ 35 Detective Tracey Mathis testified for the defense that she and Department of Children and

Family Services agent Lisa Ellis spoke with Marques and Lei-anna at Comers Hospital on October 16, 2007. Marques informed them that, when he arrived at home that day, another man was present, though he did not know the man's name. Lei-anna told them that she once saw defendant remove food from James' mouth as James was choking, and James suffered some bruising as a result. Detective Mathis further testified that Marques and Lei-anna displayed no signs of abuse or neglect, but Lei-anna avoided eye contact and kept her head down during the interview.

¶ 36 *Evidence Technician Clarence Jordan*

¶ 37 Evidence technician Clarence Jordan testified that he photographed James' body on October 16, 2007. He later photographed Cassandra's apartment at 7824 South Cornell Avenue.

¶ 38 *James' DNA*

¶ 39 The parties stipulated that Illinois State Police forensic scientist Wendy Gruhl would testify that she swabbed James' fingernail clippings and preserved them for DNA analysis. Forensic scientist Brian Schoon would testify that he analyzed James' fingernails and found two DNA profiles: James' and Marques'. Defendant's DNA profile was not present.

¶ 40 *Officer Harvey*

¶ 41 The parties stipulated that Officer Harvey would testify that he processed defendant on October 16, 2007, and found that he was 5'9" tall, 170 pounds, 26 years old, and born in Mississippi.

¶ 42 Verdict and Sentence

¶ 43 During closing argument, the State played portions of the interrogation video, in which

defendant stated that he punched James multiple times, threw him against the bunk bed pole, and killed him, as well as a portion in which defendant stated, "I'm a hyperactive person. I take medication." The jury was instructed on both first degree murder and involuntary manslaughter and, after deliberating for less than two hours, found defendant guilty of first degree murder. The trial court denied defendant's motion for new trial.

¶ 44 At sentencing, the State presented victim impact statements from Cassandra Hall and Betty Wilson, as well as live testimony regarding a warrant for defendant's arrest in Mississippi. Defendant argued in mitigation that he was 30 years old, illiterate, and taking psychotropic medications, and had an extremely low IQ and no prior criminal convictions. During allocution, he stated that he had not intended to kill James and that God had entered his life since his incarceration. The trial court refused to consider the warrant for defendant's arrest, but expressly weighed the other factors before sentencing him to 44 years' imprisonment and three years' mandatory supervised release.

¶ 45 ANALYSIS

¶ 46 Defendant presses three issues on appeal: (1) the trial court erred in admitting other-crimes evidence; (2) defense counsel provided ineffective assistance where he failed to seek redaction of defendant's videotaped interrogation prior to its publication to the jury; and (3) his sentence is excessive.

¶ 47 I. Other-Crimes Evidence

¶ 48 Defendant first contends that the trial court erred when it allowed Marques to testify that defendant hit him and James with a belt and allowed Cassandra and Dr. Kalelkar to testify about

a cigarette burn on James' left heel. The State argues that this evidence was admissible to rebut the defense of mistake or absence of intent. We agree with the State.

¶ 49 Other-crimes evidence is inadmissible if relevant only to show a defendant's criminal propensity. *People v. Heard*, 187 Ill. 2d 36, 58 (1999). Such evidence is overly persuasive and may convince a jury to convict simply because a defendant is a bad person. *People v. Thingvold*, 145 Ill. 2d 441, 452 (1991). But it is admissible for any other purpose. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). Pertinent to this appeal, it is admissible to show a defendant's intent or absence of mistake. *People v. McKibbins*, 96 Ill. 2d 176, 182 (1983); *Wilson*, 214 Ill. 2d at 136; *Heard*, 187 Ill. 2d at 58. Specifically, other-crimes evidence may be admitted to show that the defendant did not act inadvertently, accidentally, involuntarily, or without knowledge of guilt. *Wilson*, 214 Ill. 2d at 135. Even when offered for a proper purpose, the trial court should exclude other-crimes evidence, where its prejudicial effect outweighs its probative value. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 50 At the outset, we must determine the proper standard of review. Defendant, relying on *People v. Aguilar*, 265 Ill. App. 3d 105, 109 (1994), contends that the standard of review is *de novo*, because this case presents a legal question about the scope of the law regarding other-crimes evidence. The State argues that we should review the trial court's admission of other-crimes evidence for an abuse of discretion. We agree with the State. *Aguilar* addressed a legal issue regarding hearsay, not the admission of other-crimes evidence. *Aguilar*, 265 Ill. App. 3d at 109. This case does not present a strictly legal issue. Moreover, Illinois courts have consistently held that the admission of other-crimes evidence rests within the trial court's sound discretion,

and that decision should not be disturbed absent an abuse of discretion. *Wilson*, 214 Ill. 2d at 135; *Heard*, 187 Ill. 2d at 58; *Thingvold*, 145 Ill. 2d at 452-53; *Illgen*, 145 Ill. 2d at 364; *McKibbins*, 96 Ill. 2d at 187-89. With this standard in mind, we turn to defendant's arguments.

¶ 51 A. *Hitting Marques and James with a Belt*

¶ 52 Marques testified at trial that defendant hit him and James with a belt. On appeal, defendant challenges the admission of this evidence on two grounds: (1) defendant's conduct did not fall within the scope of other-crimes evidence; (2) the prior acts are not sufficiently similar to the acts that caused James' death. We are not persuaded by either argument.

¶ 53 First, defendant argues that hitting James and Marques with a belt "did not rise to the level of criminal misconduct, and instead falls within the bounds of permissible physical discipline" and therefore should not have been admitted as other-crimes evidence. Defendant cites no authority for the proposition that the law regarding other-crimes evidence applies only to prior criminal misconduct. Indeed, the phrase "other-crimes evidence" is misleading. Other-crimes evidence actually encompasses other "wrongs" or "bad acts" that do not rise to the level of a criminal offense. *People v. McSwain*, 2012 IL App (4th) 100619, ¶35; *People v. Davis*, 260 Ill. App. 3d 176, 190 (1994); see also *People v. Williams*, 165 Ill. 2d 51, 61 (1995) ("other crimes, *wrongs* or *acts*" may be admitted for purposes other than showing criminal propensity (emphasis added)); *People v. Lucas*, 151 Ill. 2d 461, 485-86 (1992) (same). Indeed, the Illinois Rules of Evidence, which were in effect at the time of defendant's trial, include non-criminal wrongs or bad acts under the umbrella of other-crimes evidence. *See* Ill. R. Evid. 404(b) (eff. Jan. 1, 2011) ("Evidence of other crimes, wrongs, or acts [may be admissible to show] motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident.").

¶ 54 Several Illinois cases support this conclusion. In *People v. Williams*, for instance, a witness testified that the defendant lifted a grown man off the ground and set him down in a chair. *Williams*, 165 Ill. 2d at 61-62. The defendant complained that lifting the man constituted an inadmissible "bad act." *Id.* Applying the law regarding other-crimes evidence, the Illinois Supreme Court held that the trial court properly admitted the act to show that, despite his diminutive size, the defendant possessed the strength to cause brain damage. *Williams*, 165 Ill. 2d at 61. Similarly, in *Lucas*, witnesses testified that the defendant was a poor father, who drank excessively, failed to comfort his seven-month-old son when he was crying, and complained that his wife paid too much attention to the baby. *Lucas*, 132 Ill. 2d at 426-27. The Illinois Supreme Court held that this evidence was admissible to show motive and absence of accident when defendant killed his son by hitting his head against the side of his crib. *Id.*

¶ 55 Lifting a grown man, being a poor father, resenting one's son, and drinking excessively are not punishable by Illinois criminal law. Yet they constitute prior wrongs or bad acts that fall under the other-crimes rubric. Even if, as defendant argues, hitting James and Marques with a belt did not "rise to the level of criminal misconduct," the law regarding other-crimes evidence would still apply. We therefore reject defendant's first challenge.

¶ 56 Second, citing *People v. Banks*, 161 Ill. 2d 199 (1994), defendant argues that it was improper for the trial court to admit other-crimes evidence, because hitting James and Marques with a belt did not bear a "distinct similarity" to hitting and punching James and throwing him into a metal bunk bed frame. The *Banks* court held that, when other-crimes evidence is admitted

to show a defendant's *plan* or *common design*, "the two offenses must be so similar that evidence of the other crime tends to prove the defendant guilty of the offense charged." *Banks*, 161 Ill. 2d at 137; see also *Illgen*, 145 Ill. 2d at 372-73 (same). The standard is different, though, where, as here, bad acts are offered to show a defendant's *intent* or *absence of mistake*.

¶ 57 Our supreme court squarely addressed this issue in *People v. McKibbins*, 96 Ill. 2d at 185-86. The court there held that, when a prior offense is offered to show a defendant's *plan* or *common design*, there must be a "degree of identity" between the facts of the crime charged and those of the prior offense because the trier of fact may infer defendant's participation in the charged offense from his involvement in the prior offenses. *Id.* at 185. Thus, the acts must be "so similar that evidence of one offense tends to prove the defendant guilty of the offense charged." *Id.* The same degree of identity is not necessary when prior acts are offered to show a defendant's *intent* or *absence of mistake*. *Id.* at 185-86. Rather, "general areas of similarity" are sufficient to show that the defendant possessed the requisite mental state. *Id.*; see also *Oaks*, 169 Ill. 2d at 454 (where evidence of defendant's previous bad acts is offered to prove intent or absence of an innocent mental state, general similarity between the acts will suffice); *Illgen*, 145 Ill. 2d at 373 (same).

¶ 58 Hitting James and Marques with a belt and hitting, punching, and throwing James into a metal bunk bed frame shared, at the very least, general areas of similarity. The acts were committed by defendant, aimed at James, involved hitting, occurred within three months of each other, and took place in the same apartment. Defendant argues, nevertheless, that the acts did not share general areas of similarity, because hitting James and Marques with a belt constituted

discipline, while hitting, punching, and throwing James constituted play. Yet this is the very issue the State sought to address by offering other-crimes evidence: whether defendant accidentally caused James' death or possessed a culpable mental state. Specifically, the State offered evidence that defendant hit James and Marques with a belt to show that defendant was not merely playing with James when he killed him.

¶ 59 Having resolved defendant's challenges about the acts' similarities and the scope of the law regarding other-crimes evidence, the outcome in this case becomes clear. The State frequently introduces evidence of prior abuse to show a defendant's intent or absence of mistake in cases involving a child's death. In *People v. Burgess*, 176 Ill. 2d 289 (1997), for instance, the State charged the defendant with the murder of a 3½ year old he had been babysitting. The defendant claimed that the child's death was accidental. *Id.* at 308. To rebut this claim, the State presented several witnesses, who testified that defendant frequently spanked the child and once hit his legs and back with a dog leash. *Id.* at 307-08. The defendant argued that admission of the prior bad acts constituted an abuse of discretion. *Id.* at 307. The Illinois Supreme Court disagreed, holding that the prosecution properly introduced the evidence to show defendant's intent or absence of accident. *Id.* at 308. See also *Lucas*, 132 Ill. 2d at 428-29 (evidence that defendant shook 17-month-old decedent and broke his arm admissible to prove defendant's intent and absence of accident); *People v. Blommaert*, 184 Ill. App. 3d 1065, 1073 (1989) (evidence that defendant beat ten-month-old decedent's brother admissible to prove defendant's intent and absence of accident).

¶ 60 This case is nearly identical to those mentioned above. Defendant argued that James'

death was accidental. Specifically, he claimed that he was rough-housing with James when he punched his stomach, hit his head, and threw him into a metal bunk bed frame. The State presented Marques' testimony that defendant hit him and James with a belt to show that defendant's conduct was not inadvertent or accidental, but rather defendant possessed the requisite mental state for first degree murder. The trial court also instructed the jury that this evidence was "received on the issue[ ] of the defendant's *** lack of mistake and may be considered by you only for that limited purpose." Marques' testimony that defendant hit him and James with a belt was properly admitted to prove defendant's intent or absence of mistake.

¶ 61 B. *Burning James' Heel with a Cigarette*

¶ 62 Cassandra testified that, after Jalesa—the only other smoker in the house—moved out, defendant assumed babysitting responsibilities. She then observed an injury to James' heel. Based on its small, round size and scabbing, blistering texture, the medical examiner testified that the mark was a cigarette burn. Cassandra further testified that she confronted James about the injury, but he denied any knowledge of it.

¶ 63 Defendant contends on appeal that the State presented no evidence linking him to the cigarette burn on James' heel. Before the State may introduce evidence of prior bad acts, it must first show that the defendant committed those acts. *People v. Oaks*, 169 Ill. 2d 409, 454 (1996) (abrogated on other grounds by *In re G.O.*, 191 Ill. 2d 37 (2000)); *Thingvold*, 145 Ill. 2d at 455. Although the State need not prove beyond a reasonable doubt that the defendant committed the other acts, it must present more than a mere suspicion. *Thingvold*, 145 Ill. 2d at 456.

¶ 64 The trial court did not abuse its discretion in admitting evidence of the cigarette burn on

James' heel. Rather, there was sufficient circumstantial evidence in this case to show that defendant caused this injury. Defendant was James' caregiver while Cassandra was at work. He was also the only cigarette smoker living in the apartment. Based on the nature and timing of James' burn, Cassandra confronted defendant, who denied any knowledge of the injury. Although this is not proof beyond a reasonable doubt that defendant burned James' heel with a cigarette, it rises above mere suspicion. See *Oaks*, 169 Ill. 2d at 455 (more than mere suspicion showed that defendant caused child's injury, where defendant was watching the child at the time and there was indication that the injury was intentionally inflicted).

¶ 65 As with hitting James and Marques with a belt, evidence that defendant burned James' heel with a cigarette was properly offered to show his intent or absence of accident. See *Burgess*, 176 Ill. 2d at 307-08 (prior act admissible to show intent or lack of accident); *Lucas*, 132 Ill. 2d at 428-29 (same); *Blommaert*, 184 Ill. App. 3d at 1073 (same). We therefore reject defendant's claim.

¶ 66 II. Ineffective Assistance of Counsel

¶ 67 Defendant next contends that his attorney provided ineffective assistance where he failed to seek redaction of irrelevant and prejudicial portions of his videotaped interrogation before it was published to the jury. Specifically, he claims counsel should have sought redaction of (1) Detective Qualls' comment about polygraph testing; (2) defendant's comments about his temper, hospitalization, and striking a man with a piece of wood; and (3) Sergeant Wright's statements about defendant beating Cassandra's children. The State responds that counsel's failure to seek redaction of these portions constituted legitimate trial strategy and, regardless, inclusion of the

short, garbled video clips was not prejudicial.

¶ 68 The right to counsel guaranteed by the United States and Illinois Constitutions includes the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, "[a] defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill.2d 319, 326 (2011) (citing *Strickland*, 466 U.S. at 688). Under the first *Strickland* prong, a defendant must show that his trial attorney's performance was deficient. *People v. Enis*, 194 Ill. 2d 361, 376 (2000). Under the second, a defendant must show that counsel's deficient performance undermined confidence in the trial's outcome. *Id.*

¶ 69 Here, the State played for the jury an unredacted 33-minute portion of defendant's videotaped interrogation. Although defense counsel objected to the video three times, he never asked that the video be redacted. Indeed, the State noted, "Counsel and I discussed redacting portions [of the videotape]. He said he didn't want anything redacted." Defense counsel responded, "No. That [redaction] is not my issue."

¶ 70 Before addressing the specific portions of the video defendant raises, we first consider a criticism the State levels against each of defendant's claims: defense counsel's failure to request redaction was strategic, as redaction of these inculpatory portions of the video could have led to redaction of exculpatory portions as well. Specifically, the State argues that, had defense counsel redacted the polygraph, other-crimes, and hearsay portions of the video, the State could have

redacted the portions in which defendant stated that he was only playing or rough-housing with James. We disagree.

¶ 71 The State cites no authority for its claim that, "if the alleged prejudicial parts of the video were redacted, this would open the door to redaction of the other portions of the video." The State has made no showing that its right to redact the video was dependent on defendant's redaction, nor does the record evidence a mutual agreement between the parties to refrain from seeking redaction. The State's argument borders on the absurd. If the State had a right to redact the exculpatory portions of the video, it could have exercised that right regardless of whether defendant sought redaction.

Moreover, it is unlikely that the State could have successfully achieved redaction of the video's exculpatory portions. Defendant's theory at trial—that he lacked the requisite mental state—depended heavily on his statements in the video that he was merely playing with James and did not intend to hurt him. The State correctly observes that defendant could not have introduced the exculpatory portions of the video on his own. See *People v. Patterson*, 154 Ill. 2d 414, 452 (1992) (a defendant's own self-serving out-of-court statements are inadmissible hearsay). But under the completeness doctrine, once the State chose to introduce part of the videotape, defendant was permitted to introduce the remainder to the extent that it was necessary to prevent the jury from receiving a misleading impression of the statement. *People v. Weaver*, 92 Ill. 2d 545, 556-57 (1982); *People v. Olinger*, 112 Ill. 2d 324, 337-38 (1986). Defendant's admission that he hit, punched, and threw James was inextricably intertwined with his assertion that it was accidental. Nearly every time he described the offense, he quickly added—often in

the same sentence—that he was "just playing." Any attempt to redact every mention of play and lack of intent would result in a starkly misleading representation of defendant's statements. Any attempt by the State to redact exculpatory portions of defendant's videotaped interrogation posed little threat of success. Accordingly, we reject the State's contention that defense counsel strategically forwent redaction. We turn now to defendant's specific claims.

¶ 72 A. *Polygraph*

¶ 73 We must determine whether counsel's performance fell below an objective standard of reasonableness where he failed to seek redaction of a portion of the videotape in which Detective Qualls refers to a polygraph test. *Strickland*, 466 U.S. at 688. Evidence that a defendant underwent a polygraph examination is generally inadmissible. *People v. Jefferson*, 184 Ill. 2d 486, 492 (1998). Polygraphs are not sufficiently reliable to establish a defendant's guilt or innocence, and the scientific aura surrounding the test may lead triers of fact to give the evidence undue weight. *People v. Taylor*, 101 Ill. 2d 377, 391 (1984). While a few limited exceptions to the rule of polygraph inadmissibility exist, the parties do not claim—and we do not find—that they warrant discussion here. See, *e.g.*, *Jefferson*, 184 Ill. 2d at 495 (discussing exceptions to the rule).

¶ 74 The parties do not dispute the law regarding polygraph examination. Rather, based on the video's poor audio quality, they debate the content of Detective Qualls' statement and whether it was played for the jury. Defendant claims that, at 5:08 p.m., Detective Qualls said that the police are going to take him "for a test" so that they can "get to the bottom of it" and determine whether defendant is "telling the truth." He argues that these comments would lead a jury to the

conclusion that he took and failed a polygraph examination. The State argues that Detective Qualls only mentioned the word *test*, and that this word was "innocuous enough not to merit any concern." The State further claims that the jury never heard the word "test," because it was spoken at 5:07 p.m., and the video was played from 5:08 through 5:41 p.m.

¶ 75 Neither party's transcription is wholly accurate. The State correctly observes that Detective Qualls mentioned the word "test" at 5:07 p.m. Because this portion of the videotape was not introduced at trial, we need not examine its effect on the jury. At 5:08 p.m., however, Detective Qualls stated, "Here's what we're going to do: we're gonna run ya' down to lie detector test, see how truthful you're being, know what I'm saying? Hopefully you've been telling the truth." This was a clear reference to polygraph examination.

¶ 76 We find that counsel's performance fell below an objective standard of reasonableness where he failed to redact a portion of the videotape in which Detective Qualls refers to a lie detector test. The dangers of polygraph evidence are well-documented. See, *e.g.*, *People v. Baynes*, 88 Ill. 2d 225, 244 (1981) (there is a significant risk that jurors will view polygraph evidence as dispostive). Given the potential harm polygraph testing presents, no reasonable trial strategy would include failing to seek redaction. Moreover, the parties could have easily redacted Detective Qualls' polygraph comment. The offending passage occurs at the video's very outset, at approximately 5:08 p.m., before defendant is questioned about the offense. Had defense counsel requested redaction, the State could have simply started the clip at 5:09 p.m. Given the danger presented by polygraph testimony and the ease with which the State could have redacted this portion of the video, we find that counsel's failure to seek redaction was unreasonable.

¶ 77 But we cannot say that defendant suffered prejudice as a result of counsel's deficient performance. Given Detective Qualls' brief polygraph comment near the beginning of a 33-minute video, there was no danger of defendant's right to trial by jury being supplanted by "trial by polygraph." *Baynes*, 88 Ill. 2d at 243 (quoting *United States v. Wilson*, 361 F.Supp. 510, 513 (D. Md. 1973)). The State presented no other polygraph evidence, the parties did not discuss polygraph testing in closing argument, and the jury did not have an opportunity to replay this portion of the videotape, as the tape was not provided to the jury during deliberation. Given the comment's timing and brevity, we cannot say that counsel's performance undermined confidence in the jury's verdict. *Enis*, 194 Ill. 2d at 376.

¶ 78 B. *Temper, Hospitalization, and Striking a Man with a Piece of Wood*

¶ 79 We must next determine whether counsel's performance fell below an objective standard of reasonableness where he failed to seek redaction of a portion of the videotape in which defendant described his bad character and prior bad acts, including his temper, hospitalization, and striking a man with a piece of wood. Between 5:09 and 5:11 p.m., defendant explained to Sergeant Wright and Detective Qualls that he is a "hyperactive person" who "take[s] medication" and has a "quick temper." Defendant further said that when he was "down South," he struck a man with a piece of wood while in a "rage." He added that he had "been in about 13 state hospitals" and had been strapped to a bed because he was "belligerent."

¶ 80 Inadmissible other-crimes evidence contained in an otherwise proper statement or confession must be redacted before the statement or confession is published to a jury, unless the redaction would impair its evidentiary value. *People v. Lampkin*, 98 Ill. 2d 418, 430 (1983);

People v. Moore, 2012 IL App (1st) 100857, ¶48. As described above, evidence of other crimes, wrongs, or bad acts is inadmissible if relevant merely to show the defendant's criminal propensity. *Heard*, 187 Ill. 2d at 58. Such evidence is overly persuasive and may convince a jury to convict simply because he is a bad person. *Thingvold*, 145 Ill. 2d at 452. It is admissible, however, for any other purpose. *Wilson*, 214 Ill. 2d at 135.

¶ 81 In this case, the State does not contend that the other-crimes evidence regarding defendant's temper, hospitalization, and striking a man with a piece of wood was admissible for any legitimate purpose, such as to show defendant's motive, intent, or *modus operandi*. Rather, defendant's statements merely illustrated his bad character and criminal propensity. They were not admissible for this purpose. *Heard*, 187 Ill. 2d at 58 (evidence of other crimes or bad acts are inadmissible to show defendant's criminal propensity).

¶ 82 Nor does the State argue that redaction of the other-crimes evidence would have impaired the video's evidentiary value. Defendant's comments were not necessary to provide context for James' death. Like Detective Qualls' polygraph comment, defendant's statements regarding his bad character and prior bad acts occurred near the beginning of the video, before he was questioned about the offense. Had defense counsel requested redaction, the State could have simply played the video from 5:11, rather than from 5:08 p.m.

¶ 83 The State argues, however, that the video was "so difficult to understand at this point it is unlike[ly] the jury attached any significance to defendant's statements, let alone understood what he was saying." While the video's audio quality was not good, it was sufficiently clear for the State to play it for the jury and rely on it in closing argument. Because this evidence served only

to illustrate defendant's bad character and prior bad acts, and because redaction could have been easily accomplished and would not have impaired the video's evidentiary value, we conclude that counsel's performance fell below an objective standard of reasonableness.

¶ 84 While this evidence likely would have been excluded had counsel sought redaction, we cannot say that its inclusion undermined confidence in the trial's outcome. Hitting James 12 to 13 times, punching him 12 to 13 times, and throwing him into a metal bunk bed frame readily illustrated defendant's hyperactivity, temper, and rage. While the State mentioned defendant's hyperactivity and medication during rebuttal, it did so only briefly. The brief mention of these words in a 33-minute video in this case is not sufficient to undermine confidence in the outcome of the trial.

¶ 85 Defendant's assertion that he struck a man with a piece of wood is potentially more harmful, but it filled only seconds of a 33-minute video. Further, he did not describe when, where, or how this incident occurred, nor whether he acted in self-defense. Moreover, the State did not mention this incident in closing argument, and the jury was not given a copy of the video to replay during deliberation. While defense counsel's performance was deficient, the result of the proceeding would not have been different absent counsel's error. *Manning*, 241 Ill. 2d at 326.

¶ 86 C. *Beating Cassandra's Children*

¶ 87 We must further determine whether counsel's performance fell below an objective standard of reasonableness where he failed to seek redaction of a portion of the videotape in which Sergeant Wright claimed that Cassandra's children had told him that defendant beat them. Nearly ten minutes into the video, Sergeant Wright asked, "Why would these kids say that you

beat them all the time? That's what they're saying. They're saying that you beat them all the time." The Sergeant repeated, "The kids are saying that you beat them, and they're also have told other people in the family; they told their grandfather." [*sic*] Defendant denied these allegations and explained that he and Marques did not "get along." The Sergeant responded, "I could see if one kid was saying that you were hitting them, but you've got all of them saying that." Later in the video, he again stated, "I told you what the kids are saying, that you beat 'em up." Again defendant said that the children were lying.

¶ 88 Defendant claims that these statements constituted inadmissible hearsay and should have been redacted. The State does not contest that the evidence constituted hearsay, but instead claims that Sergeant Wright's statements were brief and cumulative to properly admitted other-crimes evidence, specifically, Marques' testimony that defendant hit him and James with a belt.

¶ 89 Contrary to the State's claims, the comments were not brief. Sergeant Wright's comments repeatedly punctuated the 33-minute video. Nor were the comments entirely cumulative. Although Marques testified that defendant hit him and James with a belt, Lei-anna never testified that defendant beat her or her siblings. When defendant denied beating the children and stated that he and Marques did not "get along," Sergeant Wright emphasized that Marques was not the only child complaining about being beaten: "I could see if one kid was saying that you were hitting them, but you've got all of them saying that." The jury could have discounted Marques' claim that defendant beat him and James, as there was significant evidence that defendant and Marques' relationship was strained. But unlike Marques, Lei-anna testified that defendant favored her. The implication that Lei-anna told Sergeant Wright that defendant beat her and her

siblings was more damaging than Marques' testimony, as the jury had little reason to disbelieve Lei-anna. We therefore reject the State's claim that this evidence was cumulative.

¶ 90 Unlike his inaction regarding the polygraph and character evidence, defense counsel objected to the admission of hearsay evidence:

> Here's the problem with these videos, the cops get up there and hearsay is let in. The kids are saying you beat them. It is not true. It is totally prejudicial. *** I am objecting to continually playing this, Judge. The cop basically is lying, you know, saying the kids and everyone is saying you are beating him. Marques is going to testify he hit him once with a belt. I am just making my record, Judge.

The State responded, "Judge, I have asked Counsel if there was anything he wanted redacted pre-trial. He said no." The court overruled defendant's objection, noting, "I do remember conversation with the State went in whether or not there was anything that needed to be redacted. And you said, no." [*sic*]

¶ 91 But counsel's last-minute attempt to exclude hearsay was inadequate. Counsel had an opportunity to view the video and request redaction before trial. He knew, or should have known, that the video contained damaging hearsay. The proper time to tailor the tape to exclude improper evidence was before it was being played for the jury. Redacting a video once it is being played is impracticable. It appears that counsel realized as much when he qualified his objection, "I am just making my record, Judge." We therefore find that counsel's performance fell below an objective standard of reasonableness.

¶ 92 We cannot say, however, that counsel's deficient performance undermined confidence in

the outcome at trial. *Enis*, 194 Ill. 2d at 376. Defendant's videotaped interrogation was played during Sergeant Wright's direct examination. During cross-examination, defense counsel elicited Sergeant Wright's admission that he had never actually spoken to the children. Thus, even if the comments were admitted for the truth of the matter asserted, the jury quickly found that Sergeant's Wright's comments were false. The jury was therefore left with the impression that the Sergeant was simply using an interrogation technique rather than relaying conversations he had had with Marques and Lei-anna. Further, the jurors were not provided a copy of the video during deliberation. Because defense counsel was able to show that the hearsay's content was untrue, and because he did so shortly after the hearsay portion was played for the jury, we find that defendant has failed to show that the results of the proceedings would have been different absent counsel's error.

¶ 93 III. Excessive Sentence

¶ 94 Defendant argues that his 44-year sentence for first degree murder is excessive because it is "effectively a life sentence" and fails to account for his mental illness, intellectual disability, and lack of prior criminal conviction. The State responds that defendant fails to point to any specific sentencing error, but rather asks us to reweigh the evidence presented to the trial court.

¶ 95 Illinois Supreme Court Rule 615(b)(4) grants reviewing courts the power to reduce a defendant's sentence. Ill. S. Ct. R. 615(b)(4) (eff. Aug. 27, 1999). Trial courts, however, are in a superior position to weigh the evidence presented at sentencing and have broad discretion in fashioning a sentence. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). Thus, where a sentence falls within the prescribed statutory range, we will not disturb it absent an abuse of discretion. *Id.* at

373-74. A trial court has abused its discretion where the sentence is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 96 Defendant charges that the trial court failed to account for his mental illness, intellectual disability, and lack of prior criminal conviction when sentencing him to 44 years' imprisonment. But the trial court expressly considered these factors, along with defendant's allocution and the presentence investigation report, when crafting his sentence. Notably, the trial court also properly refused to consider evidence that defendant had an outstanding warrant for arson in the State of Mississippi. See *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004) (bare arrests and pending charges may not be considered in aggravation).

¶ 97 The trial court was required to balance defendant's potential for rehabilitation with the seriousness of the offense. *People v. Taylor*, 102 Ill. 2d 201, 206 (1984). In this case, the evidence showed that defendant punched James in the stomach 12 to 13 times, hit his head 12 to 13 times, and threw him against a metal bunk bed frame with significant force. The trial court assigned significant weight to these facts: "This is not throwing the child up in the air and catching them. This is not tickling their belly. This is abuse. This is torturing a child that cannot protect themselves. [*sic*]" Defendant's 44-year sentence fell near the center of the 20-to-60-year first degree murder sentencing range. (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)). Given this evidence, we decline to substitute our judgment for that of the trial court. See *People v. Fern*, 189 Ill. 2d 48, 53 (1999) (reviewing courts may not substitute their judgment for that of the trial court merely because it would have weighed factors differently).

¶ 98 CONCLUSION

¶ 99 For the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 100 Affirmed.