2011 IL App (2d) 100767-U
No. 2—10—0767
Order filed August 12, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CF—546
SCOTT D. MORGAN,	)	Honorable Sharon L. Prather
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Bowman concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in allowing testimony pursuant to section 115—10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115—10 (West 2008)) where there were sufficient guarantees of reliability as to the statements at issue. The evidence was sufficient to convict. The trial court's act of sustaining the State's objections did not prevent defendant from presenting his theory of the case. The trial court did not err in refusing to declare a mistrial when the jury heard, contrary to a pretrial ruling, what the trial court later determined to be admissible evidence. There was no cumulative error, and defendant received a fair trial.

¶ 1 On April 29, 2010, a jury convicted defendant, Scott D. Morgan, of aggravated criminal sexual abuse (720 ILCS 5/12—16(c)(1)(i) (West 2008)), and the trial court sentenced him to two

years' probation, with the condition that he serve 120 days in the county jail. On appeal, defendant argues that: (1) the trial court abused its discretion in granting the State's motion to permit testimony pursuant to section 115—10 of the Code; (2) the State failed to prove him guilty beyond a reasonable doubt; (3) the trial court abused its discretion by sustaining certain objections by the State during his case-in-chief; (4) the trial court abused its discretion by denying his motion for a mistrial; and (5) cumulative error warrants the granting of a new trial. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On June 5, 2008, the State filed a complaint against defendant, alleging that, on May 9, 2008, defendant committed the offense of aggravated criminal sexual abuse against R.Z., then age eight, in that defendant knowingly fondled the bare buttocks of R.Z. for the purpose of his own sexual gratification. R.Z. was defendant's daughter's friend, and the alleged offense took place at a sleepover at defendant's home. Those present in the home that evening included defendant, his wife (Amy Morgan), their daughter (G.M.), R.Z., and another friend of G.M., A.M. (all three girls were age eight).

¶ 4 A. Pretrial Evidentiary Motions

¶ 5 i. Section 115—10 of the Code

¶ 6 On November 12, 2008, the State moved to permit testimony, pursuant to section 115—10 of the Code, of out-of-court statements made by R.Z. The State noted that R.Z. made out-of-court statements to her mother (Christina Z.), Amy, and the police department social services coordinator (Sue Blechschmidt), wherein she complained of and described the acts that comprised elements of the charged offense. The State contended that the time, content, and circumstances of the statements provided sufficient safeguards of reliability. Defendant disagreed.

¶ 7 On February 18, 2009, the court heard testimony on the section 115—10 motion. Christina, Amy, and Blechschmidt testified. Christina testified that she is a single mother of four children and that R.Z. is her youngest. She stated that, the day after the sleepover (a Saturday), she and R.Z. were alone in their van, on the way to the grocery store. R.Z. suddenly told Christina that she did not want to go to her softball game that coming Monday. Christina asked why, and R.Z. stated that she "just didn't want to." Christina again asked why, and this time R.Z. answered that she did not want to go because they would be playing against G.M.'s team. Christina asked R.Z. why she did not want to play against G.M.'s team. R.Z. answered, "because [G.M.'s] dad would be there." Christina then pulled the car over to the side of the road so that she could talk with R.Z. She pulled over because "[she] thought that there was something more to this and [she] needed to actually face [R.Z.] face to face to see why [R.Z.] was upset."

¶ 8 Christina testified that, after pulling over, she asked R.Z. if anything had happened at the sleepover the night before. R.Z. told Christina that "[G.M.'s] dad had touched her when she was sleeping that night or falling asleep that night." R.Z. told Christina that she had been sleeping in the same bed as G.M. and A.M. when defendant came in the room to say goodnight to G.M. (his daughter). Then, G.M. asked defendant to rub her back. Defendant rubbed G.M.'s back, but then defendant began rubbing R.Z.'s back as well. Defendant rubbed R.Z.'s back underneath her pajama top. Then, defendant put his hand down the back of R.Z.'s pants, on R.Z.'s bare buttocks. Defendant tried to move his hand to the front of R.Z., and, so, R.Z. put her arm down to block defendant's hand from moving any further. R.Z. rolled over to prevent further touching, and defendant left the room. R.Z. pretended to be asleep throughout the incident. After defendant left

the room, R.Z. began to cry. She told G.M. that defendant had tried to touch her "in her pants." G.M. got her mother, Amy. Amy talked to R.Z.

¶ 9 Christina testified that, when she was eliciting information from R.Z., she was careful to ask "very open-ended questions" because "[she] didn't want to put any words in her mouth[;] she didn't want [R.Z.] to think that [she] thought something else in case something else hadn't happened."

¶ 10 On cross-examination, Christina conceded to a few details that R.Z. may have omitted: R.Z. did not tell Christina whether it was dark in the room at the time, and R.Z. did not tell Christina that the girls had been disruptive earlier in the night. The defense then attempted to ask Christina about an incident wherein R.Z. fell out of a tree, and the court sustained the State's objection as to relevance. The defense then asked Christina "on how many occasions" R.Z. told her something that she later determined to be untrue. Christina answered that she did not know the exact number, but it would be "less than a dozen." The defense then asked if it would be more than one-half dozen, and the court sustained the State's objection as to relevance. The defense then asked Christina to recall the circumstances surrounding the most recent untruth that R.Z. had told. The court sustained the State's objection as to relevance. However, Christina was then permitted to testify as to *when* R.Z. last told an untruth, and Christina stated that she did not know.

¶ 11 Next, Amy testified that, the evening of the incident, the girls had been disruptive on several occasions. At one point, defendant went upstairs to restore order. He was upstairs for five minutes. He came back downstairs, and they finished watching their movie. Then, the girls asked Amy to come upstairs. The girls were upset. R.Z. told Amy, "Mr. Morgan touched me inappropriately." Amy remembered that those were R.Z.'s exact words, because she considered it to be "kind of an unusual stilted language from an eight-year-old girl." G.M. told Amy that she had asked defendant

to rub her back. After the incident, R.Z. wanted to go home, but Amy remembered that Christina had complained of fatigue, so she did not want to wake Christina.

¶ 12 Amy then testified to an earlier incident wherein she believed that R.Z. had lied. R.Z. told Amy that, once, she fell out of a tree and that a stick pierced through her entire stomach. Her brother pulled out the stick and bandaged her up. Amy asked R.Z. if the story was true, and R.Z. told her that it was.

¶ 13 Next, Blechschmidt testified that, several days after the incident, she interviewed R.Z. at the child advocacy center. R.Z. and Blechschmidt were the only two people in the room, but a police officer, a representative from the Department of Children and Family Services, and, possibly, an assistant State's Attorney were able to observe the interview through a mirror; additionally, the interview was recorded. The interview was 24 minutes long. The State then submitted the video recording of the interview to the trial court. The trial court stated that it would watch the video. Then, it continued the cause to March 26, 2009, for argument and ruling on the motion.

¶ 14 The transcripts of the argument and ruling on the section 115—10 motion are not in the record. The trial court granted the State's section 115—10 motion.

¶ 15 ii. Other Bad Acts

¶ 16 On January 19, 2010, the State moved *in limine* to admit evidence of other bad acts. Specifically, the State wished to introduce evidence of an incident at an earlier sleepover at defendant's home, which occurred approximately three weeks prior to the offense for which defendant was charged. At that earlier sleepover, in the morning, defendant took R.Z. to a couch and laid with her on top of him, her back to his front. Both were fully clothed. R.Z. tried to get out of defendant's hold but was unable. Eventually, R.Z. got out of his hold, and she ran upstairs to the

bedroom in which she had been staying. At hearing, defendant responded that evidence of the other bad act would be more prejudicial than probative and that, as to the charged offense, the "intent will be judged upon the four square corners of the indictment."

¶ 17 The court denied the State's request to admit, stating:

> "I believe what the State is arguing or seeking [is] to admit an uncharged act [] to show lack of mistake or inadvertence.
>
> The court would not allow this evidence in *** the State's case-in-chief. It will reserve ruling with respect to its admissibility in rebuttal."

¶ 18 B. Trial

¶ 19 During opening argument, the State informed the jury that its theory of the case was that defendant purposefully put his hand on the bare buttocks of R.Z. for his own sexual gratification. In turn, the defense informed the jury that its theory of the case was that defendant went into his daughter's "pitch dark" bedroom and rubbed the back of the child he *thought* was his daughter. The defense further stated that "[defendant] will testify that he never, ever touched the buttocks of [R.Z.] for the purpose of sexual gratification. The testimony will be it was a mistake."

¶ 20 i. State's Case-in-Chief

¶ 21 At trial, Christina testified that her daughter, R.Z., knew defendant's daughter, G.M., because they were in the same classroom in school and participated in Brownies and softball together. Prior to the sleepover, Christina had seen defendant three times; she had no relationship with him. She knew Amy through the classroom and the Brownie troop.

¶ 22 The night of the incident, a group went out to Pizza Hut for dinner following a softball game in which R.Z., A.M., and G.M. all played. The group included: Christina, A.M.'s father (whom

Christina was dating), defendant and Amy, the three girls, and three other children of the adults present. At the dinner, the girls asked if they could have a sleepover at G.M.'s house. R.Z. then left the restaurant with defendant's family.

¶ 23 Christina testified to the circumstances under which R.Z. told her about the charged incident consistent with what she had testified at the section 115—10 hearing. In addition, however, Christina testified that R.Z. had been quieter than normal before speaking, that she had a nervous tone in her voice once she began to speak, and that she started crying once she began to describe what had happened. Two days later, on Monday, Christina spoke to the school social worker about the incident. Then, Christina called the police, and the investigation began.

¶ 24 On cross-examination, the defense elicited that R.Z. did not express any hesitation to go to the sleepover. The defense also attempted to question Christina about an alleged apology from defendant to R.Z., but the court sustained the State's objection of improper impeachment. On redirect, the State asked Christina about the alleged apology. Christina explained that R.Z. told her that, the morning following the incident, defendant purchased donuts for the girls, but R.Z. was afraid to go downstairs. Defendant then allegedly told G.M. to go upstairs and tell R.Z. that he was sorry. Regarding the apology, R.Z. told Christina, "Mom, I don't know if he was sorry because he touched me accidentally or was it on purpose." Christina stated that the apology confused R.Z.

¶ 25 Next, the State called Amy. Amy testified to the evening's early events (softball, Pizza Hut, *et cetera*) consistent with Christina. Once home, Amy and defendant began watching a movie, and the girls played upstairs. At around 10:30 p.m., they paused the movie, and Amy put the girls to bed in the guestroom upstairs. The guestroom had a queen-sized bed, and Amy placed all three girls in it. Later, Amy heard the girls awake, and she twice had to go upstairs to resolve fighting. The girls

cried due to the fighting. Then, around 12:30 a.m., Amy heard the girls awake for a third time. This time, defendant went upstairs to check on the girls. Amy waited downstairs and could not see anything that happened while defendant was upstairs. Defendant was upstairs for approximately five minutes. A short time after defendant came back downstairs, G.M. called Amy upstairs. All three girls were waiting for Amy at the top of the stairs. R.Z. was upset; there were tears on her face. She told Amy that "Mr. Morgan touched [her] inappropriately." R.Z. asked Amy to call her mom. Amy did not call Christina. Instead, in a private conversation with defendant, she asked defendant to call Christina the next day. The State then impeached Amy based on her written statement to police, wherein she did *not* mention that the girls had been disruptive prior to the incident due to fighting or crying; she had only mentioned loud giggling.

¶ 26 On cross-examination, Amy testified that, originally, they had invited only A.M. to sleepover, but A.M.'s father then asked at the Pizza Hut if R.Z. could sleepover as well. R.Z. left Pizza Hut with Amy's family, but Christina drove by to drop off fresh clothes for R.Z. Amy further testified that, while she and defendant were watching the movie, the girls were disruptive. R.Z. was teasing A.M. Amy went upstairs for about 15 to 20 minutes and talked to the girls about "using kind words." When Amy left the girls, they were still in the guestroom. When the girls were disruptive for the third time, Amy rolled her eyes. Defendant told her, "if you want, I'll go up." After the incident, Amy did not call Christina because it was late at night and she knew Christina had to work the next day. When Amy put R.Z. back in bed after the incident, R.Z. was no longer upset. Amy also testified that defendant rubs G.M.'s back about two to three times per week in order to calm her.

¶ 28 Next, Blechschmidt (social services coordinator for the police department) testified that she interviewed R.Z. at the child advocacy center a few days after the alleged incident. She had an

opportunity to view the video of the interview, and it accurately represented what took place. The defense stated that it had no objection "to [that portion] pertaining to the May 9, 2008, [incident]." The State then played the video to the jury. However, the video continued to run during a portion of the interview wherein R.Z. discussed the incident at the *earlier* sleepover:

> "BLECHSCHMIDT: Have you ever had a sleepover at that house before?
>
> R.Z.: Yea...Yea... Like and but they took us— he took us to the pool. But then that, that night he in the morning he picked me up and he laid on the couch and, um, and he would be facing like, he would be laying like this, and I would be laying on top of him like this, but then h-he was holding me like this, and I tried— I tried getting out. He thought I was asleep so I tried getting out, but then he pulled me back in [or then, sic]."

¶ 29 The defense immediately objected and moved for a mistrial, reminding the court that it had previously barred evidence during the State's case-in-chief of the prior bad act. The State argued that any error was unintentional and, in any case, not prejudical because the jury only heard that defendant picked up R.Z. and brought her to the couch. The defense disagreed and argued that the jury had heard the entire answer as quoted above. The defense argued that a mistrial was appropriate because nothing could cure the prejudice; an instruction would only highlight the error to the jury.

¶ 30 The court denied the motion for a mistrial, stating that there "was probably about five seconds of that tape that was played that should not have been played at [that] point in the proceedings." The court then stated:

> "With respect to the other act that we have been arguing about, the court did rule that it would not allow the State to introduce that during the State's case-in-chief.

However, now if the defense is, as what was represented it to be in the opening statements, that the act was inadvertent or accidental, the State is going to be allowed to introduce the event as absence of mistake and inadvertence."

¶ 31 The State next called R.Z. R.Z. testified that she had pizza with A.M. and G.M. and their parents. Then, R.Z. and A.M. asked their parents if they could both sleep at G.M.'s house. Their parents said, "yes." The girls then went to bed in G.M.'s room (not the guestroom). The room had a small bed. They all slept in the same bed, which was in the farthest corner of the room. R.Z. explained that she was facing the wall, but that she was closest to the door. G.M. was next to R.Z. and near the wall. A.M. slept at their feet with her head touching the wall. R.Z. was trying to get to sleep, but she did not fall asleep. Then, defendant came in the room. Defendant asked G.M. if R.Z. was asleep, and G.M. said yes. G.M. asked defendant to rub her back, and he did. However, then R.Z. "felt a hand slip down under [her] clothes." R.Z. testified:

"R.Z.: [I]t was, like, a big hand. And so then I felt— so then it stayed like on my skin on my butt for awhile.

STATE: Okay. After you felt the big hand on your skin under your clothes for awhile, did you do anything?

R.Z.: I turned over. And I covered the front like, I covered— I covered— I covered my— the front side of my pants. And then he— he tried to get in that way. But I had my hands there so he couldn't.

STATE: Okay. When you say he tried to get in that way, can you tell me exactly what you mean?

R.Z. He tried— he tried to put his hand on my front private."

R.Z. testified that defendant had his hand on her bare buttocks for 20 to 30 seconds. After defendant left the room, R.Z. began to cry and she told her friends what happened. G.M. wanted R.Z. to tell Amy what happened, but R.Z. was too scared (to go alone). So, the three girls called Amy upstairs. They waited for Amy at the top of the stairs. G.M. whispered in Amy's ear what had happened. Then R.Z. asked to go home, but Amy said she could not go home because it was too late. Amy put all three girls back to sleep in the guestroom. After the incident, R.Z. heard Amy and defendant "yelling" in the next room. The next morning, R.Z. was afraid to go downstairs. G.M. told her that defendant said he was sorry. R.Z. came downstairs and ate one donut. Defendant was at the table, but R.Z. did not look at him. After one or two minutes, R.Z. went back upstairs and waited for A.M.'s father to come to take her and A.M. home.

¶ 32 R.Z. testified consistent with Christina as to the circumstances under which R.Z. told Christina what had happened. R.Z. further testified that, in school, she had learned about inappropriate touches. She was told that, if someone touched her in an inappropriate place, she should say, "no," and tell someone. R.Z. testified that she told her mother and a lady named Sue [Blechschmidt] what had happened. When asked if she was confused about what happened, R.Z. said, "Yes." She explained that she wondered "why that— why it happened." When asked why she turned away from defendant when his hand was on her, she answered, "because I felt really uncomfortable, and I knew it was wrong."

¶ 33 On cross-examination, R.Z. testified that she did not remember Amy putting the girls to sleep in the guestroom prior to the incident. Defendant was already in G.M.'s room when G.M. asked him to rub her back. The door to G.M.'s room had been open, and the light in the hallway was on. R.Z. stated that defendant never rubbed her back (he just had his hand on her buttocks). R.Z. testified that

she had spoken with representatives of the State between three and six times prior to trial. However, she did not practice her testimony with the State. The State's representatives told her, "how to walk into the courtroom. And, like, that it would, like, be okay." When asked to explain the difference between the truth and a lie, R.Z. answered that a lie "means not telling the truth and to tell what's—what didn't really happen."

¶ 34 The State next called police detective Mark Mogan, who testified that observed the interview with R.Z. and that he interviewed Amy and defendant (separately). The State sought to admit Amy's and defendant's written statements. The defense objected, noting that defendant's written statement began by describing the incident at the *earlier* sleepover and, therefore, as it was evidence of a prior bad act, it should be barred. The court overruled the objection, stating that "the other incident will be admissible. The court finds that its probative value is not outweighed by its prejudicial effect." The court admitted defendant's entire written statement. However, the State had Mogan read aloud to the jury only that portion of the statement that pertained to the May 9, 2008, (second) sleepover.

¶ 35 At the close of the State's case, the defense again moved to exclude that portion of the video interview wherein R.Z. described the incident at the earlier sleepover. The court *again* explained to the defense that its prior ruling on the matter was subject to change anytime prior to judgment, and it ruled that the entire video would be admitted into evidence.

¶ 36 ii. Defendant's Case-in-Chief

¶ 37 Defendant first called Christina to the stand. Christina testified that R.Z. told her that defendant started to rub R.Z.'s back and then proceeded to touch R.Z.'s buttocks underneath her underwear. She did not recall R.Z. providing the exact time-frame of 20 to 30 seconds. Several times during the defense's direct examination of Christina, the court sustained the State's objections

as to the cumulative nature of the defense's questions. The court explained, "I agree that it's your case-in-chief. But you're asking the same questions that were previously covered *** by you on cross examination."

¶ 38 Defendant next called Amy Morgan to the stand. Defendant began by questioning Amy about the Pizza Hut dinner and the events leading up to the sleepover. In the course of questions relating to this subject matter, the court sustained three objections by the State as cumulative, rejecting the defense's argument that the purpose of the line of questioning was orientation. Likewise, the court sustained three objections as cumulative when Amy attempted to testify about the girls' earlier fights and telling them to use "kind words." The court then sustained two objections as cumulative when Amy attempted to testify to what she and defendant had been eating during the movie. The court again sustained an objection as cumulative when Amy attempted to testify regarding the number of times that the girls had been disruptive that evening, prompting the following sidebar:

"STATE: Your Honor, I don't want to be going through this exercise. We could do this for the next hour and a half where he asks questions that we covered already.

DEFENSE: Yes, but it's my case-in-chief, Judge.

COURT: That doesn't mean *** that you get to repeat the same testimony that's already been presented.

DEFENSE: Judge, I believe I can put in my case however I see fit, your Honor. And I'm—

COURT: Well, you certainly—

DEFENSE: —not about—

COURT: *** you want to be held in contempt?

DEFENSE: Not whatsoever, your Honor.

COURT: The objection is sustained. You can ask new and different questions.

DEFENSE: Okay, thank you, your Honor."

Upon resumption of questioning, the court again sustained the State's objection as cumulative when Amy attempted to testify to what the girls had told her of the incident.

¶ 39 Amy was then allowed to testify to what defendant told her happened. Defendant told Amy that he rubbed what he thought was G.M.'s back, but that it turned out to be R.Z.'s back, and then he also rubbed R.Z.'s back. Amy asked defendant if he rubbed only R.Z.'s *back*, and defendant replied affirmatively.

¶ 40 During cross-examination by the State, Amy conceded that she could not actually see what happened in the room when defendant was alone with the girls. She also agreed that, of course, she did not want to see her husband "get into any trouble."

¶ 41 Next, defendant testified on his own behalf. Defendant first testified to the *earlier* sleepover, which took place April 19, 2008, several weeks prior to the incident at issue.[1] The morning after the sleepover, over a period of at least 30 minutes, R.Z. did not respond to defendant's verbal requests that she wake up and get ready for her mother. To help R.Z. wake up, defendant picked her up and carried her downstairs to the couch. He sat with her on his lap. His hands were on her stomach/rib-cage area. Shortly after they sat down, R.Z. startled and ran upstairs to get dressed.

[1] In his written statement on the same topic, defendant noted that, on the weekend of April 19, 2008, he was the only adult at home. Amy was at a "women's retreat."

¶ 42 As to the May 9, 2008, sleepover, defendant testified that they arrived home from Pizza Hut at approximately 9:45 p.m. Christina dropped off some clothes for R.Z. The kids went upstairs to play. At approximately 10:15 p.m., defendant and Amy began watching a movie. About 20 minutes later, Amy went upstairs to put the girls to bed. About 15 minutes after that, Amy came back downstairs and they resumed the movie. Throughout the movie, defendant ate popcorn and consumed two cans of Lacroix mineral water. During the movie, Amy twice went upstairs to quiet the girls. When the girls were being disruptive a third time, Amy looked at defendant; she looked irritated. So, defendant offered to go check on the girls. Defendant left the family room where they had been watching the movie; there had only been a table lamp on in that room. He walked through the kitchen, dining room, and living room before coming to the stairs; none of those rooms were lit. Likewise, there were no lights on upstairs. Defendant first peered into the guestroom, but he did not see anyone in there. Then, while standing in the hallway, defendant heard his daughter call out from her room, "Daddy, will you rub my back[?]" Defendant walked into G.M.'s room, and saw only one child on the bed, on her side, facing the wall. He began rubbing the back of that child, thinking it was his daughter. G.M. and R.Z. were approximately the same size and had the same hair color. Defendant was kneeling on the floor beside the bed. About 7 to 10 seconds later, defendant heard G.M. say, "Daddy, that's not my back; rub my back; that's [R.Z.'s] back." Defendant then surveyed the situation and realized that there were actually three girls in the bed (not just his daughter). Defendant then began rubbing his daughter's back. However, he continued to rub R.Z.'s back as well, because "I thought [R.Z.] was upset from earlier in the evening. She [had been] crying." After rubbing R.Z.'s back, she turned her back away from him. When asked if, at any time, his hand touched the buttocks of R.Z., defendant answered, "Absolutely not."

¶ 43 Defendant testified that he was in G.M.'s room for a total of 35 to 40 seconds. After leaving the room, he went to the bathroom, brushed his teeth, and urinated. Defendant had to brush his teeth because he had been eating popcorn. At no point during the five minutes that he was upstairs did he become sexually aroused. Defendant then went downstairs to finish the movie. However, shortly thereafter, he heard another disturbance (crying).

¶ 44 G.M. came downstairs and asked Amy to come upstairs to "deal with an incident." Defendant stayed downstairs, but he could hear talking. About five minutes later, Amy called defendant to the foyer and asked defendant if he had touched R.Z. inappropriately, to which he responded in the negative. After discussing the matter, they decided not to call Christina, but agreed to tell her about it the next day. However, he did not tell Christina before she went to the police several days later.

¶ 45 On cross-examination, defendant clarified that, despite the fact that he did not see anyone upon initially peering into the guestroom, he still believed that R.Z. and A.M. could have been in that room and that his daughter could have been only child in her room. He stated that the logical place to put guests is in the guestroom. The State attempted to impeach defendant's testimony that he "absolutely [did] not" touch R.Z.'s buttocks with his written statement to police, wherein he stated that it was possible that his hand slipped onto R.Z.'s bottom.

¶ 46 As its last witness, the defense called defendant's long-term neighbor, Denise Brausen. She was allowed to state that defendant generally had a reputation in the community for being truthful and honest.

¶ 47 iii. Closing Argument

¶ 48 As is relevant to this appeal, the State objected 27[2] times throughout the course of defendant's closing argument. The trial court sustained all but four of these objections. For example, the court sustained the State's objection to the defense's statements that: (1) the State did not want the jury to know certain things (there were several objections on this theme); (2) the State only took "snip-it's" of defendant's written statement (actually, the State *de-emphasized* to the jury that portion of the written statement that dealt with the prior bad act, and the jury would later be given the entire written statement); (3) the jury should take certain notes; and (4) R.Z. was confused after having numerous conferences with the State (sustained for mischaracterizing the evidence). The trial court overruled the State's objection to the defense's statement that "there were at least three inconsistent versions of what had happened."

¶ 49 Also during defendant's closing argument, the State accidently projected an image of one of the State's exhibits onto the courtroom wall (the record does not indicate the exact content of the image). The defense did not notice that it happened. However, after defendant's closing argument, the State moved to make a record of the occurrence outside the presence of the jury. The State explained that it had been preparing for its rebuttal, had attempted to view a slide of one of its exhibits, and had accidently projected it.

¶ 50 C. Posttrial Motion

¶ 51 Following his conviction, defendant moved for a new trial. Defendant raised many of the same points he now raises on appeal. The trial court denied the motion. This appeal followed.

¶ 52 II. ANALYSIS

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[2] We counted 31 actual objections, but some of these were duplicative (*i.e.*, the defense continued to argue a point after the initial objection had been sustained).

¶ 53 A. Section 115—10

¶ 54 Defendant first argues that the trial court abused its discretion in granting the State's motion to permit testimony pursuant to section 115—10 of the Code. 725 ILCS 5/115—10 (West 2008). Section 115—10 sets forth certain hearsay exceptions:

> "(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13 *** including but not limited to prosecutions for violations of Sections 12—13 through 12—16 of the Criminal Code of 1961, *** the following evidence shall be admitted as an exception hearsay rule:
>
> (1) testimony by the victim that he or she complained of such act to another; and
>
> (2) testimony of an out of court statement made by such child describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.
>
> (b) Such testimony shall only be admitted if:
>
> (1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and
>
> (2) The child ***
>
> (A) testifies at the proceeding; or

(B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement." 725 ILCS 5/115—10 (West 2008).

¶ 55 When conducting a section 115—10 hearing, the court must determine, based on the totality of the circumstances, whether there are sufficient particularized guarantees of reliability or trustworthiness in regard to the statement sought to be admitted. *People v. West*, 158 Ill. 2d 155, 164 (1994). Some factors that are important in making this determination are the: (1) child's spontaneous and consistent repetition of the incident; (2) child's mental state; (3) use of terminology unexpected of a child of a similar age; and (4) lack of motive to fabricate. *Id*. The trial court's determination of reliability of a child sexual abuse victim's statements to others will not be disturbed absent an abuse of discretion. *Id*. at 165. A court abuses its discretion where no reasonable person would take the view adopted by the court. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003).

¶ 56 Here, the statements at issue are those that R.Z. made to Christina, Amy, and Blechschmidt, telling each of them that defendant had touched her inappropriately and describing the circumstances under which he had touched her. Defendant argues that there were not sufficient guarantees of reliability at the hearing because: (1) the trial court erroneously sustained the State's objection as to relevance when the defense attempted to elicit information from Christina; (2) Christina testified that R.Z. had been untruthful to her on past occasions; (3) Amy testified that R.Z. had been untruthful to her in the past in that she once told a story about a stick that pierced all the way through her stomach and insisted that the story was true; (4) Amy testified that R.Z. used terminology unexpected of a child of a similar age when she stated that "Mr. Morgan touched me inappropriately;" and (5) generally, there was an absence of evidence bolstering the reliability of R. Z.'s hearsay statements.

¶ 57 We disagree that the testimony to which defendant points requires a finding that the trial court abused its discretion in finding sufficient guarantees of reliability. As to defendant's first point, we reject defendant's implicit argument that, by sustaining the State's objections as to relevance regarding the exact number of times R.Z. told Christina an untruth and the circumstances surrounding the most recent untruth, the court was foreclosed from gaining sufficient guarantees of reliability as to the statements at issue. Perhaps the trial court could have overruled these objections. However, pointing to missed opportunities wherein indicia of reliability might have been gained does not establish that there were insufficient guarantees of reliability overall. As set forth below, there were sufficient guarantees of reliability.

¶ 58 As to defendant's second point, Christina testified that R.Z. had been untruthful to her on less than 12 occasions. Although the testimony concerned past untruths, it also would have been reasonable for the trial court to find that this statement actually constituted positive indicia of R.Z.'s reliability. In other words, it would not be unreasonable for the trial court to find that an eight-year-old child who, over the course of her entire life, had been known to have told less than 12 "untruths" to her mother was actually a relatively truthful child.

¶ 59 As to Amy's testimony, evidence that R.Z. once told a tall tale about a stick piercing her stomach does not *require* the trial court to find that R.Z.'s statements are precluded from admission under section 115—10. The story about the stick was made while spending time with friends and did not involve an accusation. Likewise, the trial court was not required to characterize R.Z.'s statement, *i.e.*, "Mr. Morgan touched me inappropriately," as terminology unexpected of an eight-year-old child. Such language is not *per se* outside the natural vocabulary of an eight-year old. In fact, though not part of the section 115—10 hearing, R.Z. later testified that the word was used in

her classroom at school. Moreover, the *reason* that courts often consider unreliable a victim's statement that employs terminology unexpected of a young child, *i.e.*, suspicion of "coaching," is not implicated in this case. Here, Amy testified that she was the first adult to whom R.Z. spoke following the alleged incident. There was no opportunity for an intervening adult to influence R.Z.'s statement.

¶ 60 Finally, we disagree with defendant's general argument that there was an absence of evidence bolstering R.Z.'s hearsay statements. As to the first factor set forth in *West* (spontaneous and consistent repetition of the incident), Amy testified that R.Z. told her of the alleged incident within five minutes of its occurrence. Similarly, Christina testified that, within 24 hours of the alleged incident, R.Z. spontaneously expressed discomfort at the idea of being around defendant. Moreover, R.Z.'s description of the alleged incident to Amy, Christina, and Blechscmidt was consistent. As to the second factor set forth in *West* (the child's mental state), R.Z. began to cry to G.M. immediately following the incident. R.Z. was upset and wanted to go home to her mother. As discussed above, the third factor set forth in *West* (age-appropriate language), is neutral. And, as to factor four in *West*, defendant submitted no evidence that R.Z. had a motive to fabricate. In sum, the trial court did not abuse its discretion in admitting the statements pursuant to section 115—10.

¶ 61 B. Sufficiency

¶ 62 Defendant next argues that the State failed to prove defendant guilty as charged beyond a reasonable doubt. In reviewing the sufficiency of the evidence, this court must determine whether the evidence, viewed in a light most favorable to the State, would support a rationale trier of fact's finding that the essential elements of the crime had been proven beyond a reasonable doubt. *People*

v. Brink, 294 Ill. App. 3d 295, 300 (1998). It is the jury's province to determine the credibility of the witnesses and the weight to be given to their testimony, and the reviewing court may not substitute its judgment for that of the jury on such matters. *Id*.

¶ 63 To be found guilty of aggravated criminal sexual abuse under subsection (c)(1)(i), the State must prove that: "the accused was 17 years of age or over and (i) commits an act of sexual conduct with a victim who was under 13 years of age when the act was committed." 720 ILCS 5/12—16(c)(1)(i) (West 2008). "Sexual conduct" is defined as:

> "any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, *** [of] any part of the body of a child under 13 years of age, *** for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/12—12(e) (West 2008).

In particular, defendant argues that the State failed to prove that he touched R.Z. "for the purpose of sexual gratification or arousal of the victim or the accused."

¶ 64 The intent to arouse or satisfy a sexual desire can be established by circumstantial evidence, and the trier of fact may infer a defendant's intent from his conduct. *People v. Balle*, 234 Ill. App. 3d 804, 813 (1992). A defendant's intent to arouse or gratify himself sexually can be inferred solely from the nature of the act. See, *e.g.*, *People v. Burton*, 399 Ill. App. 3d 809, 813 (2010) (defendant reached under the shirt of a 15-year-old girl and touched her breast for 30 seconds or less); *People v. Calusinski*, 314 Ill. App. 3d 955, 962 (2000) (defendant placed his tongue in the mouth of a six-year-old girl); *People v. Westpfahl*, 295 Ill. App. 3d 327, 334 (1998) (defendant touched the victim's breasts); and *People v. Goebel*, 161 Ill. App. 3d 113, 125 (1987) (defendant touched the 9-year old victim's breasts).

¶ 65 Here, R.Z. testified that defendant put his hand underneath her pajamas, on her bare skin, and touched her "butt" for 20 to 30 seconds. R.Z. testified that she then rolled over onto her back to prevent defendant from touching her buttocks, but defendant then attempted to touch her front private area. This testimony was consistent with R.Z.'s videotaped interview with Blechschmidt, wherein R.Z. further described with an imitative hand-gesture defendant's attempt to touch her front. This evidence is sufficient to describe an act from which defendant's intent to arouse himself sexually can be inferred.

¶ 66 Because R.Z. testified to an act from which defendant's intent to arouse himself sexually can be inferred, it seems that defendant is really making a credibility argument. However, issues of credibility are the province of the jury (*Brink*, 294 Ill. App. 3d at 300), and the record supports that a reasonable jury could have found R.Z. to be credible. A reasonable jury could have found R.Z.'s credibility bolstered by the way R.Z. reacted to the incident, as testified to by Christina and Amy: R.Z. began to cry, she relatively immediately told Amy that defendant had touched her inappropriately, she asked to go home, and she told her mother of the incident within 24 hours.

¶ 67 We do not find helpful the eight factors set forth in the case relied upon by defendant, *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994), because those factors would weigh in favor of defendant only if the jury believed defendant's version of events, which, of course, it was not required to do. In sum, the evidence was sufficient to sustain the conviction.

¶ 68 C. Whether the Court's Exclusion of "Cumulative" Evidence Prevented Defendant from Presenting His Theory of the Case

¶ 69 Defendant next argues that the trial court abused its discretion when, during his case-in-chief, the court sustained 11 of the State's objections that Amy's testimony was cumulative to evidence set forth during *its* case-in-chief. Defendant argues that, in sustaining the State's objections to so-

called cumulative testimony, defendant's case-in-chief was dictated or limited by what the State chose to present in its case. Defendant posits that this practice is improper because it allows the State to shape, determine, limit, and guide a defendant's presentation of his or her theory of the case. Defendant reasons that preventing a defendant from asking its own witness about any facts the State previously elicited from that witness would set a dangerous precedent. The State could merely call a witness favorable to a defendant in its case-in-chief, get the proverbial first crack at that witness (wherein, of course, defense counsel's cross-examination of the witness would be limited to the scope of the State's direct), and then, with repeated cumulative objections, prevent the defendant from presenting his theory of the case to the jury.

¶ 70 The trial court has the responsibility to achieve a prompt and convenient dispatch of court business. *People v. Thigpen*, 306 Ill. App. 3d 29, 40 (1999). Evidence is cumulative when it adds nothing to what was already before the jury. *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009). The decision to exclude cumulative evidence rests within the sound discretion of the trial court. *People v. Tolliver*, 347 Ill. App. 3d 203, 227 (2004). Still, a defendant has a constitutional right to argue his or her theory of the case to the jury. *People v. Hope*, 168 Ill. 2d 1, 27 (1995). Therefore, it follows that a trial court abuses its discretion in excluding cumulative evidence where the exclusion prevents a defendant from presenting his or her theory of the case. See, *e.g.*, *State v. Bergeron*, 452 N.W.2d 918, 926 (Minn. 1990) (trial court may restrict repetitious evidence as long as the defendant has a full and fair opportunity to put forth his or her theory of the case).

¶ 71 We agree with defendant to a limited extent that, by sustaining a number of the State's objections as cumulative, the trial court made it difficult for defendant to move forward with his version of events in an uninterrupted manner during his case-in-chief. Nevertheless, we agree with

the State that the evidence at issue was collateral to defendant's theory of the case and, therefore, any minor error did not prevent defendant from receiving a fair trial. The complained-of objections occurred only during Amy's testimony, which pertained to setting the scene as to why defendant was alone with the girls upstairs (*i.e.*, Amy had already tried unsuccessfully to quiet the girls). The defense *was* able to present to the jury the essential aspects of its version of precipitating events during its cross-examination of Amy in the State's case-in-chief and through defendant's direct testimony. Defendant was not prevented from presenting his theory of the case.

§ 72 If the defense felt it was improperly barred from introducing non-cumulative evidence during Amy's testimony, it should have submitted an offer of proof as to what that evidence was. See, *e.g.*, *People v. Moore*, 397 Ill. App. 3d 555, 561-62 (2009) (record was devoid of showing that witness's testimony would have been material and non-cumulative, or that its exclusion was prejudicial, where the defense made no offer of proof and did not specify the nature of the proposed testimony in a motion for a new trial). Perfecting the record would enable this court to review whether relevant evidence was improperly barred. Additionally, when the trial court repeatedly sustained as cumulative the State's objections, it would have been more productive to suggest that the defense submit an offer of proof than to threaten to hold the defense attorney in contempt of court.[3]

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[3] In fairness to the defense's efforts in this case, we acknowledge that it *did* attempt to submit an offer of proof at a different point in the trial, just not as to this cumulative issue before us on appeal. During the State's case-in-chief, the defense submitted an offer of proof after the court sustained the State's objection that the defense was "trying to impeach irrelevant evidence" during its cross-examination of Amy. The defense made an offer of proof as to why A.M.'s father was going to pick up R.Z. in the morning. In any case, the defense was able to put this evidence before

¶ 73 D. Mistrial: Evidence of Earlier Sleepover

¶ 74 Defendant next argues that the trial court erred in denying his motion for a mistrial, which he made when the State allowed R.Z.'s video interview with Blechschmidt to continue to run in the presence of the jury while R.Z. discussed the *earlier* sleepover. Again, that portion of the interview was as follows:

> "BLECHSCHMIDT: Have you ever had a sleepover at that house before?
>
> R.Z.: Yea...Yea... Like and but they took us— he took us to the pool. But then that, that night he in the morning he picked me up and he laid on the couch and, um, and he would be facing like, he would be laying like this, and I would be laying on top of him like this, but then h-he was holding me like this, and I tried— I tried getting out. He thought I was asleep so I tried getting out, but then he pulled me back in [or then, sic]."

According to the State, the segment heard by the jury ended when R.Z. stated that "he picked me up and he laid on the couch." According to defendant, the jury heard the entire segment as quoted. A court of review shall not disturb a trial court's decision to deny a motion for mistrial absent an abuse of discretion. *People v. Bishop*, 218 Ill. 2d 232, 251 (2006).

¶ 75 The trial court did not abuse its discretion in denying the motion for a mistrial. Before trial, the court denied the State's request to introduce evidence that defendant had touched R.Z. at an earlier sleepover. Therefore, when the quoted portion of the interview continued to run in the presence of the jury, defendant's attorney immediately moved for a mistrial, reminding the court that it had previously barred evidence of the touch at the earlier sleepover. In denying the motion for a mistrial, the trial court acknowledged that it had previously barred the evidence, but it explained:

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the jury in *its* case-in-chief.

> "With respect to the other act that we have been arguing about, the court did rule that it would not allow the State to introduce that during the State's case-in-chief.
>
> However, now if the defense is, as what was represented it to be in the opening statements, that the act was inadvertent or accidental, the State is going to be allowed to introduce the event as absence of mistake and inadvertence."

Moreover, at the close of the State's case, when defendant moved to exclude evidence of the incident at the earlier sleepover, the court *again* explained its reasons for allowing into evidence the entire video and all evidence of the incident at the earlier sleepover.

¶ 76 Generally, evidence of offenses, acts, and wrongs other than those for which the defendant is being tried is inadmissible. *People v. Bobo*, 375 Ill. App. 3d 966, 971 (2007). This is because there is the risk that the jury may infer that, because the defendant has committed other wrongs, he is a bad person who deserves to be punished or he has a propensity to commit crimes. *Id*. However, evidence of other offenses or bad acts may be admissible to prove any material fact other than a defendant's propensity to commit a crime. *Id*. Such evidence may be admitted to show the existence of a common plan or design, *modus operandi*, identity, motive, intent, or absence of mistake. *Id*. Evidence of other offenses that tends to show intent or absence of mistake still must be more probative than prejudicial to be admissible. *People v. Raymond*, 404 Ill. App. 3d 1028, 1045 (2010).

¶ 77 Here, in opening argument, defendant presented the defense of mistake or inadvertence. Again, the defense stated: "[defendant] will testify that he never, ever touched the buttocks of [R.Z.] for the purpose of sexual gratification. The testimony will be it was a mistake." Given this turn of events in opening argument, the trial court was free to modify its earlier evidentiary ruling. A motion *in limine* is a means by which the parties may, in a *pretrial* setting, present the court with an

issue of admissibility of evidence that is likely to occur at trial. *Schuler v. Mid-Central Cardiology*, 313 Ill. App. 3d 326, 334 (2000). However, the trial court's ruling on the motion *in limine* remains subject to reconsideration by the court throughout the trial. *Id*. Because defendant presented the defense of mistake or inadvertence, he invited the State to present evidence, such as a prior offense, to refute that theory.

¶ 78 Moreover, we cannot say the trial court abused its discretion in finding the evidence at issue to be more probative than prejudicial. *Raymond*, 404 Ill. App. 3d at 1045. The court did not admit only the video testimony; it later admitted defendant's written statement of the prior act, and defendant testified about the prior act. The evidence of the prior act is probative on the issue of mistake. Defendant's theory of the case is that he meant to rub his daughter's back, and that he touched R.Z. only by mistake, implying that he otherwise would not have rubbed the back of someone else's sleeping child. However, evidence of the "other" touch that took place at the earlier sleepover showed that defendant *would* purposefully touch R.Z. while he thought she was asleep. To avoid undue prejudice in admitting evidence of the other act, the other act must be similar in character to the offense for which the defendant is being tried. *People v. Miller*, 254 Ill. App. 3d 997, 1011-12 (1993). Here, the other act, like the instant offense, involved defendant touching R.Z. while she lay still and feigned sleep. The other act, like the instant offense, did not stop until R.Z. moved in order to try to stop the touching. In sum, where the trial court on more than one occasion explained that the evidence at issue was admissible, it certainly did not err in refusing to declare a mistrial because the jury heard that evidence.

¶ 79 E. Fair Trial: Distractions During Closing Argument

¶ 80 Defendant argues that he was denied a fair trial as a result of the State's "distractions" during his closing argument. These distractions include 27 objections to defendant's argument raised by the State and the incident wherein the State inadvertently projected one of its exhibits. In his brief, the defendant does not detail *any* of the objections, nor does he set forth the content of the projected exhibit.

¶ 81 A reviewing court must look to all of the circumstances to determine whether a defendant received a fair trial, including instructions to the jury, arguments of counsel, and whether the weight of the evidence was overwhelming. *People v. Layhew*, 139 Ill. 2d 476, 486 (1990). A defendant has a right to make a closing argument, rooted in the sixth amendment right to counsel. *Herring v. New York*, 422 U.S. 853, 858 (1975). In general, counsel is afforded wide latitude in closing argument; argument and statements based upon the facts in evidence, as well as reasonable inferences drawn therefrom, are within the scope of a proper closing argument. *People v. Crawford*, 343 Ill. App. 3d 1050, 1058-59 (2003). The regulation of the substance and the style of the closing argument is within the trial court's discretion, and the trial court's determination of the propriety of the closing argument will not be disturbed absent a clear abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 128 (2001).

¶ 82 First, we note that the trial court *sustained* all but 4 of the State's 27 objections. Defendant does not argue on appeal that the trial court erred in sustaining the objections. As such, defendant is hard-pressed to convince this court that the State improperly raised the objections at issue, let alone that the trial court abused its discretion regulating and ruling upon the objections raised. It could just as well be argued that the defense *invited itself* to be interrupted or "distracted" by setting forth improper argument.

¶ 83 As to the incident wherein the State inadvertently projected one of its exhibits, we find that, although unfortunate, it did not cause defendant to have an unfair trial. Defendant did not argue in his posttrial motion and does not now argue on appeal that the *content* of the image was prejudicial. In fact, the record does not indicate the exact content of the image; we know only that it was "part of a statement" and "a slide that the State had presented during trial." At the posttrial hearing, the State explained to the court that, during defendant's closing argument, it attempted to view the slide in preparation for its own rebuttal. The image inadvertently projected on a courtroom wall, and the State claimed that it was there only for an "infinitesimal" amount of time. The State reported its mistake to the court outside the presence of the jury, as soon as defendant had finished his argument. The trial court did not abuse its discretion in finding that the oral arguments were proper and that the projection of the image did not deny defendant a fair trial.

¶ 84 F. Fair Trial: Cumulative Error

¶ 85 Lastly, defendant argues that the cumulative effect of the alleged errors set forth above created a pervasive pattern of unfair prejudice to defendant's case such that he was denied an unfair trial. In support of his position, defendant cites to two cases wherein the errors at issue involved prosecutorial misconduct. See *People v. Blue*, 189 Ill. 2d 99, 140 (2000), and *People v. Howell*, 358 Ill. App. 3d 512, 526 (2005).

¶ 86 Here, we have rejected defendant's claim of prosecutorial conduct. Rather, the few *non*-reversible errors that may have occurred during defendant's trial were borne by the court (*i.e.*, in sustaining too many of the State's objections as cumulative during Amy's testimony). Typically, to determine that such cumulative errors require a new trial, defendant must demonstrate *something*

approaching reversible error (as to each of the errors). *People v. Albanese*, 104 Ill. 2d 54, 83 (1984). Defendant has not met that standard.

¶ 87 III. CONCLUSION

¶ 88 For the aforementioned reasons, we affirm the judgment of the trial court.

¶ 89 Affirmed.