No. 3–09–0111

Order filed May 19, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	No. 07–CF–1463
	)	
DAVID R. NEMEC,	)	Honorable
	)	Robert P. Livas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the judgment.

ORDER

Held: The trial court did not err by admitting a recording of a telephone conversation between the victim and defendant as an exception to the eavesdropping statute. In addition, the trial court properly admitted other crimes evidence and properly instructed the jury regarding other crimes evidence. Defendant's conviction and sentence are affirmed.

Following a trial on July 25, 2008, a Will County jury found defendant guilty of one count predatory criminal sexual assault and one count criminal sexual assault, as charged. The trial court sentenced defendant to consecutive terms of 13 years imprisonment and 9 years

imprisonment. On appeal, defendant claims that the trial court erred by denying defendant's motion *in limine* which sought to exclude a telephone recording which defendant claimed violated the eavesdropping statute. Defendant also claims that the trial court improperly admitted other crimes evidence and that the trial court did not properly instruct the jury regarding both a prior, written statement made by a witness and the other crimes evidence. We affirm.

FACTS

On August 2, 2007, a Will County grand jury issued a two-count bill of indictment against defendant. Count I alleged that between November 15, 2000, and December 30, 2000, defendant committed the offense of predatory criminal sexual assault of a child in that defendant, who was 17 years of age or older, committed an act of sexual penetration with B.N., who was less than 13 years of age, by placing his penis in B.N.'s vagina in violation of section 12-14.1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-14.1(a)(1) (West 2000)). Count II alleged that between September 1, 2006, and November 1, 2006, defendant committed the offense of criminal sexual assault in that defendant, who was 17 years of age or older, committed an act of sexual penetration with B.N. by placing his penis in B.N.'s vagina and B.N. was less than 18 years of age and defendant was a family member of B.N. in violation of section 12-13(a)(3) of the Criminal Code of 1961 (720 ILCS 5/12-13(a)(3) (West 2006)).

On May 28, 2008, defendant filed a motion *in limine* requesting, in part, the exclusion of a telephone conversation between the victim and defendant recorded by a third party, not at the victim's request and without defendant's consent. On June 6, 2008, the State filed an amended motion to allow proof of other crimes pursuant to section 115-7.3 of the Code of Criminal Procedure (725 ILCS 5/115-7.3 (West 2006)) to show defendant's propensity to commit the

crimes charged in the indictment. In the motion, the State claimed that the victim and the victim's sister made allegations of other incidents of sexual abuse committed by defendant not set forth in the bill of indictment and that these incidents were similar in nature and close in proximity of time to the pending charges.

On that same day, June 6, 2008, the State filed a separate amended motion to admit evidence of other crimes. In this motion, the State claimed that the other crimes evidence of other sexual acts committed against the victim, occurring between the years 2000 and 2007, and sexual acts committed against the victim's sister, occurring between October 2006 and May 2007, would be offered to establish identification, intent, *modus operandi*, knowledge, absence of mistake, or common scheme or plan, in addition to being offered pursuant to statute to demonstrate defendant's propensity to commit the crimes alleged in the indictment.

On July 21, 2008, the court addressed the State's amended motions to allow proof of other crimes evidence. The prosecutor stated that she wanted to admit evidence to the jury that defendant had sexual intercourse with the victim "hundreds of times" at their primary home during a seven-year time period. The State believed that if the evidence was not admitted, it would limit the victim's testimony and make the incident appear isolated which would unfairly "strain" the victim's credibility.

Defense counsel stated that identification, intent, *modus operandi*, knowledge, absence of mistake or common scheme or plan were not issues in the case. Defense counsel stated that defendant was charged with only two separate crimes, but the State wished to admit evidence of hundreds, if not thousands, of other crimes. Under such circumstances, defense counsel believed that there was a great risk of unfair prejudice to defendant if the trial court admitted the other

crimes evidence.

The court found that there was similarity between the crimes charged and the other crimes evidence and stated that since the State charged defendant with an incident in "2001" [*sic*] and another incident in 2006, the State could admit into evidence any other crimes evidence which occurred between the two charged incidents. The court also preliminarily found the "probative value of these outweighs prejudicial effect despite the number of times, okay."

Next, the court addressed defendant's motions *in limine* pertaining to the recording of a telephone conversation between defendant and the victim recorded by a third party without defendant's knowledge or consent. Defense counsel argued that the recording should be excluded under the eavesdropping statute because this recording did not fall into an exception under the statute.

Neither the defense nor the State presented any witnesses to the court during this hearing. The prosecutor explained the circumstances surrounding the recording, although defense counsel did not completely agree with some of the information presented by the prosecutor. The court said that it was difficult to rule on defendant's motion *in limine* when no one offered any evidence as to what was said during the conversation prior to recording and then denied defendant's motion *in limine*.

Following the hearing on the pending pretrial motions, defendant's jury trial began. After opening statements, the State called Jeffery Jerz, a Will County sheriff's deputy, who testified that on June 2, 2007, he was dispatched to the residence located at 7620 West Royce in Frankfort, Illinois, for "a subject who just cut his wrists." When defendant opened the door to the residence, Jerz observed a horizontal cut under defendant's right forearm and observed

defendant holding a towel on his left forearm. Jerz explained to the jury that defendant told him "he and his wife had been arguing over the phone today, because his wife had found out that his oldest daughter accused him of molesting her. He was upset that no one was going to believe that he did not molest his daughters; therefore, he cut his wrists."

Christine Walsh, defendant's sister-in-law and the victim's adoptive aunt, testified that on June 2, 2007, she spoke to the victim. During this conversation on the telephone, she instructed the victim to make a three way call including Walsh and defendant. Walsh stated that she muted her telephone during the three way call. She told the jury that the victim made the telephone call and that she listened to the conversation between defendant and the victim while recording the conversation on her telephone with a voice memo application. Walsh testified that she recalled defendant saying "we can turn this into a lie, why did you say anything." During cross-examination, she testified that she did not speak to defendant that day and did not tell defendant that she was recording the conversation. Walsh said that she told the victim that she would record the conversation between the victim and defendant.

The victim's sister, J.N., testified that her sister was born on November 15, 1988. According to J.N., the girls came to live with defendant as foster children. After approximately three years, defendant and his wife adopted the girls when J.N. was 12 years old. J.N. said that defendant told her and her sister that they could not take showers at the residence unless an adult was home and that they could not lock the bathroom door. J.N. said that defendant would come into the bathroom every time she showered and would talk to her.

J.N. said that since June 2, 2007, she spoke to the police and the prosecutors on three separate occasions. She testified that the first time she spoke to the police was in early June

2007, when she told the police that nothing sexual happened between her and defendant and denied observing any sexual contact between her sister and defendant. She explained that she did not tell the police the truth because she was scared and nervous. Then, J.N. testified that during this same interview, she told the police that defendant came into her and her sister's bedroom to say good night and placed his hand inside her pajama pants and touched her vagina when she lived in Lockport with defendant. She later testified that when she met with the police on June 11, 2007, she wrote a statement for the police which indicated she believed defendant was innocent. J.N. said that the police interviewed her again on June 21, 2007. During that interview, she told the police that defendant touched her vagina on a daily basis. J.N. said that she told a secretary at the police station that she witnessed sexual acts between defendant and her sister.

J.N. testified that defendant had sexual contact with her while she lived with him, beginning at the age of 16 years. She said defendant either touched her vagina with his hand or his tongue under her clothing on a daily basis during the next year and that it ended on June 2, 2007. J.N. said that this behavior occurred in her bedroom every day at the Frankfort residence after she took a shower.

J.N. also told the jury that she observed sexual contact between her sister and defendant. She recalled they were living in Lockport, prior to moving to Frankfort. J.N. said that she walked into the bedroom that she shared with her sister and saw her sister laying on the lower bunk bed without any clothes and with defendant's head in her vaginal area. She testified that she observed further sexual contact between defendant and her sister after they moved to Frankfort. On one occasion, she walked into her sister's bedroom and saw defendant touching

her sister's vagina with his finger.

Following J.N.'s testimony, defense counsel renewed his objection to the State's other crimes evidence by asserting J.N. did not witness any events which proved any of the offenses charged in the indictment. Further, he argued that her testimony was not probative of identification, intent, knowledge, *modus operandi*, common scheme or plan. The court noted the objection and denied defendant's request for a mistrial.

The State then called the victim who testified that she was currently 19 years old, born on November 15, 1988. She stated that when she was 12 years old, she lived in Lockport, Illinois, with defendant, defendant's wife and her sister. The victim said that she came to live with defendant and his wife as a foster child through her aunt Dea when she was 12 years old. Eventually, defendant and his wife adopted her.

She told the jury she and her sister shared a bedroom at the Lockport, Illinois, residence. The victim described an incident which occurred a few weeks after her 12th birthday in November 2000, while living at the Lockport residence. She testified that she and defendant were sitting on the couch in the living room. The victim told the jury that she gave her father a "titty twister," "just trying to have fun." Defendant then told her that "anything you do to me, I'll do back to you." She said that defendant then gave her a titty twister. Thereafter, "[i]t happened a couple more times after that." She said, "[a]fter that he started rubbing my leg with his hand, and after that had happened he ended up putting his hand down my pants." The victim said that defendant rubbed her vagina with his hand.

The victim said that after these incidents, defendant had additional sexual contact with her less than a month later. The victim described doing laundry in the bedroom with defendant.

She testified that defendant walked over, started kissing her neck and lips, and removing her clothes. The victim said that defendant removed his clothes and engaged in sexual intercourse with her. The victim said that a couple of days after the first incident in Lockport, defendant told her that she "couldn't tell anybody, because if I did, then he would make me to be a liar and that he would make – he would make sure everybody believed him over us – over me."

She told the jury that after the first incident near her 12th birthday, defendant engaged in sexual intercourse with her on a daily basis unless she was menstruating. She described having a sexual routine with her father. After defendant came home from work, "[w]e'd all take our showers, and a little bit after the showers were done is when he [defendant] would start the sexual intercourse." She said that her sister walked into her room one time when defendant was having sexual contact with her, but she did not remember the specific date. She described being on the lower bunk of the bunk beds, and defendant was engaging in oral sex.

The victim said that they moved to Frankfort just before her freshman year in high school in 2004, where she and her sister had separate bedrooms. Shortly after they moved to the new residence in Frankfort, defendant continued having sexual contact with her. The victim said that defendant engaged in sexual intercourse with her almost every day, unless someone else was home at the house or she was menstruating. She told the jury that she knew when defendant wanted to have sexual intercourse with her because he "would either point or wave his hand or like nod his head towards the direction he wanted me to go in." She testified that in the months just before her 18th birthday in 2006, defendant engaged in sexual intercourse with her nearly every day. She said that she never told anyone what was happening while she lived in Frankfort because she was afraid that nobody would believe her.

On June 2, 2007, she received a telephone call from her cousin, Colleen, and then spoke with her aunt Christine. When asked if after speaking with her aunt Christine, she called defendant, the victim stated, "No." When asked if she spoke to defendant that day, she said "Yes." She said that defendant kept calling her on her cell phone on the other line and that she spoke with defendant while she was on the telephone with her aunt Christine.

After being shown State's exhibit No. 2, the victim said that she listened to the recording and that it was an accurate recording of her telephone conversation with defendant on June 2, 2007. The State offered to admit into evidence the telephone recording between defendant and the victim. Defense counsel objected stating that a proper chain of custody had not been established. The prosecutor then asked additional questions of the victim who recalled defendant telling her in the conversation that he would "deny it" and that he wanted her to "help him turn it into a lie." Defendant asked her if she was trying to put him in jail and take everything away from him. At that point, the court allowed the recording into evidence over defense counsel's objection.

The victim explained that she left defendant's residence on February 22, 2007, but moved back to defendant's residence just a few days prior to June 2, 2007. When she returned to defendant's residence in 2007, she signed an agreement with defendant and his wife on May 29, 2007, to comply with certain rules, including no drugs, a curfew, drug tests at the discretion of defendant and his wife, no guests, employment, and complete high school.

Following the victim's testimony, the State rested. Defense counsel asked the court to admit defense exhibits No. 1 and 2 into evidence. The State objected. Defense counsel stated that exhibit No. 1 was the written statement of the victim's sister which constituted direct

evidence and not impeachment. Based on the State's objection, the trial court denied admission of defense exhibit No. 1. The trial court allowed admission of defense exhibit No. 2, the agreement regarding house rules signed on May 29, 2007.

During the jury instruction conference, the State tendered People's Instruction No. 12, based on IPI Criminal No. 3.11, regarding a prior inconsistent statement of a witness. Defense counsel contended that this instruction should indicate that the jury "may consider a witness's earlier inconsistent statement" as substantive evidence based upon an exception set forth at 2A of IPI Criminal No. 3.11 because J.N.'s written statement narrated, described or explained an event or condition that the witness had personal knowledge of, and the statement was signed by the witness. The trial court denied defense counsel's request.

The State also tendered People's Instruction No. 13 to the court which provided:

> "Evidence has been received that the defendant has been involved in offenses other than those charged in the indictment.
>
> This evidence has been received on the issues of the defendant's identification, presence, intent, motive, design, knowledge and propensity to commit the offenses charged and may be considered by you only for that limited purpose.
>
> It is for you to determine whether the defendant was involved in those offenses and, if so, what weight should be given to this evidence on the issues of the defendant's identification, presence, intent, motive, design, knowledge, and propensity to commit the offenses charged and may be considered by you only

for that limited purpose."

The trial court gave the instruction over defense counsel's objection.

Following deliberations, the jury found defendant guilty of both offenses. On December 11, 2008, defendant filed a motion for new trial challenging the court's decision to allow the State to introduce the recording of the telephone conversation in addition to other contentions of error. Defendant also claimed that the trial court improperly allowed the State to present evidence of other crimes to the jury and improperly gave People's Instruction Nos. 12 and 13 to the jury. On December 19, 2008, the trial court denied defendant's motion for new trial.

The trial court sentenced defendant to 13 years imprisonment for the offense of predatory criminal sexual assault and 9 years imprisonment for the offense of criminal sexual assault to run consecutively. On February 4, 2009, the trial court denied defendant's motion to reconsider sentence. On that same day, defendant filed a notice of appeal

ANALYSIS

On appeal, defendant raises multiple claims of error. First, defendant argues that the trial court improperly denied his motion *in limine* seeking to exclude the recording of a cellular telephone conversation between the victim and defendant, recorded by a third party. Second, defendant argues that the trial court improperly instructed the jury concerning a prior written statement of a witness. Third, defendant argues that the trial court improperly allowed the State to present other crimes evidence to the jury and then improperly instructed the jury concerning this evidence.

I. Telephone Recording

Defendant argues that the trial court erroneously allowed the State to introduce a cellular

telephone conversation between defendant and the victim. Defendant submits the conversation was recorded by a third party in violation of the eavesdropping statute since the victim did not request the conversation be recorded (720 ILCS 5/14-3(i), 14-5 (West 2006)). Claiming prejudice, defendant asserts he is entitled to a new trial. The State responds that the recording did not violate the eavesdropping statute. Alternatively, the State argues that if the trial court erred by admitting the recording, then the error was harmless.

A reviewing court should not reverse a trial court's order allowing or excluding evidence unless that discretion was clearly abused. *Swick v. Liautaud,* 169 Ill. 2d 504, 521 (1996). When deciding a motion *in limine*, a trial court may base its ruling on the facts established either by live testimony or by counsel's representations which the court finds to be sufficiently credible and reliable. *People v. Owen*, 299 Ill. App. 3d 818, 823 (1998). Similarly, the court has wide discretion when conducting a hearing on a motion *in limine* and deciding that motion. *Id.*

During the hearing on defendant's motion *in limine* in this case, defense counsel argued that the recording was inadmissible under the eavesdropping statute (720 ILCS 5/14-1 *et seq*. (West 2006)). Although defense counsel and the prosecutor did not agree on the circumstances of the recording, defense counsel did not present any witnesses to the court in support of his contentions during this hearing. Noting that it was difficult to rule on defendant's motion *in limine* when the details of the conversation and the circumstances leading up to the recording were uncertain, the court denied defendant's motion *in limine*. Based upon this record, we cannot conclude the trial court abused its discretion by denying defendant's motion at the time of the pretrial hearing.

Next, we consider whether the court erroneously overruled defense counsel's objection to

testimony concerning the foundation for introducing the recorded conversation during trial. Here, defense counsel objected to the admission of the recording during trial based on lack of foundation.

The eavesdropping statute applies to all conversations, regardless of whether they were intended to be private. *People v. Herrington,* 163 Ill. 2d 507, 510 (1994). The Criminal Code of 1961 provides that any evidence obtained in violation of the eavesdropping provisions set forth in article 14 (720 ILCS 5/14-1 *et seq*. (West 2006)) are inadmissible in any criminal trial. 720 ILCS 5/14-5 (West 2006). However, the statute also creates an exception to the exclusionary rule when a recording has been:

> "made by or at the request of a person, not a law enforcement officer or agent of a law enforcement officer, who is a party to the conversation, under reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against the person or a member of his or her immediate household, and there is reason to believe that evidence of the criminal offense may be obtained by the recording." 720 ILCS 5/14-3(i) (West 2006).

Thus, the State was required to establish a foundation for the admission of this recording based on the statutory exception identified above. The defense submits the State did not establish this foundation because the victim neither recorded this conversation nor requested her aunt to make the recording. The trial court found the State had established the proper foundation.

Rulings regarding the admissibility of evidence at trial are within the sound discretion of

the trial court, and a reviewing court should not reverse such rulings unless the trial court abused its discretion. *People v. Caffey,* 205 Ill. 2d 52, 89 (2001). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey,* 205 Ill. 2d at 89.

In this case, the parties do not dispute that the victim was a member of defendant's immediate household, that the victim claimed defendant committed a criminal offense against her person, and that the victim and defendant were parties to the recorded conversation. The parties also do not dispute that neither Walsh nor the victim were members of law enforcement or agents of law enforcement at the time the recording was made. The issue in this appeal is whether the recording of the cellular telephone conversation was made at the victim's request. Our supreme court has applied the doctrine of implied consent of a recording to the eavesdropping statute, stating that "[i]mplied consent is consent in fact, which is inferred from the surrounding circumstances indicating that the party knowingly agreed to the surveillance." *People v. Ceja*, 204 Ill. 2d 332, 349-50 (2003).

By analogy, we similarly conclude that at the very least, the victim implicitly requested the recording by initiating the telephonic connection with defendant making this a three way call. The victim testified that while she was speaking with her aunt, defendant kept calling her on her cell phone and that she spoke with defendant while she was on the telephone with her aunt Christine. This testimony supports the conclusion that the victim linked defendant's call with the ongoing telephone conversation with her aunt, making the connection that facilitated the recording. Clearly, Walsh did not telephone the defendant or link him to the ongoing call with the victim.

Based on this testimony, we conclude the victim both consented to, requested, and arranged for the recording of her own conversation with defendant. Therefore, the foundation was met to allow the admission of the recording based on the statutory exception to the eavesdropping statute.

II. Prior Inconsistent Statement and Jury Instruction

Defendant claims that the trial court erred by failing to allow J.N.'s prior written statement into evidence and thereafter instructing the jury that this statement could be considered by the jury as substantive evidence pursuant to section 115-10.1 of the Code of Criminal Procedure (725 ILCS 5/115-10.1 (West 2006)). The State responds that the trial court properly refused to admit the statement into evidence and alleges defendant forfeited the instructional error by failing to tender a proposed jury instruction to the court. Finally and alternatively, the State argues that even if the court erred by not admitting the prior statement or instructing the jury, a new trial is not in order because there is not a reasonable probability that the outcome of the trial would have been different if the instruction had been provided to the jury.

A trial court's determination as to whether to admit evidence is left to the sound discretion of the court. *People v. Harvey*, 366 Ill. App. 3d 910, 920 (2006); *People v. Rojas,* 359 Ill. App. 3d 392, 401 (2005). Although we agree with defendant that J.N.'s written statement constituted an admissible, prior inconsistent statement because J.N. acknowledged under oath that she wrote the statement which described events and opinions, to which she had personal knowledge, and the statement contradicted her testimony in court (725 ILCS 5/115-10.1 (West 2006)), we conclude the trial court's failure to admit the statement itself was harmless.

In this case, the trial court allowed defense counsel to question J.N. about a portion of the

prior written statement wherein J.N. wrote that she did not believe defendant committed these offenses against her sister and believed that he was innocent. In addition, the court later instructed the jury, pursuant to a request from the State, that this prior statement could be considered by the jury when determining the credibility of the declarant, J.N. Thus, the defense was allowed to discredit the witness with her prior statement.

Next, we consider defendant's contention that it was error for the court to refuse to also instruct the jury that they could substantively consider J.N.'s prior statement. The State claims this issue has been forfeited.

It is true that a party may not raise a claim of error concerning the court's failure to give a jury instruction on appeal unless that party tendered the proposed instruction to the trial court. *People v. Fierer*, 260 Ill. App. 3d 136, 147 (1994); Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994). In this case defense counsel requested a modification of the State's instruction to allow the jury to not only discredit J.N. but also substantively considering her prior statement as proof that defendant was innocent because J.N. stated so. Assuming *arguendo* that defense counsel's efforts to modify the State's tendered instruction were sufficient to preserve this issue for our review, we are mindful that the failure to properly instruct a jury does not automatically create reversible error unless there is a reasonable probability that the outcome of the trial would have been different. *People v. Fierer*, 260 Ill. App. 3d at 148.

Even if the trial court had admitted J.N.'s prior statement into evidence and then instructed the jury to consider the written statement as substantive evidence, a reasonable probability that the outcome of the trial would have been different does not exist. Although J.N expressed her belief that defendant was innocent of the charges involving her sister, she also

provided details regarding other sexual acts committed by defendant against J.N. Based on this record, we conclude that the outcome of this trial would not have been different if the court had admitted the written statement and then allowed defense counsel's request to modify State's instruction No. 12 .

III. Other Crimes Evidence and Jury Instruction

Next, defendant argues that the trial court erred by allowing the State to present evidence of other crimes not outlined in the indictment. Defendant claims that evidence of other sex acts involving both this victim and her sister was extremely prejudicial and outweighed any probative value of this evidence. The State responds that defendant has forfeited the issue by cross-examining the victim and her sister about the other crimes evidence. If not forfeited, the State alternatively argues that the trial court did not abuse its discretion by admitting the other crimes evidence. Finally, the State argues that the error, if any, arising from the admission of the numerous other incidents between defendant and the victim or her sister was harmless and did not affect the outcome this trial.

In this case, defense counsel cross-examined the victim and the victim's sister regarding other crimes evidence following the denial of defendant's motion *in limine* pertaining to this evidence. Our supreme court has held that when a circuit court makes an adverse evidentiary decision, "defense counsel cannot be forced to choose between waiving an issue for appeal and allowing damaging testimony to go unanswered on cross-examination." *People v. Hanson*, 238 Ill. 2d 74, 100 (2010). Accordingly, we conclude that defendant has not waived this issue.

In this case, the other crimes evidence at issue consisted of the victim's description of the longstanding sexual encounters that routinely took place on a daily basis during the six years that

elapsed between 2000, the time of the first charged offense, and 2006, the time of the second charged offense. The other crimes evidence also involved eyewitness testimony from the victim's sister concerning acts against the victim, as well as sexual acts committed by defendant against the victim's sister during this same six-year time frame.

The State offered the other crimes evidence on two grounds. First, the other crimes evidence was offered as propensity evidence pursuant to statute. Second, the State also asserted the same evidence involving the victim and her sister constituted evidence of identification, presence, motive, design and intent which are admissible based on case law.

We first address the statutory basis for admission. A trial court's decision to admit other crimes evidence pursuant to section 115-7.3 (725 ILCS 5/115-7.3 (West 2006)) (section 115-7.3) will not be reversed on appeal unless we find the trial court abused its discretion. *People v. Heard,* 187 Ill. 2d 36, 58 (1999). An abuse of discretion occurs if the trial court's decision is arbitrary, fanciful or unreasonable. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). Our supreme court has observed that the legislature "enacted section 115-7.3 to enable courts to admit evidence of other crimes to show defendant's propensity to commit sex offenses if the requirements of section 115-7.3 are met." *People v. Donoho*, 204 Ill. 2d at 176. The case law further provides that the "actual limits on the trial court's decisions on the quantity of propensity evidence to be admitted under section 115-7.3 are relatively modest." *People v. Walston*, 386 Ill. App. 3d 598, 621 (2008). Based on the testimony of the victim and the victim's sister, regarding her longstanding sexual relationship with her adoptive father, we agree the trial properly admitted the evidence under the statue.

Further, in addition to offering the other crimes evidence as statutory propensity evidence,

the State also asserted the same evidence involving the victim and her sister constituted evidence of identification, presence, motive, design and intent which are admissible based on case law alone. It is well established that in sexual offense cases evidence of a defendant's prior sexual activity with the same child is admissible to show a defendant's intent, design or course of conduct and to corroborate the victim's testimony concerning the charged offense. See *People v. Anderson*, 225 Ill. App. 3d 636 (1992); *People v. Williams*, 202 Ill. App. 3d 495 (1990); *People v. Foster*, 195 Ill. App. 3d 926 (1990); *People v. Tannahill*, 152 Ill. App. 3d 882 (1987).

In this case, defendant's sexual abuse of his adoptive daughter involved multiple occasions involving graduated and escalating degrees of inappropriate sexual contact and then a well-established routine or pattern of abuse. Under these circumstances, limiting a complainant's testimony to one incident would make the incident appear isolated. *People v. Tannahill*, 152 Ill. App. 3d at 887. Since the two charged offenses were separated in time by many years, a limitation would place "an unfair strain upon the credibility of complainant's testimony concerning the charged offenses." *People v. Tannahill*, 152 Ill. App. 3d at 887, (citing *People v. Krison*, 63 Ill. App. 3d 531, 536 (1978)).

The other crimes evidence in this case provided the jury with a pattern of conduct and corroborated the victim's testimony in the case at bar. Accordingly, we conclude that the trial court did not abuse its discretion by admitting the other crimes evidence in this case on either basis advanced by the State.

Defendant next argues that the trial court gave an overly broad instruction which allowed the jury to consider evidence of other crimes as to irrelevant issues, and therefore, defendant is entitled to a new trial. The State argues that defendant has forfeited this issue on review because

defendant did not tender a more limited instruction to the court. The State also points out that the trial court gave the jury a limiting instruction tendered by the State and thus any resulting error was harmless.

We begin by addressing the State's waiver argument. Defense counsel objected to the State's proposed instruction and raised the issues of the other crimes evidence and the instruction given by the court in defendant's motion for new trial. Although these objections were not identical to the objections raised on appeal, the objections were sufficient to present defendant's essential claim to the trial court and properly preserve the issue for review. See *People v. Lovejoy*, 235 Ill. 2d 97 (2009).

The decision to give instruction rests with the trial court and will not be reversed absent an abuse of discretion. *People v. Mohr,* 228 Ill. 2d 53, 66 (2008). A trial court abuses its discretion if the jury instructions "given are unclear, mislead the jury, or are not justified by the evidence and the law." *People v. Lovejoy*, 235 Ill. 2d at 150 (citing *People v. Mohr,* 228 Ill. 2d at 65-66).

In this case, the trial court allowed the State's proposed instruction No. 13 which instructed the jury that such evidence was received on the "issues of the defendant's identification, presence, intent, motive, design, knowledge and propensity to commit the offenses charged." Further, the trial court instructed the jury that it should consider the evidence for only that limited purpose. Since the jury received a proper limiting instruction, we conclude the defendant's contention of error is without merit.

CONCLUSION

The judgment of the circuit court of Will County is affirmed.

Affirmed.