2016 IL App (5th) 130405-U

NO. 5-13-0405

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 11-CF-475
	)	
JON DEMERS,	)	Honorable
	)	Jan V. Fiss,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justice Stewart concurred in the judgment.
Justice Goldenhersh specially concurred.

ORDER

¶ 1 *Held*: Defendant's conviction and sentence affirmed because: (1) the trial court did not err in denying the defendant's motion to suppress; (2) the admission of other-crimes evidence was not improper because the prejudicial effect of that evidence did not substantially outweigh its probative value; (3) there is no cumulative error where there is no individual error; (4) the defendant's arguments with regard to prosecutorial misconduct during closing argument are without merit; (5) the defendant was proven guilty beyond a reasonable doubt; and (6) the trial judge did not abuse his discretion with regard to the sentence given to the defendant.

¶ 2 This is the direct appeal of the defendant, Jon Demers. A St. Clair County jury convicted the defendant of 12 counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2010)), and he was subsequently sentenced, in the circuit court of St.

Clair County, to a term of imprisonment of 12 years. For the following reasons, we affirm his conviction and sentence.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. Additional facts will be added, when necessary, in the "Analysis" section of this order. On January 22, 2013, the defendant, who at that point had been indicted by a St. Clair County grand jury on 12 counts of aggravated criminal sexual abuse in this case, filed a motion to suppress statements given following his arrest. In the motion, the defendant alleged, as he does on appeal, *inter alia*, that he "was denied his Sixth Amendment right to counsel, when defendant's attorney's attempts to make contact with defendant was [*sic*] consistently refused and denied by Collinsville Police, and Collinsville Police failed to notify defendant that his attorney had exercised his rights on defendant's behalf." A hearing was held on the motion on February 7, 2013, and on February 13, 2013. Therein, the following testimony relevant to this issue was adduced.

¶ 5 Detective Mark Krug of the Collinsville police department testified that on April 5, 2011, he conducted a postarrest interview with the defendant, which was audio and video recorded. Detective Krug testified that he advised the defendant of his *Miranda* rights, made certain the defendant understood those rights, and had the defendant execute a written form signifying that the defendant was aware of and understood those rights. In addition, he testified that he used a St. Clair County checklist with the defendant, to ensure that any statement given by the defendant would be voluntary. The checklist covered such issues as, *inter alia*, the fact that the defendant had not been beaten or

threatened, that his biological needs had been met, that he was not under the influence of medication or other possible intoxicants, what his education level was, his age, who else was present for the interview, and that he understood the interview was being recorded. Detective Krug testified that at no point during the interview did the defendant ask for an attorney, and Detective Krug described the tone of the interview as "cordial." When asked if he was advised, during the course of the interview, that an attorney was "present at the Collinsville Police Department wishing to speak to the defendant," he answered, "No, ma'am, I was not." On cross-examination, Detective Krug testified that during the course of the interview, he received a text message from Lieutenant Eric Zaber "that there may be a lawyer coming to the police department in reference to this investigation." He did not notify the defendant of the text message. He testified that after the interview was over, he learned that an attorney had called the police department.

¶ 6 David Fahrenkamp testified that he has been practicing law for 35 years, that he is an attorney licensed in the state of Illinois, and that on April 5, 2011, he represented the defendant "and his wife in a matter relating to the adoption of children that they had had in foster care." That evening, he received a call from the defendant's wife, who told him that the defendant had been arrested. Fahrenkamp testified that he immediately called the Collinsville police department; once he confirmed that the defendant was present at the department, he told the dispatcher with whom he was speaking that he was the defendant's attorney, that he wished to speak with the defendant, and that he did not want the defendant to "give any statements" without speaking with him. The dispatcher told him that someone would call him back, and not long thereafter he received a call from

Lieutenant Zaber, who told Fahrenkamp he did not know who Fahrenkamp was, and that because the interview with the defendant had begun, it would not be interrupted. Fahrenkamp testified that he asked if they would stop the interview if Fahrenkamp went to the department, and that Zaber told him they would not. He testified that he lived in Edwardsville at the time, and that although he would have been "reluctant" to go to the police department in Collinsville, he would have gone if he had believed they would have let him speak to the defendant. On cross-examination, Fahrenkamp testified that he did not in fact go to the police department on April 5, 2011, and on redirect he testified that he chose not to go because "it would have been a waste of time" because Zaber had told him that they would not interrupt the interview and would only allow the defendant to have counsel if the defendant requested it. He testified that, at Zaber's suggestion, he called back and left a phone message on a recorded police phone line, documenting his recollection of his conversation with Zaber.

¶ 7 Lieutenant Eric Zaber testified that on April 5, 2011, he was the supervisor of the detective division of the Collinsville police department. He participated in the arrest and booking of the defendant, during which process the defendant never requested the presence of an attorney, and then went home for the evening. At home, he received a phone call from a dispatcher, stating that a man who claimed to be an attorney representing the defendant had called the police department. He did not recognize the name given by the caller. The dispatcher gave Lieutenant Zaber the phone number the caller had left, and Lieutenant Zaber called it. He testified that he told the man who answered the phone that he was not at the police department and that he "wasn't even sure

what the status of the interview was, if they were, in fact, even started with the interview." He also told the man that "based upon [his] training and experience," he did not believe the man "could invoke that over the phone." He testified that he could not identify the caller as an attorney "by voice or familiarity" and that he was not sure who was on the other end of the phone. He testified that he did not tell the caller that the caller could not go to the police department. He confirmed that it was his suggestion that the caller leave a voice message recording on the police department phone system to document their conversation, and that the recording was subsequently preserved. After his phone call with the man, Lieutenant Zaber texted Detective Krug "advising him that an attorney might be coming to the police department."

¶ 8 On cross-examination, Lieutenant Zaber agreed that he had told the police dispatcher that they would not stop an interview for an attorney who was on the telephone. When counsel for the defendant asked if that meant "that an attorney does not have the right to invoke the rights of their client on their behalf, if an attorney wants to talk to their client while they are being interviewed, you will not stop the interview," Lieutenant Zaber responded, "If an attorney was present at the station we would certainly make that known to his or her client, and if they would choose to speak with the attorney at that time, we would most definitely stop the interview." He testified that when the caller asked him to stop the interview, he told the caller that he would not halt an interview on the basis of "someone who just claims to be an attorney on the phone." He testified that although the caller claimed to know the chief of police, Lieutenant Zaber did

not call the chief of police, but instead called his immediate supervisor, Major David Roth, to make certain he had done the correct thing.

¶ 9 At the conclusion of the hearing, the trial judge took the matter under advisement. On February 19, 2013, the trial judge entered a written order in which he denied the defendant's motion to suppress, finding, *inter alia*, that the State had met its burden of demonstrating that the defendant's "confession was obtained voluntarily." The judge wrote that although attorney Fahrenkamp had called the police department, he had not physically gone there, and thus was not "physically present and immediately available" to the defendant, as required by the controlling Illinois Supreme Court case of *People v. Chapman*, 194 Ill. 2d 186 (2000). The judge noted that the defendant was properly advised of his right to counsel, knowingly and voluntarily waived it, and that although the defendant had attorney Fahrenkamp "under retainer," he never requested to speak with Fahrenkamp or any other attorney.

¶ 10 At a separate hearing on February 13, 2013, the trial judge heard argument on the State's notice of intent to introduce other-crimes evidence under section 115-7.3 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-7.3 (West 2012)). The defendant objected to the introduction of said evidence, noting that the victim in the case at bar, J.N., had alleged that he had been abused by the defendant approximately 200 times, and that reference to that number would be "grossly, unduly prejudicial." Following argument, the judge ruled, as the State had proposed, that J.N. would not be allowed to testify as to the number of instances of abuse, but could testify to the frequency of the abuse (*i.e.*, that it occurred every time he visited his uncle, the

defendant). At a subsequent pretrial hearing, on March 6, 2013, the judge denied the defendant's motion to reconsider his ruling.

¶ 11 The case proceeded to trial on March 11, 2013, and thereafter. At trial, Detective Krug testified that he was assigned to investigate the allegations J.N. made against the defendant. He testified about an interview conducted with J.N. at a child advocacy center, about a recorded telephone overhear he conducted with J.N. and the defendant, in which the defendant provided what Detective Krug characterized as "corroborating evidence" of the accusations of J.N., and about his own interview with the defendant on April 5, 2011, following the defendant's arrest. Based upon the foundation laid by Detective Krug, both the audio recording of the telephone overhear, and the audio and video recording of the defendant's postarrest interview, were played for the jury. During the interview, the defendant admitted to abusing J.N., both within St. Clair County and at Boy Scout campouts outside of St. Clair County, and also admitted to abusing J.N.'s brothers, M.N. and V.N. In a sidebar, the defendant preserved his objection to the introduction of the other-crimes evidence.

¶ 12 Charlotte N. testified that she is the mother of the victim, J.N., and that the defendant is married to her husband's sister. She testified that over the years, J.N. had spent a great deal of time with the defendant. She testified that in January 2011, J.N. revealed to her that the defendant had molested him for a period of approximately six years. J.N. was not yet ready to talk to the police, so they did not report the abuse until March 2011. On cross-examination, counsel for the defendant asked her if she had known the victim to be dishonest with her in the past. She testified that he had been

about "normal kid things, things that were age appropriate," and denied that he had ever been dishonest with her about "who he spends time with." She conceded that when J.N. was four years old, he was the "cause" of a house fire that destroyed the family's California home in October 1999 and ultimately led them to relocate to Illinois. She denied that she told J.N. what to say to the police once J.N. disclosed the sexual abuse to her.

¶ 13 J.N. testified that he was born June 2, 1995, and at the time of the trial was 17 years old. He testified that the defendant was his uncle, had begun to sexually abuse J.N. when J.N. was "eight or nine" years old, and that J.N. disclosed the abuse approximately six years later, in January 2011, when J.N. was 15 years old. He testified that the first incident of abuse took place on a couch at the defendant's home in Collinsville, while he, the defendant, and other family members, including the defendant's wife, watched a movie. He testified that the defendant was rubbing J.N.'s stomach, then moved his hand lower and began to rub J.N.'s genitals. He testified that he did not believe the others in the room were aware of what was going on, and that a large, thick blanket was covering both him and the defendant. J.N. testified that "several days later, maybe a week or so" the defendant sexually abused him for the second time, again while J.N. was visiting the defendant's home, and again beginning by rubbing J.N.'s stomach, but then rubbing his genitals. J.N. testified that the door to the room was locked, and he "didn't know what to do or where to go" so he "just sat there and let it happen."

¶ 14 J.N. next testified with regard to the last time he was abused by the defendant, which he testified was in January 2011, shortly before he disclosed the abuse to his

mother. He was alone in a room at the defendant's home playing a video game when the defendant entered the room, closed the door, and forced J.N. to sit in his lap in a chair. This time the defendant did not rub J.N.'s stomach, only his genitals. J.N. testified about a fourth time the defendant sexually abused him at the defendant's home, during a "blackout" in the Collinsville area when J.N. was "maybe 13 or 14." J.N. testified that because it was very hot, the defendant suggested that J.N. undress, which J.N. did. Thereafter, the defendant "started with the same basic belly rub and then molestation afterwards." J.N. testified that he visited the defendant's home "at least once per month, but usually more than once." He testified that sometimes there were other people present when the sexual abuse occurred, and sometimes not, but that he did not believe that anyone else was aware that it was happening. As J.N. got older, the abuse occurred less frequently in the presence of others. He testified that sometimes the abuse was painful, because the defendant rubbed J.N.'s penis for a long time, and that although the defendant never threatened him, the defendant did at times use force to prevent J.N. from escaping the abuse. He also testified that he and the defendant attended Boy Scout campouts together outside of St. Clair County, and that the defendant sometimes abused him during the campouts. When questioned, he agreed that he had testified that he visited the defendant's home "approximately once a month" during the time in question, and when asked how often the sexual abuse occurred, he testified, "Every time."

¶ 15 On cross-examination, J.N. reiterated that the abuse began when he was "eight or nine" years old. Counsel for the defendant questioned J.N. extensively about the details of the incidents of abuse alleged by J.N and testified to on direct examination, attempting

to point out discrepancies in J.N.'s testimony and inconsistencies between his trial testimony and his earlier interview at the child advocacy center. Following J.N.'s testimony, the State rested its case. The defendant moved for a directed verdict, which was denied.

¶ 16 The defense presented four witnesses. The first two were twin sisters Rachael Reed and Rebecca Reed, who reside in Camdenton, Missouri, approximately three hours away from Collinsville, and who are J.N.'s cousins. They each testified about numerous visits to the defendant's home when J.N. was present. Neither witness ever observed any incidents of sexual abuse or anything else unusual about the relationship between the defendant and J.N. Rachael conceded that J.N. and her other cousins had probably visited the defendant's home on occasions when she was not present, and Rebecca conceded that she did not live with the defendant and was not at his home all the time. The third witness to testify for the defense was David Norris, another one of J.N.'s cousins. He testified that he had visited the defendant's home on numerous occasions when J.N. was present, and that the defendant and J.N. seemed to get along. He never observed any incidents of sexual abuse or anything else unusual about the relationship between the defendant and J.N. David conceded that he lived in Virginia, was never present on any Boy Scout campouts that the defendant took J.N. on, and that J.N. had been present at the defendant's home "on a number of other visits" when David was not present.

¶ 17 The final witness to testify for the defense was the defendant's wife, Claire Catherine Demers. She testified that the defendant and J.N. were very close, and that she

did not believe the defendant had done anything inappropriate to J.N. She testified that she had never observed the defendant sexually abuse J.N., and that to her knowledge the two of them had never been "alone together" at the defendant's home. She testified in detail about various dates that J.N. allegedly visited the defendant's home, refreshing her memory when necessary with a "family calendar" she and the defendant had compiled, and contending that there were several stretches of time during the six-year period of the alleged abuse that J.N. did not visit the home for four or more months in a row. On cross-examination, she testified that she was "generally aware" of the allegations against the defendant in this case, but testified that she "really wasn't" listening when the recorded police interview in which the defendant admitted to sexually abusing J.N. was played. She conceded that she and the defendant had added information to the "family calendar" after the charges in the present case were filed, based upon receipts and other documents. She testified that she had seen the defendant give J.N. "belly rubs," but never engage in sexual contact with him. She reiterated that in the six years in question, she knew of no occasions on which the defendant and J.N. were alone.

¶ 18 Following deliberation, the jury found the defendant guilty of all 12 counts of aggravated criminal sexual abuse with which he had been charged. The defendant filed a posttrial motion, which was denied following a hearing held on the morning of May 9, 2013. On the afternoon of May 9, 2013, a sentencing hearing was held. The State requested a term of imprisonment of 60 years, which was within the statutory range of probation to 84 years. The defendant requested probation. At the conclusion of the hearing, the trial judge sentenced the defendant to six years' imprisonment on count I and

six years' imprisonment on count II, to run consecutively, and to six years on "the remaining ten counts," to run concurrently with the sentences on counts I and II, followed by a term of mandatory supervised release. The defendant filed a motion to reconsider sentence, which was denied following a hearing. This timely appeal followed.

¶ 19 ANALYSIS

¶ 20 On appeal, the defendant first contends his right against self-incrimination and his right to counsel were violated "when Collinsville Police refused to inform [the defendant that] his retained attorney wished to speak to him." In essence, although not specifically argued as such, the defendant challenges the denial of his motion to suppress. When a reviewing court analyzes a trial court's suppression ruling, "[t]he trial court's factual findings are entitled to great deference, and we will reverse them only if they are against the manifest weight of the evidence." *People v. Oliver*, 236 Ill. 2d 448, 454 (2010). Nevertheless, we review *de novo* "[t]he trial court's ultimate legal ruling on whether suppression is warranted." *Id.* In the case at bar, the facts are contested. Before discussing those facts, however, we shall set forth the legal analysis relevant to the specific issue raised by the defendant.

¶ 21 In *People v. Chapman*, 194 Ill. 2d 186, 209-10 (2000) (quoting *People v. McCauley*, 163 Ill. 2d 414, 445 (1994)), the Supreme Court of Illinois noted its previous holding that the State fails to satisfy its burden of showing that a defendant has knowingly and intelligently waived his or her right to counsel under the Illinois Constitution where the record shows that law enforcement authorities refused the defendant's attorney access to the defendant and did not inform the defendant of the

attorney's presence when the attorney " 'was present at the [police] station, seeking to consult with' " the defendant. The *Chapman* court noted that it had not been asked whether the result would be the same "where an attorney merely telephoned the police station to contact a client in custody," but noted that the appellate court had addressed that question, reaching conflicting results. *Id*. at 210. Squarely faced with the question, the *Chapman* court held that the *McCauley* rule does not apply if the attorney is "not 'physically present' and 'immediately available' to" a defendant. *Id.* at 211. The court noted "the problems inherent in expanding the holding in *McCauley* to situations where an attorney who is seeking contact with a client in custody is not physically present at the police station," among them the fact that authorities "have no way of verifying that the voice on the telephone is actually the suspect's attorney." *Id*. at 213. The court held that "[o]nly through physical presence may the police verify, through proper identification, that the person in front of them is the person he or she is claiming to be." *Id*. The court reasoned that its holding struck "the appropriate balance between the state's interest in effective crime investigation and a suspect's state constitutional rights to due process and against self-incrimination." *Id.*

¶ 22 In the case at bar, conflicting testimony was adduced at the hearing on the defendant's motion to suppress. David Fahrenkamp testified that he has been practicing law for 35 years, that he is an attorney licensed in the state of Illinois, and that on April 5, 2011, he represented the defendant "and his wife in a matter relating to the adoption of children that they had had in foster care." Fahrenkamp testified that after learning from the defendant's wife that the defendant had been arrested, Fahrenkamp immediately

called the Collinsville police department; once he confirmed that the defendant was present at the department, he told the dispatcher with whom he was speaking that he was the defendant's attorney, that he wished to speak with the defendant, and that he did not want the defendant to "give any statements" without speaking with him. The dispatcher told him that someone would call him back, and not long thereafter he received a call from Lieutenant Zaber, who told Fahrenkamp he did not know who Fahrenkamp was, and that because the interview with the defendant had begun, it would not be interrupted. Fahrenkamp testified that he asked if they would stop the interview if Fahrenkamp went to the department, and that Zaber told him they would not. He testified that he lived in Edwardsville at the time, and that although he would have been "reluctant" to go to the police department in Collinsville, he would have gone if he had believed they would have let him speak to the defendant. On cross-examination, Fahrenkamp testified that he did not in fact go to the police department on April 5, 2011, and on redirect he testified that he chose not to go because "it would have been a waste of time" because Zaber had told him that they would not interrupt the interview and would only allow the defendant to have counsel if the defendant requested it.

¶ 23 Lieutenant Eric Zaber testified that after arriving at home for the evening following his participation in the arrest and booking of the defendant, during which process the defendant had never requested the presence of an attorney, he received a phone call from a dispatcher, stating that a man who claimed to be an attorney representing the defendant had called the police department. He did not recognize the name given by the caller. The dispatcher gave Lieutenant Zaber the phone number the

caller had left, and Lieutenant Zaber called it. He testified that he told the man who answered the phone that he was not at the police department and that he "wasn't even sure what the status of the interview was, if they were, in fact, even started with the interview." He also told the man that "based upon [his] training and experience," he did not believe the man "could invoke that over the phone." He testified that he could not identify the caller as an attorney "by voice or familiarity" and that he was not sure who was on the other end of the phone. He testified that he did not tell the caller that the caller could not go to the police department. He confirmed that it was his suggestion that the caller leave a voice message recording on the police department phone system to document their conversation, and that the recording was subsequently preserved. After his phone call with the man, Lieutenant Zaber texted Detective Krug "advising him that an attorney might be coming to the police department."

¶ 24 On cross-examination, Lieutenant Zaber agreed that he had told the police dispatcher that they would not stop an interview for an attorney who was on the telephone. When counsel for the defendant asked if that meant "that an attorney does not have the right to invoke the rights of their client on their behalf, if an attorney wants to talk to their client while they are being interviewed, you will not stop the interview," Lieutenant Zaber responded, "If an attorney was present at the station we would certainly make that known to his or her client, and if they would choose to speak with the attorney at that time, we would most definitely stop the interview." He testified that when the caller asked him to stop the interview, he told the caller that he would not halt an interview on the basis of "someone who just claims to be an attorney on the phone." He

testified that although the caller claimed to know the chief of police, Lieutenant Zaber did not call the chief of police, but instead called his immediate supervisor, Major David Roth, to make certain he had done the correct thing. Detective Mark Krug testified that during the course of his interview with the defendant, he received a text message from Lieutenant Zaber "that there may be a lawyer coming to the police department in reference to this investigation." He did not notify the defendant of the text message. He testified that after the interview was over, he learned that an attorney had called the police department.

¶ 25 At the conclusion of the hearing, the trial judge took the matter under advisement, and on February 19, 2013, entered a written order in which he denied the defendant's motion to suppress, finding, *inter alia*, that the State had met its burden of demonstrating that the defendant's "confession was obtained voluntarily." The judge wrote that although attorney Fahrenkamp had called the police department, he had not physically gone there, and thus was not "physically present and immediately available" to the defendant, as required by the controlling Illinois Supreme Court case of *People v. Chapman*, 194 Ill. 2d 186 (2000). The judge noted that the defendant was properly advised of his right to counsel, knowingly and voluntarily waived it, and that although the defendant had attorney Fahrenkamp "under retainer," he never requested to speak with Fahrenkamp or any other attorney.

¶ 26 We first note, as we have above, that conflicting testimony was adduced at the hearing, and that it was the responsibility of the trial judge to resolve those conflicts. Although attorney Fahrenkamp testified that Lieutenant Zaber told him that the interview

would not be stopped even if Fahrenkamp came to the police department, neither the State nor the defendant directly asked Lieutenant Zaber if he had made such a statement to Fahrenkamp. The State adduced from Lieutenant Zaber his testimony that he did not tell the caller that the caller could not go to the police department. Counsel for the defendant adduced from Lieutenant Zaber, on cross-examination, that "If an attorney was present at the station we would certainly make that known to his or her client, and if they would choose to speak with the attorney at that time, we would most definitely stop the interview." Lieutenant Zaber and Detective Krug both testified that Lieutenant Zaber texted Detective Krug that an attorney might be arriving at the police department in reference to the case. Lieutenant Zaber testified repeatedly that he did not know the person to whom he was speaking on the telephone, and did not know if that person was an attorney, and even informed the person that he did not believe an attorney could invoke the rights of his or her client via telephone.

¶ 27 Although the trial judge did not include written findings of fact in his order denying the defendant's motion to suppress, a fair inference from Lieutenant Zaber's testimony was that had Fahrenkamp followed the law and presented himself at the police department with proper identification, and had the police officials at the department again called Lieutenant Zaber to ask him what to do, the interview would have been suspended, the defendant would have been informed that his attorney was present and immediately available to consult with him, and had the defendant so requested, the defendant would have been allowed to speak with his attorney before choosing to either terminate or continue with the interview. To the extent the trial judge relied upon this inference to

find not credible Fahrenkamp's testimony that Lieutenant Zaber told him that he would not stop the interview even if Fahrenkamp were present at the police department, such a finding of fact with regard to the credibility of the witnesses would not be against the manifest weight of the evidence, and would not support reversal of the trial judge's ultimate conclusion that the State had met its burden of demonstrating that the defendant's "confession was obtained voluntarily." See, *e.g.*, *People v. Oliver*, 236 Ill. 2d 448, 454 (2010). We note as well that when Fahrenkamp called back to the police department after speaking with Lieutenant Zaber, to make a contemporaneous record of his recollection of his conversation with Lieutenant Zaber, although Fahrenkamp stated on the recording−which is part of the record on appeal and was considered by the trial judge prior to his ruling−that he wished to make a record of the fact that Lieutenant Zaber had told him that he would not interrupt the interview to tell the defendant that Fahrenkamp had called, and that he would stop the interview only if the defendant requested that it be stopped, Fahrenkamp did not state anything about going to the police department or offering to go to the police department, and certainly did not state in his contemporaneous recollection of the conversation what would have been its most salient point from a legal perspective: that Lieutenant Zaber told him that he would not stop the interview even if Fahrenkamp were at the police department. This fact, too, would support a factual finding by the trial judge that Fahrenkamp's hearing testimony was not congruent with his contemporaneous recollection of the conversation, and therefore was not credible.

¶ 28 A larger problem for the defendant is the undisputed fact that Fahrenkamp did not present himself at the police department. He testified at the hearing that because he did not live in Collinsville, he would have been "reluctant" to go to the police department there, but would have gone if he had believed they would have let him speak to the defendant. Accordingly, the trial judge's proper province as the one to resolve conflicting facts notwithstanding, the law with regard to Fahrenkamp's responsibility to present himself in person to the police if he wished to intervene in their questioning of the defendant was made crystal clear by the Supreme Court of Illinois in *People v. Chapman*, 194 Ill. 2d 186 (2000), a case that was decided more than 10 years prior to the events in the case at bar. Fahrenkamp's attempt−intentional or unintentional−to use a telephone call to the Collinsville police to circumvent the requirement of the Supreme Court of Illinois that he be physically present and immediately available to his client was not legally sufficient. Under *Chapman*, unless and until Fahrenkamp came to the police department with identification that confirmed his identity as an attorney, the Collinsville police were under no obligation to respond to him in any way. 194 Ill. 2d at 213. Lieutenant Zaber correctly informed Fahrenkamp that Fahrenkamp could not invoke the rights of the defendant over the telephone.

¶ 29 Once he learned, over the telephone, that the defendant was in fact being held at the Collinsville police department, Fahrenkamp should have ended the call and, had he wished to intervene in the questioning, presented himself at the department, as that was the only way to properly preserve the rights of the defendant under *Chapman*. Indeed, the *Chapman* court explicitly noted "the problems inherent in expanding the holding in

McCauley to situations where an attorney who is seeking contact with a client in custody is not physically present at the police station," among them the fact that authorities "have no way of verifying that the voice on the telephone is actually the suspect's attorney." *Id.* at 213. The court held that "[o]nly through physical presence may the police verify, through proper identification, that the person in front of them is the person he or she is claiming to be." *Id.* The court reasoned that its holding struck "the appropriate balance between the state's interest in effective crime investigation and a suspect's state constitutional rights to due process and against self-incrimination." *Id.* Because Fahrenkamp failed to comply with *Chapman*, instead taking actions that would essentially turn the *Chapman* holding on its head, there is no way for this court to know how the Collinsville police would have responded had Fahrenkamp done what he was charged under the law with doing. Certainly, had he presented himself at the police department, only to be told the interview would not be interrupted, this would be a different case. He did not do that.

¶ 30 Moreover, turning again to the facts that support the trial judge's ruling, when one considers the fact that Fahrenkamp had already testified that he would be "reluctant" to travel to Collinsville because of the distance from his home, one cannot but conclude that the trial judge could have found Fahrenkamp's testimony that he was told his physical presence would not have made any difference to be self-serving and not credible, as the testimony served to excuse behavior on the part of Fahrenkamp that was inexcusable under the clear and unambiguous law in existence on the date in question. Such a finding of fact by the trial judge would not be against the manifest weight of the evidence, and

would provide no basis for reversing the judge's denial of the defendant's motion to suppress.

¶ 31 In sum, we do not conclude that the trial judge erred in finding that the State had met its burden of demonstrating that the defendant's "confession was obtained voluntarily." The judge correctly noted that although Fahrenkamp had called the police department, he had not physically gone there, and thus was not "physically present and immediately available" to the defendant, as required by *Chapman*. The judge also correctly noted that the defendant was properly advised of his right to counsel, knowingly and voluntarily waived it, and that although the defendant had attorney Fahrenkamp "under retainer," he never requested to speak with Fahrenkamp or any other attorney. These findings were clearly supported by the unrebutted testimony of Detective Krug that he advised the defendant of his *Miranda* rights, made certain the defendant understood those rights, and had the defendant execute a written form signifying that the defendant was aware of and understood those rights. In addition, Detective Krug testified that he used a St. Clair County checklist with the defendant to ensure that any statement given by the defendant would be voluntary. The checklist covered such issues as, *inter alia*, the fact that the defendant had not been beaten or threatened, that his biological needs had been met, that he was not under the influence of medication or other possible intoxicants, what his education level was, his age, who else was present for the interview, and that he understood the interview was being recorded. Detective Krug testified that at no point during the interview did the defendant ask for an attorney, and Detective Krug described the tone of the interview as "cordial." There was no error.

¶ 32 As a corollary to his first contention on appeal, the defendant also contends that under *Chapman*, his right to due process was violated when the statement he gave to police was admitted into evidence. However, the law announced in *Chapman* and discussed in detail above controls with regard to this argument as well, and just as there was no violation of the requirements of *Chapman* by the State with regard to the defendant's right to self-incrimination, and his right to counsel, there was also no violation of his due process rights. Fahrenkamp did not follow the law, and he did not properly invoke the defendant's rights.

¶ 33 The defendant's next contention on appeal is that the "aggregate, prejudicial effect" of the other-crimes evidence presented at trial outweighed the probative value of the evidence. The defendant contends that "the majority of the State's case was comprised of other-crimes and frequency evidence" which "easily misled" the jury. The defendant acknowledges, as he must, that pursuant to section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2012)), other-crimes evidence is admissible in cases such as the case at bar "to show [a] defendant's propensity to commit sex offenses if the requirements of section 115-7.3 are met." *People v. Donoho*, 204 Ill. 2d 159, 176 (2003). Section 115-7.3 is constitutional. *Id*. at 182. Section 115-7.3 requires a trial judge to weigh certain factors to determine whether the other-crimes evidence may be admitted, because the court may not admit other-crimes evidence if the prejudicial effect of that evidence "substantially outweighs its probative value." *Id*. at 183. The factors to be weighed are (1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; and (3) any other relevant facts and

circumstances. *Id*. This court will not reverse a trial judge's decision to admit other-crimes evidence pursuant to section 115-7.3 unless we find the decision to be an abuse of discretion, which we will find only when the decision is arbitrary, fanciful or unreasonable, or where we determine that no reasonable person would take the view adopted by the trial judge. *Id*. at 182.

¶ 34 In the case at bar, the defendant contends that the foregoing notwithstanding, the trial judge's decision in this case allowed to occur "a trial within a trial," in contravention of the admonition of this court in *People v. Cardamone*, 381 Ill. App. 3d 462, 489 (2008), and earlier decisions that the danger that other-crimes evidence will create "a trial within a trial" must be avoided. He first contends "[t]here was little evidence presented about the offenses that were charged in the 12-count indictment," and complains of inconsistencies in J.N.'s testimony. However, these contentions are more appropriately addressed within the context of the defendant's sufficiency-of-the-evidence claim; accordingly, we address them when we analyze that claim, below.

¶ 35 The crux of the defendant's other-crimes argument is that he disagrees with the trial judge's ruling that although J.N. would not be allowed to testify as to the number of times he was abused by the defendant, he would be allowed to testify as to the frequency of the abuse (*i.e.*, that it occurred every time he visited the defendant); that testimony could be adduced as to crimes that occurred outside of St. Clair County and that occurred prior to the charged conduct; and that the defendant's admissions in his police interview that he also sexually abused J.N.'s two brothers were admissible as well. As a threshold matter, we agree with the State that there is no merit to the defendant's contention that the

trial judge did not balance the proper factors when making his ruling. At the February 13, 2013, hearing on the State's notice of intent to introduce other-crimes evidence, the State presented evidence and argument supported by case law that demonstrated the proximity in time and the factual similarity between the crimes charged and all of the evidence about which the defendant now complains. At the March 6, 2013, hearing on the defendant's motion to reconsider the trial judge's ruling, the judge stated, on the record, that he had "considered the documents, the filings as to the motion to reconsider, the relevant case law, [and] memorandum of law."

¶ 36 We agree with the State that the trial judge's ruling was both supported by case law and carefully crafted to protect the rights of both parties. The ruling took into consideration the defendant's fear that allowing J.N. to testify that he had been abused by the defendant approximately 200 times would lead to a trial within a trial. Accordingly, the ruling prohibited J.N. from so testifying, allowing him instead to testify as to the frequency of the abuse (*i.e.*, that it occurred every time he visited the defendant). Moreover, the defendant was able to adduce testimony from his wife that called into question J.N.'s testimony about the number of times J.N. visited the defendant, and called into question J.N.'s testimony that J.N. and the defendant were sometimes alone when he visited. With regard to testimony as to crimes that occurred outside of St. Clair County and that occurred prior to the charged conduct, and with regard to the defendant's admissions in his police interview that he also sexually abused J.N.'s two brothers, the evidence and argument presented to the trial judge by the State–and presented to this court on appeal−likewise clearly demonstrates the proximity in time and the factual

similarity between the crimes charged and all of the evidence about which the defendant now complains. Indeed, the defendant puts forward no argument that the evidence to which he objects was not sufficiently proximate in time, and of sufficient factual similarity, to the crimes charged. Instead, he asserts only that too much other-crimes evidence was presented.

¶ 37 With regard to that argument, we agree with the State that the case upon which the defendant depends, *People v. Cardamone*, 381 Ill. App. 3d 462, 489 (2008), is much different from the case at bar. In *Cardamone*, this court was troubled by the introduction of evidence of "*hundreds* of uncharged acts," adduced from the testimony of a total of 15 complainants. (Emphasis in original.) 381 Ill. App. 3d at 491. In the case at bar, no such evidence was adduced. J.N.'s brothers did not testify; only J.N. testified, and his testimony was much more severely limited than was the testimony of the complainants in *Cardamone*. Indeed, the *Cardamone* court contrasted the rather-extreme facts with which it was faced with a more typical "case where the trial court might admit other-crimes evidence as it pertains to 1 or even 2 victims." 381 Ill. App. 3d at 494. In the case at bar, it is clear to us that the prejudicial effect of the evidence of which the defendant complains does not substantially outweigh its probative value. See *People v. Donoho*, 204 Ill. 2d 159, 183 (2003). Accordingly, we do not conclude that the trial judge's ruling was arbitrary, fanciful or unreasonable, and we do not conclude that no reasonable person would take the view adopted by the trial judge.

¶ 38 The defendant also contends the errors he has alleged above "cumulatively denied [the defendant] a fair trial." However, as the State aptly notes, the doctrine of cumulative

error notwithstanding, it has long been the law of this state that where there are no individual errors, there can be no cumulative error, and therefore cumulative-error analysis is unnecessary. See, *e.g.*, *People v. Perry*, 224 Ill. 2d 312, 356 (2007). In the case at bar, we have found no individual errors; accordingly, we need not employ a cumulative-error analysis.

¶ 39 The defendant's next contention on appeal is that there was prosecutorial misconduct during the State's closing argument that denied the defendant a fair trial. The defendant complains that the State: (1) referred, at the outset of the State's closing argument, to the defendant's abuse of J.N. as "[r]epulsive, disgusting, [and] deviant"; (2) "intentionally" misstated J.N.'s birth date, so that J.N. appeared to be seven years old at the time of trial; (3) implied that the defendant's wife knew that the defendant was abusing J.N. and that she had lied when she testified that she did not; and (4) improperly commented on the other-crimes evidence. As the State notes, of the complained-of remarks, the defendant objected at trial only to the allegedly "intentional" misstatement of J.N.'s birth date, and the defendant did not raise *any* claims of prosecutorial misconduct in his posttrial motion. Accordingly, the defendant has forfeited consideration of these claims. See, *e.g.*, *People v. Williams*, 249 Ill. App. 3d 102, 103 (1993); *People v. Hillier*, 237 Ill. 2d 539, 545-47 (2010). Forfeiture notwithstanding, we find no error.

¶ 40 With regard to the defendant's first claim of prosecutorial misconduct, we do not find the remarks about which the defendant complains to be improper; in the past, recognizing the wide latitude to which the parties are entitled when remarking in closing argument upon the evidence properly before the trier of fact, we have upheld

characterizations of a defendant as "an animal" and a "coward" (*People v. Wilson*, 254 Ill. App. 3d 1020, 1057 (1993)), a "depraved baby killer," a "vicious animal," and the "lowest form of human being" (*People v. Green*, 118 Ill. App. 3d 227, 236 (1983)), and "an animal" (*People v. Welton*, 96 Ill. App. 2d 167, 173 (1968)), in situations where we have found those characterizations to be appropriate based upon the evidence properly before the trier of fact. The remarks about which the defendant complains in this case came at the outset of a lengthy closing argument, and the characterization of the sexual abuse of J.N. as repulsive, disgusting, and deviant was not only not unduly emphasized, it was also not incongruent with the evidence the State presented at trial, described in detail above. Accordingly, even if this claim were not forfeited, we would find no error.

¶ 41 With regard to the defendant's second claim of prosecutorial misconduct, that the State "intentionally" misstated J.N.'s birth date, so that J.N. appeared to be seven years old at the time of trial, we find this claim to be unsupported and to border on the absurd. During closing argument, the defendant objected after the State characterized J.N. as being born in June 2005. Following the defendant's objection, counsel for the State immediately said, "My apologies, Your Honor, and my apologies, ladies and gentlemen. I'm emotional, and my apologies. It's 1995, June 1995. And you have seen [J.N.]. You're aware of his birth date." The defendant has provided no support for his contention that the misstatement of J.N.'s birth date was "intentional," and given the immediate apology and correction by the State, it is impossible to find support in the record for such a contention. Moreover, the defendant has put forward no argument with regard to why the State would attempt to portray the victim as seven years old at the time of trial, when

the jury had clearly observed a 17-year-old J.N. testify, or as to how the defendant was prejudiced by a clear and obvious error the State made, quickly corrected, and for which the State quickly apologized. Even if this claim were not forfeited, we would find no error. See, *e.g.*, *People v. Pierson*, 166 Ill. App. 3d 558, 566 (1988) (where misstatement made during closing argument has been corrected during same, there is no error).

¶ 42 With regard to the defendant's third claim of prosecutorial misconduct, that the State implied that the defendant's wife knew that the defendant was abusing J.N. and that she lied when she testified otherwise, we first examine the context surrounding the remarks of which the defendant complains. In closing argument, counsel for the State contrasted the testimony given by J.N.'s cousins with the testimony given by the defendant's wife, stating that because they do not live with the defendant, the cousins "don't know the whole story," whereas "His wife knows. That's a different story, and I'll get to that, but she knows." Although the defendant claims that this statement was the equivalent of calling the defendant's wife "a liar," we agree with the State that to the contrary, it was a fair commentary on the evidence properly before the jury, and a fair attempt to characterize the defendant's wife as biased in favor of the defendant and perhaps in a state of serious, unreasonable denial. As explained above, on cross-examination, the defendant's wife testified that she was "generally aware" of the allegations against the defendant in this case, but testified that she "really wasn't" listening when the recorded police interview in which the defendant admitted to sexually abusing J.N. was played. She also testified that the defendant was never alone with J.N., and that she never observed any abuse of J.N. by the defendant, in contravention to J.N.'s

testimony that the defendant's wife was present in the room the first time the defendant sexually abused J.N. As the State notes, this court has long held that "[a] prosecutor has a legitimate right to comment upon the credibility of witnesses as long as such comments are based upon the evidence or reasonable inferences therefrom." *People v. Williams*, 249 Ill. App. 3d 102, 103 (1993). A reasonable inference to be drawn from the defendant's wife's testimony was that she was in denial with regard to her husband's actions, that she knew, consciously or unconsciously, more than she testified that she knew, and that accordingly she was not a credible witness. Even if this claim were not forfeited, we would find no error.

¶ 43 With regard to the defendant's fourth and final claim of prosecutorial misconduct, that the State improperly commented on the other-crimes evidence, we have already determined that the other-crimes evidence was not excessive and was properly before the jury. "In closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). This is true "even if such inferences reflect negatively on the defendant." *Id.* Accordingly, even if this claim were not forfeited, we would find no error.

¶ 44 The defendant next contends that he was not proven guilty beyond a reasonable doubt. It is axiomatic that in a criminal prosecution, the State bears the burden of proving beyond a reasonable doubt each element of each offense with which a defendant is charged. See, *e.g.*, *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). "Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must

determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime" or crimes charged. *Id.* We are mindful, as we employ this standard of review, that it is the trier of fact, not the reviewing court, that must resolve conflicts in the testimony, weigh the evidence presented to it, and draw reasonable inferences from basic facts to ultimate facts. *Id*. Accordingly, this court, as the reviewing court, "will not substitute its judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of witnesses." *Id.* at 224-25. We will not set aside a criminal conviction "unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *Id*. at 225. Moreover, it has been the longstanding and "firm" holding of the Supreme Court of Illinois "that the testimony of a single witness, if positive and credible, is sufficient to convict," even when contradicted by a defendant. *Id*. at 228. We will not reverse a conviction simply because a defendant claims "a witness was not credible." *Id*. We recognize that the trier of fact "is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt" (*id*. at 229), and that the trier of fact, having seen and heard the witnesses testify, is "in a much better position than are we to determine their credibility and the weight to be accorded their testimony." *Id.* Likewise, it is the function of the trier of fact, not the reviewing court, to resolve any discrepancies that appeared during a trial, as well as a defendant's attacks upon the character of the witnesses who testify against that defendant. *Id*. We note as well that this court has "consistently held that a complainant's testimony need not be unimpeached,

uncontradicted, crystal clear, or perfect in order to sustain a conviction for sexual abuse." *People v. Soler*, 228 Ill. App. 3d 183, 200 (1992).

¶ 45 As noted above, in the case at bar, the defendant's sufficiency of the evidence/reasonable doubt argument is premised in part upon his contention that based upon the range of dates presented with each count with which he was charged, there simply was not evidence to support conviction on all 12 counts. However, as the State points out, J.N. testified that he visited the defendant's home at least monthly during the entire six-year span of time in question, and that the defendant sexually abused him "[e]very time" he visited the home. He described in detail how the abuse would normally occur, beginning with the defendant rubbing J.N.'s belly, and then culminating in the defendant rubbing J.N.'s genitals. This testimony, if believed, was sufficient to satisfy each time period found in the charges.

¶ 46 Although the defendant claims that J.N. was "completely not credible," we reiterate that questions of the credibility of a witness are for the jury to decide. In this case, there was nothing inherently incredible about J.N.'s testimony, which is described in detail above, nor are the discrepancies in his testimony of which the defendant complains sufficient to support the defendant's disparaging claim that J.N.'s testimony was "fantastic and incredible." To the contrary, the jury could have found that the inconsistencies in J.N.'s testimony were small, and were reasonable given his age at the time the defendant abused him, as well as the span of time from the first incident of abuse until J.N. reported the abuse: approximately six years. Moreover, the jury heard the defendant's admissions that he sexually abused J.N. Counsel for the defendant attacked J.N.'s character and

credibility at trial, and made the same arguments to the jury that he makes to this court on appeal. The jury chose to believe J.N. rather than the defendant's counsel. Against the backdrop of the legal standards set out above, and after reviewing the entire record in the light most favorable to the prosecution, the jury's decision to do so was completely reasonable, and we find no merit to the defendant's claim that he was not proven guilty beyond a reasonable doubt.

¶ 47 The defendant's final contention on appeal is that in fashioning the defendant's sentence, the trial judge "failed to give proper consideration to [the defendant's] rehabilitative potential" and therefore did not properly weigh the factors in mitigation presented by the defendant. Specifically, the defendant claims that the trial judge did not consider the defendant's "lack of a criminal record, his college education, his many years of service to his community and to the veterans of this country." Following the conviction of a defendant and a sentencing hearing, a trial judge "has broad discretionary powers in imposing a sentence, and [the judge's] sentencing decisions are entitled to great deference." *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). They are entitled to such deference by this court " 'because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider [the application of the appropriate factors] than the reviewing court, which must rely on the "cold" record.' " *Id*. at 213 (quoting *People v. Fern*, 189 Ill. 2d 48, 53 (1999)). Among the factors the trial judge has had the opportunity to consider are " 'the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age.' " *Id*. (quoting *People v. Stacey*, 193 Ill. 2d 203, 209 (2000)). We will not substitute our judgment for that of the trial

court merely because we might have weighed the appropriate factors in a different manner. *Id*. Accordingly, although Supreme Court Rule 615(b)(4) grants a court of review the power to reduce a sentence, that power should be exercised with caution and sparingly. *Id*. at 212. We will not alter a defendant's sentence unless we discern an abuse of discretion on the part of the trial judge, which occurs only "where the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id*. (quoting *Stacey*, 193 Ill. 2d at 210). We are mindful as well that " '[a] defendant's rehabilitative potential *** is not entitled to greater weight than the seriousness of the offense' " for which the defendant has been convicted. *Id*. at 214 (quoting *People v. Coleman*, 166 Ill. 2d 247, 261 (1995)). That said, "[i]n exercising its discretion, a trial court *must* consider all relevant factors in mitigation." (Emphasis in original.) *People v. Weiser*, 2013 IL App (5th) 120055, ¶ 31.

¶ 48 In the case at bar, as the State notes, prior to issuing sentence, the trial judge recognized that the range of sentencing was between probation and 84 years, and that the State was requesting a sentence of 60 years, while the defendant requested probation. Ultimately, the trial judge sentenced the defendant to six years' imprisonment on count I and six years' imprisonment on count II, to run consecutively, and to six years on "the remaining ten counts," to run concurrently with the sentences on counts I and II, followed by a term of mandatory supervised release. Before doing so, the trial judge specifically stated that he had "considered the statutory factors in aggravation and mitigation, the criminal history, various documentation that's been supplied during the course of this matter, [and] arguments of counsel." As the State points out, this would include all of the

factors and circumstances that the defendant complains the judge failed to properly consider. Indeed, when, at the hearing on the defendant's motion to reconsider his sentence, the defendant made essentially the same arguments he makes now, the trial judge specifically stated that prior to issuing sentence he "did weigh all these factors." As this court has long recognized, when the record demonstrates that mitigating evidence was presented to the judge, "we presume that the court considered this evidence unless there is 'some indication, other than the sentence imposed, to the contrary.' " *People v. Weiser*, 2013 IL App (5th) 120055, ¶ 31 (quoting *People v. Tye*, 323 Ill. App. 3d 872, 890 (2001)). In this case, there is no such indication, and when the trial judge's sentencing decision is viewed in light of the foregoing case law, it is clear that there is no merit to the defendant's claim of error.

¶ 49 CONCLUSION

¶ 50 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 51 Affirmed.

¶ 52 JUSTICE GOLDENHERSH, specially concurring.

¶ 53 I specially concur. As the majority correctly notes, we are bound by the precedent of *People v. Chapman*, 194 Ill. 2d 186 (2000). The factual scenario stated in detail by the majority proves the wisdom of Justice Harrison's dissent in *Chapman*:

> "By requiring counsel to be physically present at the site of the interrogation, the majority invites police misconduct. If law enforcement officers

are free to continue interrogation until the lawyer appears in person at the station house where the suspect is being held, what will happen is obvious. Police will resort to subterfuge and prevarication to delay counsel's discovery of his client's whereabouts for as long as possible. Their goal, in every case, will be to extract a confession faster than the attorney can track the client down and intercede.

The exercise of constitutional rights should not turn on a footrace to the police station. To hold otherwise, as the majority does, reflects a basic and unwarranted distrust for the role of lawyers in our criminal justice system. We wrote in *McCauley*, 163 Ill. 2d at 446, that

> ' "[n]o system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, [his] rights." (Emphasis omitted.) [Citation.] If our system is, indeed, such a system, we have no reason to fear both lawful and protected consultation.'

I, for one, continue to believe in the wisdom of this rule." *Chapman*, 194 Ill. 2d at 267 (Harrison, C.J., dissenting).

¶ 54 Justice Harrison, in the paragraphs noted above, was writing in the finest tradition of our nation's jurisprudence. Unfortunately, Justice Harrison's statement was prophetic. The facts in the instant case underline the wisdom of his position. The exercise of one's constitutional rights is not a game.