2017 IL App (2d) 160744-U
No. 2-16-0744
Order filed October 12, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PETER SANCHEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 14-CF-1380 Honorable John R. Truitt, Judge, Presiding.

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

ORDER

¶ 1 *Held*: Although the State violated the trial court's order limiting the use of certain videos as other-crimes evidence, defendant was not denied due process or a fair trial, where the error was harmless; the evidence of defendant's guilt was overwhelming and the unapproved video depicted essentially the same acts as the approved videos. Affirmed.

¶ 2 Following a jury trial, defendant, Peter Sanchez, was convicted of two counts of aggravated criminal sexual abuse. 720 ILCS 5/12-16(c)(1)(i) (West 2016). The trial court denied defendant's motion for a new trial or for judgment notwithstanding the verdict and sentenced him to concurrent five-year terms of imprisonment on each count. The court

thereafter denied defendant's motion to reconsider his sentence. Defendant appeals, arguing that he was denied due process and a fair trial, where the State violated the trial court's ruling that limited the use of other-crimes evidence in the form of videos from the school bus where the victim, Z.R. (born November 20, 2008), was abused that depicted another girl, S.Z. (born October 27, 2008), also being abused. We hold that, although the State violated the court's ruling, the error was harmless because the evidence of defendant's guilt was overwhelming and because all of the videos, those approved and not approved by the court, depicted essentially the same acts. Accordingly, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Count I of the indictment charged that defendant committed aggravated criminal sexual abuse in that he knowingly committed an act of sexual conduct with Z.R., who was under age 13 at the time of the offense, where he knowingly placed his hand on Z.R.'s vagina for the purpose of sexual gratification or arousal of the victim or himself. 720 ILCS 5/11-1.60(c)(1)(i) (West 2016). In count II, the State alleged that defendant committed the same offense by placing his hand on Z.R.'s "butt." Three counts in the State's indictment alleged acts against S.Z. These counts were severed from the ones involving Z.R. and were later dismissed on the State's motion.

¶ 5 A. October 8, 2015, Hearing on the State's First Motion *in Limine*

¶ 6 On October 8, 2015, the trial court heard arguments on the State's first motion *in limine* concerning other-crimes evidence, specifically, conduct toward S.Z. (who, unlike Z.R., had not disclosed acts of abuse when interviewed at Carrie Lynn Children's Center, a children's advocacy center). See Ill. R. Evid. 404(b) (eff. Jan. 1, 2011) (evidence of other crimes, wrongs, or acts is admissible in cases where the defendant is accused of aggravated criminal sexual abuse

"to show action in conformity therewith"); Ill. R. Evid. 403 (eff. Jan. 1, 2011) (relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). The State argued that there were many similarities between defendant's conduct with Z.R. and S.Z.: the conduct took place between April 15, and May 23, 2014; it took place on the school bus, specifically in the morning when defendant dropped off the children at school; both girls were present at the same time on the bus during some of the conduct; both are depicted in the videos; all of the conduct took place at the front of the bus; and both girls were five years old at the time of the offenses. The State also noted that defendant had admitted to conduct against both girls in his written statement to police.

¶ 7 Defense counsel argued that the prejudicial nature of the evidence outweighed its probative value and asked that, if the court ruled that the videos could be shown to the jury, that not all videos be admitted. She noted that not all videos showed both girls present on the same day.

¶ 8 Reviewing various dates with the court, the State requested that videos depicting acts against S.Z. from the following five dates be allowed: April 15, April 28, April 29, April 30, and May 23. The trial court agreed, granting the State's motion and finding that there were similarities between the acts and that they were not so unduly prejudicial that they outweighed the evidence's probative value. It further noted:

> "Now, if the list expands beyond the five dates that we have just talked about and all of a sudden there are 25 dates, I'm going to allow you to, Miss Schafer [(defense counsel)], ask the Court to reconsider the, uh – the ruling and – and – and consider paring down, if you will – in light of the ruling paring down what other bad acts evidence the Court would allow.

> So if – while you are doing trial prep or whatever, Ms. Dailey [(assistant State's Attorney)], if you are going to attempt to introduce anything other than the five dates we just talked about, 4/15, 4/28, 4/29, 4/30, and 5/23, I think then the burden is on you because it's your motion to ask the Court to consider other dates."

The prosecutor replied, "Yes."

¶ 9 Although the court approved of five videos, only two videos depicting acts against S.Z. were played at trial. One was from the approved group: April 29, 2014. The second video was from April 21, 2014, a date the court did not approve.

¶ 10 In the videos, generally, S.Z. is at the front of the bus, standing in the aisle. The other children are behind her, either in the aisle or in their seats. Defendant sits up from his seat and turns and sits on (apparently) an armrest. He faces towards the back of the bus, with his right knee pointing toward the back of the bus. S.Z. often leans into the knee, interacting with defendant, but also interacting with the children behind her. He often places his hand over his knee so that S.Z.'s vaginal area or buttocks touch his hand when she leans toward him. He pulls his hand away when she walks away. Defendant frequently looks to his left, where the exit doors are located, looking for the adult who will take the children into the school. When S.Z. moves only inches away from defendant's knee, defendant also places his right hand on the front of his knee and stretches out his fingers to touch S.Z.'s buttocks, hips, and/or vaginal area. If she steps away, he quickly pulls back his hand.

¶ 11 B. Trial – State's Case-in-Chief

¶ 12 1. Z.R.

¶ 13 Z.R., age seven, testified that she went to Prairie Hill School for pre-kindergarten and kindergarten, when she was ages 4, 5, and 6. She got to school by sometimes riding a bus. Z.R.

identified defendant as the bus driver. Most of the time, Z.R. sat in front; there were no assigned seats. Sometimes, she read a book with defendant. When she read the book, defendant "touched my private part," the area "[b]etween my legs." At the time, she referred to the area as her "[p]ee-pee." He touched Z.R. "[a]bove my clothes." Defendant did this more than once, but Z.R. does not recall how many times. "Not every day." Defendant's hand "was by it but it didn't really touch it." Z.R. could not recall how long defendant's hand was there, but it was "until my teacher got there." When her teacher arrived, defendant "would open the door." Z.R. told her grandma, grandpa, and her mother.

¶ 14 On cross-examination, Z.R. testified that she liked sitting in the front of the bus because she could be first in line to get off. When S.Z. rode the bus, she also liked to be up front with Z.R. Some days Z.R. read a book with defendant, and some days she did not. When defendant touched her, he touched by her "private." Sometimes, when they arrived at school, they would have to wait for the teacher to come for them. When the teacher arrived, defendant would open the door and they would all go into the school. There were boys and girls on the bus, but Z.R. could not recall how many or their names. Some were picked up before her and some after her.

¶ 15 2. Sergeant Pete DalPra

¶ 16 Sergeant Pete DalPra testified that he has worked with the Winnebago County sheriff's office for 20 years and worked as a detective there for 13 years. On May 27, 2014, DalPra was assigned to investigate this case.

¶ 17 On June 8, 2014, DalPra traveled with detective Kyle Boomer to Puerto Rico to locate and interview defendant, who was there for a planned event. On June 9, 2014, DalPra and Boomer, who were accompanied by two U.S. Marshals assigned to Puerto Rico, located defendant at a Ponderosa restaurant at about 1 p.m. Defendant was in a food line, and DalPra

asked him to come outside and speak to him. Defendant asked if DalPra was a police officer, and the detective showed him his badge. Defendant walked outside with DalPra.

¶ 18 Once outside, defendant was patted down and got into the back seat of the detectives' vehicle. DalPra sat beside defendant, and Boomer sat in the front seat. They did not handcuff defendant. They took defendant to the federal building, about one hour away. While in the car, DalPra learned that defendant could speak and write English, had a G.E.D., was retired from ComEd, and was employed as a bus driver. After receiving this background information, DalPra "Mirandized" defendant. DalPra had defendant read out loud the top line of the *Miranda* form, and DalPra read the remaining lines. Afterwards, defendant initialed and signed the form.

¶ 19 DalPra told defendant that there was a sexual allegation brought against him. Defendant denied that he had done anything wrong and stated that he would never touch a child. Defendant, who was born in 1945, told DalPra that he picked up nine children (seven boys and two girls) at eight different stops on the Prairie Hill school-bus route. The route started at 11:15 a.m. Defendant had to be at the school by 12:45 p.m. Z.R. was one of the two girls who rode the bus. Defendant stated that both of the girls were believable, but he denied the sexual-abuse allegations. DalPra testified that he told defendant that the allegations were not deniable. Defendant continued to deny them. At this point, DalPra took out his laptop and played portions of the videos for him. Defendant denied that he was the person in the videos.

¶ 20 Once at the federal building, DalPra, Boomer, and defendant went to a conference room. DalPra played additional videos for defendant. The detective accused defendant of making penetration, which defendant denied, stating that he touched only the insides of their legs. "I accused him of penetration again, and he said I touch[ed] their vaginas and their buttocks but I never went under their underwear or inside their underwear."

¶ 21 DalPra typed a statement containing everything they talked about.[1] Defendant commented as DalPra typed information, "he would say yes, that is fine, or no, I want it to say B, C, D." DalPra read the entire statement, and, then, defendant read it. DalPra printed it out, read it aloud to defendant again, and defendant read it. Defendant was allowed to make any changes he desired, and then initialed and signed it at about 5:20 p.m. Defendant had DalPra make one correction, adding the year, and then, in his own writing, wrote "I'm sorry." The detectives also signed the statement. They informed defendant that he was being arrested.

¶ 22 On cross-examination, DalPra testified that, on the first day he was assigned to the investigation, he met with Ladell Cass, the contract manager for First Student, the bus company, who told him that defendant was going to Puerto Rico for a couple of weeks within three days of his retirement. DalPra obtained a warrant on June 4, 2014. He also had defendant's cell-phone number. DalPra went to Puerto Rico to find defendant, arrest him, and interview him.

¶ 23 In Puerto Rico, a U.S. Marshall called defendant's cell phone and, using G.P.S coordinates, learned his location. The detectives were in plain clothes when they entered the Ponderosa restaurant. Defendant asked if they were police officers, and they showed him their badges. After they got into the car, the detectives told defendant that they were from Winnebago County. They did not tell defendant that he was under arrest because they did not want to alert him to the fact that he was wanted, and they wanted to avoid a flight situation. For the same reason, they did not handcuff him. They also wanted defendant to cooperate and speak to them.

[1] Prior to reading defendant's statement, the trial court read a jury instruction concerning other-crimes evidence, which noted that it will be received on the issues of defendant's intent, lack of mistake, and propensity. In response to defense counsel's request, the court noted counsel's ongoing objection to the evidence.

¶ 24 None of the detectives' questioning of defendant was recorded, and the statement is not labeled as a confession.

¶ 25 Initially, while in the car, defendant denied the sexual allegations. After the videos were played, he continued to deny that he had touched the girls in a sexual manner. "Initially, yes." Next, DalPra employed a technique that accused defendant of something that no child had said he had done: accusing him of penetration. Defendant denied there was any penetration. "He told me that it wasn't sexual in nature. That it wasn't an inappropriate touching." The detectives did not confront defendant with the First Student protocols concerning touching students. DalPra denied that he asked defendant if he was sorry for violating the protocols that prohibited touching any students, and he denied that defendant responded that he was sorry he had violated them.

¶ 26 At one point during the interview, the detectives asked defendant to submit to a buccal swab (*i.e.*, using a Q-tip to obtain a DNA sample from his mouth), and defendant complied. Afterwards, defendant asked to call his family, and DalPra allowed him to do so. Defendant also wanted to return to his family to go back home; DalPra denied this request.

¶ 27 Addressing the videos, defendant told DalPra that he knew that he was constantly being videotaped while on the bus. DalPra believed that the audio and video start recording when a key is inserted into the ignition. The only time the system does not record is if there is no recording cartridge in it.

¶ 28 Defendant told the detectives that the girls were credible in response to a question by DalPra. This is a technique that the detective uses. Defendant questioned if a couple of the boys on the bus are credible, but agreed that the two girls are.

¶ 29 Defendant's wife was present at the Ponderosa restaurant, but was not allowed to accompany defendant to the federal building.

¶ 30 On re-direct examination, DalPra testified that he did not wait until defendant returned from Puerto Rico to execute the warrant because he was concerned about locating defendant. At no point was defendant confused about anything. He understood English, and he did not appear to have problems understanding what the detectives were telling him. When they went to Puerto Rico, the detectives already had a warrant; they did not need a confession, but there are several reasons for wanting to talk to someone, including to hear their side of it. The written statement contains defendant's words; DalPra typed it. Defendant could have changed anything he wanted. He changed only the date and added that he was sorry.

¶ 31 At about 5:42 p.m., DalPra had defendant write a second statement. Both detectives were present when defendant wrote it out. The statement says: "I speak English without a problem."

¶ 32 On re-cross examination, DalPra testified that defendant's second statement followed a discussion about whether or not defendant understood English. The entire conversation was in English.

¶ 33 Defendant's statement, which was read to the jury, reads as follows:

> "My name is Peter A. Sanchez, and I live at 3024 Hamlin Drive in Machesny Park, Illinois. I am 68 years old and I have been married to Maribel Sanchez for 42 years. I have 2 grown sons that live near me and I have 6 grand[]children that range in age from 18 to 5 years old. I worked for Ex[]elon for 22 years before retiring when I was 51 years old. I started working for bus companies because I would have summers and holidays off and it was something to do. I first worked for Van Galder and then Laidlaw. Laidlaw was sold to First Student and they became Illinois Central before going back to

First Student. I retired from First Student on May 23, 2014[,] and I was going to be done working for good. I say all that because I am embarrassed to say what I did. I am a good man and I love my family. I go to church every week. I do not know why I have done any of this. This past school year a route opened up for Prairie Hill School which allowed me to just work middays and afternoons. On my midday route, I would arrive at work at around 11:30 a.m. I checked my bus out and made 8 stops picking up a total of 9 children. Two of the children were twin brothers and they were picked up at the same house. All of the 9 children were preschool. There were 7 boys and 2 girls. The 2 girls were [Z.R.] and [S.Z.] I do not remember their last names. I know that they about 4 or 5 years old because they attend pre-K at Prairie Hill and Mrs. Hill is their teacher. I initially drove the 9 of them in a full-sized bus which would hold 71 passengers. A couple of the kids got hurt on that bus so I started taking a smaller 22[-]passenger bus. I do not know why they had the big bus initially but it wasn't my decision. The small bus being used began in about the beginning of April 2014. It was right after [D.] got hurt. He hit his head on the floor, when we were near the school, I do not know exactly what happened. He got staples in his head when it occurred, and I felt terrible that it happened. If I wouldn't of [*sic*] been that close to the school, I would have called an ambulance to the bus. For some reason, when I started driving the smaller bus, I began talking to the children more often and we would park outside of Prairie Hill School for multiple minutes. The school and the bus company decided on times that the bus should get there and where I should drop the kids off. I have [*sic*] taken it upon myself to get to the school a little earlier than I was scheduled to. I just picked up the kids a few minutes earlier than I was scheduled. Sometimes the kids would not get a ride and that would

push the time up as well. It was intentional to get to the school early but not overly early. While the bus was parked outside of Prairie Hill School, an urge came over me and I started touching [S.Z.] with my hands. I touched her butt and her vagina with my hands. I know that there is a bus company policy that a driver should never touch a child in any way and I broke that policy over and over. I then started touching [Z.R.'s] vagina and butt. I also touched her many times. I told the Detectives today that I know that I made this huge mistake but I never put my hand inside of their underwear and I never put my fingers or anything else into their vaginas or anus. I think that I may have even touched [S.Z.'s] breasts at one time or another. I'm sick that I did this. The detectives that I am talking to asked me about my granddaughters and other children that I drove on any bus or had any kind of contact with ever in my life. I told them that I had never touched any other child like I touched [S.Z.] and [Z.R.] I even offered to take a lie detector test. On my granddaughter[s'] lives, I have not ever sexually abused any other person. I have probably touched other children but not like this. I hug them and I get too close to them which is my biggest problem. I do not know why I have done this, I feel awful. I do not know how I can fix this. I am sorry to them and my family. I am sorry to everybody that I have hurt. I am sorry[.]"

¶ 34 3. Dan Schiro

¶ 35 Dan Schiro, Z.R.'s grandfather, testified that, in May 2014, Z.R., her parents, and her brother lived with Schiro and his wife in South Beloit. On May 26, 2014, Schiro was in his bedroom. Z.R. came to his room and asked if he would play a game with her. While playing cards, Z.R. "blurted out *** Papa, is it bad when the bus driver touches my private?" Schiro asked her if she meant on the bus, and Z.R. said, "Yes" four or five times. They continued

playing the game, Schiro tried to keep his composure, and, a short time later, he told Z.R.'s parents, Sara and Derek. On cross-examination, Schiro testified that was the full conversation with Z.R. about the bus driver.

¶ 36 4. Sara R.

¶ 37 Sara R., age 35 and Z.R.'s mother, testified that, after speaking with Schiro on May 26, 2014, she called Z.R. into her bedroom to ask her what had happened. No one else was in the room. Sara testified that she said, "I know that lately you have been grabbing at your pee-pee, which is what she called her private, and I was asking if there was anything she wanted to tell me about that." Z.R. told her that "I already told Papa earlier about the bus driver touching my pee-pee." Sara asked what he did and to show her on Sara's body. Z.R. touched Sara's "pee-pee," and Z.R. "said that he would take his hand and rub it back and forth on her pee-pee." When Sara asked Z.R. how often this occurred, Z.R. initially responded that it happened every day; later, she said it happened for a couple of weeks; and then she said it happened for a few years. Z.R. told Sara that it did not matter what she was wearing; shorts, pants, or a dress. He still did it. It happened every day before she got off the bus. Z.R. told her mother that he did not do it to anyone else and that she would read a book to him when it happened.

¶ 38 Z.R. did not tell Sara sooner because she was scared; on television the only people who do that are married and Z.R. felt like she was married to defendant. Sara asked Z.R. if defendant ever said anything to her, and she replied that he would tell her she looked pretty on some days when she got on the bus. Sara spoke to Z.R. for about 30 to 45 minutes. Afterwards, she told her husband, Derek, and they drove Z.R. to the hospital.

¶ 39 On cross-examination, Sara testified that she also spoke to Z.R. at the hospital about what happened. Z.R. gave three timeframes for when this happened: every day; a couple of weeks;

and for a few years. Sara could not recall if the responses were all during the first conversation, in her bedroom, or at the hospital. Z.R. told her that it would happen when she would read defendant a book.

¶ 40 Sara contacted the police and gave a statement on May 26, 2014. The police wrote it and Sara signed it. In her written statement, Sara did not state that Z.R. said it happened every day before she got off the bus. Sara took Z.R. to the hospital because she was grabbing at her "pee-pee." There was no infection.

¶ 41 On re-direct examination, Sara stated that Z.R. had been grabbing at her pee-pee for two weeks to a few months beforehand. Z.R. was five years old in May 2014. She did not have a concept of time; tomorrow could mean one week down the road, and yesterday could mean two weeks ago.

¶ 42 5. Jennifer Reed

¶ 43 Jennifer Reed testified that she is assistant location manager for First Student, the school-bus company that defendant worked for in 2014. Reed testified that her job is to ensure that buses are on time and routes are staffed. She met defendant in 2010 when they both worked for Illinois Central, another bus company. She had minimal contact with him there. When she went to work for First Student, defendant was already working there.

¶ 44 When defendant was first hired at First Student, he would have signed a national employee handbook, acknowledging its receipt and his review of the company's rules and regulations. Provision 14 on page 40 states that drivers shall not physically touch students unless necessary to protect them or another passenger. Reed identified defendant's signature from the handbook's signature page.

¶ 45 First Student hired defendant on May 11, 2013. His route in April and May 2014 was a midday route with a smaller bus (*i.e.*, a van-type bus) with a capacity of 24. Defendant's route had nine students going to the Prairie Hill School. First Student has a router who uses a software program to prescribe routes; the router can adjust the route as needed or as requested by the driver. Reed could not recall what time defendant's bus was required to arrive at the school, but, typically, it would be a few minutes before the "paras" would come out to get the children. If a driver is routinely arriving early at a school, they should bring that to Reed's attention.

¶ 46 Defendant's bus had audio- and video-recording equipment. It consisted of a camera and a DVR box that was in a locked black container. Reed had the key to the box and to the drive inside it. Drivers do not have a key to the container. When the bus is powered on, the equipment is constantly recording. The company has several practices to ensure that the equipment is properly functioning, including a monthly check with a portable reader and random checks by Reed. In April and May 2014, the cameras on defendant's bus were properly working. They had been installed in 2013.

¶ 47 On May 29, 2014, Reed met with detectives DalPra and Boomer. She had already obtained recordings they had requested and had reviewed them. Reed identified two discs she burned for the detectives. One contained recordings from April 15, 2014, to May 5, 2014, and the second contained recordings from May 6, 2014, to May 23, 2014. They both depicted defendant driving his school bus. Defendant's last day of work for First Student was May 23, 2014.

¶ 48 On cross-examination, Reed testified that defendant typically drove the same bus on the same route. First Student keeps track of which bus is used on what route and by which driver. The videos on the discs are from the same bus, every day; there were no replacements. When

she went to retrieve the videos, she unlocked the box and secured the drive; there was no evidence of tampering.

¶ 49 Reed explained that, on each bus, a camera is mounted near the driver. In the videos, you can see part of the driver in his or her seat, the students in their seats, and all the way to the back of the bus. First Student makes all of its drivers aware that there are cameras on their buses. Routers use software to set routes that drivers take. Routes can be "tweaked" if a driver says that there is a problem. If a student's pick-up or drop-off time needs to be changed, First Student, not the driver, notifies the parents. As to defendant, Reed never received calls from parents complaining that defendant was picking up their children too early or too late.

¶ 50 During the 2013-2014 school year, there was a shortage of drivers (as there is every year), and defendant took over the Prairie Hill route after another driver "probably" left or retired. It is a midday route, is considered extra work, and drivers bid on it.

¶ 51 On re-direct examination, Reed testified that defendant's route was in South Beloit. The driver's direction sheets (or route sheets) specify the routes that drivers take.

¶ 52 6. Teresa Z.

¶ 53 Teresa Z., S.Z.'s mother, testified that, in the spring of 2014, S.Z. was five years old and went to Prairie Hill School. She rode the school bus to and from school. Teresa currently has a civil suit pending against First Student. During cross-examination, she testified that the suit is for money damages, and she "probably" also filed suit against defendant in that suit.

¶ 54 7. Sergeant Kyle Boomer

¶ 55 Winnebago County sheriff's sergeant Kyle Boomer testified that, on May 27, 2014, he was assigned as a detective on this case. He learned that Z.R. and S.Z. rode defendant's bus. On

May 29, 2014, Boomer want to Prairie Hill School, where Reed gave him two discs of videos from the surveillance cameras on defendant's bus.

¶ 56 Eleven of the videos were published to the jury, with defense counsel's prior objection noted: "MS. SCHAFER: Just for the reasons that I previously discussed with the Court." Nine videos depict acts against Z.R., the victim, and two videos (one approved and one unapproved) depict (other-crimes) acts against S.Z.

¶ 57 The first video was from April 21, 2014, a date not approved by the court and that depicts acts against S.Z. In the April 21, 2016, video, defendant places his hand on his knee while S.Z. is facing either the back or front of the bus and leaning toward him, thus, touching her buttocks or vaginal area and often looking at either area. Defendant quickly takes his hand away when S.Z. walks away from him. When she returns, he places or slides his hand on his knee again so that it touches her butt or vagina. When she moves away slightly, he outstretches one or more of his fingers, placing them on her buttocks or vaginal area.

¶ 58 After the first video was played, Boomer identified defendant as the bus driver and the girl in the blue jacket as S.Z. (the girl with dark hair) and the girl with the pink hood up as Z.R. (the girl with blonde hair).

¶ 59 Ten additional videos were played in open court: April 29, 2014 (S.Z.; approved); May 7, 2014 (Z.R.); May 8, 2014 (Z.R.); May 9, 2014 (Z.R.); May 12, 2014 (Z.R.); May 13, 2014 (Z.R.); May 14, 2014 (Z.R.); May 19, 2014 (Z.R.); May 20, 2014 (Z.R.); and May 21, 2014 (Z.R.).

¶ 60 (Based on this court's review, we note that the videos depicting acts against Z.R., the victim in this case, are similar to those depicting acts against S.Z., but also involve Z.R. sitting on defendant's lap on several occasions, with defendant reading to Z.R. Generally, as in the

videos with S.Z., defendant puts his hand on his right leg and moves it forward to cover his knee when Z.R. approaches him and leans into him, either facing him or toward the back of the bus. Defendant's hand touches Z.R.'s buttocks or vaginal area. His outstretched fingers can also be seen in the videos, with defendant reaching for and touching either Z.R.'s vaginal area or buttocks.)

¶ 61 Boomer testified that he reviewed all the dates of videos between April 15, and May 23, 2014. Defense counsel did not cross-examine Boomer.

¶ 62 8. Kim Larson

¶ 63 Kim Larson, a forensic interviewer at the Carrie Lynn Center, a children's advocacy center, testified that she conducts interviews with children in a non-suggestive, non-leading manner to obtain detailed information about an event that a child may have experienced or witnessed. On May 28, 2014, Larson interviewed Z.R. in a room with a one-way mirror. Boomer, DalPra, and another representative from the Carrie Lynn Center were in the observation room. The interview was videotaped. Prior to the interview, Larson knew that there was an allegation of abuse on a bus, and she had a DCFS report concerning the allegation.

¶ 64 A videotape of the interview was played for the jury, with defense counsel's prior objection noted. In the video, Z.R. tells Larson that defendant touched her pee-pee over her clothes. Using an anatomical drawing, Larson has Z.R. circle the area defendant touched on her. Z.R. states that defendant touched her every day while they waited for her teacher to arrive.

¶ 65 After the video was played, Larson testified that she wore an earpiece during the interview through which the members of the agencies in the observation room could communicate with her. Larson explained that she used the "Corner House" interview method, which begins with building a rapport with the child, then anatomy identification, touch inquiry,

and abuse scenario, and closure. She uses open-ended questions based on the child's age and ability; they may be more direct in order to clarify. She does not suggest an answer to the child. A drawing by Z.R. of the house she lives in and the people she lives with was admitted into evidence, as was an anatomy-identification chart that Larson used with Z.R.

¶ 66 Defense counsel did not cross-examine Larson. The State rested its case-in-chief. Defendant moved for a directed verdict, and the court denied the motion.

¶ 67 C. Trial - Defendant's Case-in-Chief

¶ 68 1. Arnie Cabello

¶ 69 Arnie Cabello, a retired machinist, testified that he has lived in the Rockford area for 40 years and has been married for 46 years. He has two children and is raising his two grandchildren. Cabello has known defendant for 10 to 12 years. They met at church. He sees defendant every week, on Sundays. They used to go to Rascals Bar after church, joining other friends there. Their families would also get together for birthdays and anniversaries.

¶ 70 About two years ago, defendant moved to the suburbs and, since that time, Cabello does not see defendant as often as he used to, perhaps every other month. Cabello has developed an opinion that defendant is a moral and decent person.

¶ 71 On cross-examination, Cabello testified that he does not know any of the facts of this case and has not seen any of the evidence. On re-direct examination, he stated that, despite not knowing the facts and not seeing any evidence, he still holds his opinion of defendant.

¶ 72 2. Defendant

¶ 73 Defendant testified that he was born in 1945 in Puerto Rico and moved to Chicago in 1954. He obtained his G.E.D. Defendant and his wife, Maribel, whom he married in 1972, have two sons and six grandchildren. He worked for Commonwealth Edison/Exelon for 22 years, first

in Chicago and then in Byron. Defendant retired from Commonwealth Edison in 1996, and he and Maribel moved to Puerto Rico for about one year. In 1998, they returned to the area. Defendant worked for about one year as a delivery driver for a pharmaceutical company.

¶ 74 After speaking to a family friend about the benefits of working as a school bus driver, defendant applied to Galder Bus Company. He was hired. He worked a total of 15 years as a school bus driver for four different bus companies.

¶ 75 In 2013, defendant and his wife moved to South Beloit. He worked for First Student. During the school year, they moved to Machesney Park; they were making plans for defendant to completely retire, but he decided to work that last school year (2013 to 2014) to pay for a trip to Puerto Rico for his sister's 50th anniversary party in May 2014. Initially, defendant had a mid-day and an afternoon route. After the move to Machesney Park, he bid for and was able to switch to the Prairie Hill School route. This occurred in late 2013 or early 2014. Defendant was told there would be nine children on the new route. First Student provided him a sheet with route information, including the times and stops. Defendant only picked up the Prairie Hill School students; he did not take them home. He drove a different route, with different students, at the end of the day.

¶ 76 On the Prairie Hill route, defendant initially drove a large 71-seat bus that did not have seat belts. After an accident occurred on the bus in the spring of 2014, First Student provided defendant with a smaller bus with seat belts.

¶ 77 Defendant testified that his route and times were all set by First Student. Defendant could have input or make suggestions, but the company made the ultimate decision. Factors that impacted his arrival time were the weather, traffic, and the time a child boarded the bus.

¶ 78 The children on defendant's route were pre-schoolers, about five years old. Certain rules applied to this population, including that a driver could not allow a preschooler to board the bus unless there was an adult parent present and the driver could not allow the students to leave the bus at the school unless an adult was present. Defendant observed these rules. At the school, Mrs. Hill was the teacher to whom defendant usually released the children. Sometimes, a substitute teacher was assigned to pick them up.

¶ 79 Typically, when defendant arrived at the school, a teacher was not yet present. He would sometimes wait 8 to 10 minutes for the teacher to arrive. Defendant did not get off of the bus. While waiting, he would get out of his seat and sit on the armrest. He would sometimes interact with the students, talking to them or reading with them. Z.R. and S.Z. would sometimes come up and play with defendant's coat. He made sure that they did not go near the area with a step where they might fall.

¶ 80 Defendant denied sexually abusing Z.R. and S.Z., but he conceded that he had physical contact with them. Defendant explained:

> "While I was sitting there, the kids would come up to me. They were right there, physically there, and sometimes just – I would put my hand around them, and I was not trying to sexually abuse them or anything because I wouldn't want to do that to a child. It's just a matter of just interacting with the children and – but never did I try to do anything that would be sexual."

¶ 81 Defendant is aware of First Student's policy concerning how he is permitted to interact with students. He should not touch children, "but sometimes a bus driver, you have the tendency to try to protect them. So there is [*sic*] interactions with the children, but it's stuff that it's not done – to me I wasn't doing it in a sexual way."

¶ 82 Defendant retired on May 23, 2014. Within a couple of days, he went to Puerto Rico. There, on June 9, 2014, defendant, Maribel, his brother, niece, and nephew went to a Ponderosa restaurant. While in the restaurant, defendant received a phone call from someone who spoke Spanish, concerning paperwork relating to property he formerly owned in Puerto Rico. The male speaker tried to arrange a meeting. He received a second call from the same caller. Afterwards, DalPra arrived at the restaurant and gestured defendant to come over to him. Defendant complied, and DalPra identified himself, showed is badge, and asked defendant to come with him in his vehicle. They did not leave right away. Defendant was "Mirandized." The detectives started asking him about the school bus and mentioned the girls by name. They asked who would be most likely to lie on the school bus. DalPra took out his laptop and started playing videos, accusing defendant of touching and molesting the children. "I kept telling him, sir, what you're telling me is not what I am doing." "I might be touching the children but not in the way you're telling me I'm doing this."

¶ 83 According to defendant, they might have stayed in the parking lot for about one hour. As they were pulling out, DalPra continued to play the videos and questioned defendant. The questioning continued at the federal building. DalPra played more videos and accused defendant of molesting the girls. "And at one point he told me, if I find out that you had your hand down her pants and you had your finger in her vagina, I'm going to make sure you get 60 years." Defendant testified that, during the course of the drive and interview, he never told the detectives that he had rubbed the girls' vaginas and buttocks.

¶ 84 At one point, DalPra typed up a statement. He read it to defendant. At this point, defendant was thinking about his family and the fact that he was in Puerto Rico for his sister and wife. (He was not permitted to speak to his wife after the detectives had him get in their car.)

When asked if he read the statement, defendant replied: "I kind of read some of it, but most of it was – most of it was kind of something that I couldn't really comprehend as far as what was in there, because I was – in my mind I thought that I was signing something that they were going to release me and let me go back to my family." Defendant agreed that he can read and write English. He signed the statement. At the time, the statement was not clear to him. At the end of the statement, he wrote that he was sorry. Defendant explained:

> "Well, when Detective DalPra gave me the sheet to sign, he was telling me, will you swear on your grandchildren that you didn't do what you're telling me that you're doing? I said, yes, sir, I swear on my grandchildren that I did not do what they said. Well, if you're sorry, then you swear on your grandchildren? Yes, I swear on my grandchildren that I did not do this. I'm sorry that, you know. He says, well put over here that you're sorry, that you swear on your grandchildren that you didn't do this."

¶ 85 Defendant testified that the statement he signed is not accurate about what occurred. It is not true that he said that he touched the girls' vagina. "I kept telling him that I touch the children but not in the way that he was saying that I did so." He signed the statement because: "I thought that after the statement was done with – because I asked him after it was all over with, I asked him can I go back to my family, and he said, no[.]"

¶ 86 Defendant gave the detectives a buccal swab, and agreed to return to Illinois. Defendant denied that he touched Z.R. or S.Z. in a sexual way in the videos or at any other time.

¶ 87 On cross-examination, defendant testified that he was the person in the videos. He denied that he told DalPra that the person was not him. He saw the video where he touched Z.R., and he "might have put my hand behind there by her thigh or whatever, but I wasn't sexually

trying --." He denied that he touched S.Z.'s vagina. When asked if he touched S.Z.'s chest, defendant replied, "I might have touched them, but it was not --."

¶ 88 Defendant worked for First Student for a number of years and is familiar with their protocols or policies, but the detective put it in a context that was not what defendant was saying. He signed the policy manual, acknowledging that he had read the protocols. One of them states that he shall not touch the students. He did touch the students, but not in a sexual way. "Sometimes when the children get close to you, sometimes it happens, but it was not – I was not touching the children in a sexual way."

¶ 89 Defendant did not know that, if he was getting to school too early, he needed to ask to have his route times changed. He never asked to have them changed. Defendant denied that he was intentionally getting to school early. He also denied telling DalPra that he picked up the students early and tried to get to school earlier than scheduled, but not too early.

¶ 90 Defendant has a G.E.D. and can understand, read, and write English. He was not under the influence of drugs or alcohol when he spoke to the detectives. He understood his rights. Defendant spoke with the detectives, but never said he sexually touched the children. DalPra typed the statement. He was talking, and defendant answered questions. Defendant read the statement and signed it. "I read it as my mind could try to go through that, but it's – at the time, the state of mind that I was in, I was trying to read what he was giving me to read." DalPra might have asked defendant if he wanted to make any corrections, and defendant added that the events happened in April 2014. He also wrote that he was sorry. He had the opportunity to read the line above his signature: "before signing I have read or had read to me this page to make certain that it is my statement and that it is the truth." No one told defendant that he would be

allowed to go home if he signed the statement. He wrote and signed another statement, stating that "I speak English without a problem."

¶ 91 When the detectives arrived at the Ponderosa restaurant, they showed defendant their badges. They did not grab defendant or handcuff him, but DalPra told defendant that he had to come with him. Defendant chose to answer the questions that were asked of him. At the federal building, the detectives offered defendant water, and he was not handcuffed there. He denied telling the detectives that, while his bus was parked outside the school, an urge came over him and he started touching S.Z. with his hand. He also denied that he told the detectives that: he took it upon himself to get to school earlier than he was scheduled to; he touched S.Z.'s butt and vagina with his hands; he touched Z.R.'s vagina and butt; he touched Z.R. many times; that he touched S.Z.'s breasts; he was sick that he did this; he never touched any other child like he touched S.Z. and Z.R.; and he does not know why he did this and he feels awful.

¶ 92 On re-direct examination, defendant stated that DalPra asked questions, played videos, and then started typing. It was the detective's choice as to what to put in the statement. Defendant's statement that he was sorry was in response to questions about putting his wife through all of this. He did tell the detectives that he has touched children, but not in a sexual way. When the statement was finished, the detectives instructed defendant to put his initials in certain places. Defendant complied.

¶ 93 Defendant acknowledged to the detectives that it was him on the videos. At the Ponderosa, defendant did not feel like he had a choice about whether to go with DalPra. The statement he signed is not an accurate account of his interaction with S.Z. and Z.R. There are some accurate statements in the document, but defendant again denied that he sexually abused the girls.

¶ 94 On re-cross-examination, defendant testified that he guesses that he had a choice as to whether to speak to DalPra at the Ponderosa.

¶ 95 D. Trial – State's Rebuttal

¶ 96 In rebuttal, the State called Sergeant Boomer, who testified that he was with DalPra in the car in the Ponderosa parking lot the entire time when DalPra questioned defendant. They spent about 10 to 15 minutes in the parking lot. During this time, DalPra did not take out his laptop and play the videos. There was never any time when DalPra was with defendant and Boomer was not present. Boomer also testified that DalPra did not say to defendant that, if he found out defendant put his hand in the girls' pants and finger in their vaginas, he would ensure defendant would get 60 years in prison. Addressing the written statement and defendant's writing that he was sorry, Boomer stated that, after defendant read the statement, DalPra asked him if he wanted to add anything and defendant said "I'm sorry. So Detective DalPra had him write I'm sorry." DalPra did not say anything about swearing on defendant's grandchildren's lives.

¶ 97 The State rested. The trial court denied defendant's motion for a directed verdict.

¶ 98 D. Trial – Verdict and Subsequent Proceedings

¶ 99 The jury found defendant guilty of both counts of aggravated criminal sexual abuse. The trial court denied defendant's motion for judgment notwithstanding the verdict or for a new trial (wherein he argued that the court erred in granting the motion *in limine* concerning the videos of other-crimes evidence and for allowing the State to play 11 videos). On July 8, 2016, the trial court sentenced defendant to two concurrent five-year terms of imprisonment (after noting that the sentencing range was three to seven years) and two years of mandatory supervised release on each count. The court denied defendant's motion to reconsider his sentence. Defendant appeals.

¶ 100 II. ANALYSIS

¶ 101 Defendant argues that he was denied due process and a fair trial when the State violated the trial court's order limiting the use of other-crimes evidence in the form of the bus videos by playing to the jury one unapproved video. For the following reasons, we agree that the State violated the court's order, but we conclude that the error is harmless because the evidence was overwhelming and because the unapproved video depicted essentially the same acts as those in the approved videos.

¶ 102 As defendant notes, because we must review the videos themselves to determine whether the State violated the trial court's ruling, our review is *de novo*. *People v. Lamborn*, 185 Ill. 2d 585, 590 (1999) (applying *de novo* review where the court had to review photographs to determine if they were lewd under child pornography statute).

¶ 103 Aggravated criminal sexual abuse is defined in section 12-16 of the Criminal Code of 2012, which states that, as relevant here, the offense is committed if the accused is 17 years of age or over and commits an act of sexual conduct with a victim who is under 13 years of age. 720 ILCS 5/12-16(c)(1)(i) (West 2016). Sexual conduct is defined as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age *** for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1 (West 2016).

¶ 104 Generally, other-crimes evidence may be admitted if it tends to show intent, *modus operandi*, identity, motive, absence of mistake, and any material fact other than propensity that is relevant to the case. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Section 115-7.3 of the Code of Criminal Procedure of 1963 provides, as relevant here, that, in cases where the defendant is accused of aggravated criminal sexual abuse, other-crimes evidence "may be admissible (if that

evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(b) (West 2016). Thus, under section 115-7.3(c), such evidence may be admitted to show propensity to commit certain sex offenses. *Donoho*, 204 Ill. 2d at 176. See also Ill. R. Evid. 404(b) (eff. Jan. 1, 2011) (evidence of other crimes, wrongs, or acts is admissible in cases where the defendant is accused of aggravated criminal sexual abuse "to show action in conformity therewith"); Ill. R. Evid. 403 (eff. Jan. 1, 2011) (relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

¶ 105 Here, at the hearing on the State's motion *in limine*, the State specified five dates of videos that it asked the court to allow it to use as other-crimes evidence (in addition to defendant's written statement) to show defendant's intent, lack of mistake, and propensity. The trial court granted the State's motion, specifying that, if the prosecutor wished to introduce "anything other than the five dates we just talked about, 4/15, 4/28, 4/29, 4/30 and 5/23, I think then the burden is on you because it's your motion to ask the Court to consider other dates." The prosecutor replied, "Yes." The record contains no documentation of a written or oral request by the State to modify the dates that the court approved.

¶ 106 At trial, the State played and published two videos depicting acts against S.Z., but only one of those videos was from the approved group, specifically, April 29, 2014. It also showed the jury a video from April 21, 2014, which was not approved by the court. Defense counsel did not object to the April 21, 2014, video, but counsel's standing objection to the videos in general was noted.

¶ 107 Defendant notes that the trial court based its ruling, allowing videos from five dates, on its own review of the videos and arguments from both sides. The court conducted the required

balancing test, assessing the evidence's probative value and prejudicial impact. Defendant argues that the unapproved video[2] introduced to the jury images that may or may not have been evidence of criminal sexual abuse; however, they were enough to convince the jury that defendant was a bad person deserving of punishment, even if the evidence regarding Z.R., the victim, was not. The State's violation of the court's order, defendant argues, introduced prohibited evidence of other crimes to the jury and denied defendant a fair trial and due process.

¶ 108 The State responds that, because the trial court had originally approved of five videos depicting S.Z. being abused, the introduction of one unapproved video had no impact on the verdict because all of the videos involving S.Z. show defendant doing essentially the same thing to her.

¶ 109 We agree with defendant that the State violated the trial court's ruling when it played the April 21 video to the jury. This date was clearly not approved by the court, which was explicit in directing the prosecutor to seek the court's approval before showing additional videos. The State's response essentially addresses whether the error was harmless (which we turn to next), not whether or not there was error.

¶ 110 Having determined there was error in playing the video, we now turn to assess whether the error was harmless. The State argues that any error was harmless because the evidence

[2] Defendant references both the April 21 and May 21 videos as being unapproved videos depicting acts against S.Z. This is incorrect. Only the April 21 video contains images of other-crimes against S.Z. The May 21 video depicts both girls on the bus, but defendant's actions are directed almost entirely against only Z.R., the victim in this case. The video runs over 11 minutes, and defendant appears to be touching S.Z.'s left hip for about 30 seconds.

against defendant was overwhelming. Defendant filed no reply brief and, thus, does not respond to this argument. We agree with the State.

¶ 111 Improper admission of other-crimes evidence is harmless if the defendant has not been prejudiced or denied a fair trial, and the State must show beyond a reasonable doubt that the result would have been the same without the improper admission. *People v. Gregory*, 2016 IL App (2d) 140294, ¶ 28. Thus, we must consider whether the other-crimes evidence was a "material factor" in the conviction. *Id.*

¶ 112 We conclude that the State has shown that the error in playing one unapproved video was harmless beyond a reasonable doubt. The evidence against defendant, primarily, the videos depicting his acts against the victim, Z.R., was overwhelming. The videos depicting acts against Z.R. are essentially the same as those depicting acts against S.Z., but also involve Z.R. sitting on defendant's lap on several occasions, with defendant reading to Z.R. Generally, as in the videos with S.Z., defendant puts his hand on his right leg and moves it forward to cover his knee when Z.R. approaches him and leans into him, either facing him or toward the back of the bus. Defendant's hand touches Z.R.'s buttocks or vaginal area. His outstretched fingers can also be seen in the videos, with defendant reaching for and touching either Z.R.'s vaginal area or buttocks.

¶ 113 In addition to the videos, we note that Z.R. was consistent in reporting the crimes to her family, Kim Larson at the Carrie Lynn Children's Center, and in her testimony at trial. She stated that defendant touched her "pee-pee" over her clothing on many occasions. Z.R.'s grandfather and mother corroborated these statements. Further, defendant's statement (and DalPra's testimony concerning the interview) relates that he touched the girls' vagina and buttocks over their clothing. Although defendant disavowed his statement in court, the video

evidence was irrefutably damaging to his case. Finally, we agree with the State that all of the videos showing defendant's acts against S.Z., both approved and unapproved, depict essentially the same acts. He placed his right hand on his right knee when S.Z. approached and leaned her vaginal area or buttocks into him and outstretched his finger(s) when she moved away slightly, reaching, again, for her vaginal area or buttocks.

¶ 114 In summary, we conclude that, even without the erroneous admission of the unapproved video, the result would have been the same.

¶ 115 III. CONCLUSION

¶ 116 For the reasons stated, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 117 Affirmed.