2014 IL App (2d) 131109-U
No. 2-13-1109
Order filed September 5, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LEONARD W. PUCCINI, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 10-CF-0654 Honorable Michael W. Feetterer, Judge, Presiding.

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

ORDER

¶ 1 *Held*: Trial court erred in admitting other-crimes evidence where the evidence was both remote and factually dissimilar to the charged conduct. As the evidence without the other-crimes evidence was insufficient to sustain defendant's conviction, we reverse the conviction.

¶ 2 For around three months in the summer of 2009, defendant, Leonard W. Puccini, was 12-year-old J.S.'s mentor through a Big Brothers Big Sisters program. In 2010, defendant was arrested for allegedly pulling down J.S.'s pants and spanking his bare buttocks while J.S. was lying on his stomach and watching television. According to J.S., after spanking him, defendant went into his bedroom and J.S. heard "tapping" noises. Defendant was charged with aggravated

criminal sexual abuse (750 ILCS 5/12-16(c)(1)(i) (West 2008)), in that he knowingly committed an act of sexual conduct, being the touching of a part of the body of a child under the age of 13, for the purpose of sexual gratification or arousal of the accused.[1]

¶ 3 The McHenry police department issued a press release asking anyone in the community with knowledge of defendant to come forward. Four men (two sets of brothers, who were friends with each other) did so, concerning events that they alleged took place in the 1980s and 1990s. Two of the men were allowed to testify at defendant's trial, although they testified that defendant never spanked them. The court found defendant guilty of spanking J.S.'s bare buttocks for the purpose of sexual gratification and sentenced defendant to five years' imprisonment.

¶ 4 Defendant appeals. He argues that: (1) the evidence was insufficient to sustain his conviction; (2) the trial court violated his due process rights, where it rendered conclusions not supported by the evidence; and (3) the court's admission of the other-crimes evidence was erroneous. We agree with defendant's third argument and conclude that, without the erroneously-admitted other-crimes evidence, the evidence was insufficient to sustain defendant's conviction. Accordingly, we reverse defendant's conviction.

¶ 5 I. BACKGROUND

¶ 6 A warrant for defendant's arrest issued on June 25, 2010. On June 29, 2010, Detective Travis McDonald interviewed defendant, and he was charged with aggravated criminal sexual

[1] As relevant here, sexual conduct is defined as "any knowing touching or fondling by the victim or the accused either directly or through clothing of ***any part of the body of a child under 13 years of age ***for the purpose of sexual gratification or arousal of the victim or the accused." 750 ILCS 5/12-16(c)(1)(i) (West 2008).

abuse. On June 30, 2010, an article about defendant's arrest and the charges appeared in a local paper; the end of the article contained a request that anyone with potentially relevant information about defendant call the criminal investigations division. As mentioned, four men came forward. The State moved *in limine* to admit their testimony as other-crimes evidence to establish, pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2008)), defendant's propensity to commit sex crimes. After a hearing, Judge Joseph Condon granted the State's motion.

¶ 7 Defendant moved the court to reconsider and, on March 15, 2012, Judge Condon denied defendant's motion, noting that it had given considerable weight to the gender and age of the other-crimes victims.

¶ 8 On January 9, 2013, defendant filed a second motion to reconsider. Judge Condon had retired, and the motion was heard by Judge Michael Feetterer. Judge Feetterer granted defendant's motion in part. The judge limited the other-crimes evidence to that offered by only two of the men, Dion Doty and Robert Crandall, and limited their testimonies to specific allegations. In ruling, the court found that, while there were some differences between the experiences of the victim in this case and that of the other-crimes victims, there also existed similarities, including: (1) the victims' relationships with defendant; (2) their ages at the time of the alleged offenses; (3) their gender; (4) the fact that they were alone with defendant at the time of the alleged offenses; and (5) they all alleged inappropriate touching. The court found that the lack of proximity in time lessened the probative value of the other-crimes allegations, but did not, alone, render the evidence inadmissible.

¶ 9 On May 20, 2013, defendant waived his right to a jury and his bench trial commenced.

¶ 10 A. J.S.'s Testimony

¶ 11 1. Relationship to Defendant

¶ 12 J.S. testified that his birthday is September 26, 1996 (accordingly, he would turn age 13 on September 26, 2009). J.S. testified that, when he was 12 years old, he met defendant through the Big Brothers Big Sisters program. He testified that he knew defendant for about one year, and that the last time he saw defendant was "2009, 2010." The State then asked, "and how old were you?" J.S. again answered that he was age 12.

¶ 13 In the summer of 2009, J.S. spent time with defendant at defendant's house, which was a log cabin with defendant's bedroom, two guest rooms, "Ryan's room,"[2] and a workout room. J.S. testified that he and defendant would eat together, take trips to Chicago, visit Woodstock, and sleep at defendant's house. When he slept at defendant's house, J.S. would sleep on the floor of defendant's bedroom by defendant's closet. Defendant bought J.S. a remote control boat, an iPod touch, a samurai sword, candy, and food. J.S. testified that he enjoyed spending time with defendant. J.S. and defendant both said they loved each other.

¶ 14 2. Spanking

¶ 15 J.S. testified that he once ran away and defendant searched for him; when J.S. returned, defendant pulled down J.S.'s pants and underwear and spanked him. J.S. testified that this happened at his own house.

¶ 16 Another time, at defendant's house, "during the summer," J.S. was lying on the floor, watching television in defendant's living room. Defendant entered the living room from his bedroom. Defendant pulled down J.S.'s jeans and underwear and spanked him. Defendant did not say anything to J.S. J.S. testified, "I think" defendant was wearing boxers and "I think he had an erection. I don't know." The State asked J.S. what he noticed, and J.S. answered, "That

[2] Ryan's full name and relationship with defendant are not clear from the record.

he had one, but I wasn't going to sit there and stare at it." J.S. testified that defendant returned to his room and closed the door. The State asked, "Did you hear anything after he closed the door?" J.S. replied, "Tapping noises I guess. I don't know." The State asked, "What did the tapping noises sound like?" J.S. answered, "Jacking off, I don't know." J.S. stated the incident made him feel disturbed, because he thought he could trust defendant.

¶ 17 On cross-examination, J.S. explained that, when defendant entered the room, he was laying on his stomach on the floor, facing the television with his chin on a pillow. J.S. was wearing jeans, but they were not baggie and he did not wear them low across his hips. The jeans were pulled up, zipped, and had a button fly. He heard defendant come up behind him. Defendant did not unbutton or unzip the jeans before pulling them down below J.S.'s buttocks. J.S. testified that defendant could pull down the jeans without unbuttoning them, and had also done so when he spanked J.S. in front of J.S.'s mother. On cross-examination, J.S. was impeached by a statement from his videotaped interview, wherein he had stated defendant made him pull down his own pants.

¶ 18 Neither defendant nor J.S. said anything before or after the spanking. Although J.S. testified on direct examination that he thought defendant was wearing boxer shorts and had an erection, he agreed on cross-examination that he never turned around to look at defendant.

"Counsel: So you never really turn around and look at him, right?

J.S.: Right.

Counsel: When he was spanking you, did you see how he was standing?

J.S.: I think he was on his hands and knees. I don't know. I didn't look back, so how would I know?

Counsel: Okay. So if you never looked back, you never saw whether or not he had an erection, right?

J.S.: Right, I guess."

¶ 19 Defendant went into the bedroom and J.S. pulled up his pants. Defense counsel asked J.S. to describe what the tapping noises sounded like, and J.S. responded, "Jacking off, I don't know." Defense counsel continued:

"Counsel: Okay. At that time[,] is that what you thought it was?

J.S.: Probably.

Counsel: What made you think the tapping noise was jacking off?

J.S.: I don't know."

Defense confirmed that J.S. was 12 years old at the time and continued:

"Counsel: I mean—not to get personal, did you at that time in your life –

***

Counsel: –do that?

***

J.S.: I was 12, so I don't know.

Counsel: I'm sorry, what?

J.S.: I don't know. I was 12.

Counsel: As you were laying there, is that what you thought you were hearing?

J.S.: Yes.

Counsel: You didn't hear any moaning.

J.S.: No.

Counsel: You didn't hear any other noises.

J.S.: No.

Counsel: How often were the taps?

J.S.: I don't know.

Counsel: How loud were the taps?

J.S.: Not that loud.

Counsel: Door was shut, right?

J.S.: Yeah.

Counsel: Did you get up?

J.S.: No.

Counsel: Was the TV still on?

J.S.: Yeah.

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Counsel: So you were hearing this with the TV on.

J.S.: Yes."

¶ 20 3. Date of Incident and Disclosure

¶ 21 Again, on direct examination, J.S. testified that he met defendant when he was 12 years old. He explained that he spent time with defendant in the summer of 2009, and described the spanking incident that formed the basis of the charges as having happened during the summer. When asked if it was summer of 2009, J.S. responded, "I think so."

¶ 22 On cross-examination, defense counsel asked if defendant's actions took place in 2009, and J.S. responded "No, not necessarily," clarifying that "it could have been 2009 or 2010." He testified that a "couple" of months passed before he told anyone about defendant's actions, and that it occurred in the summer, a couple of months before he gave a video statement to the Child

Advocacy Center. J.S. agreed that the video statement took place on June 15, 2010, and he thought that was about two months after the incident with defendant occurred. He also testified, however, that he was 12 years old when he spoke to Detective Michelle Asplund at the Child Advocacy Center (which must be incorrect, because it is undisputed that the video was made on June 15, 2010, and J.S. turned age 13 on September 26, 2009).

¶ 23 According to J.S., the first time he discussed the spanking in defendant's living room was with Detective Asplund. J.S. testified that he *only* spoke with Asplund about it and that he never told his mother about it. J.S. clarified that he never discussed the events with his mother before giving the June 15, 2010, video interview. J.S. agreed that, prior to going to the Child Advocacy Center, he met with Tim Noonan from the Youth Services Bureau. J.S. agreed that he met with Noonan in September 2009, and he did not think that he told Noonan about the spanking.

¶ 24 B. Shannon S.

¶ 25 Defendant's mother, Shannon S., testified that, in May 2009, defendant was assigned through the McHenry County Big Brothers Big Sisters program to act as J.S.'s mentor (the process began in March 2009). Defendant acted as J.S.'s mentor for about three months and their relationship was initially good, with J.S. being happy to have a male figure in his life. Defendant would buy J.S. gifts, take him places, and Shannon saw them "wrestle around." Shannon agreed, and a defense photograph showed, that a large, pendulum-style clock was located in defendant's home, against the living room wall.

¶ 26 Shannon testified that, in June or July 2009, she noticed a change in J.S.'s behavior; he was more private, hiding his cell phone, and more quiet about his relationship with defendant. About three months after they met, Shannon saw text messages from defendant to J.S. that said, "Good Morning, [J.S.]. I love you. Have a good day. I'll call you later" and "Good night.

Remember, I love you." Shannon testified that, in mid-July, 2009, defendant telephoned and J.S. was on the computer and did not wish to speak to him. Defendant repeatedly called back and they turned the phone off. The computer then went black and someone had changed the password.

¶ 27 Around July 28, 2009, Shannon decided that she wanted the relationship between defendant and J.S. to end because "***he was inappropriate. He wasn't listening to me. He was buying [J.S.] expensive gifts that I couldn't afford to give him." Shannon and defendant exchanged numerous emails. In one e-mail, dated July 28, 2009, defendant offered to adopt J.S., but wrote that, if that was not want Shannon wanted, he would respect her decision and it would be best for everyone for him to be "out of the picture. If you do not want to do this then no need to reply. If you wish to consider this let me know otherwise I don't think it's good to have [J.S.] at my home. Thank you." In one of her responses, on July 29, 2009, Shannon wrote, "So you are making the choice to walk away AGAIN", and, "It's sad really because no matter what, [J.S.] wanted to be in your life and know [*sic*] you just walk away. Shame on you." J.S. stopped seeing defendant at the end of July, 2009.

¶ 28 Shannon agreed that she had been asking J.S. if defendant touched him inappropriately. She testified that J.S. was "very embarrassed and said he didn't want to talk about it." On cross-examination, when asked if she ever saw defendant spank J.S., Shannon testified that "several times" she saw defendant put his hands on J.S.'s buttocks and pull his pants down as they were wrestling. She testified that she saw defendant pull down J.S.'s pants and spank him, but not for disciplinary reasons. J.S. would giggle and laugh and they would be rolling around on the ground for fun; Shannon did not, at first, think anything was wrong with it. Defense counsel asked if she ever told the police about the spanking she witnessed, and she answered "No."

Later, however, she testified that she *did* tell police. Specifically, Shannon testified that, on August 8, 2009, she met with Detective Travis McDonald because defendant had "hacked into" her computer and that, at that time, she told him that defendant had been pulling down J.S.'s pants. Defense counsel asked: "Are you saying in August of 2009[,] you reported the spanking that we're here about today?" Shannon replied, "Yes." She testified that she told McDonald and assistant State's Attorney Bill Stanton that defendant had tampered with her computer and that defendant had been wrestling with J.S. and pulled his pants down and spanked him. She saw McDonald and Stanton take notes. According to Shannon, in August 2009, she brought J.S. to speak with McDonald.

¶ 29 According to Shannon, in September 2009, J.S. was evaluated by Noonan at the Youth Services Bureau. Shannon agreed that Noonan's evaluation occurred *after* J.S. was in the Big Brothers Big Sisters program (and, per her testimony, after she told police about the spanking). She recalled providing Noonan with background information about J.S., but did not recall telling him that J.S. had a history of physical aggression and lying. Shannon was shown Noonan's report. She recalled Noonan asking about sexual abuse or improper touching: at first, she testified that she did not recall whether she told Noonan that she was *not* aware of any sexual abuse or improper touching. Then, she testified that she *did* tell Noonan that she saw or suspected something inappropriate had occurred.

¶ 30 Shannon testified that, although she raised defendant's actions with police in August 2009, it was not until June 2010 that she brought J.S. to the Child Advocacy Center for a video interview. Shannon testified that "all the time" between September 2009 and June 2010, she inquired with police about the status of their investigation into the abuse allegations.

¶ 31 Shannon agreed that she filed a civil lawsuit against defendant over the allegations that he spanked J.S. She denied contacting his insurance company to file a claim prior to filing the lawsuit.

¶ 32 C. Detective Travis McDonald

¶ 33 McDonald testified that he met with Shannon at her home on August 5, 2009, in response to her claim that someone, specifically, defendant, had been tampering with her computers. In addition, Shannon gave McDonald emails that defendant had sent her. On August 25, 2009, McDonald returned because Shannon said she was having computer problems and she again thought defendant was involved. McDonald testified that Shannon told him that J.S.'s behavior changed as a result of defendant, although he did not document that in his report. McDonald testified that Shannon did *not* say anything in August 2009 about J.S. being touched inappropriately. She did not tell McDonald that defendant had inappropriately touched or spanked J.S. Shannon called McDonald in September 2009, to ask about the computers, but she never called about any touching allegations.

¶ 34 Despite having spoken with Shannon in 2009, the first time that McDonald received any information that J.S. may have been touched inappropriately was in June 2010, shortly before J.S. was interviewed by Asplund at the Child Advocacy Center. Between June 15 and June 25, 2010, McDonald had a meeting with Shannon and Stanton to discuss the allegations in this case.

¶ 35 McDonald interviewed Dion Doty and Robert Crandall (other crimes witnesses). He agreed that they are friends with each other. McDonald also arrested defendant and interviewed him. The interview is videotaped and was admitted into evidence. In addition, McDonald had defendant write a statement, in which defendant agreed that it was possible he spanked J.S. once, but he denied everything else alleged. In the written statement, dated June 29, 2010, defendant

wrote that he had several issues with Shannon about disciplining J.S. and that, while he did not remember a reason or a date, he knew J.S. was "out of control several times and I believe it is possible that I spanked him once. His mother was ok[ay] with me having some discipline over him as he would kick, scream, steal and lie about everything and she had no control over him in anyway." Defendant wrote that he had not had contact with J.S or Shannon since around the time he offered to adopt J.S. and Shannon was upset by the offer. In the interview, which also occurred June 29, 2010, defendant stated that he had not seen J.S. since sometime in the "summer of last year."

¶ 36 D. Other-Crimes Evidence

¶ 37 1. Dion Doty

¶ 38 Dion Doty was born September 17, 1980. He and his brother, Donald, met defendant playing basketball in 1993. Doty estimated that defendant was 20 years older than him.

¶ 39 Defendant financially assisted Doty's mother in obtaining a divorce. In 1995, when he was 15 years old, Doty and his mother moved into defendant's two-room apartment. Later, they moved with defendant into a two-bedroom home.

¶ 40 Doty testified that in 1995 and 1996, when he was 15 years old, he and defendant played a game in the car. Specifically, when defendant drove them home from playing basketball, in the winter, they would listen to the radio and, if Doty answered questions incorrectly, defendant would put his hand outside of the sunroof for around 30 seconds and then put his cold hand down Doty's pants and onto his penis. They were alone in the car. This happened two or three times and only in the winter. There were no other times defendant touched Doty inappropriately.

¶ 41 Over defendant's objection, Doty testified that "a few times" between 1995 and 1998, when he and defendant shared a bed, he observed defendant masturbating. Defendant never said

anything when he was masturbating. Doty testified that he, too, masturbated and defendant would watch. Defendant did not force Doty to masturbate, defendant never touched him, and Doty never touched defendant. Doty never asked for his own bed. He and defendant shared a bed until around 1998 or 1999, when defendant moved into a four-bedroom house; there, they no longer shared a bedroom.

¶ 42 Doty agreed that the car incident happened two or three times, and that, two times, defendant laid in bed and masturbated. Otherwise, nothing else happened. Further:

"Counsel: He never pulled your pants down and spanked you?

Doty: No, sir.

Counsel: He never touched you and then went off in another room and masturbated?

Doty: No, sir."

¶ 43 Doty's mother stopped living with defendant around 1998. Doty, however, lived with defendant for six more years, until 2002, when he was 22 years old. Nothing inappropriate happened in those six years. When asked what caused him to leave defendant's residence in 2002, Doty answered, "I got a DUI and he kicked me out." At first, after defendant kicked him out of the house, Doty was angry.

¶ 44 Doty never told his mother about any of the alleged incidents. He first reported this information to police on July 2, 2010, after seeing an article about defendant in the newspaper that included a request that anyone with information about defendant should call the police. Doty agreed that, when he spoke to police in 2010, he wanted to see defendant get in trouble. Doty had another DUI pending at the time of trial.

¶ 45 2. Robert Crandall

¶ 46 Crandall was born on July 16, 1979. In 1988, when he was around nine years old, Crandall met defendant, who lived in the neighborhood. Crandall got to know defendant and, at some point, defendant moved in with Crandall and Crandall's family. Crandall could not approximate the year in which defendant moved in, but he testified that he thought it was before he was a teenager. Defendant lived with Crandall for a couple of years.

¶ 47 Crandall testified that his relationship with defendant lasted seven or eight years. During that period, defendant masturbated Crandall with his hands and mouth. This happened "over a hundred" times "basically everywhere we went." Crandall would be alone with defendant and would not say anything to him beforehand. Crandall estimated that he was age 9 or 10 the first time defendant masturbated him, and age 16 the last time. Crandall testified that defendant ended their relationship when one day, without explanation, defendant was gone. He testified that the last time anything happened between him and defendant was in 1995. Crandall testified that defendant never spanked him.

¶ 48 Around 15 years later, in 2010, after he heard about the pending charges in this case, Crandall came forward. Crandall's wife knew that he was friends with defendant and she pointed him to the article in the newspaper about defendant. Crandall testified that he was dating his wife when he was involved in his relationship with defendant, but, because he was ashamed, he never told her or anyone else about the inappropriate contact. After his wife pointed out the article, Crandall spoke with his brother and then contacted the police. "I was in a mental facility because I have psychological problems and when I was taken out of the mental facility, went right to, you know, make a statement [to the police]." In his statement, he told police he wants defendant to go to jail and get the death penalty.

¶ 49 Crandall was convicted (possibly twice) of the offense of attempting to obstruct justice by giving false information to a police officer. Crandall had a drug problem and began abusing drugs when he was age 14. He has bipolar disorder and is schizophrenic. Crandall testified that the conditions do not affect his memory, but that he sometimes hears and imagines things.

¶ 50 Crandall agreed that, in 2005, he took his wife and children to defendant's house to spend Christmas with him. Specifically, Crandall telephoned defendant, asked what he was doing for Christmas, and asked if he could bring his family to defendant's house for Christmas. In addition, at some point after 2005, Crandall asked defendant for financial assistance to help him obtain a part for his car. Defendant loaned Crandall $400. Crandall did not pay him back. Finally, Crandall testified that he saw defendant a third time after 1995, but he could not remember "the validity of that encounter." When asked what he meant, Crandall explained that he knew it occurred, be he did not remember "what pretenses it was under." Crandall next testified that he stopped taking his bipolar medications; his doctor did not tell him to stop taking them but, rather, he could not afford them so, at the time of trial, he was not medicated for bipolar disorder or schizophrenia.

¶ 51 E. Timothy Noonan

¶ 52 Noonan testified that, in 2009, he worked for Youth Services Bureau. He testified that he began working with J.S. in January 2009, and concluded his first period of working with him in September 2009. Noonan testified that he prepared something entitled an initial assessment and identified defendant's exhibit No. 5 as his assessment (exhibit 5 was not, however, offered or admitted into evidence). Noonan testified that the initial assessment was *not* prepared in January. Rather, Noonan testified (somewhat confusingly) that assessments were completed on an "annual basis," that "this is my assessment when I began working with [J.S.]," and that this

particular assessment includes a summary of face-to-face contact with J.S. and his mother, which occurred on September 15, 2009.

¶ 53 On that date, Noonan met with J.S. and Shannon. Shannon told Noonan that J.S. had a history of lying to her. Noonan asked them whether there had been any sexual abuse or molestation. "The response to the question was that he had not been a victim." Noonan confirmed that, when he met with them in September 2009, Shannon or J.S. told him that defendant was his mentor through Big Brothers Big Sisters, but they did not tell him there had been any problems with defendant inappropriately touching J.S.

¶ 54 F. Ruling

¶ 55 The trial court denied defendant's motion at the close of the State's case for a directed finding.

¶ 56 On May 30, 2013, the trial court found defendant guilty of aggravated criminal sexual abuse. In announcing its ruling, the court made extensive factual findings. In sum, the court found that the State proved all elements of the offense beyond a reasonable doubt, including that defendant was age 49 in the summer of 2009, and that J.S. was age 12 at the time of the offense. Specifically, the court found that J.S. had maintained through all examinations that he was 12 years old at the time of the offense. The court noted that Shannon testified that J.S. did not, to her knowledge, see defendant in 2010. Further, the court noted that, in his statement, defendant stated that he last saw J.S. in the summer of last year, which would have been 2009, when J.S. was 12 years old.

¶ 57 Next, the court found that defendant knowingly touched J.S. The court found that, while J.S. was watching television in defendant's living room, defendant entered the room clad in boxer shorts, pulled down J.S.'s pants to expose his buttocks, and spanked him. The court found

that J.S. never wavered in his testimony regarding whether the incident occurred or the manner in which it occurred.

¶ 58 The court noted, but ultimately rejected, defendant's credibility challenges to J.S.'s and Shannon's testimonies, including the timing of the alleged incident, Shannon's alleged disclosure to McDonald in August 2009, Shannon's threats to sue defendant if she ever found out that defendant touched her son and that she did, in fact, eventually file the promised lawsuit, the implication that Shannon and J.S. were pursuing the allegations for money, and that, if the incident happened when they say it did, they would have disclosed to Noonan in the September 2009, interview. It stated,

> "As the Court was listening to the testimony and the argument at trial, the Court agreed with many of the points raised by the defense during the closing argument.
>
> There did appear to be inconsistencies in the testimony of the State's witnesses on these points. And in preparing this decision, the court reviewed the trial transcript of the testimony and evidence and reviewed it very carefully."

¶ 59 After doing so, the court concluded that the timeline that Shannon and McDonald testified to ultimately "dovetails," with the primary discrepancy being the date on which Shannon told police about the inappropriate touching. The court found that the testimony was ultimately consistent and that the inconsistencies could be ascribed to the passage of time and "foibles of human memory."

¶ 60 The court found that "the point that unravels [defendant's] conspiracy argument, is that [J.S.] never told Shannon what defendant had done to him." The court found that the first person that J.S. told was Detective Asplund during the June 2010, interview. "The Court fails to see how Shannon could coach her son about the way or what to say to the police in an interview

that was conducted while Shannon was still in the dark about what happened between [J.S.] and the defendant in defendant's living room in the summer of 2009."

¶ 61 Further, the court determined that Noonan prepared the initial assessment when he first began working with J.S., in January 2009, not September 2009. The court found that, although the assessment was dated September 2009, that was the end of Noonan's time working with J.S.

> "The court does not know why the initial face-to-face with [J.S.] and Shannon would take place near the end of the work with [J.S.] Frankly, this testimony makes no sense.
>
> Rather[,] the more likely scenario is that the assessment was prepared when Noonan says that he prepared it in January of 2009 when he first met with [J.S.]
>
> The Court finds that this is a reasonable inference based upon the record in this case.
>
> Moreover, it is a reasonable explanation for why Shannon did not tell Noonan that [J.S.] was improperly touched by defendant or anyone else during the preparation of the initial assessment.
>
> Simply put, if the initial assessment was prepared at the time that Noonan says it was, in January of 2009, Shannon could not have told Noonan about an event that would not yet occur for another six months."

¶ 62 Finally, the court addressed what it found to be the two central questions to the case: (1) whether it believed J.S.; and (2) whether defendant committed the act for his own sexual gratification. It answered both in the affirmative, noting that it watched J.S. closely as he testified and found that J.S. testified consistently "on nearly every relevant and important point," including: where he was in the summer of 2009; who he was with in the summer of 2009; what

he was doing immediately prior to the act; what he did during the act; what he did immediately after the act; what room defendant came from; how he walked to where J.S. was lying; and where he went when he was finished with J.S. The court found J.S. consistent, credible, and that his testimony was supported by defendant's statement, wherein he agreed that he likely spanked J.S. at some time.

¶ 63 As to whether defendant committed the act for purposes of sexual gratification, the court recounted Doty's and Crandall's testimonies, noted that "both men have issues," but, nevertheless, testified credibly, and, therefore, their testimony establishes that defendant has a propensity to touch young boys inappropriately. Further:

> "And the question becomes, why would defendant, a 49-year-old man decide to pull a 12-year-old boy's pants down and touch him on the bare buttocks, spank him? A boy that he has known for [ ] only a couple of months.
>
> [J.S.] was not misbehaving. There is no credible evidence in the record indicating that [J.S.] was in need of discipline at that moment in time.
>
> The only plausible explanation for defendant's behavior on that day was that defendant, a man who has the propensity for touching young boys for sexual gratification, touched [J.S.] for that reason, that very reason, sexual gratification."

¶ 64 The court denied defendant's motions for a new trial and sentenced him to five years' imprisonment. Defendant appeals.

¶ 65 II. ANALYSIS

¶ 66 Defendant raises three issues on appeal. First, he argues that the evidence was insufficient to sustain his conviction. Second, he argues that the trial court made several findings that were unsupported by the evidence and, therefore, violated defendant's right to due process.

Third, defendant argues that the court erred in admitting and considering evidence of other alleged prior bad acts. Because we find that the other-crimes argument is dispositive, we address that argument first.

¶ 67 Section 115-7.3 of the Code permits admission of evidence of a defendant's prior sexual activity with a child complainant for any purpose, including the defendant's propensity to commit sex offenses. 725 ILCS 5/115-7.3 (West 2008); *People v. Donoho*, 204 Ill. 2d 159, 176 (2003). Under section 115-7.3, other-crimes evidence may be admissible only if: (1) it is relevant; and (2) its probative value is not outweighed by its prejudicial effect. *Donoho*, 204 Ill. 2d at 177-78. Section 115-7.3 further provides that, in weighing probative value against prejudicial effect, a court should consider: "(1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; or (3) other relevant facts and circumstances." 725 ILCS 5/115-7.3(c) (West 2008).

¶ 68 Still, other-crimes evidence is unquestionably prejudicial to a defendant. Generally, the risk associated with the admission of other-crimes evidence is that it might prove "too much," rendering a factfinder inclined to convict the defendant simply because it believes that he or she is a bad person deserving of punishment. *Donoho*, 204 Ill. 2d at 170. Courts should avoid admitting evidence that entices a factfinder "to find defendant guilty *only* because it feels he or she is a bad person deserving punishment, rather than basing its verdict on proof specific to the offense charged." *People v. Smith*, 406 Ill. App. 3d 747, 751 (2010). Accordingly, our supreme court has urged trial courts "to be cautious in considering the admissibility of other-crimes evidence to show propensity by engaging in a meaningful assessment of the probative value versus the prejudicial impact of the evidence." *Donoho*, 204 Ill. 2d at 178. A trial court's decision to admit other-crimes evidence will not be reversed unless the court abused its

discretion. *Id.* at 182. A trial court abuses its discretion if the court's determination is unreasonable, arbitrary, or fanciful. *Id*. For the following reasons, we conclude that the trial court abused its discretion in admitting the other-crimes evidence.

¶ 69 Here, the prejudicial effect of introducing the other-crimes evidence cannot be overstated. In fact, defendant's conviction rests entirely on the other-crimes evidence: it was the *only* evidence the trial court found supported the requisite element that defendant committed the charged conduct for purposes of sexual gratification. Notably, although the court found J.S. credible and specified several "important" facts on which J.S. never wavered, the court did *not* reference J.S.'s testimony that defendant had an erection or went to his room to masturbate, points on which J.S. was inconsistent. Indeed, J.S. ultimately testified that he did *not* see whether defendant had an erection, and there was absolutely no foundation for his speculation that the tapping he heard was defendant masturbating. As such, Doty's and Crandall's allegations were the only evidence the court could have used, and, in fact, *explicitly referenced*, to find that defendant spanked J.S. for sexual gratification. However, as explained below, those uncharged, unproven allegations were neither proximate in time nor factually similar to the charged conduct. Thus, where the allegations lacked both proximity and similarity to the charged conduct, and where the other-crimes evidence was significantly more egregious than the charged conduct, the probative value was low and no reasonable person could conclude that the probative value outweighed the prejudicial effect.

¶ 70 As to proximity in time, there is no bright line rule precluding admission of aged events. See *Donoho*, 204 Ill. 2d at 183-84. However, when weighing the probative value of the evidence, proximity in time, or a lack thereof, must be considered. *Id.* Here, Doty alleged that defendant touched him inappropriately twice in 1995 and 1996, and that he and defendant

watched each other masturbate (without touching one another) twice between 1995 and 1998. As such, Doty's allegations occurred 11 to 14 years prior to the charged events. Crandall testified that he met defendant in 1988 and that the last inappropriate incident occurred in 1995. Thus, Crandall's allegations occurred 14 to 21 years prior to the charged events. Together, the other-crimes evidence occurred 11 to 21 years prior to the charged offense. Clearly, and as the trial court essentially acknowledged, the lack of proximity in time between the charged conduct and other-crimes allegations, while not sufficient alone to preclude admissibility, renders the offenses prejudicial and lessens their probative value. See *e.g.*, *Smith*, 406 Ill. App. 3d at 754.

¶ 71 We next consider whether the remoteness of the other crimes is at all mitigated by their factual similarity to the charged conduct. In other words, we consider whether the factual similarities compensate for the time lapse between the offenses and weigh in favor of admission of the other crimes. See, *e.g.*, *Smith*, 406 Ill. App. 3d at 753. In doing so, we remain mindful that the existence of some differences between the prior offense and current charge does not defeat admissibility because no two independent crimes are identical. *Donoho*, 204 Ill. 2d at 185. Nevertheless, to be admissible, other-crimes evidence must have "some threshold similarity to the crime charged" and, where the evidence is not being offered to establish *modus operandi*, "mere general areas of similarity will suffice" to support admissibility. *Id.* at 184. As factual similarities increase, so does the relevance or probative value of the other crimes evidence. *Id.* Conversely, however, as the number of dissimilarities increase, so does the prejudicial effect of the other-crimes evidence. *Smith*, 406 Ill. App. 3d at 754. A review of caselaw reflects that even threshold similarity requires more similarity than that present here.

¶ 72 For example, in *Donoho*, threshold similarity was satisfied, even though the other crimes were not proximate in time to the charged conduct (occurring 12 to 15 years prior to the

charges), where the other crimes and charged conduct involved children of *both* genders, the defendant inserting his finger into the girls' vaginas, and forcing both the boys and the girls to touch the defendant's penis. *Donoho*, 204 Ill. 2d at 185. Similarly, in *People v. Theis*, 2011 IL App (2d) 091080, ¶ 66 (2011), similarity was established where the charged and uncharged conduct, while not identical, both involved anal penetration with the defendant's penis, digital penetration of the anus, oral sex acts, presence of another adult, and other circumstances. In *People v. Roberson*, 401 Ill. App. 3d 758, 761, 772 (2010), the uncharged conduct occurred almost 10 years prior to the charged event, but both the charged and uncharged conduct involved the defendant fondling 14- and 16 year-old girls outside their clothing, trying or having sexual intercourse with them, and assaulting them in cars and his apartment. Further, in *People v. Ross*, 395 Ill. App. 3d 660, 675-76 (2009), threshold similarity was established, despite the 11 to 17 year remoteness in time, where, among other similarities, both the charged and uncharged offenses involved the defendant penetrating the victims' vaginas with his mouth and penis. Finally, in *People v. Williams*, 2013 IL App (1st) 112583, ¶ 48, similarity was established where the charged and uncharged crimes occurred within 20 *months* of each other and similarities included forceful vaginal penetration and the assailant holding the victims down with his body weight.

¶ 73 In contrast, proximity and threshold similarity were not satisfied in *Smith*. There, the defendant was charged with, in 2005, knowingly fondling his granddaughter's vaginal area outside of her clothes. *Smith*, 406 Ill. App. 3d at 749-50. The court found that the other-crimes evidence from the defendant's sisters and daughters, alleging that the defendant committed forcible sex and digitally penetrated and rubbed their vaginas outside of their clothes in the 1960s, 1970s, and 1980s (a span of 25 to 42 years before the charged conduct), was too remote

and dissimilar to the charged conduct. *Id.* at 753. The court expressed concern that allowing the evidence could lead to a conviction based upon those alleged prior bad acts, rather than the charged offense. *Id.* Further, the court rejected the State's argument that the trial court overemphasized the time lapse and, in any event, any lapse was mitigated by the factual similarities. The appellate court stated:

> "The enormous time lapse between the offenses in this case, standing alone, renders the prior offenses prejudicial. This prejudice is compounded by the factual differences between the alleged prior offenses and the charged offense, especially since the prior offenses involve uncharged and unproven allegations of sexual abuse that is even more heinous than the charged offense." *Id.* at 754.

¶ 74 Similarly, in *People v. Johnson*, 406 Ill. App. 3d 805, 812 (2010), the court found that dissimilarities between the charged and uncharged crimes rendered erroneous (but ultimately harmless) the trial court's admission of the uncharged crimes. In *Johnson*, the charged and uncharged events both involved: (1) victims that were abducted while walking past alleys; (2) victims that were taken to an abandoned building before the assault; (3) the use of physical force and threats to kill the victims if they did not comply with the assailant's commands; (4) vaginal and oral penetration of the victims by the assailant's penis; and (5) victims that were both adults when they were attacked. *Johnson*, 406 Ill. App. 3d at 811. Nevertheless, the court noted that there also existed distinct differences between the attacks. For example, the uncharged incident involved two attackers, a vehicle, the assailant blew cocaine in the victim's face and gave her alcohol during the assault, and the assailant anally penetrated the victim. None of those circumstances were present in the charged crime. *Id.* at 811. Accordingly, the court found that, due to the dissimilarity between the allegations and the trial court's failure to conduct a

meaningful assessment of the risk of unfair prejudice, admission of the other-crimes evidence to establish propensity was erroneous. *Id.*; see also *People v. Holmes*, 383 Ill. App. 3d 383 Ill. App. 3d 506, 518-19 (2008) (evidence of prior assault properly excluded; dissimilarities between charged and uncharged conduct rendered other-crimes evidence insufficiently probative to establish propensity, where, unlike the charged conduct, the prior assault involved a second person, some voluntary engagement in intimacy, no threats with a weapon, escape by the victim, and no actual penetration).

¶ 75 The aforementioned cases reflect that threshold similarity was not satisfied here, and certainly not to a degree to mitigate the remoteness of the uncharged events and the undue prejudice that resulted from admission. The charged conduct and uncharged conduct were not similar. Defendant was charged with spanking J.S.'s bare buttocks on one occasion, in the family room of defendant's home. Doty and Crandall testified that defendant *never* spanked them. Neither Doty nor Crandall testified that defendant *ever* touched their buttocks on any occasion. Rather, Doty testified that, on two occasions, in a car, defendant touched his penis. Although Doty testified that he and defendant watched each other masturbate on a few occasions, there was no touching involved. Crandall testified that defendant masturbated him "hundreds of times" and in multiple locations. There is simply nothing similar about the charged and uncharged allegations. The differences between the allegations are particularly noteworthy given the fact that defendant was charged with an act that is not inherently sexual, *i.e.*, spanking bare buttocks. Indeed, J.S.'s mother saw defendant spank J.S.'s bare buttocks on another occasion and did not, at first, think anything was wrong. As such, the other-crimes evidence was introduced for the purpose of establishing that *this* spanking was, beyond a reasonable doubt, committed for sexual purposes. However, the uncharged, unproven allegations of sexual abuse,

touching the victims' penises and masturbating Crandall, were not only inherently sexual, they were *clearly* more heinous than the charged offense. See *Smith*, 406 Ill. App. 3d at 754. Where the other-crimes allegations were far more egregious than the charged conduct, the similarity was low, and proximity in time was remote, the risk of undue prejudice to defendant clearly outweighed the probative value.

¶ 76 We do not agree that the superficial similarities relied upon by the trial court outweighed the dissimilarities between the charged and uncharged conduct. The trial court found that the following similarities between the charged offense and the other crimes weighed in favor of admission: (1) the victims' relationships with defendant; (2) their ages at the time of the alleged offenses; (3) their gender; (4) the fact that they were alone with defendant at the time of the alleged offenses; and (5) they alleged inappropriate touching. While defendant's relationship with the alleged victims was similar in that they were not, for example, family members and the victims apparently all lacked father figures in their lives, the nature of their relationships was also arguably dissimilar. Both Doty and Crandall had lengthy relationships with defendant, which included that they and their families lived with him for numerous years. In contrast, J.S. met defendant through the Big Brothers Big Sisters mentor program, never lived with him, and knew him for only a few short months. Further, as to the age of the victims and the fact that the touching occurred in private, the age of the victims is an inherent element of the offenses (see, *e.g.*, *People v. Wassell*, 321 Ill. App. 3d 1013, 1017 (2001)), and it is likely common for inappropriate touching to occur privately. Thus, we do not find particularly compelling that the victims were of similar age and were alone with defendant when the acts occurred. Rather, we find unreasonable the court's determination that the charged and uncharged acts were sufficiently similar.

¶ 77 In sum, the other-crimes allegations were not proximate to the charged conduct. Further, both Doty and Crandall testified that defendant *never spanked them*. Instead, they testified to inherently sexual, heinous conduct. There was no other evidence regarding the charged conduct to establish that, when defendant spanked J.S.'s bare buttocks, he did so for the purpose of sexual gratification. Indeed, critically, the other-crimes evidence was the only evidence upon which the court explicitly relied to find that the act was committed for sexual gratification. Again, because the uncharged conduct was remote, dissimilar, and far more egregious than the charged conduct, the risk of undue prejudice to defendant outweighed the probative value. Thus, there is great risk here that defendant was convicted based on the uncharged, unproven, remote allegations, rather than the evidence supporting the charged crime. Because the prejudicial effect of the evidence greatly outweighed its probative value, the trial court abused its discretion in admitting the other-crimes evidence.

¶ 78 While double jeopardy does not preclude retrial where a conviction is set aside due to an error in proceedings, it does prohibit retrial for the purpose of allowing the State another opportunity to supply evidence that it failed to present in the first proceeding. See, *e.g.*, *Burks v. United States*, 437 U.S. 1, 11 (1978); *People v. Mink*, 141 Ill. 2d 163, 173-74 (1990). Here, we have determined that there was an error in proceedings in that the other-crimes evidence should not have been admitted. However, as previously discussed, the other-crimes evidence was the *only* evidence the trial court found supported the element of the offense that the touching be committed for sexual arousal or gratification. Without the other-crimes evidence, the State lacked proof beyond a reasonable doubt as to an element of the offense. Thus, because the other-crimes evidence was improperly admitted, there exists insufficient evidence to sustain defendant's conviction and a retrial would serve only to allow the State an opportunity to supply

evidence that it failed to present in the first proceeding. As such, we conclude that double jeopardy precludes a retrial and that the conviction must be reversed outright.

¶ 79 III. CONCLUSION

¶ 80 For the reasons stated, we reverse the judgment of the circuit court of McHenry County.

¶ 81 Reversed.