2013 IL App (2d) 120773-U
No. 2-12-0773
Order filed August 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MOHAMMED U. SALEEM, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County No. 06 CF 67 Honorable Fernando L. Engelsma, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: In defendant's appeal of his conviction for criminal sexual abuse by the use of force, the State proved that defendant used force on the victim, D.G., by holding her in place while fondling her breast. Also, trial counsel was not ineffective for failing to cross-examine D.G. on her prior descriptions of the assault that mentioned additional sexual touching by defendant. Finally, the trial court did not err in cutting short defense counsel's cross-examination of D.G. on calls made to defendant from a cell phone that she shared with her husband.

¶ 2 Defendant, Mohammed Saleem, appeals his conviction for criminal sexual abuse by the use of force (720 ILCS 5/12-15(a)(1) (West 2004) (now 720 ILCS 5/11-1.50). Defendant previously was tried and convicted in 2007 on the same charge, but later successfully moved for a new trial. On

appeal from his current conviction, defendant argues that (1) the State failed to prove that he used force against the victim, D.G.; (2) his trial counsel was ineffective for failing to cross-examine D.G. on her prior descriptions of the assault; and (3) the court erred in not permitting him to cross-examine D.G. on phone records showing numerous calls to defendant's home phone and cell phone from a cell phone that D.G. shared with her husband. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The First Trial

¶ 5 In March 2006, defendant was indicted on one count of criminal sexual abuse for fondling D.G.'s breast by the use of force on July 13, 2005.

¶ 6 In February 2008, the case was tried to the bench before the Honorable J. Todd Kennedy. The record contains two reports of proceedings from that trial, each labeled "Partial Transcript." Defendant included the two volumes with the posttrial motion he filed following his second conviction, the one now on appeal. One of the volumes contains what appears to be the entire testimony of D.G. and Dale Stein as the State's witnesses. The record contains no other reports of proceedings from that trial.

¶ 7 For purposes of the present appeal, we relate only a small portion of the testimony from the first trial. D.G. testified that she and her husband Bill G. (Bill) met defendant in July 2003. D.G. and Bill were looking for a home to purchase in the Candlewick neighborhood of Poplar Grove and took an interest in a home at 517 Bounty Drive owned and for sale by defendant. In September 2003, D.G. and Bill entered into a land contract to purchase the home. As part of the contract, defendant agreed to make certain improvements to the home. D.G., Bill, and their two children moved into the home while defendant was still performing the work. D.G. did not work outside the

home and was frequently there alone with the children while defendant worked on the home. On these occasions, defendant often made sexual comments to D.G. and touched or attempted to touch her sexually. In one instance, defendant exposed his genitals to D.G. D.G. rebuffed these advances, telling defendant that she loved her husband and that nothing would ever happen between her and defendant. D.G. testified that she became "scared" of defendant after his first advance. D.G. did not inform Bill of these advances because she was afraid that he would angrily confront defendant and, as a result, she and her family would be homeless. D.G. did, however, tell Bill and certain neighbors that she was "uncomfortable" in defendant's presence. D.G. also told Bill that she wanted him to be at the house when defendant was there.

¶ 8 D.G. testified that, in the daytime on July 13, 2005, she was outside the front of the home watering the lawn when defendant parked in the driveway of another home he owned two doors down. Defendant ran to her and asked why she did not love him and why she was not calling him. Defendant threatened to raise the price on the home unless D.G. had sex with him. Defendant then reached his hand under D.G.'s shirt and bra and fondled her breast. D.G. yelled and cursed at defendant and "tried to push him away." Because defendant was "stronger," D.G. "couldn't do anything," and "[s]o [defendant] kept doing it." Defendant then removed his hand from her breast and reached his other hand down the back of her shorts and touched her bottom. D.G. screamed at defendant, and he left. D.G. told her husband about the assault and, two days later, contacted the police. In August 2005, D.G. and Bill moved out of 517 Bounty.

¶ 9 Dale Stein testified that, in July 2005, he and his wife were D.G. and Bill's next door neighbors. On July 13, Dale was outside sweeping his porch when he heard D.G. curse and scream from next door. Dale looked over at D.G.'s house and saw her and defendant outside the front of

the home. Defendant had one arm wrapped around D.G.'s waist while his other hand was down inside her shirt. D.G. continued to scream and curse while she tried to get away from defendant. When defendant saw Dale, he released D.G. and drove away.

¶ 10 On cross-examination, Dale was asked how well he knew D.G. and Bill. Dale replied that they were "[j]ust neighbors" and did not "socialize."

¶ 11 The trial court found defendant guilty. Subsequently, in September 2008, defendant filed a motion for a new trial alleging, *inter alia*, that his trial counsel was ineffective for failing to utilize certain evidence in cross-examination. For instance, defendant asserted that records for the cell phone that D.G. shared with Bill would have shown in excess of 500 calls from that number to defendant's cell phone or home phone and in excess of 250 calls to the Steins' residence. This evidence, defendant claimed, would have undercut both D.G.'s testimony that she was frightened of defendant and Dale's testimony that he and his wife were "[j]ust neighbors" with D.G. and Bill and did not socialize with them. Defendant attached to his posttrial motion hundreds of pages of records for a cell number registered to Bill. Included were records for all months from July 2003 to September 2005. The outgoing calls were color-coded by receiving number. In his February 2012 posttrial motion following his second conviction, defendant included a digest he prepared of the phone calls. The digest tabulated the total number of calls to defendant at 552, of which 529 were to defendant's cell phone and 23 to his home phone. The digest also tabulated 225 calls to the Steins. The State does not contest the accuracy of the digest.

¶ 12 On November 4, 2008, the trial court entered an order stating that it had heard evidence on defendant's motion and was granting a new trial and vacating his conviction. The court's order did

not set forth any rationale, and the record contains no report of proceedings or bystander's report associated with the posttrial motion.

¶ 13 B. The Second Trial

¶ 14 In October 2011, the case proceeded to a bench trial before the Honorable Fernando L. Engelsma. The State called D.G. and Dale Stein. D.G. testified that, in the summer of 2003, she and Bill were seeking a home to purchase in the Candlewick neighborhood of Poplar Grove. They met defendant as he was working in the basement of a home that he owned and had for sale. When that home became unavailable, D.G. and Bill looked at another home, 517 Bounty Drive, that defendant owned and had for sale. Defendant was in the business of buying homes, making improvements, and then selling them. D.G. testified that 517 Bounty was her and Bill's "dream home." According to D.G., defendant agreed to sell her and Bill 517 Bounty Drive and also to purchase their townhouse in Carpentersville. As part of the sale of 517 Bounty, defendant agreed to make certain repairs and improvements to the home. When D.G. and Bill were not able to arrange financing for the house, defendant agreed to a land contract whereby D.G. and Bill would have immediate occupancy but, within the first year, had to pay ten percent of the purchase price as a down payment and arrange financing for the remainder. The down payment would be submitted through monthly "rent" payments. D.G., Bill, and their two small children moved into 517 Bounty in the fall of 2003. Bill, who also worked at Market Day in Wood Dale, began to perform maintenance and repair work on the various homes defendant owned. In exchange, defendant paid Bill either in cash or through deductions from the rent.

¶ 15 D.G. testified that, on the day she first met defendant, he told her that she was beautiful and that he always wanted a woman like her. D.G. thanked him for the compliment. Defendant then

tried to kiss her. D.G. did not tell Bill about this incident. She acknowledged testifying in the previous trial that the reason she did not tell Bill was that she "loved that house [517 Bounty]" and "wanted to go to that house."

¶ 16 D.G. stated that, for the first three months that she and her family lived at 517 Bounty, defendant worked there nearly every weekday, and sometimes on the weekends, making improvements and repairs as he had agreed. On weekdays, Bill would leave for work in Wood Dale at 12:30 p.m. and return at 1:00 a.m. D.G. did not work outside the home and she and her children were often alone with defendant. According to D.G., whenever defendant was at the house he would make vulgar comments to her and touch her inappropriately. Asked how many times defendant inappropriately touched her, D.G. replied, "I couldn't count the times, there was [*sic*] several." Defendant made such comments as that he wanted to "lick [D.G.'s] ass." D.G. testified that defendant was out of Illinois from December 2003 to February 2004. When he returned, he began the improper remarks and contact again. Each time defendant touched her inappropriately, D.G. would "push him off." She denied that she ever reciprocated defendant's advances, had a sexual relationship with him, or permitted him to touch her in exchange for discounted rent. D.G. also denied that defendant ever came to her house for social visits. If defendant was at the home at dinner time, she would offer him dinner. Once, on the evening of the Super Bowl, defendant was involved in a car accident in the neighborhood. D.G. and Bill let him stay overnight because he was drunk. D.G. denied that she ever borrowed money from defendant.

¶ 17 D.G. stated that, "as early as fall of 2003," she told Bill that she was "uncomfortable" being alone with defendant. D.G. eventually "ma[d]e some sort of arrangement that [defendant] would leave at 12:30[p.m.], when [Bill] left." Defendant, however, would only pretend to leave when Bill

left and would afterward bring a bottle of rum from his car, get a Coke from the refrigerator, and sit and drink at the kitchen table. D.G. did not "let" defendant back into the house on these occasions; rather, he had his own key as a landlord. D.G. testified that she and Bill once changed the locks but defendant demanded a key. D.G. admitted that she "possibly" gave defendant coffee while he was at the house.

¶ 18 D.G. testified that, though she told Bill that she was uncomfortable being alone with defendant, she did not initially tell Bill that defendant was making advances. She feared that, if Bill knew, he would angrily confront defendant, provoking him to evict them. D.G. and her family would then have nowhere to go because they had no savings and she was not employed. D.G. was "scared" of defendant and "annoyed" by his advances. At one point, defendant threatened to take her and her children to Pakistan. D.G. initially believed, however, that she could "handle the situation herself."

¶ 19 D.G. stated that, when the first year of her family's tenancy expired in September 2004, they had not yet been able to arrange financing. Defendant let them remain on a month-to-month arrangement. Occasionally, they had difficulty making the rent payments. By July 2005, they still had not arranged financing. D.G. attributed this to defendant's refusal to provide lenders with D.G. and Bill's payment history.

¶ 20 On July 13, 2005, D.G. was outside her home near the front door when defendant drove up in his white work van, which had the logo of his company, "Fix It," on it. D.G. could not recall whether defendant parked in the driveway at 517 Bounty or in the driveway of a home he owned two doors down from 517 Bounty. Defendant ran up to her and asked why she was not calling him and why she did not love him. She replied that she loved her family and that nothing would ever happen

between her and defendant. D.G. told defendant to leave. He became angry, raising his voice and threatening to increase the price of the house if she did not have sex with him. Defendant then "put his hand on [her] stomach and reached over [her] shoulder and grabbed [her] breast." At the time, D.G. was wearing overalls with a T-shirt underneath. Defendant reached his hand under her shirt and bra and "grabbed [her] breast firmly." D.G. tried removing defendant's hand and pulling away from him, but he was "a little bit stronger." He had his hand on her breast for "several seconds." He "eventually removed his hand. [She] could not fight him off." While defendant had his hand on her breast, D.G. screamed and cursed at him, but defendant was laughing. She did not give consent to this physical contact. After defendant let her go, he drove away in his van without saying anything else.

¶ 21 After defendant left, D.G. realized that Dale Stein was outside next door. Dale asked whether she was okay and told her that she needed to tell Bill what was going on. D.G. initially testified that she could not recall whether she saw Shirley Naqvi, a realtor who worked with defendant, outside while defendant was at 517 Bounty. D.G. knew that Naqvi drove a yellow Volkswagen Beetle. D.G. was then confronted with her testimony at the previous trial that Naqvi arrived two doors down (513 Bounty Drive) while D.G. was disputing with defendant, and that D.G. then told defendant "that he better go, that his girlfriend was here, or I would tell her exactly what was going on." D.G. stated that her prior testimony refreshed her recollection and was accurate.

¶ 22 D.G. testified that, after the July 13 incident, she no longer believed that she could handle the matter herself. She called the police on July 15. However, she told Deputy Rhonda Moore that she did not want defendant arrested because she and her family would then have nowhere to go.

¶ 23 About a week later, defendant came to the house to pick up rent money. When D.G. opened the door, defendant "pushed past" her and walked up into the kitchen. She told defendant to take the rent money and leave. Defendant "grabbed [D.G.'s] butt" as she was trying to escort him outside. Ultimately, defendant left. Subsequently, in November 2005, D.G. contacted the police again and spoke to Detective Candy Bunk about defendant's conduct. At Bunk's request, D.G. prepared a written statement describing defendant's conduct toward her.

¶ 24 D.G. testified that, even after this latter incident, she "never really" changed her mind about pressing charges against defendant. She "just wanted to get away from him." She contacted attorneys to find out a way to prevent defendant from expelling the family from 517 Bounty in case he was arrested.

¶ 25 D.G. was questioned as to when she first told Bill of defendant's advances. Initially, she testified that she could not recall exactly when she told him, but believed it was subsequent to the July 2005 incident. D.G. acknowledged writing in her statement to police that it was in September 2004 that she told Bill specifically about defendant's behavior toward her. Later in her testimony, however, D.G. became more emphatic that she did not tell Bill the specifics until July 2005. Two weeks after she told Bill, they moved out of 517 Bounty. Subsequently, defendant brought a civil suit against them for unpaid rent and demanded that they return certain items such as a dishwasher, window blinds, and a swing set. Though D.G. was certain that the items were hers and Bill's, she did not become angry at defendant's demand. D.G. acknowledged that she later "confronted" defendant. She "saw him in the yard and *** yell[ed] at him because of how he was acting with me and trying to find me." She told him "that they were our things and he was not going to get them."

She "told him to stop and to leave me and the family alone." D.G. was by herself when she confronted defendant. D.G. denied that she threatened to sue defendant for sexual harassment.

¶ 26 D.G. was cross-examined about her phone contact with defendant. She testified that she shared a cell phone with Bill. She denied that she spoke with defendant on the phone "every few days," but did admit there was some phone contact. For instance, "sometimes [defendant] would call to tell me to tell Bill to meet here or he would call to try to talk to Bill." She further testified:

"BY MS. POIRIER [defense counsel]:

Q. Now, you said that on occasion you spoke to [defendant] on the phone, correct?

A. Yes.

Q. Okay. And sometimes late at night?

MS. SWITZER (assistant State's Attorney): Objection.

THE COURT: Overruled.

A. I'm not sure of the times. I don't know. Sometimes he would be out of town, different time frames. Sometimes he would call from Pakistan. Different times. I'm not sure. He would call whenever, sometimes I would talk, sometimes my husband would talk, so I'm not—

Q. There were lots of phone calls going on?

A. Yes, there were.

Q. Okay, would you say hundreds of phone calls?

A. MS. SWITZER: Objection.

Q. THE COURT: Sustained.

BY MS. POIRIER:

Q. How many phone calls would you say there were?

A. No idea.

MS. SWITZER: Objection.

THE COURT: Sustained.

BY MS. POIRIER:

Q. Would looking at your records—oh, sorry, you sustained.

THE COURT: No, the objection is sustained.

BY MS. POIRIER: I'm sorry, I'm withdrawing."

¶ 27 D.G. was also cross-examined about her and Bill's relationship with Dale Stein and his wife, Michelle. She testified that she and Bill were "acquaintances" of the Steins and were "neighborly" toward them, but were not "good friends" with them. Their children would play together and she and Michelle would engage in small talk in the yard. On occasion, if defendant was at the house and she felt "uncomfortable," D.G. would ask Michelle to watch her kids for her. D.G. did not ever babysit for the Steins. D.G. acknowledged that she had made phone calls to the Stein residence. However, when defense counsel asked how often D.G. phoned the Stein residence, the trial court sustained the State's objection.

¶ 28 Dale Stein testified that, in July 2005, he resided with his wife and children at 519 Bounty, next door to 517 Bounty where D.G. and her family resided. On July 13, 2005, Dale was sweeping his front porch when he heard D.G. "screaming her head off" from the front of 517 Bounty. She was saying, "[G]et the [fuck] off of me. Get off the property. Stop. Quit it. Let go of me." Dale, whose house was set back farther from the street than 517 Bounty, walked forward to where he could see the front of 517 Bounty. Dale looked over and saw defendant with his "left hand around on [D.G.'s]

stomach area, right hand over the shoulder, hand down inside of her shirt." D.G. was "pushing [defendant] to get off of her." Dale was about 20 to 30 feet away from defendant and D.G. According to Dale, at the time of the incident D.G. was five feet two inches and weighed 90 pounds. Dale cleared his throat loudly to get defendant's attention. When he saw Dale, defendant released D.G. and drove away. Dale then spoke with D.G. He told her that she needed to tell Bill. D.G. replied that she was scared to tell Bill because she did not want him "to go after" defendant. She asked Dale not to tell Bill. According to Dale, defendant had been at 517 Bounty about one to three times a week working on the house.

¶ 29 Dale testified that, when he observed D.G. and defendant, he did not see anyone else outside at the time. He could not be sure, however, that Shirley Naqvi was not there at the time. He noted that the street goes uphill near his house and that her car could have been parked beyond the crest where he could not see it.

¶ 30 Dale was asked about his relationship with D.G. and Bill. Dale described them as "good neighbors" with whom he and his wife would socialize on occasion. After D.G. and Bill moved away, their son became Facebook friends with the Steins' son. The Steins sent a greeting to D.G. and Bill's family through Facebook and received a Christmas card from the family.

¶ 31 At the close of the State's evidence, defendant moved for a directed finding. The trial court denied it.

¶ 32 The defense's first witness was Michelle Stein, Dale's husband. Michelle testified that, in the summer of 2005, D.G. invited her to 517 Bounty to see the basement remodeling. Defendant was in the basement when they went down there. According to Michelle, defendant followed D.G. around and touched her the entire time she and Michelle were in the basement. Defendant was

"stroking her hair, her back, her bottom." D.G. became "irritated." She was "very uncomfortable" with defendant's touching and was "kind of pushing him off, trying to walk a little closer ahead." D.G. and Michelle "weren't down there very long because it was just too much."

¶ 33 Michelle stated that, on another occasion, she was outside her house playing with her kids when D.G. ran from her home. She appeared "very scared" and "very upset." She asked Michelle "in a very erratic manner" to watch her children "because she was having to deal with a situation with [defendant]." Defendant then ran out of the house after D.G. Once Michelle took D.G.'s children, D.G. went back and spoke with defendant.

¶ 34 Michelle testified that she and D.G. were "[j]ust friendly neighbors." She saw D.G. at least five days a week because their children were in school together. Michelle would not, however, describe her interaction with D.G. as "socializing."

¶ 35 Shirley Naqvi testified that she met defendant when he contacted her because she was the realtor for several homes in the Candlewick neighborhood. Defendant purchased seven or eight homes in the neighborhood. Naqvi testified that she never had any contact with D.G. Naqvi recalled occasions when she was with defendant and D.G. would call him on his cell phone. Naqvi knew it was D.G. because the volume on defendant's phone was always very high. To Naqvi, defendant's phone conversations with D.G. seemed friendly.

¶ 36 On July 13, 2005, Naqvi drove her yellow Volkswagen to 513 Bounty, which was owned by defendant, and parked in the driveway. Naqvi came there because defendant wanted her to drive him to Lake Geneva to purchase some floor tile. Naqvi saw defendant two doors down at 517 Bounty. He was sitting on the front porch with D.G. and her children. Defendant and D.G. were "talking and laughing." Naqvi did not see any neighbors outside. She grew aggravated from having to wait

for defendant, and left. Defendant then phoned her and asked her to come back. Naqvi circled the block and returned. Naqvi described it as a "long" block and estimated that it took her five minutes to return to 517 Bounty. She approached the house from the other direction. She saw defendant and D.G. standing in front of the house. Naqvi did not observe any shouting. When defendant saw Naqvi, he came to her car.

¶ 37 Sabrina Lanham, Naqvi's daughter, testified that, in 2005, she was employed by defendant, helping him clean and restore homes. In September 2005, Lanham was working with defendant at one of his homes on Bounty Drive when D.G., whom Lanham did not know personally, drove up. A verbal altercation took place between D.G. and defendant. They spoke loudly and heatedly, and Lanham overheard D.G. say to defendant, "I will get back at you for this." She assumed that D.G. "was talking about the house situation and the rental situation." Initially, Lanham testified that she did not recall D.G. mentioning sexual harassment. However, when her recollection was refreshed with her testimony at the first trial, Lanham recalled that D.G. did mention sexual harassment. Lanham could not recall whether D.G. was threatening retaliation for alleged sexual harassment of her.

¶ 38 Rosemary Quinley testified that, in 2005, she and her husband were renting a house from defendant. Defendant did "a lot" of work on the home. He was "very good" to Quinley and her husband and she considered him a friend. Quinley would offer defendant dinner while he was working on the home. Quinley testified that, on a day in 2005, defendant was at her house when D.G. came over and reminded defendant that he had promised to take her out to lunch. As Quinley recalled, defendant did not take D.G. out for lunch that day. On a later occasion, Quinley was at her grandson's karate class when she saw D.G. D.G. asked if Quinley had heard "what [she was] doing

to [defendant]." D.G. said she had "got [defendant] for sexual harassment." D.G. commented that defendant "owns a lot of homes" and that she was "going to get a lot from this." Quinley was shocked at the mention of sexual harassment.

¶ 39 Nauman Saleem, who was no relation to defendant, testified that, in 2005, he worked part-time for defendant's company, "Fix It Renovation." Bill was also employed by defendant at the time. Nauman testified to defendant's interaction with D.G. Nauman stated that defendant would receive calls from D.G. on his cell phone. Nauman once saw defendant and D.G. drinking coffee together. On another occasion, D.G. asked to borrow money from defendant. Nauman testified to another instance where D.G. needed gas money and defendant directed Nauman to go with D.G. and purchase gas for her.

¶ 40 Nauman further testified that, on a day when he and defendant were working at 517 Bounty after D.G. and Bill had moved out, D.G. arrived and started screaming and cursing at defendant. D.G. mentioned something about appliances and a "gift from [her] mom." D.G. threatened that, if defendant filed a lawsuit, she would file a sexual harassment case against him. When D.G. left, Nauman asked defendant what was happening. Defendant smiled and said that D.G. had gotten "mad."

¶ 41 Camille Saleem testified that she has been married to defendant since 1985. According to Camille, D.G. and her children came over to Camille and defendant's home on at least three occasions to pay rent or pick up Bill's check for work done for defendant. On several occasions, Camille and defendant were invited to D.G.'s house for birthdays or barbecues. They never accepted those invitations. Camille testified that D.G. and Bill fell behind in rent during their tenancy and that Camille and defendant ultimately obtained a $10,000 judgment against them.

¶ 42 Detective Rhonda Moore testified that, when she met with D.G. on July 15, 2005, D.G. told her that she wanted no charges filed against defendant. D.G. stated that she was concerned about the impact on the civil case she was bringing against defendant based on the land contract. Moore told D.G. to call again if she had further issues. D.G. did subsequently contact the police again.

¶ 43 Defendant testified that, in the fall of 2003, he entered into a land contract with D.G. and Bill for the sale of 517 Bounty. Defendant required a down payment of $7,500, which D.G. and Bill anticipated would be paid from the proceeds of the sale of their townhome to defendant. The proceeds of that sale, however, were only $1,000. Regardless, defendant permitted D.G. and Bill to move into 517 Bounty, on the understanding that they would pay the balance of the $7,500 within a year. Defendant also agreed to continue with repairs and improvements to 517 Bounty while D.G. and Bill lived there.

¶ 44 Defendant stated that, shortly after he met D.G. and Bill, she began to make sexual advances toward him. Defendant recounted an occasion that took place even before he agreed to purchase D.G. and Bill's townhome and to sell them 517 Bounty. Defendant was working on a bathroom at 517 Bounty when D.G. approached him, pulled down her sweat pants to expose her underwear, and asked him to guess the color of her bra. Defendant told her the conduct was "inappropriate" and asked where Bill was. Despite this occurrence, defendant agreed to the sales. He testified that, a couple of weeks after D.G. and Bill moved into 517 Bounty in September 2003, D.G. began "touching and feeling" him on days he was doing work at the home. Defendant was there two to three times a week, and D.G. touched him on almost every one of those days. Initially, D.G. would hug him and try to kiss him. Because she was a smoker, defendant permitted D.G. to kiss him only a couple of times. The contact became more intimate when D.G. began touching defendant's penis

underneath his clothing. D.G. touched defendant in this way as many as 20 times. When D.G. did so, defendant would respond by touching D.G.'s "back, shoulders, or behind." He touched her over her clothes only. D.G.'s touching of defendant's penis began in September 2003 and continued to March 2004, with a six-week break starting in January 2004 while defendant was undergoing job training out of state. After the penis touching ended in March 2004, D.G. and defendant would continue to hug "because [he] would listen to her," but nothing more intimate occurred. Defendant never had sex with D.G. because, in November 2003, she told him that, since their "relationship [was] moving fast," he may want to know that she had herpes. Defendant never told his wife about his physical contact with D.G.

¶ 45 Defendant stated that, soon after D.G. and Bill moved into 517 Bounty, she began to complain to defendant about Bill while they were alone together at the house. D.G. would frequently call defendant from her cell phone. She would sometimes cry or scream about wanting to leave Bill but not knowing where to go. Defendant would respond that everything would fine. D.G. would call "numerous times," as many as 12 times a day. Sometimes the calls would last over an hour. According to defendant, Bill would call mostly from his work phone and seldom from his cell phone.

¶ 46 Defendant testified that, at the same time he was having such extensive one-on-one contact with D.G., he became D.G. and Bill's "family friend." From "day one," they invited him over to socialize. Defendant went to their home "numerous times" for barbecues and bonfires. On one occasion, D.G. and Bill invited defendant over for a Super Bowl party. Defendant was drinking that night and, because he "could not get out of the driveway," he stayed overnight at 517 Bounty. Defendant's wife Camille attended none of these social functions at 517 Bounty.

¶ 47 Regarding the July 13 incident, defendant admitted that he was drinking on that date and that he drove to 517 Bounty. He denied, however, that he touched D.G.'s breast that day (he did add that, on other occasions, he touched her "in response to her touching"). Defendant further denied that he asked D.G. on that date why she stopped calling him or why she did not love him, or that he threatened to raise the rent if she did not have sex with him.

¶ 48 Defendant stated that D.G. and Bill fell behind in rent during their tenancy at 517 Bounty. They moved out in the fall of 2005. In September 2005, defendant sent them a "notice before legal action" indicating that they owed rent and had improperly taken fixtures belonging to the premises. One or two weeks after he mailed the notice, D.G. came to 517 Bounty. Defendant, Nauman, and Lanham were present. D.G. "came in screaming and yelling" that defendant had "done enough" and had "hurt [her] enough." D.G. said that she would "get [him] for this" and that "if [he] [didn't] stop" she was "going to file sexual harassment charges against [him]." After consulting with his attorney, defendant filed a small claims action in October 2005. D.G. and Bill owed him $14,000, but defendant settled with them for $7,500.

¶ 49 D.G. testified in rebuttal. She denied ever pulling down her pants to show defendant her underwear. She reasserted that defendant exposed his penis to her. D.G. never touched or tried to touch defendant's penis. Defendant, on the other hand, "quite frequently" tried to force her to touch his penis, but he never succeeded. D.G. never told defendant that she had a sexually transmitted disease.

¶ 50 In closing argument, defense counsel suggested that, if defendant did touch D.G. on July 13, 2005, the touching was consensual, consistent with defendant's narrative of D.G.'s frequent sexual advances. Counsel suggested that defendant and D.G. may well have been "hug[ging]" on July 13

and that, when D.G. perceived Dale's presence, she "pushed [defendant] away" in order to avert suspicion.

¶ 51 The trial court found defendant guilty. The court made extensive findings of fact, including detailed credibility determinations. The court considered D.G.'s and Dale's accounts of the incident on July 13, 2005, to be credible and reliable. The court remarked that Dale's testimony was unimpeached and that he had no motive to fabricate his account. The court found that Naqvi's observations on July 13 were not necessarily inconsistent with Dale's testimony, as Naqvi acknowledged that she left 517 Bounty for at least five minutes. The court found defendant's claim of sexual advances by D.G. to be incredible.

¶ 52 Defendant, by new counsel, filed a posttrial motion for acquittal or, in the alternative, a new trial. Defendant alleged not only errors by the trial court but also ineffectiveness on the part of his trial counsel. First, defendant argued that his placing his arm around D.G.'s waist could not have sufficed as the "force" necessary to support a conviction for criminal sexual abuse as charged by the State. Second, defendant asserted that the trial court denied him his right to a fair trial by limiting cross-examination on the number of calls placed by Bill's cell phone to the Stein residence and to defendant. Third, defendant claimed that trial counsel was ineffective for failing to cross-examine D.G. on her prior descriptions of the incident on July 13, 2005. Specifically, defendant noted that, while D.G. testified at trial to a single instance of defendant's touching her breast on July 13, she (1) testified at the first trial that defendant also placed his hand down her shorts and touched her bottom; and (2) recounted in her written statement that, when defendant initially placed his hand down her shirt, she pulled away, after which defendant again placed his hand there and grabbed her

breast. Fourth, defendant contended that trial counsel was ineffective for not seeking to introduce Bill's cell phone records into evidence.

¶ 53 For his claims of ineffectiveness, defendant attached the same phone records that he had filed with his September 2008 posttrial motion, but now included a digest of the calls. Defendant asserted that Judge Kennedy based his order for a new trial "primarily" upon the evidence of the phone calls.

¶ 54 At the hearing on the motion, defendant called the attorney who prepared the September 2008 posttrial motion to explain why he believed the phone records were pertinent to the defense and should have been offered into evidence by counsel at the November 2008 trial. However, counsel admitted that, since Bill and D.G. shared a cell phone, counsel was not sure which calls were placed by Bill and which by D.G. Counsel added, however, that "if [he] recalled correctly, [Bill] was not allowed to make phone calls from his cell during work."

¶ 55 Defendant, who also testified, stated that, if asked at trial which calls were made by Bill and which by D.G., he would have answered that more than 95 percent of the calls were from D.G.

¶ 56 The trial court denied the motion. Regarding the phone records, the court said:

> "As to the telephone records, I find I did not err in excluding the records over [defense counsel's] initial objection and cutting short testimony concerning them. I did not believe they were relevant and still make that finding now.
>
> There was some testimony allowed concerning calls, and I find that was sufficient, and there was no testimony of extreme fear during the particular trial that was presented to me. So impeachment—their use for potential impeachment[,] the number of calls made—why would someone make that many calls if they had that much fear, I don't find that

> kind of fear present and I don't change my finding as to the relevance of that. I find at best the telephone records were cumulative of what was already presented."

Later in its reasoning, the trial court noted that, if defendant had admitted that he had sexual contact with D.G. on July 13 but that the contact was consensual, then "you could see some of the relevance of [the phone calls], but there wasn't any such evidence presented to the Court."

¶ 57 The court further found that trial counsel's decision not to impeach D.G. with her prior descriptions of the July 13 assault was "one of trial tactics" and, therefore, did not constitute ineffectiveness.

¶ 58 Defendant filed this timely appeal.

¶ 59 II. ANALYSIS

¶ 60 A. Proof of "Force"

¶ 61 Defendant's first contention on appeal is that the State failed to prove the "force" element of the offense of criminal sexual abuse. When considering the sufficiency of the evidence, "our function is not to retry the defendant." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Rather, we must determine " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 560 (1979)). Accordingly, we "must allow all reasonable inferences from the record in favor of the prosecution." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). A reviewing court "will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 62 Defendant was charged under section 12-15(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-15(a)(1) (West 2004) (now 720 ILCS 5/11-1.50), which states that the "[t]he accused commits criminal sexual abuse if he or she *** commits an act of sexual conduct by the use of force or threat of force ***." The State charged that defendant used force (not the threat thereof) to fondle D.G.'s breast.

¶ 63 Section 12-12(d) of the Code (720 ILCS 5/12-12(d) (West 2004)) defines the "force" element in section 12-15(a)(1):

> "(d) 'Force or threat of force' means the use of force or violence, or the threat of force or violence, including but not limited to the following situations:
>
> (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat; or
>
> (2) when the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement."

The State notes that this provision was repealed by Public Act 96-1551, eff. July 1, 2011. We apply, however, the elements of the crime charged as they existed at the time of the offense. See *McGee v. Snyder*, 326 Ill. App. 3d 343, 348 (2001); *People v. Gulley*, 162 Ill. App. 3d 545, 549 (1987). Section 12-12(d) was still in effect in 2005 when defendant committed the offense.

¶ 64 In applying sections 12-15(a)(1) and 12-12(d), we are mindful that " '[f]orce' *** does not mean the force inherent to all sexual penetration—for example, the exertion of the hand in the act of pushing into the vagina—but physical compulsion, or a threat of physical compulsion, that causes

the victim to submit to the sexual penetration against his or her will." *People v. Denbo*, 372 Ill. App. 3d 994, 1005 (2007).

¶ 65 A rational trier of fact could conclude from D.G.'s and Dale's testimony that defendant exerted more than the force necessary to reach his hand under D.G.'s clothing and grab her breast. By D.G.'s and Dale's accounts, defendant placed his arm around D.G.'s waist as he fondled her breast, and then exerted enough force to hold D.G. in place for several seconds as she attempted to break free. D.G. testified that she could not break away because defendant was "stronger." D.G. screamed as she physically resisted.

¶ 66 Defendant argues that no rational trier of fact could find "that whatever force [he] employed in touching [D.G.'s] breast discouraged her in any way from resisting the advance." Defendant points to D.G.'s verbal protest as a clear indication that he had not "overpowered [her] will to resist his advances." While defendant may not have overcome D.G.'s capacity to verbally manifest her lack of consent, the evidence demonstrates that he did overcome her physical resistance, holding her to him for several seconds as he fondled her breast. This sufficed to satisfy the "force" element.

¶ 67 Defendant compares the facts at hand to two cases: *Denbo* and *People v. Vasquez*, 233 Ill. App. 3d 517 (1992). Neither case is relevantly similar to this one.

¶ 68 In *Denbo*, the Fourth District Appellate Court reversed a conviction for aggravated criminal sexual assault premised on the use of force. The complainant, R.H., had dinner with the defendant at her home. The two had had sex with each other on prior occasions. The evidence was that, after dinner, R.H. lay down on the bed in the defendant's bedroom. The defendant's nephew and niece were sleeping in another room. The defendant entered her bedroom and, straddling R.H., kissed and undressed her. R.H. did not resist at this point. After undressing R.H., the defendant inserted her

hand into R.H.'s vagina. R.H. testified that the insertion was painful and that she pushed against the defendant's shoulders. The defendant kept her hand inside R.H.'s vagina. R.H. pushed again, and the defendant removed her hand. The defendant testified that she felt R.H.'s first " 'nudge[]' " but did not hear her say anything until she " 'nudged' " again and said she was " 'finished.' " *Denbo*, 372 Ill. App. 3d at 1003. The State's argument at trial and on appeal was that the victim withdrew her consent while the defendant's hand was inside her, and that the continued penetration became a sexual assault done by the use of force. *Id.* at 1006.

¶ 69 The appellate court agreed with the State that, if there was an aggravated criminal sexual assault at all, it occurred "during the very short duration between the first and second push ***." *Id.* at 1008. In that case, the "force" would have consisted of the defendant's "bodily inertia prevent[ing] [the victim] from disengaging." *Id.* The court disagreed, however, that any rational trier of fact could have found that the first push was an objective manifestation of withdrawn consent:

> "R.H.'s excuse was that she did not want to wake the children by screaming. Even if one credited that excuse, it would not solve the problem of an uncommunicated withdrawal of consent. R.H. could have said no—and, evidently, defendant expected her to say no, or at least say something, if she wanted defendant to stop the sexual penetration. This expectation seems reasonable. R.H. did not say no or stop. Instead, she pushed defendant. The problem is, people push one another during sexual congress. We do not mean to suggest that a push can never signify nonconsent or a withdrawal of consent. In fact, the second push here was clearly made with enough force to both be distinguished from a caress and to effectively communicate the withdrawal of consent. ' "Force" and "consent" simply do not have static

> meanings. The significance of various factors—a cry for help, level of resistance, attempt to escape—depend[s] on the circumstances of each case.' [*People v. Kinney*, 294 Ill. App. 3d 903, 909–10 (1998) (Knecht, J., specially concurring)]. Under the circumstances of this case, a single push to the shoulders, without more, cannot serve as an objective communication of R.H.'s withdrawal of consent." *Id.*

¶ 70 The facts of *Denbo* are significantly different from the facts at hand. In *Denbo*, the complainant gave the defendant an initial push that was ambiguous, at least in the absence of a verbal expression of withdrawn consent. Here, by contrast, D.G.'s resistance, as described by her and Dale, was an unmistakable manifestation of nonconsent. Her struggles were evident to an observer, Dale, and she punctuated her resistance with shouts and curses.

¶ 71 Defendant suggests that D.G. could have struck him "[w]ith her appendages." The evidence does not suggest why D.G. did not take this action. Perhaps, given the relative brevity of the encounter, it did not occur to her. In any case, we know of no authority to suggest that a victim must employ all available measures of resistance. There was adequate evidence of force in that, though D.G. attempted to push away from defendant, he kept her in place and kept his hand on her breast.

¶ 72 Similarly distinguishable is *Vasquez*. There, the defendant was convicted of two instances of criminal sexual assault by the use of force, but this court found the evidence of force insufficient. The evidence at trial was that, on two occasions, P.L. a 13–year–old foster child, performed oral sex on the defendant. In both instances, the defendant pushed the back of P.L.'s head onto the defendant's erect penis. During the first incident, P.L. willingly entered the defendant's car and, after performing oral sex on him, remained in the car while he urinated outside. P.L. later allowed the defendant to drive him home. *Vasquez*, 233 Ill. App. 3d at 520-22.

¶ 73 Several months later, P.L. was walking to McDonald's when he saw the defendant. P.L. tried to walk away, but the defendant caught up. Hoping that the defendant would leave him alone, P.L. suggested that they speak under a bridge or viaduct. When they reached a viaduct, P.L. performed oral sex on the defendant. P.L. testified that, initially, he was unable to push the defendant off of him during this incident, but eventually he succeeded. The defendant then went to the other end of the viaduct to urinate. P.L. waited for the defendant. *Id.* at 520-22.

¶ 74 On both occasions, P.L. did not alert passersby to anything or seek assistance. P.L. testified that the defendant never threatened him and that he did not believe that the defendant intended to harm him. P.L. stated that he was too scared to report the incidents, but he was unable to say why he was afraid. *Id.* at 520-22.

¶ 75 Reversing the convictions, we noted first the lack of any evidence that the oral sex P.L. performed on the first occasion was forced by the defendant. *Id.* at 528. We said:

> "Although it is true that the law does not require useless acts of resistance [citations] nor is a child expected or required to offer as much resistance as might be expected of an adult [citation], our view of the evidence here, undertaken in the light most favorable to the prosecution, is that not only would an act or acts of resistance not have been foolish or useless, such resistance would probably have been successful. Although P.L. testified he was 'scared' of the defendant, he admitted he was not threatened by the defendant nor did the defendant hurt him ***. P.L. also testified he believed the defendant did not intend to hurt him." *Id.*

Regarding the second incident, though P.L. claimed he struggled against the defendant, we found it "highly improbable," in light of the "circumstances before and after the act," that the defendant forced P.L. to engage in it. *Id.* at 529.

¶ 76 Here, in contrast to P.L.'s actions in *Vasquez*, there was no ambiguity in D.G.'s actions as described by her and Dale. She screamed and attempted to break free while defendant grabbed her breast, but he restrained her for, as she testified, "several seconds." Defendant suggests that, had D.G. attempted greater resistance, it "would probably have been successful" (*id.* at 528). This is but speculation on defendant's part. A rational trier of fact had adequate evidence in D.G.'s physical struggles and verbal protests to conclude that defendant used force to effectuate his sexual touching of her.

¶ 77 B. Ineffective Assistance of Counsel

¶ 78 Defendant next argues that his trial counsel was ineffective for failing to cross-examine D.G. on the descriptions of the July 13 assault she gave in her statement to police and in her testimony at the February 2008 trial.

¶ 79 Both the United States and Illinois Constitutions guarantee a defendant the right to effective assistance of counsel. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. Claims of ineffective assistance of counsel are evaluated under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). *People v. Harris*, 225 Ill. 2d 1, 20 (2007). Under *Strickland*, defense counsel was ineffective only if (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694. "A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *Id.* at 694. Failure to establish either prong is fatal to the claim. *Id.* at 697.

¶ 80 "A criminal defendant has a fundamental constitutional right to confront the witnesses against him and this includes the right to conduct reasonable cross-examination." *People v. Davis*, 185 Ill.2d 317, 337 (1998). "Generally," however, "the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *Id.* at 326-27. "[A defendant] can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable." *Id.* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. "[T]he defendant must prove that counsel made errors so serious, and that counsel's performance was so deficient, that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." *People v. Richardson,* 189 Ill. 2d 401, 411 (2000). "Generally, matters of trial strategy will not support a claim of ineffective assistance of counsel unless counsel failed to conduct any meaningful adversarial testing." *People v. Patterson*, 217 Ill. 2d 407, 441 (2005).

¶ 81 Defendant offers multiple generalities about trial counsel's performance in cross-examining D.G. Defendant claims that it was "imperative for Defendant's trial counsel to confront [D.G.] with every falsehood and inconsistency upon which she constructed the fundamentally bizarre description of the relationship she claimed to have with the Defendant leading up to the events of July 13." He

further claims that trial counsel erred by "never confron[ting] [D.G.] with the patent falsities of both her statement and her testimony at the first trial." The only specific failure defendant charges, however, is trial counsel's failure to cross-examine D.G. on her prior descriptions of the July 13, 2005, assault. Defendant notes that, while D.G. described only one act of inappropriate touching on July 13, she testified at the first trial that defendant not only grabbed her breast but also placed his hand down her shorts. Further, in her written statement to police, D.G. stated that defendant twice placed his hand down her shirt.

¶ 82 In declining to impeach D.G. on these prior descriptions, trial counsel's representation did not fall below an objective standard of reasonableness. Counsel had to consider whether the discrepancies would discredit D.G. enough to justify the potential detriment to defendant of the mention of further sexual aggression by him. Defendant suggests that the impeachment would have tended to show that D.G. fabricated her account of July 13, 2005. Trial counsel, however, could have reasonably concluded otherwise given the passage of time since the incident. D.G. gave her written statement in February 2006. The first trial occurred in February 2008 and the second trial in October 2011. Counsel could have justifiably believed that confronting D.G. with descriptions that she gave significantly closer in time to the alleged incident would more likely reveal an understandably fading memory than an intent to fabricate—and in any case would show a defendant even more sexually aggressive than depicted in her current testimony. Given the delicate benefit-risk balance, we cannot conclude that counsel's decision was unreasonable.

¶ 83 Moreover, even if counsel's decision to forgo the impeachment was unreasonable, defendant was not prejudiced, as there was no reasonable probability that the impeachment would have changed the outcome of the proceeding. We recognize that defendant and D.G. gave starkly

conflicting accounts of their relationship prior to July 13, 2005. D.G.'s account of the unwanted sexual contact on July 13 was, however, substantiated by Dale Stein, whose credibility and reliability were not seriously questioned at trial. Defendant's purpose in calling Naqvi was to undercut Dale's account, but her testimony suffered from two shortcomings. First, there was nothing to exclude the possibility that D.G. and defendant had more than one encounter on July 13 and that Dale and Naqvi were witnessing different ones. Second, even if Naqvi and Dale were witnessing the same encounter, Naqvi admitted that she left the area of 517 Bounty for five minutes, which, we note, was adequate time for the assault to occur given its relative brevity as recounted by D.G. and Dale.

¶ 84 We conclude that trial counsel was not ineffective for failing to confront D.G. with her prior accounts of the July 13 incident.

¶ 85 We note that defendant has not reasserted on appeal the claim in his posttrial motion that trial counsel was also ineffective for not attempting to introduce Bill's cell phone records into evidence.

¶ 86 C. Cross-Examination of D.G. Regarding the Phone Records

¶ 87 Defendant's final contention on appeal is that the trial court erred by truncating defendant's cross-examination of D.G. on calls made from the cell phone that she shared with Bill. Defendant attempted cross-examination both on calls to the Stein residence and calls to defendant.

¶ 88 Regarding the calls to the Steins, defendant develops no argument for the relevance of the calls, but simply states that there was error because of the "potential light they might [have] shed on the relationship described by [D.G.] between her and both the Defendant and the Steins." We will not consider this claim of error further.

¶ 89 Defendant does, however, develop an argument regarding the calls to him. We note that a defendant's constitutional right to cross-examination is not unlimited. " '[T]he Confrontation Clause

guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (Emphasis in original.) *People v. Jones*, 156 Ill. 2d 225, 243-44 (1993) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). "A trial judge retains wide latitude to impose reasonable limits on such cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or of little relevance." *People v. Kliner*, 185 Ill. 2d 81, 134 (1998). "The latitude permitted on cross-examination is a matter within the sound discretion of the trial court, and a reviewing court should not interfere unless there has been a clear abuse of discretion resulting in manifest prejudice to the defendant." *Id.* at 130. "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 90 In denying defendant's posttrial claim of error regarding the phone calls, the trial court gave as its initial reason that the phone calls were not relevant. The court reasoned that there was no evidence that D.G. was in such "extreme fear" of defendant that she would not be likely to speak with him on the phone. The court also recognized, however, that if defendant had admitted to the sexual contact on July 13 but claimed it was consensual, the records might possibly be relevant. The court was correct that defendant did not admit to such contact, though defense counsel suggested in closing that Dale Stein might have witnessed D.G. and defendant "hug" that day (and that D.G., upon seeing Dale, would have quickly pushed away from defendant to avoid suspicion). Notably, the trial court also determined that the phone records would be "cumulative" of other evidence.

¶ 91 Defendant argues to us that the phone records would have "len[t] obvious support" to his version of his relationship with D.G., namely his testimony that D.G., in addition to her frequent

sexual overtures toward him, made numerous phone calls to him, as many as 12 a day, in which she spoke to him about Bill. Defendant submits that D.G. should have been asked to explain "the more than 500 phone calls placed to the man she depicted as a constant ogre when in her presence."

¶ 92 The trial court did not, we determine, abuse its discretion in disallowing inquiry into the phone records. The court reasonably determined that the evidence was cumulative of other evidence of calls. Presumably, the court had in mind D.G.'s admission that there were "lots of phone calls going on" and Naqvi's and Nauman's testimony that defendant received calls from D.G. on his cell phone.

¶ 93 Moreover, there was considerable other evidence that D.G. not only endured defendant's company while he was at 517 Bounty, but also invited additional interaction. D.G. herself testified that, on days he was at 517 Bounty at dinner time, she invited him to eat with her (it is not clear whether Bill, who worked all afternoon and evening, was even present on those occasions). Nauman testified that he saw D.G. drinking coffee with defendant, and Quinley testified that she observed D.G. remark to defendant that he had promised to take her to lunch. Nauman also stated that D.G. asked defendant to lend her money.

¶ 94 Another factor, not noted by the trial court, that weighed against admission of the phone records was the fact that the line was shared by D.G. and Bill, and, hence, the records themselves did not distinguish between calls from D.G. and calls from Bill. Counsel who filed the September 2008 posttrial recalled that Bill was not permitted to make calls from work, but counsel did not substantiate this assertion. Even if most of the calls were from D.G., the reason for them is simply a matter of speculation. Defendant asserts that they corroborate his claim of D.G.'s profound attraction to him, but, as the State notes, it is also possible that D.G. was pleading with defendant

to cease *his* advances and not retaliate against her and Bill. Given this uncertainty, it was well within the trial court's discretion to determine that the phone calls ultimately indicated no more than that D.G. was willing to engage with defendant, of which there was already ample evidence received.

¶ 95 Furthermore, even if the trial court did abuse its discretion in excluding the phone records, there was no "manifest prejudice" to defendant (*Kliner*, 185 Ill. 2d at 130). Whatever the prior relationship between D.G. and defendant, there was abundant evidence upon which a rational trier of fact could conclude that D.G. was subjected to unwanted sexual touching on July 13, 2005. Dale Stein's testimony, unimpeached and reliable, corroborated D.G.'s account of the assault. The defense presented Naqvi's observations on July 13, as contrary to Dale's. Not only, however, is it unclear that they were observing the same encounter between D.G. and defendant that day, but Naqvi admitted that she was absent from the area for a significant period of time while D.G. and defendant were interacting.

¶ 96 We conclude, therefore, that there could have been no prejudicial error in the trial court's limiting the cross examination of D.G.

¶ 97 III. CONCLUSION

¶ 98 For the foregoing reasons, we affirm the judgment of the circuit court of Boone County.

¶ 99 Affirmed.