2014 IL App (2d) 121361-U
No. 2-12-1361
Order filed December 24, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-0285
ROBERT W. LUCHT,	)	Honorable Joseph P. Condon
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's trial attorney was not ineffective for failing to file a motion to suppress defendant's statements because defendant was not in custody when those statements were made and the evidence adduced at trial established defendant's guilt beyond a reasonable doubt; (2) under 725 ILCS 5/115-10 (West 2012), the trial court properly admitted the victim's out-of-court statements; and (3) defendant's convictions of three counts of predatory criminal sexual assault did not violate the-act, one-crime doctrine.

¶ 2 Following a jury trial, defendant, Robert W. Lucht, was convicted of three counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse. He appeals, arguing that: (1) his trial attorney was ineffective for failing to file a motion to suppress

his statement to police; (2) the complainant's out-of-court statements should not have been admitted under section 115-10 of the statute (725 ILCS 5/115-10 (West 2012)); and (3) his convictions of two counts of predatory criminal sexual assault violated the-act, one-crime doctrine because the wording in the indictment was identical. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 2, 2009, defendant was charged by indictment with three counts of predatory criminal sexual assault of a child under 13 years old and one count of aggravated criminal sexual abuse, all occurring between "January 1, 2005, and January 1, 2007, inclusive." Count I alleged that defendant committed the offense of predatory criminal sexual assault of a child when he knowingly committed an act of sexual penetration with J.B. "in that [he] placed his finger in the vagina of J.B., in violation of [720 ILCS 5/12-14.1(a)(1) (West 2008)]"; count II alleged predatory criminal sexual assault of a child in that he knowingly committed an act of sexual penetration with J.B. "in that he placed his tongue in the vagina of J.B., in violation of [720 ILCS 5/12-14.1(a)(1) (West 2008)]"; count III alleged aggravated criminal sexual abuse in that defendant knowingly committed an act of sexual conduct with J.B. in that he "touched the vagina of J.B. with a foreign object, specifically a 'dildo', in violation of [720 ILCS 5/12-16(c)(1)(i) West 2008)]"; and count IV alleged predatory criminal sexual assault of a child in that he knowingly committed an act of sexual penetration with J.B. in that he "placed his finger in the vagina of J.B., in violation of [720 ILCS 5/12-14.1(a)(1) (West 2008)]."

¶ 5 Section 115-10 Hearing

¶ 6 Prior to trial, the State filed notice of its intent to admit out-of-court statements under the statutory hearsay exception provided by section 115-10(a) of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 115-10(a) (2012). J.B. made the statements to Seretha Eiland and Mia

Anderson of Alexian Brothers Hospital; Susan Blechschmidt, Social Services Coordinator for the Lake in the Hills Police Department; and Mary Richardson of the Department of Child and Family Services (DCFS).

¶ 7 Blechschmidt testified that, on March 5, 2009, she interviewed J.B. at Alexian Brothers Hospital where J.B. had been admitted due to self-injurious behavior and suicidal ideations. While protocol was to conduct the interview in a Child Advocacy Center facility and to record the interview, Blechschmidt deviated from that protocol because J.B.'s doctor refused to allow her to leave the hospital and refused permission to allow J.B. to be recorded. In addition, although protocol called for interviews to be conducted one-on-one, two detectives and Richardson were also present during the interview.

¶ 8 Blechschmidt stated that, at the time of the interview, J.B. was 11 years old and in sixth grade. J.B. told Blechschmidt that she had been sexually abused by defendant, her stepfather. J.B. said the abuse began when she was between the ages of 5 and 8 years old, in the third or fourth grade. J.B. described four different incidents.

¶ 9 The State did not call the other witnesses who were present for the March 5 statements made by J.B. After hearing argument, the trial court found that the timing, content, and circumstances of the March 5, 2009, statements provided sufficient safeguards of reliability and were admissible under section 115-10 of the Code, provided that J.B. would be available for cross-examination at trial.

¶ 10 Mia Anderson, family therapist at Alexian Brothers Behavioral Health Hospital, testified that in February 2009 she was the case manager when J.B. was admitted to Alexian Brothers for self-injurious behavior. On February 24, 2009, Anderson had a conversation with J.B. about sexual abuse committed by defendant when J.B. was between 6 and 8 years old. J.B. told

Anderson that the abuse occurred at home, in her bedroom and in the computer room. J.B. stated that, on different occasions, defendant forced her to touch his penis with her hands, put his fingers inside of her vaginal area, and "touched her with a vibrator." J.B. described two different vibrators.

¶ 11 The trial court found that the timing, content, and circumstances provided sufficient safeguards of reliability; the statements were made to a therapist in a therapeutic session and "it would be in the self-interest of the child to accurately report the events in the child's life." The trial court held that the State met its burden of proving that the February 24, 2009, statements were reliable and, therefore, admissible under section 115-10 of the Code.

¶ 12 Trial

¶ 13 The following evidence was adduced at trial.

¶ 14 Anderson testified that she was J.B.'s case manager at Alexian Brothers Behavioral Health Hospital. On February 24, 2009, she had a conversation with J.B., who had been admitted to the hospital for "self-injurious behavior." Anderson asked J.B. about answers J.B. had given on an assessment regarding sexual abuse. J.B. report that she had been sexually abused by her stepfather; specifically, that he "forced her to touch his penis, that he put his fingers inside her vaginal area, and that he touched her with a vibrator." J.B. told Anderson this happened at home in her bedroom and also in a computer room when she was between six and eight years old.

¶ 15 J.B. testified that she was 15 years old and in 10th grade. She stated that defendant was her stepfather. In February 2009, she went to Alexian brothers because of "suicidal thoughts and self-injury," specifically, "cutting." She had been "cutting" since around 5th grade, when she was ten and a half years old. She stated that while at the hospital she told Anderson that

defendant had sexually abused her "a couple times every other week," from when she was six years old until she was ten or eleven. These incidents occurred when she was home alone with defendant, while her mother was either at work or on vacation in Florida. The abuse stopped when she was "taken out of the home."

¶ 16 J.B. then described specific occasions that she remembered. One incident occurred at nighttime in her parents' bedroom, with pornography playing on the television. Her mother was on vacation in Florida. Defendant touched inside her vagina with his fingers, and would place his tongue on the outside of her vaginal area. Defendant also "would sometimes use the toys" on the outside of her vaginal area. He also would put her hand on his penis. J.B. stated that when defendant was touching her his penis was "hard" and he would sometimes ejaculate. Then he would "grab a Kleenex and wipe it off." She stated that he also would put a red dildo "inside the vaginal area."

¶ 17 J.B. described an incident in the daytime in the computer room when her mother was not at home. Defendant sat in the computer chair and masturbated while she sat on his lap and he watched "porn" on the computer. She described another incident in her bedroom at night when she was asleep and was awakened because defendant was trying to pull down her pants. There was a "porn" tape playing on the VCR on her television. She also described an incident during the daytime in the living room. It was Christmastime during the day and she was lying on the floor with a blanket over her. She had no shirt on and defendant was wearing a blue wrap around him. There was "porn" on the television, but defendant stopped because J.B.'s stepbrother came to the door.

¶ 18 Blechschmidt, social services coordinator with the Lake in the Hills police department, testified next. On March 5, 2009, she interviewed J.B at Alexian Brothers Hospital. J.B was 11

years old at the time. The usual protocol was to conduct interviews at a children's advocacy center. Present at the interview were Mary Richardson DCFS, and Detectives Dennis Ludtke and Matt Mannino of the Lake in the Hills police department. Blechschmidt stated that her role was to "conduct the interview and facilitate the conversation." Detective Mannino took notes. Both he and Detective Ludtke were in plain clothes without their guns.

¶ 19 Blechschmidt related that J.B. told them about four separate incidents of abuse. The first was in the bedroom and lasted about an hour. The second was in the computer room when she was sitting in front of a computer on defendant's lap. Defendant touched her vagina and breasts. The third time was in her bedroom in the middle of the night. J.B. was sleeping and "awoke to him having his fingers inside of her vagina." She pretended she was asleep. A fourth incident was around Christmas in the afternoon. J.B. was lying on a blanket on the floor and defendant touched her on the "inside and outside of the vagina with his fingers." After about 20 minutes, defendant stopped because her brother was outside knocking on the door.

¶ 20 Blechschmidt testified that J.B. told her that her mother was always either at work or on vacation in Florida when these incidents occurred. J.B. did not report any of the abuse to her mother because she was afraid her mother wouldn't believe her. J.B. was also concerned because she did not want to be removed from the home; she wanted to stay in school and be with her friends. J.B. was "very straightforward" and "forthcoming" with information. J.B. explained to Blechschmidt that she finally told someone at Alexian Brothers about the abuse because "she had to get it off her chest."

¶ 21 Detective Matthew Mannino testified that in March 2009 he was assigned to the criminal investigations division with the Lake in the Hills police department. Mannino stated that on March 10, 2009, he interviewed Charmayne LeBlanc, J.B.'s mother, at the police department

regarding whether there were any sex toys in the house and what type of relationship she had with defendant. LeBlanc gave Mannino defendant's cell phone number. Mannino called defendant and asked him to come to the station to discuss allegations that were being made against him by J.B. Defendant arrived at the police department late in the afternoon.

¶ 22 Mannino then interviewed defendant with Detective Ludtke present. The interview room was not locked. Mannino and Ludtke were in plain clothes, shirts and ties. They were wearing their firearms. Mannino stated that defendant was told at the beginning of the interview and sometime in the middle that he was not under arrest and that he was free to leave. During the course of the interview, defendant and Ludtke had a "heated exchange." Mannino stated that both Ludtke and defendant were "getting loud" and speaking with "raised voices." Ludtke left the room and Mannino continued the interview. Eventually, defendant threw up his hands and said "I give up." Defendant then signed a written statement that said "Whatever [J.B.] said about Robert Lucht is true." Defendant then told Mannino that "his memory isn't that good, that [J.B.'s] memory of what happened would be better." Defendant stated that he could remember one instance where he was lying naked in bed with J.B. and that he touched J.B.'s breasts, buttocks and vagina. Defendant then told Mannino this occurred "the half dozen times between ages seven to nine." Mannino left room and was talking to Ludtke outside. They heard a commotion and saw defendant on the floor convulsing. He appeared to have swallowed some money. The interview ended when defendant was taken to the hospital by ambulance.

¶ 23 Around midnight, Mannino went to defendant's home and conducted a search pursuant to a search warrant. Pornographic videos and a red dildo were recovered. The dildo was found in a plastic bag in a garbage can outside defendant's home. Mannino testified that LeBlanc told him that earlier that day she had thrown it in the garbage.

¶ 24 LeBlanc testified during the State's case-in-chief. She was married to defendant in 2002. She identified the dildo that was recovered by the Lake in the Hills police on March 10, 2009. She admitted that she plead guilty to attempt disorderly conduct for taking the dildo out of the bedroom and throwing it out in the garage. She also "probably" told Susan Collins, a neighbor, that she and defendant had a conversation in the hospital during which he told her he had "touched [J.B.] in the shower and in her bedroom and it only happened a half a dozen times."

¶ 25 Officer Ludtke of the Lake in the Hills police department testified that he and Mannino together interviewed defendant. Ludtke left the room after he told defendant he thought defendant was lying. Ludtke stated there was no "heated exchange" between himself and defendant. He did not threaten or scream at defendant.

¶ 26 LeBlanc also testified for defendant. From 2005 to 2007, she worked from 7:00 a.m. until 3:00 p.m. and she would arrive at home around 3:30 p.m. In 2008 she was working in a private home as a "caretaker" and usually arrived at home around 1:30-2:00 p.m. She worked at that job for about two years. J.B. was at a babysitter while LeBlanc was at work, and LeBlanc would pick her up on her way home. Defendant usually arrived home around 5:30-6:00 p.m.

¶ 27 Defendant testified on his own behalf. He met LeBlanc online in a "chat room" and they subsequently married when J.B. was five years old. He had a good relationship with J.B. He noticed that the summer before J.B. entered sixth grade her personality changed; she became irritable, incommunicative and argumentative "with us." She dropped all her friends and had new friends. In January 2009, the school notified LeBlanc and defendant that J.B. began cutting herself.

¶ 28 In February 2009, he received a telephone call from Mannino and he went to the police station. Defendant stated he knew that "they needed me in for questioning about molestation."

At the police station, he was interviewed by Mannino and Ludtke in a small room with a table and some chairs. Defendant tried to explain why J.B. was in the hospital and what he thought "brought on these charges." He was asked about pornography on his computer. He did not feel free to leave the room, and when he signed the incriminating statement, he felt that he had "no choice at that point."

¶ 29 After defendant signed the statement, Mannino left the room. Defendant then tried to kill himself by shoving a paper towel and some money from his pocket down his throat. He testified that he tried to kill himself because he "didn't do it."

¶ 30 Two of the four jury verdict forms, signed by all members of the jury, had identical wording:

> "We, the jury, find the defendant *** guilty of the offense of predatory criminal sexual assault of a child (finger in the vagina)."

The jury convicted defendant of three counts of predatory criminal sexual assault and one count of aggravated sexual abuse of a victim under the age of 13.

¶ 31 Defendant timely appealed from his convictions.

¶ 32 II. ANALYSIS

¶ 33 A. Ineffective Assistance of Counsel

¶ 34 Defendant argues that his trial counsel was ineffective because his counsel failed to file a motion to suppress his incriminating statements made to police at the police station and he was prejudiced by counsel's inaction. He argues that his statements to police were made during a custodial interrogation without having received *Miranda* warnings.

¶ 35 Under *Strickland v. Washington*, 466 U.S. 668 (1984), in order to prevail on a claim of ineffective assistance, a defendant must show both that counsel's performance "fell below an

objective standard of reasonableness" and that the deficient performance prejudiced the defense. *Id*. at 687-88. When counsel's allegedly deficient performance involves a failure to file a motion to suppress, substantial prejudice exists if there is a reasonable probability that the motion would have been granted and that the outcome of the trial would have been different had the evidence been suppressed. *People v. Ayala*, 386 Ill. App. 3d 912, 917 (2008). A failure to show substantial prejudice disposes of the ineffective assistance claim. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984).

¶ 36 We find that, even without defendant's statements, the evidence adduced at trial was overwhelmingly in favor of a finding of guilt beyond a reasonable doubt such that the outcome of the trial would not have been different had the evidence of defendant's statement been suppressed. The 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." *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *People v. Sutherland*, 223 Ill.2d 187, 242 (2006). J.B.'s statements to Anderson, Blechschmidt, and Mannino and her testimony at trial were consistent. The physical evidence found at defendant's home corroborated J.B.'s testimony. We cannot say the jury's verdict, even without defendant's statement, would have been against the manifest weight of the evidence.

¶ 37 Moreover, we determine there was not a reasonable probability that a motion to suppress would have been granted. It is axiomatic that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it

demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The determination of whether an interrogation is custodial should focus on all of the circumstances surrounding the questioning. *People v. Brown*, 136 Ill. 2d 116, 124-25 (1990). Factors to consider include the location, length, mood and mode of the interrogation; the number of police officers present; any indicia of formal arrest or evidence of restraint; the intentions of the officers; and the extent of knowledge of the officers and the focus of their investigation. *Id*. The trial court must examine and weigh these factors, along with the credibility of the witnesses, and then make an objective determination as to what a reasonable man, innocent of any crime, would perceive if he were in defendant's position. *People v. Melock*, 149 Ill. 2d 423, 440 (1992).

¶ 38 One factor considered in making a custody determination is the manner by which the individual arrived at the place of questioning (*People v. Slater*, 228 Ill. 2d 137, 154 (2008)); here defendant voluntarily drove himself to the police station and obviously had the means to leave and return home. At no time was the room locked and there is no evidence that defendant requested to leave. We also look to the location, time, length, mood, and mode of the questioning, as well as the number of police officers present. *Id*. Here, the questioning took place at the police station and lasted approximately one hour, with one, and sometimes two, officers present. Defendant's testimony regarding the mood and mode of the interrogation was that it was confrontational with Officer Ludtke admittedly raising his voice. However, Ludtke left the room and only Mannino remained with defendant. Defendant was told twice, at the beginning and in the middle of the interview, that he was not under arrest and was free to leave. See *id*. at 156-57. We note that there were no indicia of formal arrest procedures during defendant's questioning, such as booking fingerprinting, or physical restraint. See *id*.

Throughout the time defendant was at the police station, the detectives were in plain clothes and not uniformed, although they did carry holstered weapons. See *id*.

¶ 39 Defendant relies on *Brown*, 136 Ill. 2d 116, and *People v. Gorman*, 207 Ill. App. 3d 461, 476-477 (1991), to support his contention that he was in custody and, therefore, he contends that a motion to suppress his statements would have been "patently meritorious." Both *Brown* and *Gorman* involved defendants who voluntarily went to the police station and were told they were not under arrest, but were, nevertheless, found to be "in custody" for purposes of *Miranda* warnings. In *Brown*, less than two hours before the defendant went to a federal law enforcement agent's office, he had been arrested in a public place, handcuffed and forcefully brought to a police station where he was subjected to a custodial interrogation. *Brown*, 136 Ill. 2d at 131. The condition for his being allowed to leave this setting was the agreement that he return at a specified time; thus, the court found that it was reasonable to believe that the defendant felt that if he did not return he would have breached his agreement and again would be subjected to a public arrest and interrogation at anytime. *Id*. The supreme court in *Slater* distinguished *Brown* on its facts, pointing out that factors supporting the conclusion that defendant was in custody included that police officers searched and handcuffed defendant, took him to the police station, and filled out an arrest card. *Slater*, 228 Ill. 2d at 156. For the same reasons, *Brown* is distinguishable from this case.

¶ 40 In *Gorman*, the court applied a subjective test as to whether the defendant believed that he was in custody in order to trigger the protections afforded by *Miranda*. As stated above, the proper test for custody is strictly an objective one of what a reasonable man, innocent of any crime, would perceive if he were in defendant's position. *Melock*, 149 Ill. 2d at 440; *People v.*

Carroll, 318 Ill. App. 3d 135, 139 (2001). Neither *Brown* nor *Gorman* is determinative of the issue presented here.

¶ 41 Our review of the above factors leads to the conclusion that, based upon the circumstances presented, a reasonable innocent person in defendant's position would have felt free to terminate the interview. Accordingly, there is no indication that defendant was in custody at the time this interaction took place.

¶ 42 We find that defendant was not prejudiced by counsel's inaction; further, had a motion to suppress been filed, it would not have been granted. Defendant's argument fails.

¶ 43 B. Hearsay Statements

¶ 44 As an initial matter, we disagree with the State's assertion that defendant did not properly preserve the issue of the admissibility of J.B.'s statements because he did not object at the section 115-10 hearing. The record contradicts the State's position; in fact, defendant vigorously participated in the hearing and included this issue in his motion for a new trial. Additionally, the State mischaracterizes a statement made by defense counsel as "evidence that counsel acquiesced to the admission of all of the statements." This representation is belied by the record. Defense counsel's comments were preliminary and involved the order of witnesses and timing of the hearing. In no way can they be construed as "acquiescence."

¶ 45 In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13, section 115-10 provides for a hearsay exception in certain circumstances:

> "(1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and
>
> (2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element

> of an offense which is the subject of a prosecution for a sexual or physical act against that victim."725 ILCS 115-10(a) (2012).

Pursuant to the statute, such testimony by the victim, or other persons to whom the victim made statements, shall only be admitted if the trial 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 the child testifies at trial.

¶ 46 There are no precise tests for evaluating trustworthiness or reliability of a child witness; instead, specific guarantees of trustworthiness must be drawn from the totality of the circumstances surrounding the victim's statements. *People v. West*, 158 Ill. 2d 155, 164 (1994). Important factors in making the determination of reliability include the child's spontaneous and consistent repetition of the incident, the child's mental state, the use of terminology unexpected of a child of a similar age, and the lack of a motive to fabricate. *People v. Bowen*, 183 Ill. 2d 103, 120 (1998). A trial court has considerable discretion in admitting hearsay statements. *People v. Sundling*, 2012 IL App (2d) 070455, ¶ 31. We review a trial court's decision as to the reliability and admissibility of a victim's out-of-court statements pursuant to section 115-10 of the Code (725 ILCS 115-10 (2012)) under an abuse of discretion standard. *People v. Hubbard*, 264 Ill. App. 3d 188, 193 (1994). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable, or where no reasonable person would agree with the position adopted by the trial court. *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 47 Here, the evidence shows that J.B. made statements to Blechschmidt and Anderson that were consistent and forthcoming. Both Blechschmidt and Anderson characterized J.B.'s demeanor as straightforward, talkative, and forthcoming with information. They explained the circumstances under which they each interviewed J.B.

¶ 48 Anderson's interview with J.B. on February 24, 2009, occurred four days after she was admitted to Alexian Brothers Hospital. It was the first meeting Anderson had with J.B.; the purpose of the interview was to introduce Anderson's role as a case manager and to discuss treatment at the hospital and potential discharge planning. J.B. had responded to a sexual abuse question in her initial assessment, so Anderson asked her about her response. J.B. then related instances of sexual abuse by her stepfather when she was between the ages of six and eight years old that occurred at her home. She expressed hesitation about family counseling because she was reporting the abuse. The details she provided were that at different times she was forced to touch her stepfather's penis; he put his fingers inside her vaginal area; and she was touched with a vibrator.

¶ 49 The trial court held that these statements were admissible as they were made to a therapist in a therapeutic session during a course of therapy, and it was "in the self-interest of the child to accurately report the events in the child's life." This was not an abuse of discretion.

¶ 50 At the time of Blechschmidt's March 5 interview with J.B at Alexian Brothers Hospital, J.B was 11 years old and had been admitted for self-injurious behavior. Also present at the interview were Mary Richardson from DCFS and Detectives Ludtke and Mannino. Blechschmidt explained that although the usual protocol was to conduct interviews at a children's advocacy center, they deviated from protocol because J.B.'s doctor refused to allow her to leave the hospital and refused permission to allow J.B. to be recorded. Blechschmidt stated that her role was to "conduct the interview and facilitate the conversation" and that Mannino took notes. Both he and Detective Ludtke were in plain clothes without their guns. We agree with the trial court's determination that the timing, content, and circumstances of J.B.'s

statements provided sufficient safeguards of their reliability, and Blechschmidt would be allowed to testify provided J.B. was available for cross-examination at trial.

¶ 51 C. One-act, one crime

¶ 52 Finally defendant argues that his convictions under Counts I and IV of the indictment cannot both stand under the one-act, one-crime doctrine. He concedes that he did not raise this issue at any time in the trial court and thus it is forfeited. However, multiple convictions based on the same act constitute plain error because they implicate a substantial right. See *People v. Artis*, 232 Ill. 2d 156, 165 (2009) (a court may disregard forfeiture where a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process). We will review the alleged one-act, one-crime violation under the second prong of the plain-error rule.

¶ 53 In this case, counts I and IV both alleged that defendant committed the offense of predatory criminal sexual assault of a child when he knowingly committed an act of sexual penetration with J.B. in that he "placed his finger in the vagina of J.B., in violation of [720 ILCS 5/12-14.1(a)(1) (West 2008)]." All counts of the indictment were alleged to have occurred "between January 1, 2005 and January 1, 2007, inclusive ***." Defendant concedes that "[w]hen viewed in the light most favorable to the prosecution, the evidence presented at trial supported a finding that the defendant placed his finger in J.B.'s vagina on more than one occasion." Likewise, in his reply brief he states "the evidence presented at trial could have supported guilty verdicts on both counts, had the jury been informed that they involved distinct acts." He contends, however, that neither the language in counts I and IV nor in the jury instructions informed the jury that, in order to find defendant guilty on both counts, they would have to find that he committed two acts of digital penetration.

¶ 54 A defendant may not be convicted of multiple offenses arising out of a single physical act. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). An act is "any overt or outward manifestation which will support a different offense." *People v. King*, 66 Ill. 2d 551, 566 (1977). We review *de novo* whether multiple convictions are based on the same act. *In re Samantha V.*, 234 Ill. 2d 359, 369 (2009).

¶ 55 Under *People v. Crespo*, 203 Ill. 2d 335 (2001), if the State is to obtain valid separate convictions based on individual acts that are part of a group of related acts, it must present those acts to the jury as separate acts that support independent charges. *Id*. at 342-45; see also *People v. Stull*, 2014 IL App (4th) 120704, ¶ 48. The supreme court held that, although the evidence showed that the defendant stabbed the victim three separate times, which *could* have supported three separate convictions, both the indictment and the State's closing argument evinced an intent to charge the stabbing as a single incident. The four different counts merely charged the same conduct under four alternative theories. *Crespo*, 203 Ill. 2d at 342. In *People v. Bishop*, 218 Ill.2d 232, 244-46 (2006), the court reiterated that the State's treatment at trial of the various charges was relevant in deciding whether the State intended to charge the defendant with multiple acts. The court noted that *Crespo*'s primary concern was the State's treatment of several closely related acts as one act in the indictment and at trial, then changing course on appeal and contending that the acts were separate. *Id*. at 245-46.

¶ 56 The indictment in the present case charged four separate offenses that the State consistently treated as separate throughout the proceeding. At trial the State formulated counts I and IV as undifferentiated offenses. However, unlike in *Crespo*, it did not charge the same conduct under alternative theories. Looking past the indictment to the trial proceedings, we must determine whether there could have been any confusion that resulted in a one-act, one-crime

violation. The trial court read the indictment to the jury. Hearing two identical charges alleged to have occurred during the same time period could certainly put the jury on notice that these were two separate offenses. In opening statement and closing arguments, the State detailed a course of conduct that took place over a two-year period. Most importantly, J.B.'s testimony specifically referred to separate acts taking place at separate times in separate locations. If the two counts did not charge separate offenses, they were redundant and meaningless. Similarly, at the close of the case the jury received separate "guilty" and "not guilty" verdict forms for each offense. While these verdict forms were identical, the jury could not have reasonably believed that it was being asked to decide whether defendant was guilty or not guilty of the same offense twice. Even though the two counts at issue had identical wording and identical dates alleged, the evidence was clear that there were four different acts attributed to defendant at different times and locations.

¶ 57 Thus, when the jury was instructed and given verdict forms on both counts, the message to the jury was that defendant was being charged with two different acts. This is particularly true given the overwhelming evidence at trial that defendant committed multiple acts. The only other conclusion is that the jury found defendant guilty of the exact same act twice.

¶ 58 Therefore, under *de novo* review, we find the convictions in both counts I and IV are supported by the evidence and do not violate one-act, one-crime principles. While we have concluded that here there was no one-act one-crime violation, we urge the State to more clearly articulate indictments, as here to delineate that the conduct alleged in count 1 occurred at a *different time* than the conduct alleged in count 4. Such language would unequivocally put the defendant and trier of fact on notice that the conduct alleged in count 1 and count 4 are *separate*

acts, albeit acts which are each alleged to have occurred between "January 1, 2005 and January 1, 2009 inclusive."

¶ 59 III. CONCLUSION

¶ 60 In conclusion, trial counsel was not ineffective because he failed to file a motion to suppress defendant's statements, and the trial court did not err by admitting testimony regarding J.B.'s out-of-court statements to a social services caseworker and case manager. Further, defendant's convictions of counts I and IV do not violate one-act, one-crime principles. Therefore, we affirm the judgment of the circuit court of McHenry County.

¶ 61 Affirmed.