2014 IL App (2d) 120914-U
No. 2-12-0914
Order filed September 30, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WILLIAM S. MUTH, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 08-CF-385 Honorable T. Jordan Gallagher, David R. Akemann, Judges, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Holding*: The trial court did not abuse its discretion at the conclusion of the reliability hearing when it allowed the DVD of the child victim's interview into evidence, provided that she testified at trial. The trial court did not abuse its discretion when it allowed expert witness testimony regarding the general dynamics of child abuse. The trial court properly determined at trial that M.M. was available as a witness and had testified, thus properly admitted the DVD into evidence. Defendant was not denied the effective assistance of counsel at trial for the failure to renew a motion to exclude the child victim's statement. Last, we determine that multiple convictions were proper and did not violate the one-act, one-crime rule. We affirmed the judgment of the trial court.

¶ 2 In 2012, a jury convicted defendant, William S. Muth, of six counts of predatory criminal sexual assault of a family member (720 ILCS 5/12-14.1(a)(1) (West 2006)) and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-13(a)(3) (West 2006)). The trial court sentenced defendant to six consecutive terms of six years' imprisonment for predatory criminal sexual assault and two concurrent four-year sentences for aggravated criminal sexual abuse. On appeal, defendant contends that: (1) the trial court erroneously admitted M.M.'s recorded statement under section 115-10 of the Code, and erroneously allowed Laurie Riehm to testify about general behavior patterns of sexually abused children; (2) the State failed to prove his guilt beyond a reasonable doubt; (3) defense counsel provided ineffective assistance when she failed to ask the trial court to reconsider a prior ruling, which allowed M.M.'s recorded statement under section 115-10 of the Code after subsequently learning that M.M. had admitted to her therapist that her biggest problem in life was her lying; and (4) some of his convictions should be vacated under the one-act, one-crime, rule. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 25, 2008, a grand jury returned a 16-count indictment, charging defendant with committing offenses against his 5-year-old daughter, M.M. All of the charged conduct was alleged to have occurred during the time frame of January 1, 2007, through February 7, 2008. Counts 1, 2, and 3 alleged that defendant committed the offense of predatory criminal sexual assault of a child, a violation of section 12-14.1(a)(1) of the Criminal Code of 1963 (the Criminal Code) (720 ILCS 5/12-14.1(a)(1) (West 2006)), in that

> "defendant, a person [17] years of age or over, committed an act of sexual penetration with M.M., a child under the age of [13] years, in that the defendant put his penis in the sex organ of M.M."

Counts 4, 5, and 6 alleged that defendant committed the offense of predatory criminal sexual assault of a child, a violation of section 12-14.1(a)(1) of the Criminal Code, in that

> "defendant, a person [17] years of age or over, committed an act of sexual penetration with M.M., a child under the age of [13] years, in that the defendant put his penis in the anus of M.M."

Counts 7 and 8 also alleged the commission of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)); however, the State dismissed these two counts prior to trial. Counts 9 and 10 alleged that defendant committed the offense of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2006)), in that

> "defendant, a family member of M.M., knowingly committed an act of sexual conduct with M.M., a female minor under 18 years of age when the act was committed, in that the defendant touched the sex organ of M.M. with his hand for the purpose of the sexual arousal or gratification of the defendant or M.M."

Counts 11 and 12 also alleged that defendant committed the offense of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2006)), in that

> "defendant, a family member of M.M., knowingly committed an act of sexual conduct with M.M., a female minor under 18 years of age when the act was committed, in that the defendant touched the buttocks of M.M. with his hand for the purpose of the sexual arousal or gratification of the defendant or M.M."

Counts 13, 14, 15 and 16 also alleged the commission of aggravated criminal sexual abuse (720 ILCS 5/16(c)(1)(i) (West 2006)); however, the State dismissed these four counts prior to trial.

¶ 5 On January 7, 2011, the State filed an intention to offer out-of-court statements pursuant to section 115-10 of the Code of Criminal Procedure (the Code) (725 ILCS 5/115-10 (West

2006)). The State sought to introduce a videotaped statement that M.M. had given to David Berg, an investigator. On February 23, 2011, the trial court conducted a hearing on the State's motion. The State's first witness was Elizabeth Muth, defendant's wife. Elizabeth testified that M.M. was their daughter. Elizabeth testified that, in early 2007, she was driving M.M. to another person's house, and M.M. commented to her that defendant had "cleaned me with his pee-pee." M.M. was approximately five years of age at that time. Elizabeth asked M.M. what she had just said, and M.M. repeated it. They were nearly at their destination, so Elizabeth told M.M. that they would talk about it later. In the early evening of the same day, Elizabeth and defendant had a conversation with M.M. about what she had said earlier. Elizabeth testified that M.M. said that "she did not know why she said it; she made up a story; and she was sorry that she said something that was hurtful." Elizabeth testified that one challenge she and defendant were experiencing with M.M. at that time was getting M.M. to tell the truth and not make up stories. Elizabeth indicated to M.M. that what she had said did not "really ring true," and they wanted to know why she said that.

¶ 6 On cross-examination, Elizabeth testified that M.M. was not afraid to discuss the matter in defendant's presence. M.M. did not mention anything concerning her vagina or her buttocks or her mouth. Elizabeth further testified that she did not want to take M.M. to the Child Advocacy Center, but the police told her that she had to. She was not allowed to be present with M.M. during the interview; she was not allowed to have an attorney for M.M. present. On redirect examination, Elizabeth testified that M.M. referred to the specific areas of her body as her "butt" and "pee-pee."

¶ 7 David Berg testified that he was employed with the Kane County State's Attorney's office as an investigator at the Kane County Child Advocacy Center. In 1989, Berg was

designated by the Elgin police department to be the primary investigator of child sexual abuse cases. Since then he has attended conferences and received training related to investigating child sexual abuse and conducting forensic interviews of children. Berg explained that a "forensic interview of a child" meant "talking to a child and giving them the opportunity to explain *** things that have happened in their life, if anything, and *** to record the things they say *** in a nonleading fashion." Berg explained "nonleading" as he does not ask questions that suggest answers.

¶ 8 Berg further testified that on February 7, 2008, he interviewed M.M. at the advocacy center; the interview was video recorded and copied to a DVD. Berg did not recall being asked by Elizabeth to be in the interview room with M.M., and even if she did, Berg indicated that he would not have allowed it based on the center's policy. The trial court admitted the DVD into evidence for purposes of the hearing, and then viewed it.

¶ 9 The DVD reflected that M.M. knew her name, how to spell her name, and the names of her family members. M.M. knew her age and the age of her two younger brothers. M.M. was in first grade and indicated where she attended school. M.M. said that they spent the night at her grandmother's house but her dad had gone with the police somewhere. M.M. felt safe at the house and knew she could call the police if there was a fire or a robber or something bad happening. Berg continued, "You can go and knock on [the neighbor's] door or ring their doorbell and tell them would you please call the police [or] the fire department. And I bet they would call for you. Right? I bet that's good. Now did [your] mom tell you anything else? Did [your] mom ever tell you about parts of your body that nobody should touch?"

¶ 10 M.M. responded that her mother had talked to her about one part, "[m]y bottom" and that "nobody should touch it except mommy and daddy." M.M. continued, "sometimes they have to

clean *** because I don't wipe my bottom very good sometimes." Berg asked who helped her, and M.M. responded, "My mommy or my daddy. Sometimes in the middle of *** the night my daddy wakes me up when he cleans me" and "he wakes me up I just fall back to sleep and then he cleans me." Berg asked what part is cleaned, and M.M. responded "[m]y bottom"; the "part where I go pee pee because I don't wipe that." M.M. explained that her dad usually cleaned her because he "stays up really late and watches the game." M.M. said that her dad "doesn't come to my room all the time." M.M. said that she wears underwear, a t-shirt, and pajamas when she goes to bed.

¶ 11 Berg then asked M.M. what touched her when defendant cleaned her bottom. M.M. responded that she did not know. After M.M. indicated again that she did not know, Berg stated, "You must have some idea." M.M. continued to respond, "I don't know." Berg continued, "Is it something that's already in your room? Is it something that your daddy brings with him when he comes in your room? Is it some part of your daddy's body?" M.M. responded twice with her head shaking no, and once with "I don't know." Berg stated, "Oh yes you do. Tell me what, *** what is that thing that he touches you with?" M.M. responded, "I don't know." Berg asked, "Well, *** is it a part of his body?" M.M. responded, "I don't know that?" Berg replied, "I think you do. Don't ya? You remember. You can help me cause that's, you know, you came to help me and I just want to make sure to understand all the things that happened and so *** you said *** he comes in and cleans you with that thing, right? Ok."

¶ 12 M.M. continued to express that she did not know, and then Berg showed her a drawing of a girl's body. Berg asked her to identify parts of the body that he was pointing to on the drawing. M.M. identified the parts where one goes "pee pee" and one goes "poo poo." M.M. indicated that her dad cleaned her "pee pee" part.

¶ 13 Berg again asked M.M. what defendant used to clean her with or what touches her bottom when he cleans her, and she responded that she did not know. Berg asked, "Can you at least tell me, remember I asked before, is it something he brings with him?" M.M. shook her head, indicating that it was not. Berg asked, "Is it some part of his body?" M.M. responded, "I think so." Berg asked if she knew what part of his body it was, and M.M. described it as "this thing that my brother has and it sticks out and you go potty out of it and it has a little hole but I don't have it." M.M. knew defendant had one because "sometimes I wake up *** [a]nd I just feel him and after a while I fall back to sleep."

¶ 14 Berg asked what defendant's looked like, and M.M. responded, it has a hole where *** he goes potty and he like cleans my bottom out with it." Berg asked what it felt like, and M.M. responded that "[i]t tickles and sometimes he pushes in, it hurts a little." Berg continued, "when he cleaned your bottom, it was in your bed[,] right?" M.M. responded, "Uh huh. He cleans it in my bed all the time" and "when he comes in, I *** am still asleep and then when I feel *** he (sic) touching me then I start to wake up and fall back asleep and I still try to go back to sleep."

¶ 15 Berg asked M.M. to use the picture to show where defendant had touched her with his thing, and M.M. "circled the bottom where the pee pee comes out," and also said that "[i]t touches me where I go poo poo." M.M. explained that "[i]t touches in the middle *** [w]here I go poo" and that "[i]t hurts sometimes." M.M. stated that, when it happens, "[i]t's always in the night." M.M. did not know the name of the part that touches her.

¶ 16 Berg asked how many times it happened, and M.M. said that "it doesn't happen all the time," but that it did happen on different nights. M.M. remembered Christmas, and said that it had happened in January.

¶ 17 Berg next asked M.M. whether "any other part of your daddy touch you?" and she responded, "[h]is hands." M.M. explained, "[‘c]ause sometimes he like touches this or the cheeks to get inside," and "he *** parts my bottom ‘cause he has to get where I go." M.M. said that "[i]t doesn't feel like anything. It *** just feels like *** my bottom[’]s stretching." M.M. added that her mother "sometimes touches where I go pee because she has to put lotion on my bottom [‘]cause sometimes my bottom itches." Berg asked whether defendant put lotion on her, and M.M. responded, "when *** he cleans me sometimes." M.M. told Berg they had different kinds of lotion, and it's kept all over the house. Berg asked what defendant did with the lotion, and M.M. responded that "[h]e puts it on my bottom and he uses this part and he rubbed it all around," both where she goes "pee pee" and where she goes "poo," "[‘]cause sometimes it itches."

¶ 18 Berg asked whether any other part of defendant's body touched her, and she responded "No." Berg asked if defendant ever gave her kisses, and she said yes, "[o]n her cheek or on her lips. M.M. said that her mother and grandmother also kiss her.

¶ 19 Berg asked M.M. whether she thought about telling anyone, and she responded that she did not want "to tell my teachers about my bottom." Berg asked what defendant would do or say after he cleaned her bottom, and M.M. responded, "[h]e doesn't say anything[;] he just pulls my panties and my pants or my skirt back down or up and then he goes away and goes to bathroom and then goes to bed *** [o]r back downstairs."

¶ 20 Berg asked M.M. whether she had "seen anything come out of [her] daddy's thing" and she responded that she had not, but she knew it was the same "cause my brother has the same thing." Then M.M. asked if she could ask Berg a question: "Why do our, why does like our skin

have little hairs all over it?" Berg explained that little girls did not "get hair, but men sometimes get hair on their arms." M.M. said it looked "more like string" to her.

¶ 21 Thereafter, Berg identified the State's exhibits. Exhibit No. 2 was a rear drawing of a preschool female with the buttocks circled. Exhibit No. 3 was a frontal drawing of a preschool female with a drawing around the vaginal area. Exhibit No. 4 was a frontal drawing of an adult male with circles around the penis and the hands.

¶ 22 On cross-examination, Berg admitted that he did not recall whether the topic of lotion being applied to M.M. was discussed. Berg admitted that he did not ask any follow-up questions when M.M. said that her parents disciplined her. Berg admitted that he did not ask anyone whether M.M. was prescribed medication for any physical condition. Berg also agreed that M.M. admitted in the interview that "she lies or tells stories."

¶ 23 The trial court reserved its ruling, and on April 14, 2011, it conducted a hearing and issued its decision. The trial court noted that it had ordered and reviewed the transcript, reviewed the DVD, "and based on the evidence and the law, I will allow the statements to be admissible as long as she testifies."

¶ 24 On April 30, 2012, the parties appeared before the trial court on scheduling, pending motions, and other pretrial matters. One of the pending motions was defendant's motion to reconsider the trial court's prior denial of his motion regarding impeachment by conviction. The trial court had previously ruled that defendant's prior conviction of possession of child pornography would be admissible for impeachment purposes should he choose to testify in his own defense. Defense counsel argued that, subsequent to the trial court's ruling, she received the counseling records of M.M., which reflected that M.M. had been court ordered to attend counseling sessions. She also received documents turned over in discovery that revealed M.M.

had filled out forms for the counselor indicating that M.M. believed that one of her biggest problems was telling lies. Counsel noted that on the forms there were sentences with a blank for the child to complete. "One of them states, 'I need help with' blank. [M.M.] wrote in lying. 'A habit that I would like to change is' – she wrote in lying. 'I am not proud of' blank, and she wrote in lying." With this information, defense counsel asked the trial court to reverse its prior ruling so defendant could testify without any kind of taint of conviction. Following argument, the trial court "conditionally granted" defendant's motion to reconsider and prohibited the State from using defendant's prior conviction so long as his testimony relates to the incidents alleged in the indictment and not his character. The trial court continued that, if defendant testified regarding his character, then the State would be allowed on rebuttal to introduce evidence of impeachment by prior conviction.

¶ 25 On June 12, 2012, defendant filed a motion to prohibit the State from calling Laurie Riehm, a social worker, as an expert witness to testify about general behavior patterns of children who have been sexually assaulted. In a written order dated July 15, 2012, the trial court noted that it had already indicated that Riehm would not be allowed to testify without providing the defense with an opportunity to speak with her. The trial court also noted that it would hear the proffered testimony outside the presence of the jury prior to its being offered to the jury. The trial court, after hearing the arguments of the parties and reviewing relevant case law, ruled that, if the prerequisites from *People v. Atherton*, 406 Ill. App. 3d 598 (2010), were met, and after hearing the testimony, it may permit the same. Later, during trial, the trial court ruled that Riehm's testimony about her credentials as an expert "in the area of dynamics of child sexual abuse, including disclosures," was admissible.

¶ 26 At the June 2012 jury trial, M.M. testified that she was 11 years of age and had two younger brothers. M.M. recalled that, when she was still in kindergarten and first grade, her bedtime routine included baths on Saturday night. She recalled her bedtime attire was a nightgown or a shirt with bottoms. Her mother helped to give her baths, and M.M. testified that she bathed with her brothers. Either her mother or her father would say prayers to her when she went to bed. M.M. testified that she had not seen her father for four years.

¶ 27 M.M. further testified that she could recall that she had difficulties wiping herself when she would use the bathroom. She recalled that she used to wet the bed, and her mother or father would clean up and change her pajamas. M.M. did not recall talking to Berg or seeing the State's exhibits depicting anatomical drawings of a girl. M.M. did not feel comfortable saying the names of her private body parts. M.M. could not remember whether her father ever cleaned "the parts" where she went to the bathroom. M.M. testified that she did not think that a boy's or man's body parts or private parts had ever touched her. M.M. recalled that her mother would apply lotion to her bottom.

¶ 28 Following M.M.'s direct testimony, defense counsel objected to her testimony and to the State's intended use of M.M.s videotaped statement on the basis that M.M.'s testimony had not met the requirements of section 115-10 of the Code. After hearing arguments, the trial court found that, while M.M. did not recall being abused, she did answer questions put to her by the State. In denying defendant's motion, the trial court ruled that, because M.M. could be cross-examined, the State would be permitted to use the videotaped statement.

¶ 29 On cross-examination, M.M. testified that she had recently finished the fifth grade, was on the honor roll, and was a straight "A" student. M.M. recalled that, when she was in first grade, she had problems wiping herself properly and wetting her bed. The front and back of her

bottom would get irritated. M.M.'s pediatrician was Dr. Slavik. She would develop rashes and infections on her private parts, and it would hurt to wipe. M.M.'s mother and father would put lotion on both the front and back parts of her bottom. Her parents taught her how to wipe properly.

¶ 30 Weekly for the past four years, M.M. had been going to a female counselor. The counselor taught her about the different parts of the human body. M.M. did not recall ever seeing defendant's penis. M.M. admitted that she had a problem of lying and that she had lied to her mother and her father. M.M. had also told her counselor that one of her biggest problems was telling lies, including when she was in kindergarten and first grade. When she would get caught lying, she would apologize.

¶ 31 Elizabeth Muth next testified on behalf of the State. Elizabeth testified that, after M.M. was potty trained, she had difficulty wiping herself correctly after using the toilet. M.M. would also urinate in her underwear, which would cause irritation, redness, and infections. M.M. would then have pain when using the toilet. Their pediatrician instructed her and defendant to apply lotions, like Desitin, to relieve M.M.'s irritation. Although M.M.'s hygiene issues improved over time, there was still an ongoing problem. On occasion in the past few years, M.M. has had irritation and itching, which required Elizabeth to clean M.M. and apply lotions.

¶ 32 Elizabeth testified that, early one morning, between January and May 2007, when M.M. was five years old, she made "an offhand[ed] comment" to Elizabeth while she was driving M.M. to their carpool drop-off point. Before arriving, M.M. said, "daddy cleaned me with his pee-pee." At this time, M.M. had been repeatedly lying. Later that day, Elizabeth talked to defendant and suggested that, because M.M. had made the comment about him, he should talk to M.M. That evening, defendant talked to M.M. in her bedroom. Elizabeth briefly stood outside

the bedroom and listened to them talking, and then went downstairs. A few minutes later, defendant came downstairs. The conversation between defendant and M.M. lasted approximately three to four minutes. A few minutes after defendant came downstairs, M.M. came downstairs and told them what she had said "about daddy" was a lie and she was sorry.

¶ 33 Jamil Brown, an officer with the South Elgin police department, testified that he had interviewed Elizabeth on February 6, 2008. Elizabeth said that, when she woke up M.M. for school one morning, M.M. commented that she had needed to be cleaned during the night and that defendant had cleaned her with his "thing," and then "washed his hand." Elizabeth stated that she questioned M.M. about the statement, and determined that it was not serious. Elizabeth did not indicate to Brown that M.M. later admitted it was a lie.

¶ 34 The State next tendered Laurie Riehm, a licensed clinical social worker, as an expert witness in the area of dynamics of sexual abuse, including how children disclose sexual abuse, piecemeal disclosures, delayed disclosures, retraction, recantation or lack of memory, the impact of disclosures on a child, and the physical act perpetrated on the child. Defense counsel cross-examined Riehm, and the parties presented argument. The trial court again reviewed the prerequisites from *Atherton* and determined Riehm would be allowed to opine generally in the indicated areas.

¶ 35 Riehm testified that she has been working with traumatized children for approximately 26 years, particularly children who have been sexually abused. Approximately 75% of the children she works with are alleged victims of sexual abuse. Riehm worked with a doctor in developing a video demonstrating how an abused child recalls details of an "event." She has been qualified as an expert witness in the area of "dynamics of child sex abuse," which concerned disclosure, recantation, minimization, and acting out issues. Riehm had never met M.M., did not review any

materials or police reports concerning the present case, and would testify only about general principles in her field.

¶ 36 Riehm testified that, approximately 93% of the time, children are sexually abused by someone they know and trust. The closer the relationship of the child to the offender, the more difficult it was for the victim to talk about the abuse. Riehm testified that "some children understand the mother's financial dependency on the alleged offender." In cases where the child develops mental health problems, more than 30% of the time the problems were "caused by the mother not believing the child's claim of sexual abuse." Even if the abuse is not believed by a parent, the child may still do well in school and make friends. However, sexual abuse could be manifested by symptoms such as bed-wetting, and toileting problems were fairly common with sexually abused children. Some abused children who suffer severe stress could have developmental regression. They might regress from developmental milestones that they had previously accomplished. The child might have problems with hygiene or toileting, which was a manifestation of the stress that the child was experiencing.

¶ 37 Riehm testified that recantation occurs when an abused child attempts to take back what he or she originally had said. Some children will recant after they realize family members have been removed from their life. A child may also recant if he or she sees financial pressure placed on the family. Some children develop coping skills that make it difficult for them to recall and describe the events. Riehm testified that a person conducting a forensic interview with a child should ask nonleading questions and should not challenge the child when the child indicates that "she does not recall being abused."

¶ 38 Berg testified regarding his interview with M.M. at the Center on February 7, 2008. M.M. initially responded that defendant had cleaned her with a "thing." During the interview,

Berg showed M.M. anatomical drawings of a girl and a boy. The interview had been recorded and copied onto a DVD. Over defendant's objection, the transcript was published to the jury, and the DVD was played for the jury. On cross-examination, Berg acknowledged that it was he who had first used the term, "the thing," during the interview and not M.M.

¶ 39 At the close of the State's case in chief, defendant moved for directed verdicts. The State argued that it had shown three separate incidents of predatory criminal sexual assault of a child with each incident involving sexual penetration of both the sex organ and anus (counts 1 through 6): the "outcry to the mother" in early 2007; (2) M.M.'s statement to Berg during the interview that the last time "it" happened was January 21, 2008; and (3) "And then the third one *** in her words, she was stating that there were other times it would happen. I mean, we don't have to prove specific dates, obviously, but this happened more than just three times."

¶ 40 With respect to the aggravated criminal sexual abuse charges (counts 11 and 12), the State argued that it had proved the charges through M.M.'s description that "sometimes he would use his hands, and he would, you know, touch her buttocks, and he would part her buttocks, and once again, because she didn't say, hey, this only happened one time, and she was saying sometimes this happened, so it happened more than once."

¶ 41 The trial court denied defendant's motion as to counts 1 through 6 and 11 and 12, taking the evidence "in the light most favorable to the State." The trial court noted that the three separate incidents of predatory criminal sexual assault were (1) "the outcry to mom"; (2) "the indication of the time period [in] the 115-10 statement"; and (3) "other times with unspecified dates in the general time period."

¶ 42 Dr. Michael Slavik testified on defendant's behalf. Slavik had been M.M.'s pediatrician since birth, and he had training in diagnosing sexual abuse in children. When M.M was old

enough to urinate in a cup, she tested positive for a common urinary infection, which can indicate kidney problems. When M.M. was four years old, "there was a little bit of masturbation," which could have contributed to infections and hygiene problems. M.M. had constant problems with constipation, which many times accompanied urinary tract infections and problems with bed-wetting. When M.M. was five or six years old, she had rashes in the vaginal area and on the anus, for which he recommended ointment. He said a parent should apply ointment on a five- or six-year-old child.

¶ 43 Slavik further testified that, on February 21, 2008, he interviewed and physically examined M.M. after Elizabeth told him there had been an allegation of sexual abuse. At that time, he found no evidence of physical, sexual, or emotional abuse. In September 2009, Elizabeth brought M.M. in for a check up and informed Slavik that, over the past year, M.M. had had three urinary tract infections, "or stool incontinence." Slavik examined M.M. and found a rash over her gluteal muscles. M.M.'s private parts were normal as he had observed 18 months previously in February 2008.

¶ 44 Defendant testified on his own behalf. He testified that he never sexually assaulted M.M. M.M. had difficulties with her hygiene from ages two through five. Every night he checked his other children's diapers and M.M.'s underwear to make sure they were not sleeping in soiled clothes. Defendant had to clean M.M. two to three times a week and had to change her sheets about twice a month. The night before M.M. made the statement to Elizabeth, he had gone to M.M.'s bedroom and found that she had soiled her underwear. He changed her underwear and cleaned her. He washed her underwear and placed it on the washing machine to dry. On one occasion when M.M. was five years old, defendant's three-year-old son stood up in the bathtub and urinated on M.M., and M.M. yelled out that her brother was "cleaning her with his pee-pee."

¶ 45 In rebuttal, and over defendant's objection, the State called Dr. Sangita Rangala. Rangala testified that she provided medical services for children who may have been sexually abused, and was an expert in the medical evaluation of pediatric sexual abuse. Rangala never met with M.M. but was provided some of M.M.'s medical records. Sexually abused children have normal physical examinations because the hymen can heal within 24 hours. If the child is examined more than 30 days after the abuse, physical examinations will be normal 98-99% of the time. To find any abnormality of the anus "outside of the first 24 hours is almost unheard of." When interviewing a child about being sexually abused, the parent is asked to step out of the room unless the child wants the parent present. Rangala further testified that if a child is repeatedly asked the same question by an adult, the child will want to give a response in a manner that will please the adult.

¶ 46 In its closing argument, the State argued that defendant went into M.M.'s bedroom "almost every day of the week," pulled down her underwear and placed his penis "on her sex organ her vagina or her anus." Defendant penetrated M.M. on numerous occasions: "You had the outcry to the mother almost a year before. You had what she told Investigator Berg, that this occurred in January of 2008. Not only did he rub his part, his thing, on her pee-pee or her bottom, where she, in her words, goes poo-poo. And you heard the defendant this morning. He was in that room almost every night, every night." The State argued that the two aggravated criminal sexual abuse charges were proved by evidence that defendant admitted going in there and taking her underwear down, and that the only part he did not admit was using his penis. The aggravated criminal sexual abuse occurred when defendant placed his hands on M.M.'s buttocks and spread her "cheeks so that he could get to her anus with his penis." In rebuttal, the State argued that "we all know he was a sexual[ly] abusing her and sexually assaulting her."

¶ 47 Defense counsel argued that in the interview with Berg, M.M. stated that she did not know what had happened 33 times and that she could not remember 11 times. Before being shown the drawing of the man's penis, M.M. stated that she did not know 19 times. At the 17:49 mark of the DVD, Berg whispers to M.M., "penis."

¶ 48 Following closing arguments, the trial court instructed the jury, and the jury retired to deliberate. The jury found defendant guilty of counts 1 through 6, and counts 11 and 12. The trial court entered judgment on the verdicts and ordered a presentence investigation report. Defendant filed a posttrial motion, which was denied. The trial court thereafter imposed six consecutive 6-year sentences for predatory criminal sexual assault of a child, and two concurrent 4-year sentences for aggravated criminal sexual abuse, consecutive to the 36 years. Defendant filed a timely notice of appeal.

¶ 49 II. ANALYSIS

¶ 50 Defendant's first contention challenges two evidentiary rulings by the trial court. Defendant argues that Berg's interview techniques rendered M.M.'s statement unreliable and furthermore, M.M. was unavailable as a witness at trial, and therefore, the trial court abused its discretion when it admitted the statement under section 115-10 of the Code. Defendant's other evidentiary challenge concerns Riehm's testimony as an expert witness. Defendant contends that the trial court abused its discretion when it allowed Riehm to testify to various and general hypothetical syndromes that targeted the credibility of M.M.'s statement to Berg in an unfairly prejudicial manner and because she gave statistical probabilities about children who had been sexually abused. Defendant argues that Riehm's testimony permitted the jury to find defendant guilty based on probabilities.

¶ 51 We review evidentiary rulings for an abuse of discretion. *People v. Garcia-Cordova*, 2011 IL App (2d) 070550-B, ¶ 82. A trial court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the trial court's view. *Id.*

¶ 52 In determining whether to admit the statements made by M.M. to Berg, which allegedly identified defendant as an abuser, the trial court conducted a reliability hearing pursuant to section 115-10 of the Code. Section 115-10 states in relevant part:

> "(a) In a prosecution for a sexual act perpetrated upon 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 to the hearsay rule: * * *
>
> (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 act perpetrated upon a child.
>
> (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 either:
>
> (A) Testifies at the proceeding;
>
> (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(a), (b) (West 2012).

¶ 53 At the outset, because this issue concerns the testimony and evidence presented at the reliability hearing, we will not consider any events transpiring at trial. We note that the trial court did not set forth its reasons for finding that the time, content, and circumstances surrounding M.M.'s statements provided sufficient safeguards of reliability for their admissibility at trial. However, our supreme court has held that trial courts are not required to state the reasons for such a finding. *People v. West*, 158 Ill. 2d 155, 190 (1994). When conducting a reliability hearing, a trial court evaluates the totality of the circumstances surrounding the making of the hearsay statement. *Id.* at 164. Factors that are important in making the determination include: the child's spontaneous and consistent repetitions of the incident; the child's mental state; use of terminology unexpected of a child of similar age; and the lack of a motive to lie. *Id.* The State, as the proponent of the statements, bears the burden to show that the statements were reliable and "not the result of adult prompting or manipulation." *People v. Johnson*, 363 Ill. App. 3d 1060, 1076 (2005). A trial court's finding will not be disturbed absent an abuse of discretion. *West*, 158 Ill. 2d at 165; see also *People v. Zwart*, 151 Ill. 2d 37, 44 (1992) (holding that the State failed to demonstrate that the circumstances surrounding the victim's statements supported the reliability of those statements, as required by section 115-10).

¶ 54 In the present case, the trial court conducted a hearing in which Berg described the method and setting of his interview with M.M. Defendant was given the opportunity to cross-examine Berg and adduce the circumstances surrounding the interview that would have suggested unreliability. All of the pertinent circumstances were before the trial court. Although a brief explanation of the reasons for the trial court's determination would have been appropriate, it was not required. See *West*, 158 Ill. 2d at 190.

¶ 55 The record before us indicates that the trial court did not abuse its discretion in determining that M.M.'s statements were reliable. We first consider the timing of the statements. According to Elizabeth, in early 2007, she was driving M.M. to another person's house, and M.M. commented to her that defendant had "cleaned me with his pee-pee." M.M. was approximately five years of age at that time. Elizabeth asked M.M. what she had just said, and M.M. repeated it. Elizabeth, defendant, and M.M. then discussed the matter later that evening. Despite Elizabeth's decision not to inquire further at the time M.M. commented to her, the record reflects that M.M. accurately repeated the comment a few minutes later and then that evening when asked. Moreover, when Berg interviewed M.M. in February 2008, M.M. remained consistent with her characterization of the events, and even indicated to Berg that defendant had "cleaned her pee pee" the month prior, in January 2008. Based on the circumstances, M.M. recounted the incidents accurately and repeatedly, and to a certain extent, without delay when asked, thus rendering the statements sufficiently reliable to satisfy section 115-10 of the Code. See *People v. Edwards*, 224 Ill. App. 3d 1017, 1031 (1992) (three-month delay); *People v. Anderson*, 225 Ill. App. 3d 636 (1992) (one-month delay).

¶ 56 We next consider the content of M.M.'s statements. M.M. initially told her mother that defendant had possibly abused her when he "cleaned [her] with his pee pee." One year later, M.M. spoke with Berg regarding similar circumstances occurring with defendant. These statements consistently identified defendant as the only person who abused her, and M.M.'s description of the abuse was consistent throughout the interview. Further, M.M. consistently replied that only defendant cleaned her in the evening, even when Berg asked whether her mother ever cleaned her at night.

¶ 57 Other circumstances support the trial court's ruling. The questions asked of M.M. by her mother and Berg were not unduly suggestive or coercive. See *People v. C.H.*, 237 Ill. App. 3d 462, 469 (1992). It also does not appear that the environment of the interview was unduly coercive. Berg was the only person in the room with M.M. As reflected above, it appears that Berg did ask some leading questions and did encourage M.M. to be more candid. However, this is understandable in light of M.M.'s age and the need to focus the interview, rather than to appear threatening or intimidating. Berg's repetition of questions to M.M. following her responses of "I don't know" seemed to help transition the interview to a point where M.M. was responding more substantively given her possible reluctance or embarrassment at describing the details of the incidents. See *People v. Edwards*, 224 Ill. App. 3d 1017, 1031 (1992) ("It is entirely unrealistic to expect a child to speak about such topics in the course of casual conversation."). M.M. also explained why she did not tell anyone; she did not feel comfortable discussing her "bottom" with her teacher. The DVD reflects that, at one point, M.M. initiated her own questioning of why there seemed to be "little hairs all over it." It appears that M.M.'s responses were in her own words. Even if defendant's assertion is true that Berg whispered "penis" to M.M. during the interview, M.M. never repeated the word in a response to his questions. That statements were made in response to questions, even leading questions, do not render them inadmissible. See *Edwards*, 224 Ill. App. 3d at 1031; *People v. Deavers*, 220 Ill. App. 3d 1057, 1070 (1991). The DVD and the transcript of the DVD do not support defendant's argument that M.M. was led to provide incriminating statements about him. Also, M.M. used language consistent with that of a five- or six-year-old child, and the record reflects no evidence of a motive on to fabricate the allegations. We conclude that the time, content, and

circumstances surrounding the hearsay statements provided sufficient safeguards of reliability, and hold that the trial court did not abuse its discretion in determining their admissibility for trial.

¶ 58 With respect to Riehm's testimony as an expert witness, defendant contends that the trial court abused its discretion when it allowed Riehm to testify to various and general hypothetical syndromes that targeted the credibility of M.M.'s statement to Berg in an unfairly prejudicial manner and because she gave statistical probabilities about children who had been sexually abused. Defendant argues that Riehm's testimony permitted the jury to find defendant guilty based on probabilities.

¶ 59 The Illinois Supreme Court has set out the standard for qualification of an expert witness in *People v. Miller*, 173 Ill. 2d 167 (1996):

> "Whether an individual is an expert on a particular subject is a matter generally reserved to the sound discretion of the trial court. [Citation.] An individual will be allowed to testify as an expert if his experience and qualifications afford him knowledge which is not common to laypersons, and where such testimony will aid the trier of fact in reaching its conclusions. [Citation.] An expert need only have knowledge and experience beyond that of the average citizen. [Citation.] There is no predetermined formula for how an expert acquires specialized knowledge or experience and the expert can gain such through practical experience, scientific study, education, training or research." *Id.* at 186.

¶ 60 More specifically, section 115-7.2 of the Code provides:

> "In a prosecution for an illegal sexual act perpetrated upon a victim, including but not limited to prosecutions for violations of Sections 12-13 through 12-16 of the Criminal Code of 1961, or ritualized abuse of a child under Section 12-33 of the Criminal Code of 1961, testimony by an expert, qualified by the court relating to any recognized and accepted form

of post-traumatic stress syndrome shall be admissible as evidence." 725 ILCS 5/115-7.2 (West 2012).

¶ 61 The purpose of section 115-7.2 of the Code is to provide for the admission of an expert witness's testimony concerning whether the victim's behavior is consistent with known syndromes. *People v. Pollard*, 225 Ill. App. 3d 970, 978 (1992). Section 115-7.2 does not require the expert witness to label his or her theory as posttraumatic stress syndrome, as long as the witness testifies regarding behavioral patterns typically manifested by victims of sexual abuse. *People v. Wasson*, 211 Ill. App. 3d 264, 272 (1991). The adequacy of an expert witness's qualifications is a matter within the sound discretion of the trial court that will not be disturbed on review absent an abuse of that discretion. *People v. Atherton*, 406 Ill. App. 3d 598, 614 (2010) (citing *People v. Petitt*, 245 Ill. App. 3d 132, 145 (1993)).

¶ 62 In the present case, Riehm has knowledge and experience of child sexual abuse beyond that of the average citizen; for example, 26 years of experience working with traumatized children who have been the alleged victims of sexual abuse. The trial court did not abuse its discretion in finding that Riehm met this standard. See *Miller*, 173 Ill. 2d at 186. With respect to the standards set forth pursuant to section 115-7.2 of the Code, we conclude no abuse of discretion occurred here either. Riehm testified that she had never spoken with M.M. and had not reviewed any of her materials, and further, never commented on M.M.'s credibility. See *Atherton*, 406 Ill. App. 3d at 614-15. Her testimony reflected a discussion of her training and experience about generally accepted principles in her field. Riehm's testimony was properly admitted and it was defendant's responsibility to challenge the reliability of the basis for Riehm's statistics on cross-examination, which defendant did competently. Statistics are admissible as relevant to identification, and any challenges to their reliability go only to the weight to be given

the evidence. *People v. Redman*, 135 Ill. App. 3d 534, 540 (1985). The weight to be given to Riehm's testimony was properly left to the jury, and we find no abuse of the trial court's discretion in allowing Riehm to testify.

¶ 63 Defendant next challenges the sufficiency of the evidence. When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, " 'the relevant question is 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.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The reviewing court should not substitute its judgment for that of the trier of fact, who is responsible for weighing the evidence, assessing the credibility of witnesses, resolving conflicts in the evidence, and drawing reasonable inferences and conclusions from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). However, a reviewing court must set aside a defendant's conviction if a careful review of the evidence reveals that it was so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 64 Defendant asserts that the State's evidence was primarily based on the recorded statement M.M. gave to Berg when she was six years of age and argues that the statement was rendered untrustworthy by Berg's suggestive and manipulative interviewing techniques, which elicited the accusations of abuse. Defendant argues that, even if M.M.'s statement was reliable, she was "not available as a witness as intended by the statute." Defendant also argues that M.M. did not describe the elements of the charged offenses in sufficient detail to support any of the convictions but for, at most, two convictions for predatory criminal sexual assault of a child.

¶ 65 We have already determined that the trial court's ruling at the reliability hearing was not an abuse of discretion. Therefore, our analysis here will focus on whether M.M. was "available as a witness" at trial. Section 115-10 of the Code allows for a child victim's hearsay statement to be admitted under two scenarios: (1) the trial court deems the statement reliable and the child testifies at trial (725 ILCS 5/115-10(b)(1), (b)(2)(A) (West 2012)), or (2) the child is unavailable as a witness, the statement is deemed reliable, and the allegations of sexual abuse are independently corroborated (725 ILCS 5/115-10(b)(1), (b)(2)(B) (West 2012)). A trial court's ruling on evidentiary matters will not be reversed absent a clear abuse of discretion. *In re Brandon P.*, 2014 IL 116653, ¶ 45 (citing *People v. Stechly*, 225 Ill. 2d 246, 312 (2007)). Here, the trial court admitted M.M.'s testimony under the first scenario as M.M. testified at trial.

¶ 66 Defendant argues that the statutory requirements of section 115-10 concerning M.M.'s availability as a witness are different from the availability requirements for purposes of the Confrontation Clause pursuant to the holding in *Crawford v. Washington*, 541 U.S. 36 (2004). Our supreme court in *People v. Kitch*, 239 Ill. 2d 452, explained the additional requirements of section 115-10 by stating that the statute satisfies *Crawford* in part. Under this statute, a child's reliable hearsay statement is admissible only if (1) the child testifies (subsection (b)(2)(A)), or (2) the child "is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement" (subsection (b)(2)(B)). Therefore, under the second scenario, a statement deemed reliable by the trial court could be admitted if the child were "unavailable" and the statement was supported by "corroborative evidence." *Crawford*, however, requires something different: where the declarant is unavailable, the defendant must have had a prior opportunity for cross-examination. See *Crawford*, 541 U.S. at 68.

¶ 67 The situation is different under the first scenario because here, the declarant M.M. was not unavailable, but rather testified at trial and was present to defend or explain the testimony on cross-examination. See *Crawford*, 541 U.S. at 59 n. 9. Admitting a hearsay statement under the first scenario thus comports with *Crawford*. See *Kitch*, 239 Ill. 2d at 467 (stating that the Confrontation Clause poses no restrictions on the admission of hearsay testimony if the declarant testifies at trial and is present "to defend or explain" that testimony).

¶ 68 Defendant maintains that, even if M.M. was an available witness to satisfy the *Crawford* requirements of the Confrontation Clause, M.M. was still not available as a witness via the requirements of section 115-10(b)(2)(A) of the Code. In support of his argument, defendant relies on *Learn*, 396 Ill. App. 3d 891. In *Learn*, the defendant was charged with one count of aggravated criminal sexual abuse; the victim was his four-year-old niece. *Id.* at 893. Prior to trial, the trial court granted the State's section 115-10 motion to admit out-of-court statements made by the child victim to her father and two police officers; the motion was granted on the condition that the child testify. *Id.* at 895. At trial, the child testified as to her age, the names of her family members, where she lived, and where she attended school. *Id.* Upon further questioning and two breaks so the child could be calmed and comforted, the State discontinued its direct examination. *Id.* at 896. With respect to the child's demeanor, the trial court noted that she was not "sobbing, but *** every time somebody asked her a limited question, she began to cry again and it was not a light crying by a child." *Id.* at 897. The trial court concluded that, despite the State's failed attempt to elicit testimony from the child regarding "the event," it ruled that the child was "not unavailable because she is here"; was "competent"; and "did testify at the proceedings" for purposes of section 115-10, and allowed the State to introduce her hearsay statements. *Id.*

¶ 69 The trial court found defendant guilty, and on direct appeal, this court reversed, concluding that the child was not "available" and did not "testify" within the meaning of the statute. *Id.* at 898. We explained that "a witness's mere presence in court to answer general questions without testifying about the alleged offense" was insufficient to qualify as "testimony" pursuant to section 115-10. *Id.* at 899. We stated:

> "Section 115-10(b)(2)(A) acknowledges this; it requires that the child 'testifies at the proceeding.' [Citation.] It does not merely require that the child be 'available' to testify or be sworn in and available for cross-examination. If the child is the only witness (other than hearsay reporters) who can accuse the defendant of actions constituting the charged offense, the child *must* testify and accuse if she is to be considered to have testified at the proceeding under section 115-10(b)(2)(A). Immaterial or general background 'testimony' is not sufficient." (Emphasis in original.) *Id.* at 900.

¶ 70 Since *Learn* was first decided in 2007, and again upon reconsideration in 2009, reviewing courts and commentators have taken the opportunity to excoriate the decision and its rationale. See, *e.g.*, *People v. Kennebrew*, 2014 IL App (2d) 121169, ¶¶ 47-57 (Schostok, J., specially concurring) ("The reason why our courts so abhor that case is obvious: *Learn* was wrongly decided"; "Beyond its misinterpretation of *Crawford* and the other applicable law ***"; "if the *Learn* court had not taken the language in *Crawford* out of context and had employed the proper standard of review, the outcome in that case would have been different"); Robert J. Steigmann, When Hearsay Testimony is a Nonevent Under the Confrontation Clause, 96 Ill. B.J. 304, 308 (2008) ("A troubling aspect of the *Learn* decision is how bereft of analysis it is on the question it purports to be addressing."). Rather than taking a superficial "good law v. bad law" approach or second-guessing a different panel of judges without the benefit of an actual review of the record

on appeal, we view *Learn* as an attempt at an oblique reconciliation of an accused's fundamental rights, the wellbeing of children of tender years who are compelled to testify, and the respect of the judicial process.

¶ 71 Turning back to the issue presented, there should be no doubt that we have reviewed the *Learn* decision. At its most basic, the present case is distinguishable because M.M. did answer questions that could serve as the foundation for meaningful cross-examination. Accordingly, and contrary to defendant's position, the circumstances of the child witness in *Learn* are quite dissimilar to the circumstances of the testifying child witness in the present case. Thus, we will look to our supreme court's decision in *In re Brandon P.*, 2014 IL 116653, in determining the availability of a witness under section 115-10 of the Code. In *Brandon P.*, the defendant, a minor child, allegedly committed an act of sexual conduct against his 3-year-old cousin, M.J. *Id.* ¶ 1. A few days after the alleged incident, M.J. gave testimonial statements to the investigating officer about what had occurred. *Id.* ¶ 9. The officer testified to the substance of his interview with M.J. *Id.* ¶ 10. The trial court found his testimony reliable and admissible under section 115-10 provided that M.J. was available as a witness at trial. *Id.* ¶ 11. M.J. was able to testify to her name, with whom she lived, and that she was in preschool. *Id.* ¶ 15. She was unable to give substantive answers to the State's questions concerning the incident at issue. She became confused and the State's questioning ceased. *Id.* ¶ 16. Defense counsel declined to cross-examine M.J. *Id.* Our supreme court found no doubt as to M.J.'s unavailability as a witness based upon both her youth and fear. *Id.* ¶ 47. The court went on to hold, however, that it was harmless error beyond a reasonable doubt as it was cumulative of properly admitted testimony. *Id.* ¶¶ 85-94.

¶ 72 The circumstances of the present case are similar to those in *People v. Garcia-Cordova*, 2011 IL App (2d) 070550-B. In *Garcia-Cordova*, the defendant was convicted of three counts of predatory criminal sexual assault of a child and argued on appeal that the trial court erred when it admitted hearsay testimony of the victim pursuant to section 115-10 of the Code. Specifically, although the victim testified at trial, she did not testify regarding any criminal conduct of the defendant. *Id.* ¶¶ 8-11. The reviewing court noted that the victim did not refuse to answer any questions and, when confronted with questions touching upon the alleged abuse or the statements the victim made to others regarding the abuse, she indicated that she could not recall. *Id.* ¶ 62. Similar to the circumstances in *Garcia-Cordova*, the memory-loss rule applies to M.M. because she could not recall any instances of abuse with defendant or her interview with Berg. In *Garcia-Cordova*, the victim was asked detailed questions about her statements to the detective and was specifically asked whether anything actually happened to her on the couch or in her bedroom, which were where, she had stated, the abuse occurred. *Id.* ¶¶ 8-11, 51. The reviewing court determined that this satisfied the standard of "availability." *Id.* ¶ 62.

¶ 73 Also instructive is *People v. Lara*, 2011 IL App (4th) 080983-B, in which the defendant was convicted of predatory criminal sexual assault and argued that the child victim's testimony at trial made her unavailable as a witness because her testimony provided no corroboration of the act of oral sex that was the subject of her recorded interview that the trial court admitted under section 115-10 of the Code. Although the victim answered all of defense counsel's questions on cross-examination, defendant argued that she was unavailable for cross-examination because she did not testify that the defendant engaged in the oral sex described in her recorded interviews. *Id.* ¶ 51. The reviewing court in *Lara* rejected the defendant's claims. The *Lara* court considered *Kitch* and specifically held: "We do not interpret our supreme court's decision in

Kitch to require a victim to testify to every element of a charged offense before evidence of her hearsay statements can be admitted pursuant to section 115-10 of the Code." *Id.* ¶ 52.

¶ 74 As stated above, the circumstances in *Learn* are distinct from the circumstances in the present case, and are therefore, inapposite. See also *Brandon P.*, 2014 IL 116653, ¶ 46 (unavailable witnesses for purposes of section 115-10 include those children who are unable to testify because of fear, inability to communicate in the courtroom setting, or incompetence). Rather, the circumstances of the present case reflect a child witness, who, by all accounts in the record, appeared to testify in court willingly and candidly. M.M. testified at trial to her age, proficiency in school, and not seeing her father in several years. She was unable to remember her interview with Berg or any alleged instances of abuse by her father. M.M. testified to her problem with telling lies as well as her hygienic issues that, from time to time, required help from both of her parents. Following M.M.'s testimony, defense counsel objected to her testimony and to the State's intended use of M.M.'s videotaped statement on the basis that M.M.'s testimony had not met the requirements of section 115-10 of the Code. The trial court found that, while M.M. did not recall being abused, she did answer questions put to her by the State. In denying defendant's motion, the trial court ruled that, because M.M. could be cross-examined, the State would be permitted to use the videotaped statement. Beyond the mere fact that M.M. could be cross-examined, she was cross-examined by defense counsel and substantively answered all questions presented to her.

¶ 75 At issue is whether M.M. appeared for cross-examination following a direct examination in which she did not believe that anyone had ever touched her body in a bad way or that a penis had ever touched her; or that she did not recall ever seeing defendant's penis or him ever coming into her bedroom in the middle of the night and waking her or him ever cleaning her private parts

with his "thing." The record supports the trial court's determination that, despite M.M.'s less-than-incriminating testimony regarding the offenses allegedly committed by defendant, she was available to testify consistent with the requirements of section 115-10 of the Code. See 725 ILCS 5/115-10(b)(1), (b)(2)(A) (West 2012)); see also *People v. Garcia-Cordova*, 2011 IL App (2d) 070550-B. Accordingly, we conclude that the trial court did not abuse its discretion when it admitted M.M.'s out-of-court statements to Berg.

¶ 76 We turn now to the sufficiency of the evidence. Defendant contends that the State's evidence supports only two convictions: one for predatory criminal sexual assault of a child (penis to vagina), and one for predatory criminal sexual assault of a child (penis to anus). The jury had convicted defendant of three counts of predatory criminal sexual assault (penis to vagina) (720 ILCS 5/12-14.1(a)(1) (West 2006)), three counts of predatory criminal sexual assault (penis to anus) (720 ILCS 5/12-14.1(a)(1) (West 2006)), and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-13(a)(3) (West 2006)).

¶ 77 Under Illinois law, proof of an offense requires proof of two distinct propositions or facts beyond a reasonable doubt: (1) that a crime occurred, *i.e.*, the *corpus delicti*; and (2) that the crime was committed by the person charged. *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). In this case, defendant seems to contend that the State failed to prove the *corpus delicti* for two counts of penis-to-vagina contact and two counts of penis-to-anus contact. Rather than developing this contention with case law, defendant points us to unclear and inconsistent statements M.M. made to Berg and argues that "it is impossible to know whether [M.M.] was intermingling the instances when defendant had allegedly used his penis and when defendant was just taking care of her hygiene." Defendant also argues that M.M. "did not specifically state that the three times defendant allegedly committed predatory criminal sexual assault as charged

in the indictment and argued by the State ***, defendant had placed his penis on [M.M.'s] vagina, or her anus, or both."

¶ 78 With respect to our standard of review, all reasonable inferences from the record must be allowed in favor of the State. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). As we stated earlier, when considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant, it is for the trier of fact to determine the credibility of witnesses, weigh the evidence, draw reasonable inferences, and resolve any conflicts in the evidence. *People v. Siguenza–Brito*, 235 Ill. 2d 213, 228 (2009). A reviewing court will reverse a conviction only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of a defendant's guilt. *Givens*, 237 Ill. 2d at 334.

¶ 79 A defendant commits an act of predatory criminal sexual assault of a child if the defendant is 17 years of age or older and commits an act of sexual penetration with a victim who is under 13 years of age. 720 ILCS 5/12-14.1(a)(1) (West 2012). " 'Sexual penetration' means any contact, however slight, between the sex organ or anus of one person by *** the sex organ, mouth, or anus of another person ***." 720 ILCS 5/12-12(f) (West 2012). The issue of whether penetration actually occurred is a question of fact to be determined by the trier of fact, and the amount of detail in a witness's testimony only goes to the weight of the evidence. *People v. Herring*, 324 Ill. App. 3d 458, 464 (2001) (citing *People v. Shum*, 117 Ill. 2d 317, 356 (1987)).

¶ 80 In the present case, all of the charged conduct was alleged to have occurred during the time frame of January 1, 2007, through February 7, 2008. M.M.'s testimony at trial, the DVD and transcript of Berg's 2008 interview of M.M., and the remainder of the State's evidence were sufficient to show multiple instances of contact occurred. Elizabeth had testified that, between January and May 2007, M.M. had commented to her that "daddy cleaned me with his pee-pee."

In the 2008 interview, M.M. indicated to Berg that "[s]ometimes in the middle of *** the night my daddy wakes me up when he cleans me." M.M. explained that defendant cleaned the "part where I go pee pee because I don't wipe that." M.M. also told Berg that "sometimes I wakes up *** and I just feel him" and "sometimes he pushes in." M.M. continued, "[i]t touches in the middle *** [w]here I go poo" and that "[i]t hurts sometimes" and, when it happens, "[i]t's always in the night." We recognize that M.M. indicated that defendant "doesn't come to my room all the time"; nevertheless, "sometimes" connotes a meaning of more than once. See, *e.g.*, *People v. Maguire*, 329 Ill. App. 3d 1186, 1190 (2002) (reflecting that, "sometimes when defendant put his 'wiener' in [the victim's] mouth it would make her cough" and that even though the victim's concept of time was not good, the victim indicated that it happened more than once). Most telling is that, when Berg asked how many times it happened, M.M. said that "it doesn't happen all the time," but that it did happen on different nights.

¶ 81 "The trier of fact is entitled to draw all reasonable inferences from both circumstantial and direct evidence ***." (Internal citations omitted.) *People v. Herring*, 324 Ill. App. 3d 458, 465 (2001). The lack of specificity as to dates or body parts in this case does not undermine defendant's conviction. Viewing the evidence in a light most favorable to the State, we hold that a rational jury could have found defendant guilty beyond a reasonable doubt of multiple counts of predatory criminal sexual assault based on defendant's penis making contact with M.M.'s vagina and anus.

¶ 82 Defendant next contends that he received the ineffective assistance of counsel when counsel failed to ask the trial court to reconsider its ruling regarding the admissibility of M.M.'s section 115-10 statement. Defendant argues that M.M. had acknowledged that she had serious problems with telling lies about other people, and that, had defense counsel filed a motion to

reconsider, there was a reasonable likelihood that the trial court would have found M.M.'s statement inadmissible.

¶ 83 Ineffective-assistance-of-counsel claims are reviewed under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the first prong of the *Strickland* test, a defendant must show that counsel's performance fell below an objective standard of reasonableness. To establish that counsel's performance was deficient, the defendant must overcome the strong presumption that counsel's action or inaction was the product of sound trial strategy. *People v. Richardson*, 189 Ill. 2d 401 (2000).

¶ 84 When a defendant seeks relief in the appellate court to overturn the trial court's refusal to suppress his statement and the request is based on later-adduced trial evidence, the defendant can rely on trial evidence only if he renewed his suppression motion at trial and asked the court to reconsider its earlier ruling. *People v. Causey*, 341 Ill. App. 3d 759, 766 (2003) (citing *People v. Centeno*, 333 Ill. App. 3d 604, 620 (2002)). To successfully assert that counsel was ineffective for failing to file such a motion, the defendant must demonstrate that the motion would have been successful, thus affecting the outcome of the trial. *Causey*, 341 Ill. App. 3d at 766 (citing *People v. DeLuna*, 334 Ill. App. 3d 1, 16 (2002)).

¶ 85 Pursuant to *Centeno*, for defendant to prevail, he must show that his trial counsel was deficient in not requesting the trial court to reconsider its decision at the reliability hearing once he learned that M.M. acknowledged that she had problems telling lies about other people. Defendant must demonstrate that had his counsel done so, the trial court would have granted the request, and, furthermore, that the result of his trial would have been different. Therefore, defendant must show that the trial court would have reversed its previous ruling at the reliability hearing and granted his renewal motion in light of M.M.'s trial testimony.

¶ 86 Based on our review of the record, we cannot conclude that even if defense counsel had sought at trial to renew a motion to reconsider the trial court's ruling regarding the admissibility of M.M.'s section 115-10 statement, the trial court would have reversed its previous rulings. We note that M.M.'s veracity was brought up and questioned at the reliability hearing. As reflected above, Elizabeth testified that one challenge she and defendant were experiencing with M.M. at that time was getting M.M. to tell the truth and not make up stories. Elizabeth testified that she and defendant both wanted to know why she said that, since it did not really "ring true." The trial court was aware of M.M.'s veracity, and yet, ruled that M.M.'s statements to Berg were admissible. If a defendant has not suffered prejudice as a result of counsel's actions, we need not consider whether counsel's performance was deficient. *Strickland*, 466 U.S. at 697. We, therefore, reject defendant's ineffective-assistance claim.

¶ 87 Defendant's last issue concerns whether some of his convictions should be vacated under the one-act, one-crime, rule. Defendant argues that "all of the charges, including the aggravated criminal sexual abuse charges, could have been based on one act of defendant touching [M.M.'s] vagina with his penis, and one act of defendant touching [M.M.'s] anus with his penis." Defendant requests that we consider this issue pursuant to the plain-error doctrine.

¶ 88 Multiple convictions are improper if they are based on precisely the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977) (stating that "[p]rejudice results to the defendant *** in those instances where more than one offense is carved from the same physical act"). However, multiple convictions are permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. *Id.* Our supreme court has held that " '[a] person can be guilty of two offenses when a common act is part of both offenses.' " *People v. Rodriguez*, 169 Ill. 2d 183, 188 (1996) (quoting *People v. Lobdell*, 121 Ill. App. 3d 248, 252

(1983). "As long as there are multiple acts as defined in *King*, their interrelationship does not preclude multiple convictions ***." *People v. Myers*, 85 Ill. 2d 281, 288 (1981).

¶ 89 For the State to properly obtain multiple convictions for connected acts that might be treated as a series of offenses, the State must apportion the acts to the offenses in the charging instrument and at trial. See *People v. Crespo*, 203 Ill. 2d 335, 345 (2001). In this case, the State charged defendant with committing the offenses over a period of 13 months. At trial, during closing arguments the State distinguished between the separate acts for the separate charges. Contrary to defendant's speculative suggestion, the jury could have also determined that defendant's conduct supported multiple acts. The jury could have acquitted him on any one or more of the counts at issue, but it declined to do so. Accordingly, and without more, we too decline to modify defendant's convictions.

¶ 90 III. CONCLUSION

¶ 91 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 92 Affirmed.