2018 IL App (1st) 162335-U

FIRST DIVISION
July 16, 2018

No. 1-16-2335

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	14 CR 18395
	)	
RODNEY WOOLFORD,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt. Other crimes evidence was properly allowed to establish intent and absence of innocent state of mind. Propensity evidence was properly allowed. The trial court abused its discretion in denying defendant's evidence of specific conduct to rebut State's propensity evidence. We reverse and remand for new trial on aggravated kidnapping and aggravated criminal sexual abuse counts.

¶ 2 Following a jury trial, defendant Rodney Woolford was found guilty of four counts of aggravated kidnapping (counts 1 through 4) (720 ILCS 5/10-2(a)(3) (West 2012)), eight counts of aggravated criminal sexual abuse (counts 5 through 12) (720 ILCS 5/11-1.60(a)(6), (c)(1)(ii), (d), (f) (West 2012)), two counts of engaging in conduct prohibited by a convicted child sex

offender (counts 13 and 14) (720 ILCS 5/11-9.3(c-7)(West 2012)), and was sentenced to 18 years' imprisonment. Defendant now appeals and argues that (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred in admitting evidence of defendant's prior sexual abuse to show propensity; (3) the trial court erred in admitting evidence of defendant's prior child sexual abuse to prove intent and absence of an innocent state of mind; and (4) the trial court erred in limiting defendant's specific acts of conduct evidence to rebut propensity evidence. For the following reasons, we affirm defendant's convictions for engaging in conduct prohibited by a convicted child sex offender (counts 13 and 14), and reverse defendant's convictions for aggravated kidnapping (counts 1 through 4) and aggravated criminal sexual abuse (counts 5 through 12) and remand for a new trial on those counts.

¶ 3 BACKGROUND

¶ 4 Defendant was indicted with multiple counts of aggravated kidnapping, aggravated criminal sexual abuse, and engaging in conduct prohibited by a convicted child sex offender following allegations that defendant, a convicted child sex offender, hired E.P., a 13-year-old girl, to assist him with teaching swimming lessons to young children and that on two occasions, defendant secretly confined E.P. in his basement and rubbed his penis against her legs and buttocks until he ejaculated.

¶ 5 Prior to trial, the State filed a motion to admit other-crimes evidence based on defendant's prior sexual abuse of young girls. The State sought to introduce this evidence to show his propensity to commit sex crimes, and to show his intent, motive and the absence of an innocent frame of mind. The motion alleged that in 1994, defendant was hired as a personal trainer and paid to give massages to a 13-year-old and an 11-year-old girl. During those massage sessions, defendant rubbed the girls' breasts, vaginas, and buttocks and pressed his erect penis

against their bodies. Defendant also penetrated one of the girl's vaginas with his finger. Also, in the fall of 1990, while employed as a swimming instructor at a YMCA in Chicago, defendant touched five girls' (ages 10 to 12) vaginas over their bathing suits and was charged with multiple counts of aggravated criminal sexual abuse but was later acquitted. The State's motion argued that, pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3 (West 2014)) the evidence of defendant's prior instance of sexual abuse of young girls should be admitted to show his propensity to commit sex crimes. The State argued that based on their relative proximity in time, their high degree of factual similarity, the prior offenses showed a clear pattern and were highly probative of defendant's guilt, and should be admitted at trial. In response, defendant objected to the evidence being admitted on the basis that the prior offenses were not proximate in time and lacked similarity and probative value, were highly prejudicial and were not admissible to show his intent or mental state.

¶ 6 At a hearing on the motion, the court stated that the 1995 incident was sufficiently proximate and bore a strong factual similarity to the current offense, and therefore found that the evidence was relevant to the issues of propensity, intent and the absence of an innocent frame of mind. The court found that the evidence of the 1990 incident was not sufficiently similar and barred the introduction of that evidence.

¶ 7 Defendant then filed a motion seeking to admit evidence to rebut the propensity evidence, supported with offers of proof, under section 115-7.3. Specifically, defendant sought to present testimony of friends and former clients who would state that defendant never sexually abused other children during sleepovers, trainings or other encounters, despite the opportunity to do so. Defendant averred that each witness would also testify that defendant had a good reputation in the community for chastity and non-violence.

¶ 8 The State responded that although section 115-7.3 allows for a defendant to rebut propensity evidence with opinion testimony regarding his good character, Illinois Rules of Evidence 405(a) prohibits the introduction of specific instances of conduct. Defense counsel argued that section 115-7.3 is not limited to character evidence. Defense counsel argued that he wanted to present testimony that defendant never abused other children who were in his care despite the opportunity to do so. The trial court granted defendant's request to present witnesses to offer their opinion and testify to his good character but denied his request to elicit specific acts of "non-abuse," finding that whether defendant failed to abuse other children was irrelevant to whether he committed the charged offense. The trial court denied defendant's motion to reconsider.

¶ 9 At trial, E.P. testified that in July of 2014, she was 13 years old. She lived with her family in Chicago, a block away from defendant and his family. Defendant's daughter was E.P.'s best friend. E.P. swam competitively and in July of 2014, defendant offered E.P. a job helping him teach children to swim at the John Hancock Centre in Chicago. She accepted the position and on her first day, July 9, 2014, defendant picked E.P. up from her home. He told her that he had to go back to his house to get kick boards and towels. When they arrived at his house, they went inside and defendant collected the equipment and placed it by the door. He then told E.P. that they needed to stretch. E.P. said that they usually do their stretching at the pool but they went down into the basement where there was exercise equipment. As she was stretching, defendant told her to lie face down on a mat, which she did. Defendant then straddled her body and began massaging her shoulders. E.P. pressed his erect penis into her back and rocked back and forth while he pressed his penis against her lower back and buttocks. He kissed her shoulder each time he rocked back and forth. Defendant put his hands underneath E.P.'s

shirt and shorts and touched her back and her buttocks. E.P. asked defendant to stop but he refused and asked her if it "felt good." She said "no" and begged him to get off of her. This went on for about 20 minutes, during which time defendant's breathing became faster. He eventually stopped and said he had to go change. When he got up, E.P. saw that his shorts had a wet spot on them near the crotch area. Defendant went to change and when he returned, he told E.P. that he would kill her if she told anyone about what happened. E.P. was scared so she went with him to the pool and helped with the swimming lessons. On the way home, defendant asked E.P. if she remembered what he said about not telling anyone. She said that she remembered and testified that she was afraid that if she told anyone, defendant would come after her.

¶ 10 On the day of the next scheduled swim lesson, July 23, 2014, E.P. was scared and begged her mother to let her stay home. E.P. did not want to be alone with defendant and did not want defendant to touch her again. Unaware of the abuse, E.P.'s mother made her go to swimming. When defendant picked E.P. up, he had the equipment in his car. E.P. was happy because she thought that meant defendant would not take her back to his house. Defendant drove to his house but E.P. refused to get out of the car. Defendant became angry and dragged her out of the car by her arm and then grabbed her by the back of the neck and led her into the house. Defendant told her not to scream and if she did, she would never be able to see her best friend Emily.

¶ 11 Defendant led E.P. by her neck into the basement and told her they needed to stretch. E.P. initially refused but eventually laid on the floor after defendant repeatedly directed her to. Similar to the previous time, defendant got on top of her but this time he did not massage her. Instead, he immediately started rocking back and forth, rubbing his erect penis against her back and buttocks, kissing her shoulder while he was rocking. His breathing became fast and then

slowed as he suddenly stopped rocking against her. E.P. felt wetness on defendant's pants and saw a wet spot on his shorts when he got up. Defendant reminded E.P. not to tell anyone about what happened. Defendant then went upstairs and changed and then took E.P. out to the car.

¶ 12 When E.P. got into defendant's car, she sent text messages to her mother saying that defendant had touched her on her "backside" and she was uncomfortable and did not want to work with him anymore. E.P. refused to go into the Hancock Center when they arrived. E.P.'s parents called defendant and spoke with him. Defendant then drove E.P. home because E.P.'s mother had a flat tire. During the drive, defendant was screaming and yelling at E.P. telling her that it was all her fault and that she would never be able to see Emily again. Defendant then began crying and he rehearsed what he was going to say to her mother by saying "Diane, I'm so sorry. I don't know why she took it that way, that was never what the plan was, I never wanted to do anything to hurt her. I am so sorry, Diane."

¶ 13 When they arrived at her house, E.P. jumped out of the car. Defendant told her mother what he had practiced in the car. E.P. told her mother everything that defendant did to her.

¶ 14 Before L.H. testified, the court gave a limiting instruction to the jury that the evidence L.H. was about to offer could be considered only for the limited purpose of the issues of defendant's intent, propensity to commit sex crimes, and absence of an innocent frame of mind. L.H. then testified that in January 1995, she was 13 years old and had scoliosis. Her family hired defendant to give her massages to alleviate the muscle pain. These bi-weekly massages took place on a massage table in her parents' bedroom. She wore a bikini and the massages were supposed to be limited to her arms, legs and back.

¶ 15 Defendant used massage oil and massaged her breasts and vaginal area. Defendant placed his hands beneath her bikini top and rubbed her breasts for about ten times. He also put

his hands down her bikini bottoms and touched her labia about ten times. On a few occasions, defendant pressed his erect penis against her buttocks. L.H. also said that defendant would lay on top of her and kiss her nose, ears and lips. Defendant also gave massages to L.H.'s younger sister, K.K. In August of 1995, L.H. told her mother what defendant was doing and the police were called. L.H. stated that defendant later pleaded guilty to sexually abusing her by touching her breasts. On cross-examination, she said sometimes nothing inappropriate happened.

¶ 16 K.K. stated that in January of 1995, she was 11. Defendant began giving her massages to prevent scoliosis. She wore a bathing suit for these massages and on at least one occasion defendant put his hands under her bathing suit and rubbed her breasts. K.K. believed the touching was accidental until her sister reported what defendant was doing to her and the police were contacted. K.K. stated that defendant became a close friend of their family and spent a lot of time at their house. K.K. said that defendant would put her on his lap and she would feel his erect penis on her buttocks. He also tried to teach her to "dirty dance" like they did in his native country and she felt his erect penis while he danced with her. At the end of K.K.'s testimony, the court reminded the jury of the limiting instruction he had given prior to L.H.'s testimony.

¶ 17 Esperanza Marroquin testified that she babysat for a family who lived in the Hancock building. In July 2014, defendant gave swimming lessons to the family's children and E.P. assisted him. She never saw E.P. talking on her phone during the lessons. Marroquin told defendant that since the girls' mother paid him for the lessons, she would not want E.P. to be giving the instruction.

¶ 18 The parties stipulated to the testimony of a Vernon Hills' police officer who took a statement from defendant after defendant voluntarily waived his *Miranda* rights. In the statement, which was read to the jury, defendant admitted to sexually abusing L.H. in 1995.

Defendant stated that he came to the United States in 1984 and had been an Olympic athlete. He worked as a personal trainer and a masseur. In 1994 or 1995, L.H.'s mother hired him to give massages to her daughter L.H. to help with her scoliosis. Defendant stated that he did not normally work with children.

¶ 19 Defendant massaged L.H. on a table in her parents' bedroom. Defendant said that during the massages he could "go too far and get away with it." Defendant admitted that on two occasions he went too far with L.H. and did something he knew was wrong. He said that he rubbed her breasts with his hands and although he did not have an erection, he had a "sexual fantasy at the time." Defendant said that the experience made him uncomfortable and he was glad when L.H.'s mother ended the messages.

¶ 20 Defendant said that he kissed L.H. on the forehead but it was not "sexual." He denied touching L.H.'s vaginal area. He said "if I touched her there, it was not a sexual thing like it was with her breasts." Defendant denied that he ever laid on top of L.H., but said that her siblings would lay on top of him during "horseplay." Defendant stated that L.H. was the only minor he had sexual contact with and "[a]fter that happened, [he] was so upset that [he] could not sleep at night." Defendant also said, "[he] knew what [he] did was wrong," and he felt bad about what happened.

¶ 21 Before resting, the State introduced a certified copy of defendant's 1995 conviction for aggravated criminal sexual abuse of a child. Defendant's motion for a directed verdict was denied.

¶ 22 Before defendant called his character witnesses, the State sought permission to ask if their opinion about defendant's character would change if they knew about an admission he made to a detective concerning his prior sex offense. The State argued that whether a character

witness was aware that defendant had admitted to sexually abusing another girl was "highly relevant to their opinion." Defense counsel asserted that questions regarding defendant's prior sexual abuse would open the door and allow him to ask about the basis of their opinion of defendant, including specific instances of conduct where defendant did not inappropriately touch other children. The court ruled that if defense counsel asked the character witnesses about their opinions regarding defendant's reputation for peacefulness and chastity, the State would then be allowed to ask the witnesses about defendant's admission in the 1995 case because it would affect their opinion. Defense counsel then argued that if the witnesses testify that knowing about defendant's admission would not change their opinion, he should be allowed to ask the witnesses why their opinions would not change, which would bring out specific instances of conduct. The court denied defense counsel's request.

¶ 23 James Dibiasi testified that defendant was his personal trainer and they had become good friends. He was married and had grown children. Dibiasi opined that defendant was an "incredibly peaceful person" and a sexually virtuous person. Dibiasi stated that his opinion of defendant would not change if he knew that defendant admitted that he had a sexual fantasy while rubbing a 13-year-old girl's breasts.

¶ 24 Bryan Schwartz testified that he was an attorney and had known defendant for 25 years. Schwartz stated that defendant was a peaceful person and a sexually moral person. His opinion of defendant would not be different if he knew that defendant admitted that while giving a massage to a 13-year old girl, he rubbed her breasts while he was having a sexual fantasy.

¶ 25 Ida Lane testified that she was employed as an investigator with the Department of Children and Family Services. On September 12, 2014, Lane interviewed E.P. at E.P.'s home. E.P. told her that on July 23, 2014, defendant pulled her out of the car by her hand and she did

not scream because she knew the neighbors were not home. Lane said that E.P. did not tell her that defendant yelled at her or threatened that E.P. would not see Emily again if she did not come with him. E.P. did not tell Lane that defendant was speaking in a friendly tone of voice or threatened to kill her as he dragged her out of the car. Lane said that E.P. told her that defendant basically did the same thing to her on July 23 as he had done on July 9, but "seriously stretched her" the second time. E.P. told Lane that she was texting her mother while defendant was straddling her but did not know why she didn't tell her mother what defendant was doing. E.P. told her that defendant had an erection on July 9, but did not tell her that defendant had an erection on July 23, that he ejaculated or that he had a stain on his pants, although she had told Lane that the incidents were "basically the same." Finally, E.P. did not tell Lane that defendant threatened to kill or harm her, although she did say that he threatened to hurt E.P.'s mother.

¶ 26 Cecilia Adams testified that she was 14 and was friends with defendant's daughter Emily. She had known defendant since she was 5 and saw him weekly for several years as their families were friends. She stated that defendant would occasionally give her massages and opined that defendant is a peaceful, chaste and sexually moral person.

¶ 27 Jordan Richardson, Cecilia Adams' sister, testified that she was 24 and had known defendant since she was 14. Defendant gave her massages on a weekly basis. She opined that defendant is a peaceful, chaste and sexually moral person. She stated that she was aware that defendant was convicted of touching a 13-year-old's breasts while he massaged her.

¶ 28 Lisa Adams, Cecilia and Jordan's mother, stated that she had known defendant for about ten years. Adams stated that she was friends and neighbors with defendant and they had spent a great deal of time together over the years. She said that defendant had given her massages and that defendant was a peaceful and chaste person. Adams stated that she was aware that

defendant was a convicted child sex offender and had admitted to rubbing a 13-year-old's breasts while having a sexual fantasy.

¶ 29 David Adams, Lisa Adams' husband, testified that he knew defendant for about ten years and saw defendant and his family weekly. He opined that defendant was a peaceful and chaste person. David learned that defendant was a convicted child sex offender four or five years after they met. David said that he was not aware that defendant admitted to rubbing a 13-year-old girl's breasts while having a sexual fantasy. David said that this had no impact on his opinion that defendant was chaste.

¶ 30 Emily Woolford testified that she considered her father to be a peaceful and chaste man. She stated that she was no longer best friends with E.P.

¶ 31 Defendant's wife, Suzanne Woolford, testified that she had been married to defendant for 23 years and they had 2 children together. She was aware that defendant was a convicted child sex offender and that his conviction was based on his admission that the rubbed a 13-year-old's breasts while having a sexual fantasy. Suzanne stated that her next door neighbors were school employees and likely would be home during the day in the summer months.

¶ 32 Defendant testified that he worked as a fitness professional and a massage therapist. He also taught swimming and golf. He admitted that he had confessed to sexually abusing L.H. in 1995 and was convicted of that offense. He gave L.H. approximately 24 massages during which L.H. wore a bikini and was covered with a towel. On two occasions, he touched L.H.'s breasts and had sexual fantasies. He initially lied to the police but eventually told them what he had done. He denied touching L.H.'s vagina, or pressing his erect penis against her body. He also denied touching K.K.'s breasts. He admitted that he put K.K. on his lap but denied having an erect penis. Defendant stated that he had a problem with incontinence and wore adult diapers

with tights over them, which would have given the mistaken impressions that he had an erection. He received probation in exchange for his plea of guilty to sexual abuse and as part of his probation, he underwent therapy.

¶ 33 Defendant stated that his family was close with E.P.'s family. In the summer of 2014, he learned that E.P. wanted to become a lifeguard so he offered her a position as his assistant teaching children to swim, which she accepted. He picked her up on July 9, 2014, and drove her back to his house to discuss the lesson plan. Defendant was sore from working out and playing golf, so he and E.P. discussed the lesson plan in the basement while he stretched. E.P. was texting on her phone and not paying attention while defendant was stretching and explaining the lessons. He denied giving her a massage or touching her. After about 15 minutes defendant raised his voice at her because she was not paying attention. He apologized and they drove to the Hancock Center where the lessons were to take place. When the lessons began, E.P. was not instructing the children correctly and had no control over the students. After the lesson was over, defendant drove E.P. home.

¶ 34 Defendant picked E.P. up on July 23, 2014. Defendant was sore from working out and playing golf so he drove back to his house so he could stretch and talk to E.P. about her poor performance during the last lesson. Defendant stated that he discussed the lesson and told her that she needed to pay better attention. He stated that he yelled at her and told her that the clients did not want her to come back. Defendant denied that he forced E.P. into the basement. He also denied touching or stretching her.

¶ 35 When they arrived at the Hancock Center, E.P. refused to go inside. She was on the phone with her father and crying. E.P. gave the phone to defendant and her father told defendant that E.P. did not want to go to the class because defendant had touched her and she was

uncomfortable. Defendant agreed to drive her home and when they arrived, E.P.'s mother was on the porch. Defendant told E.P.'s mother, "I'm sorry this didn't work out."

¶ 36 Defendant admitted that he never told E.P.'s mother that he took her to his basement and agreed that he could have discussed E.P.'s performance at the first lesson in the car on the way to the second lesson. He also admitted that during the July 9 lesson, he took a photo of E.P. teaching a 2-year-old how to swim and texted it to her mother with the message, "She's doing a great job." Defendant denied that it was his idea to hire E.P.

¶ 37 In rebuttal, the State called Detective Majeed and E.P.'s mother. Detective Majeed stated that defendant told her that he had asked E.P.'s mother if she could work for him. E.P.'s mother testified that it was defendant's idea to hire E.P. She also identified text messages that defendant sent to her on July 9 showing E.P. working with a 2-year-old and defendant's message stating that she was doing a good job. E.P.'s mother stated that on July 23, defendant picked up E.P. 30 minutes early and she never gave defendant permission to take E.P. back to his house. E.P.'s mother also said that when defendant dropped E.P. off on July 23, defendant was upset and stated, "I'm so sorry. Can I just please come in and talk to you?"

¶ 38 During the jury instruction conference, the trial court agreed to issue defendant's modified Illinois Pattern Jury Instruction, No. 3.16, which instructed the jury that the evidence offered to establish defendant's chastity and peacefulness could be considered to raise a reasonable doubt of his guilt. The instruction also stated that if the jurors were satisfied beyond a reasonable doubt of defendant's guilt, the jury was required to find him guilty "even though others may have an opinion that he's chaste and peaceful."

¶ 39 The jury found defendant guilty. His motion for a new trial was denied. Defendant was sentenced to 18 years' imprisonment for aggravated kidnapping, 7 years for 2 counts of

aggravated criminal sexual assault and 3 years for the child sex offender violation, all sentences to run concurrently. This appeal followed.

¶ 40 ANALYSIS

¶ 41 Defendant first makes a general argument that the State failed to prove him guilty beyond a reasonable doubt. Defendant does not challenge the State's evidence as to any specific offense or element thereof, but instead argues that E.P. was not credible, her testimony was directly contradicted by defendant's testimony and her testimony was not supported by any physical evidence.

¶ 42 In assessing the sufficiency of evidence on appeal, a reviewing court considers whether, after viewing the evidence in the light most favorable to the State, *"any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The reviewing court "determine[s] whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 280 (emphasis added) (quoting *Jackson*, 443 U.S. at 318). The court's function is not to retry the defendant. *Collins*, 106 Ill. 2d at 261. For a reviewing court to reverse a criminal conviction due to insufficient evidence, the evidence presented must be "so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98 (2008).

¶ 43 Defendant's attack on the sufficiency of the evidence here is nothing more than an attack on E.P.'s credibility. Defendant urges this court to consider his version of the events over E.P.'s. The jury heard both E.P.'s testimony and defendant's testimony. E.P.'s impeachment by omission and contradictory statements go to her credibility. Since neither version of events was

so implausible or improbable as to call its veracity into question, the decision of which version to believe rested with the jury. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). After hearing both E.P.'s testimony and defendant's testimony, as well as the testimony of other witnesses, and viewing the witnesses while testifying, the jury nevertheless chose to believe E.P. over defendant. Given the deferential rules of appellate review, we will not reassess the witnesses' credibility and we cannot say that the jury's findings are so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of defendant's guilt. *People v. Wheeler*, 226 Ill. 2d 92, 11-15 (2007).

¶ 44 Defendant's reliance on *People v. Schott*, 145 Ill. 2d 188, 190 (1991), is unavailing. In *Schott*, our supreme court found that the State's evidence was insufficient to convict defendant of indecent liberties with a child. The victim, defendant's step-daughter, was contradicted as to where, when and how many times the alleged offense occurred; prior acts of sexual abuse; and whether she told anyone about the alleged offense. *Id*. at 206-07. In addition, the victim admitted that she lied to a judge when she previously falsely accused her uncle of molesting her, admitted that she had previously lied because she was angry with her uncle, and had a motive to lie about the defendant because she wanted him to leave the house. *Id*. The court found that the victim's testimony was so lacking in credibility that it left a reasonable doubt as to defendant's guilt. *Id*.

¶ 45 The alleged inconsistencies in E.P.'s testimony in this case are nowhere close to the evidentiary problems identified by the *Schott* court. E.P.'s testimony was overall consistent, with a few minor discrepancies. These minor discrepancies did not detract from her evidence as a whole and therefore her testimony was sufficient to convict defendant. There was sufficient evidence for a reasonable jury to convict defendant of the charges. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 46 Defendant makes several arguments related to the admission of other crimes evidence. Defendant argues that the trial court erred by allowing the State to introduce evidence of his prior sexual misconduct to establish his intent and absence of an innocent state of mind. Defendant also argues that the trial court erred by allowing the State to admit other crimes evidence to prove propensity under section 115-7.3 (725 ILCS 5/115-7.3 (West 2014)). Defendant next argues that the trial court erred and violated his constitutional right to present a defense when it prevented the defense from introducing evidence of specific acts of conduct to prove that defendant lacked the propensity to commit sexual offenses against children when the court ruled that it was not relevant that defendant had not abused other children. We address each argument in turn.

¶ 47 Defendant claims the trial court erred in admitting evidence of prior sexual crimes on the issues of intent and an absence of innocent state of mind because he flatly denied touching E.P. in any manner, either accidentally or intentionally. Therefore, defendant claims, intent was not an issue and, therefore, the propensity evidence should not have been allowed.

¶ 48 Generally, other crimes evidence is admissible if relevant for any purpose other than to show propensity to commit crime. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). Other crimes evidence may be admitted to show *modus operandi*, intent, motive, identity, or the absence of mistake. *People v. Pikes*, 2013 IL 115171, ¶ 11; see also Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). "Evidence of other crimes [or bad acts] is objectionable not because it has little probative value, but rather because it has too much." *People v. Manning*, 182 Ill. 2d 193, 213 (1998). The admission of other crimes evidence is limited to protect against the danger that the jury will convict a defendant because he is a bad person deserving of punishment. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Thus, where the other-acts evidence has no value beyond that inference,

it is excluded. *Id*. Even other-acts evidence that is relevant for a proper purpose will be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v. Pikes*, 2013 IL 115171, ¶ 11; see also Ill. R. Evid. 405 (eff. Jan. 1, 2011). The trial court's admission of other-acts evidence will be upheld on appeal unless the court abused its discretion. *Donoho*, 204 Ill. 2d at 182.

¶ 49 *People v. Fretch*, 2017 IL App (2d) 151107, provides a thorough analysis of the admissibility of other crimes evidence to establish intent when a defendant denies committing the offense. The defendant in *Fretch* was convicted of several offenses based on evidence that he knowingly exposed his penis and masturbated in his front doorway in the presence of G.G., a female minor. The defendant denied masturbating in his front doorway and testified that he had taken a bath and was wrapped in a towel when he went to shut the inner front door. Other crimes evidence was admitted to establish intent. *Id*.

¶ 50 Noting that our supreme court acknowledged a split in the case law among the districts on the admission of other-crimes evidence as to intent, but declining to decide between the two positions (*People v. Wilson*, 214 Ill. 2d 127 (2005)), the *Fretch* court analyzed the two separate position and stated:

> "We can place into two groups the cases we have discussed in which the reviewing court found that the defense made intent an issue at trial: (1) cases in which the defendant admitted in some part to the acts underlying the offense (the actus reus) but denied that he had the requisite intent for the offense (*Illgen*, *Harris*, *Johnson* [*People v. Illgen*, 145 Ill. 2d 353 (1991); *People v. Harris*, 297 Ill. App. 3d 1073 (1998); and *People v. Johnson*, 239 Ill. App. 3d 1064 (1992)]); and (2) cases in which the defendant did not admit to the acts underlying the offense, but did admit at least that he was with the victim at the

> time in question, and the evidence raised questions about the defendant's conduct and intent toward the victim during that time (*Wilson, Deenadayalu, Luczak* [*People v. Wilson*, 214 Ill. 2d 127 (2005); *People v. Deenadayalu*, 331 Ill. App. 3d 442 (2002), *People v. Luczak*, 306 Ill. App. 3d 319 (1999)]). Where the defense at trial involves no admissions or acknowledgements consistent with scenario (1) or (2), then the defense has not made intent an issue (*People v. Bobo*, 278 Ill. App. 3d 130 (1995) evidence that teacher fondled other students was not admissible to show intent and/or motive and/or knowledge where the defendant denied entire incident occurred.)" *Fretch*, 2017 IL App (2d) 151107, ¶ 66.

¶ 51 The *Fretch* court found the facts to be more in line with the cases in group 2 because the defendant admitted that he was in the doorway, but denied masturbating. The defense also admitted that the defendant photographed G.G. standing in his doorway. The defendant's and G.G.'s conflicting accounts of what defendant did at his door "raised a question of his intent in being at the door." *Id*. Therefore, defendant made intent an issue at trial and other crimes evidence was properly admitted to establish intent. *Id*.

¶ 52 We find the facts of this case similar to the line of cases identified by the *Fretch* court as group 2. Defendant admitted to being with E.P. on July 9 and July 23. He admitted to picking up E.P. at her home and taking E.P. to his basement before they went to the pool. Defendant's and E.P.'s conflicting accounts of what occurred on both of those dates raises questions about defendant's intent. Therefore, we find that the trial court properly admitted other crimes evidence to establish intent and a lack of an innocent state of mind.

¶ 53 Defendant contends that the trial court erred in allowing the State to admit other crimes evidence in order to prove propensity pursuant to section 115-7.3 (725 ILCS 5/115-7.3 (West

2014).

¶ 54 Propensity evidence is generally inadmissible. However, section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2014)), allows the prosecution to offer evidence of other crimes involving sexual offenses, including aggravated criminal sexual assault, and provides that such evidence "may be considered for its bearing on any matter to which it is relevant." The other crimes evidence must be relevant and will be admitted unless the prejudicial effect of the evidence substantially outweighs its probative value. *Donoho*, 204 Ill. 2d at 177, 182-83. Section 115-7.3 lists three factors that a trial court should weigh when determining whether the probative value outweighs the undue prejudice: (1) the proximity in time to the charge; (2) the degree of factual similarity to the charged offense; and (3) other relevant facts and circumstances. 725 ILCS 5/115-7.3(c) (West 2014). The determination of whether the probative value of other crimes evidence outweighs its prejudicial effect rests within the sound discretion of the trial court (*People v. Hale*, 2012 IL App (1st) 103537, ¶ 24), and the court's ruling will not be disturbed absent an abuse of that discretion (*People v. Ward*, 2011 IL 108690, ¶ 21). An abuse of discretion "occurs when the court's decision is arbitrary, fanciful, or unreasonable." *People v. Gwinn*, 366 Ill. App. 3d 501, 515 (2006).

¶ 55 We consider the first factor in balancing the probative and prejudicial value, proximity in time of the offenses. The offense involving L.H. and her sister K.K. occurred in 1995, almost 20 years prior to the charged offense. There is no bright-line rule about when a crime is too distant in time to be admitted. *Donoho*, 204 Ill. 2d at 183-84. Rather, the proximity in time must be evaluated on a case-by-case basis and is a factor in determining the other crime's probative value. *Id*. A time lapse of 20 years or 12 to 15 years has not barred such evidence where other factors

support its admission. *Id.* (12 to 15 years); *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994) (over 20 years). We do not find the time lapse in this case to be too remote.

¶ 56 We next consider the degree of factual similarity between the two crimes. See 725 ILCS 5/115-7.3(c) (West 2014). For other-crimes evidence to be admissible, there must be some "threshold similarity" to the charged crime. *Donoho*, 204 Ill. 2d at 184. The use of other-crimes evidence to show propensity allowed by section 115-7.3 requires only "mere general areas of similarity" between the past offense and the charged offense to be admissible. *Id*. at 184. An increase in factual similarity leads to an increase in the probative value of the other-crimes evidence. *Id*. at 184.

¶ 57 Defendant argues that there is no similarity between the crimes because the incidents with L.H. and K.K. involve allegations of sexual conduct that are completely different in kind than those alleged in this case. With E.P., defendant allegedly rubbed his erect penis on her clothed buttocks and ejaculated. Defendant admitted that he massaged L.H., under her bathing suit and placed his hand on her breast and his finger in her vagina. He also placed his erect penis against her; however, there was no allegation of ejaculation. Defendant also touched K.K.'s breasts and had an erection when she was sitting on his lap.

¶ 58 We agree with the State that the incidents involving L.H. and K.K. were similar enough to the sexual assault of E.P. to allow the other crimes evidence to be admissible. In both instances defendant used his position as a trusted adult to exert his authority to sexually assault young girls in his care for his sexual gratification. This was a crime of opportunity, as were the sexual assaults on L.H. and K.K. in 1995. Furthermore, "no two independent crimes are identical." *Donoho*, 204 Ill. 2d at 185. The presence of some differences between the crimes

does not defeat admissibility. Accordingly, we find that the trial court did not err in admitting this other crimes evidence to establish propensity.

¶ 59 In a related argument, defendant contends that the trial court erred in allowing the State to offer propensity evidence under section 115-7.3 without allowing him to introduce evidence of specific acts to rebut that proof that he lacked a propensity to sexually abuse children. Defendant claims that the trial court's ruling prevented him from presenting an adequate defense and deprived him of a fair trial.

¶ 60 If evidence is admitted under section 115-7.3(c) "evidence to rebut that proof or an inference from that proof, may also 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." 720 ILCS 5/115-7.3 (b) (West 2014). "In a criminal case in which evidence is offered under this Section, proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony." 725 ILCS 5/115-7.3(e) (West 2014).

¶ 61 Defendant argues that the plain language of section 115-7.3(b) allows the defense to offer evidence to rebut proof of or an inference of a propensity to commit sexual crimes. Defendant claims that the evidence offered under section 115-7.3(b) may be "specific instances of conduct" (725 ILCS 5/115-7.3(e) (West 2014)). Defendant further claims that nothing in the statutory language restricts "specific instances of conduct" to prove a propensity to commit sexual crimes and that nothing in the statutory language requires "specific instances of conduct" to prove a lack of propensity to commit sexual crimes.

¶ 62 We agree with defendant that 115-7.3(e) clearly allows the defense to offer evidence of specific acts of conduct to "'rebut * * * proof' of other sexual crimes or the 'inference from that proof,' 725 ILCS 5/115-7.3(b) (the inference of a propensity to commit sexual crimes), and may do so by 'specific instances of conduct.' 725 ILCS 5/115-7.3(e)." However, the specific acts of conduct that may be admissible to rebut propensity evidence or the inferences therefrom are still subject to the threshold statutory requirements of admissibility and relevance. *People v. Williams*, 2013 IL App (1st) 112583, ¶ 60; *Donoho*, 204 Ill. 2d at 182-83; 720 ILCS 5/115-7.3(b) (West 2014) (In cases involving allegations of aggravated criminal sexual assault evidence of the defendant's commission of another offense or offenses set forth in paragraph (1), (2), or (3) of subsection (a) [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, criminal transmission of HIV, or child abduction], 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*.")

¶ 63 Evidence is relevant when it (1) renders a matter of consequence more or less probable or (2) tends to prove a fact in controversy. *People v. Lynn*, 388 Ill. App. 3d 272, 280 (2009). We review a trial court's decision to admit evidence under the standard of abuse of discretion. *People v. Kliner*, 185 Ill. 2d 81, 146 (1998). The exercise of the trial court's discretion in that regard will not be reversed absent an abuse of that discretion. *Lynn*, 388 Ill. App. 3d at 280. A trial court abuses its discretion only when its decision is arbitrary, unreasonable, or fanciful or where no reasonable person would take the trial court's view. *People v. Bean*, 389 Ill. App. 3d 579, 590, (2009).

¶ 64 Here, the trial court allowed the State to present propensity evidence but precluded defendant from introducing specific acts of conduct to rebut that evidence because the court found that whether defendant did not abuse other children was irrelevant to whether he committed the charged offense. Yet section 115-7.3(b) specifically allows a defendant to rebut this type of evidence by introducing evidence of specific acts of conduct pursuant to section 115-7.3(e). The preclusion of this evidence was unfairly prejudicial to defendant given the facts of this case, especially where the propensity evidence took place 20 years earlier. Defendant's offer of proof included testimony of numerous adults who would testify that defendant interacted with them and their children on numerous occasions over a long period of time and for various different reasons and defendant did not sexually abuse or behave inappropriately with their children. The specific conduct evidence that defendant sought to introduce was clearly relevant to rebut the inference from the State's propensity evidence. See 725 ILCS 5/115-7.3 (West 2014).[1]

¶ 65 The State argues that the specific acts of conduct that defendant sought to introduce were inadmissible, even if they were relevant, because section 115-7.3 provides that evidence of propensity to commit sexual crimes or evidence to rebut such a propensity is only admissible "if that evidence is otherwise admissible under the rules of evidence." Therefore, defendant's evidence to rebut the State's propensity evidence must conform to the strictures of Illinois Rule of Evidence 405(a), which prohibits specific instances of conduct from being admitted to prove character.

¶ 66 Rule 405(a) in its current form states:

[1] Although the parties don't discuss the issue, the testimony offered by defendant to rebut propensity evidence and the inference of propensity evidence contains hearsay statements that may otherwise be inadmissible, even if that testimony would be admissible under section 115-7.3

"(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation, or by testimony in the form of an opinion.

(b) Specific Instances of Conduct.

(1) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct; and

(2) In criminal homicide or battery cases when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor, proof may also be made of specific instances of the alleged victim's prior violent conduct." Ill. R. Evid. 405(a) (eff. Jan. 1, 2011).

¶ 67 The State submits that no "irreconcilable conflict" exists between section 115-7.3(e) and Rule 405(a), and therefore the trial court could properly seek to reconcile section 115-7.3(e) with Rule 405, which it did in this case. See *People v. Peterson*, 2017 IL 120331, ¶ 30 ("where an irreconcilable conflict exists between a legislative enactment and a rule of this court on a matter within the court's authority, the rule will prevail"). Squaring these rules of evidence, the State argues, the trial court allowed defendant to rebut the propensity evidence with character testimony, and allowed defendant to elicit the crux of what he sought to introduce through testimony of other benign massages. Defendant responds that section 115-7.3(e) supersedes Rule 405(a)'s prohibition against specific instances of conduct to prove character.

¶ 68 We disagree with both parties. In this case, sections 115-7.3 and Rule 405 work in harmony. Section 115-7.3 allows the State to offer propensity evidence in sex crimes prosecutions and it allows a defendant to rebut or defend against propensity evidence offered by

the State by introducing specific acts of conduct. Rule 405 allows for specific acts of conduct to be introduced when a defendant's character is "an essential element of a charge, claim or defense." Ill. R. Evid. 405(b) (eff. Jan. 1, 2011). Certainly, when the State offered propensity evidence in this case to infer that defendant sexually abuses children, the State was also attacking defendant's character. But defendant's character is not "an element of a charge" under Rule 405(b)(1). Here, it is defendant who is asserting "a trait of character" as "an essential" "defense" so that "proof may also be made of specific instances of [defendant's] conduct." Ill. R. Evid. 405(b)(1) (eff. Jan. 1, 2011). Under 405(b)(1), defendant was allowed to offer specific instances of conduct to defend against or rebut that attack on his character. The evidence of specific acts that defendant sought to introduce was both relevant and admissible under Rule 405. 725 ILCS 5/115-7.3(b) (West 2014) (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.") Ill. R. Evid. 405(a) (eff. Jan. 1, 2011).

¶ 69 We note that the court did allow defendant's character witnesses to testify, all of whom opined that defendant was a man of good character who was sexually moral and chaste. These character witnesses were also available to testify about specific acts of conduct but were prohibited from doing so. However, the trial court abused its discretion in precluding defendant from introducing specific acts to rebut the propensity evidence and the inference of propensity evidence offered by the State where it was clearly allowed by both statute (section 115-7.3) and rule (Ill. R. Evid. 405(a)).

¶ 70 The State argues that even if the court abused its discretion by preventing defendant from offering specific acts of conduct, it was harmless beyond a reasonable doubt because the court's

ruling did not prevent defendant from eliciting the essence of what he sought. The State suggests that allowing defendant to offer character witnesses who testified that defendant was a peaceful, moral and sexually chaste individual, was sufficient because "it strains reason to suggest that these character witnesses would harbor this opinion if he had abused them or their children." Furthermore, the State claims that defendant informed the jury in opening statement that defendant was a personal trainer for the past 20 years, and had engaged in:

> "appropriate activities, including physical activities, including touching children, holding children * * * upstanding people in the community who have known [defendant] intimately for years including contact with their children, including contact with their young daughters, will come in here and testify that in their opinion, based on their knowledge of him, he is a chaste [and] sexually virtuous person."

¶ 71 With respect to the kidnapping and aggravated criminal sexual abuse charges, we disagree that the error here was harmless. Defendant was allowed by both section 115-7.3 and Rule 405 to present specific acts of conduct evidence to rebut the State's propensity evidence and the inferences therefrom but was precluded from doing so. The fact that defendant was allowed to offer character evidence or make reference in opening statement as to witnesses that may testify to his lack of propensity, which was objected to and could not be considered as evidence, does not cure the prejudice defendant suffered by not being allowed to produce witnesses to testify to specific acts of conduct to rebut the State's propensity evidence. We find that the evidence related to the kidnapping and aggravated criminal sexual abuse in this case was closely balanced because the evidence against defendant was exclusively based on the testimony of E.P. that was, in part, inconsistent and impeached and totally denied by defendant. Defendant was unfairly prejudiced by his inability to present his proffered evidence consisting of specific

acts of conduct to rebut the propensity evidence admitted against him. We further find that had defendant been allowed to introduce specific acts of conduct to rebut the propensity evidence and the inferences therefrom, specifically that defendant worked with countless other children whom he had not sexually assaulted or abused, that the jury's verdict on the kidnapping and aggravated criminal sexual abuse counts could have been different.

¶ 72 We have also considered whether the court's denial of specific acts of conduct evidence to rebut the State's propensity evidence had an unfair prejudicial effect on the evidence considered by the jury with respect to counts 13 and 14 alleging conduct prohibited by a convicted child sex offender. (720 ILCS 5/11-9.3(c-7)(West 2012) (It is unlawful for a child sex offender to knowingly offer or provide any programs or services to persons under 18 years of age in his or her residence or the residence of another or in any facility for the purpose of offering or providing such programs or services, whether such programs or services are offered or provided by contract, agreement, arrangement, or on a volunteer basis.)) We find that it did not. The evidence to support the conduct prohibited by a convicted child sex offender convictions were unconnected and not related to the evidence necessary to convict on the kidnapping and aggravated criminal sexual abuse counts. With respect to count 13, conduct prohibited by a child sex offender, the evidence given by E.P. was that she was under the age of 18 and was hired by defendant to provide services for defendant. As for count 14, defendant admitted that he provided services, swimming lessons, to persons under the age of 18, and he was a convicted child sex offender. It was uncontested that defendant was a convicted sex offender. Neither of these charges were contested by defendant at trial or on appeal. The propensity evidence offered by the State was not in any way related to the proof of these two charges. Therefore, the jury was not improperly influenced by that evidence in relation to finding defendant guilty of these

two offenses. We therefore affirm defendant's convictions for conduct prohibited by a convicted child sex offender in counts 13 and 14.

¶ 73 CONCLUSION

¶ 74 The defendant was unfairly prejudiced by the trial court's denial of his proffered specific acts of conduct to rebut the propensity evidence introduced by the State pursuant to section 115-7.3 (725 ILCS 5/115-7.3 (West 2014)). We find the evidence against defendant on the kidnapping and aggravated criminal sexual abuse counts was closely balanced because the testimony against defendant was given by a single witness that was uncorroborated, somewhat inconsistent and impeached and totally denied by the defendant. This error was not harmless and likely had a prejudicial effect on the jury's consideration of these charges. We reverse and remand counts 1 through 12 for a new trial. As we have found the evidence sufficient to convict defendant beyond a reasonable doubt, there is no double jeopardy impediment to a new trial on these counts. See *People v. Ward*, 2011 IL 108690. Counts 13 and 14 are unaffected by the reversible error that occurred in this case. We therefore affirm counts 13 and 14.

¶ 75 Affirmed in part; reversed and remanded for new trial in part.