No. 130127

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- CECIL SMART, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, No. 1-22-0427. There on appeal from the Circuit Court of Cook County, Illinois, No. 19 CR 14458. Honorable Carol M. Howard, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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E-FILED
11/8/2024 11:10 AM
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ISSUE PRESENTED FOR REVIEW

Where there was no dispute that the alleged contact between Cecil Smart and J.P. was for the purpose of sexual gratification, was evidence of Smart's prior conduct admissible under the intent exception to other act evidence?

STATEMENT OF FACTS

J.P., a 16-year-old from Philadelphia, spent the summer of 2018 in Chicago with his adult sister, Ciera Smith. (R. 214) Smith lived in Chicago and worked for Breakthrough Ministries. (R. 215) While in Chicago, J.P. volunteered at Breakthrough. (R. 215) Cecil Smart also worked at Breakthrough and met Smith through this work. (R. 216) Smart and Smith became friends and hung out often. (R. 217) When J.P. was in town, Smith introduced him to Smart. (R. 217) Smart lived with several nieces and nephews and invited J.P. along when Smart would take his family to visit downtown Chicago. On one occasion, Smart took J.P. and his three nephews to see fireworks at Navy Pier. (R. 224) After getting back to Smart's home late that night, J.P. slept over at Smart's home with Smart and his nephews. (R. 228) Several months later, J.P. alleged that Smart sexually abused him that night. (R. 255) After allowing the State to admit into evidence a prior act involving Smart's alleged inappropriate behavior with a teenage boy, Smart was convicted at a bench trial of two counts of aggravated criminal sexual abuse of J.P. (R. 536). On appeal, Smart argued that the trial court erred by admitting this other act. The appellate court reversed Smart's convictions, holding that other acts are not admissible to prove intent "if a defendant denies the commission of the crime and does not offer any evidence or argument that his actions were or may have been accidental, incidental, or inadvertent." *People v. Smart*, 2023 IL App (1st) 220427, ¶ 33.

Pre-trial

Other Acts Evidence

As a lifelong athlete, Smart worked with children in organized and recreational sports. (R. 437-438) Prior to trial, the State sought to admit other act evidence of three alleged work-related incidents involving Smart and other young people. (CI. 62-73) The first incident occurred in October of 2012, while Smart worked as a collegiate men's basketball coach. (CI. 63-64) According to the State, Smart provided a student with alcohol while he was driving the student home. (CI. 64) The second incident occurred on March 29, 2018, where Smart was reprimanded for breaking company policy at Breakthrough by working out alone with a teenage male. (CI. 63) In the final instance from June 12, 2018, Smart allegedly drove a student, I.G., home in violation of Breakthrough company policy and grabbed his buttocks. (CI. 63)

According to the State's motion *in limine*, these incidents were "relevant on the issues of defendant's intent, motive, *modus operandi*, common scheme or design, lack of consent, and propensity with respect to the sexual assault of J.P." (CI. 64) In its written motion, the State argued that "[a]llowing a jury to hear evidence of only the sexual assault of J.P. could create the false impression that this was an isolated incident." (CI. 72) At the hearing on the motion, however, the State conceded that the prior incidents could not be used for propensity purposes because they did not involve the requisite criminal conduct under 725 ILCS 5/115-7.3. (R. 103)

Despite the concession that propensity evidence was statutorily inadmissible, the State emphasized what it perceived to be similarities

between the prior acts and the charged sexual abuse to show Smart's "common design" of sexually abusing children. (R. 106-107)

The State did not argue that "intent" would be in dispute at trial or that, in Illinois, other crimes evidence is presumptively admissible in all prosecutions involving specific intent crimes.

The court only admitted the "I.G." incident:

> [A] hand to the buttocks could be perceived as sexual behavior. And I think there's sufficient case law that supports the position that this incident should be admitted. So I am introducing that incident as other crimes evidence. Only one witness will be able to testify regarding the incident regarding IG, and that witness must have personal knowledge of the incident.

(R. 113)

Trial

Testimony

Ciera Smith worked for Breakthrough Ministries during the summer of 2018 when her brother, J.P., came to visit. (R. 287) During her time at Breakthrough, she befriended Smart. (R. 287) By the time J.P. came to visit, Smart no longer worked at Breakthrough, but Smith and Smart continued to spend time together. (R. 288, 291) When J.P. came to Chicago, Smith introduced him to Smart. (R. 291)

One evening, Smith and another coworker were hanging out with Smart at his home. (R. 439-440) Smith insisted they go back to her house because J.P. was there alone. (R. 440) Once they arrived, Smart invited J.P. to go to the zoo the next day with him and his nephew. (R. 218) Because Smith had to work early the next morning, Smith took J.P. back to Smart's

home so that J.P. could spend the night and go to the zoo the next morning. (R. 219) Smith eventually left and J.P. fell asleep in Smart's bed. (R. 220) The next morning, they went to the zoo. (R. 221) J.P. testified that he had "a good day" at the zoo. (R. 221)

Around two weeks later, on July 25th, Smart and Smith were at Smart's home. (R. 292) Smart mentioned that he was taking his nephews to see fireworks that night and to the museum the next day, and asked Smith if J.P. wanted to join them. (R. 222, 292) They called J.P. to ask; when he said yes, Smith went to pick him up and take him back to Smart's home. (R. 293) From there, Smart, his three nephews, and J.P. left to see the fireworks. (R. 224) Smith could not come because she had to work early the next morning. (R. 293) When they arrived at Navy Pier, the show had already ended. (R. 226) Smart felt bad that they had missed the show, so he took J.P. and his nephews to the beach to see the city skyline. (R. 442) From there, they headed to McDonalds to pick up food around 11:30 p.m. (R. 228, 475) When they got back to Smart's home around midnight, J.P. ate his McDonald's but threw it up soon after. (R. 229) According to J.P., he vomited because of alcohol that Smart gave him. (R. 229). Smart cleaned up the vomit and J.P. took a shower. (R. 469) After the shower, Smart and J.P. recounted different versions of how the evening unfolded.

According to J.P., after getting sick and taking a shower, he got into Smart's bed alone. (R. 232) Around thirty minutes to an hour later, Smart came into his room and got into bed next to J.P. (R. 232-233) J.P. was awake

but kept his eyes closed and pretended to be asleep. (R. 233) Around twenty minutes later, Smart started touching J.P. (R. 233) J.P. was on the opposite side of the bed, facing the wall. (R. 234) Smart grabbed J.P.'s waist and began touching J.P.'s penis over his clothes. (R. 234-235) Smart then moved J.P. onto his back, moved his shorts and underwear to the side to access J.P.'s penis, and stroked J.P.'s penis up and down for fifteen minutes. (R. 235-236) The State then asked J.P. what Smart did after he "used his hand to masturbate [J.P.]" (R. 237) According to J.P., Smart put his mouth on J.P.'s penis for five to ten minutes until J.P. ejaculated into Smart's mouth. (R. 238) Smart then began masturbating and continued to touch J.P. with his hands throughout the night. (R. 239-240) J.P. also testified that Smart tried to use J.P.'s hands to touch Smart's own body and ground his body against J.P.'s fist. (R. 240-241) J.P. testified that he kept his eyes closed and pretended to be asleep because he was scared and thought that if he said something, Smart would attack him and he would have no one to help him. (R. 237) J.P. did not tell anyone in his family about this incident until a few months later when he texted his sister. (R. 257)

Smart testified in his own defense and denied J.P.'s allegations of sexual abuse. Smart explained that after J.P. showered, he, his nephews, and J.P. all went to Smart's room so that Smart could turn on the TV and video games for the kids to play. (R.445) It was normal for the kids to spend time in Smart's room because that was where the television and video games were located. (R. 346) While the kids were in his room, Smart went back

downstairs to hang out with his brothers, Frank and Andre, and after that, went back upstairs to his room and fell asleep. (R. 446)

On cross-examination, the State questioned Smart regarding the admitted other act. Smart admitted that he drove I.G. home and no one else was in the car. (R. 457) When I.G. exited Smart's car, Smart slapped his buttocks, but in a non-sexual way as I.G.'s coach. (R. 458, 490) According to Smart, he had "that kind of relationship" with the youth he worked with. (R. 484) I.G. then sent a group text saying, "coach slapped my butt." (R. 456) This text got out to one of the parents, who then called Smart for an explanation. (R. 456) The next day, Smart went to the HR director for Breakthrough, Marcie Curry, to explain the situation. (R. 456) Smart was ultimately dismissed from Breakthrough due, in part, to this incident. (R. 458)

Frank's partner, Amanda, testified that on the night in question, she was upstairs caring for her newborn baby. (R. 347) Amanda was awake with the baby throughout the night and checked on her sons in Smart's room about three to five times. (R. 347) She testified that "the TV was on, the children were asleep or appeared to be asleep scattered throughout the bedroom." (R. 348) Though Smart was not in the bedroom any of the first three times she checked in, the fourth time she looked in, "everyone was asleep including Cecil." (R. 349-350) Amanda did not see Smart molest anyone. (R. 351)

Frank testified that he saw the kids, including J.P., go to bed in

Smart's bedroom around 1:00 or 1:30 in the morning. (R. 392-393) Frank was with Smart on the porch until Smart went to bed around 3:00 in the morning. (R. 393-394) The next day, J.P. appeared completely normal. (R. 449-450) On cross-examination, the State asked Frank if he knew that Smart got fired from Breakthrough "for driving a kid home and grabbing his butt." (R. 427) Frank responded, "No, ma'am." (R. 427)

Stipulations

After the State and defense presented their respective cases, the parties agreed to the following stipulations: a State's Attorney investigator would have testified that he reached out to Frank Smart, but Frank never responded. (R. 502) Marcie Curry, human resources director for Breakthrough Ministries, would have testified that on June 22, 2018, Smart "was notified by mail that he was terminated from employment at Breakthrough Ministries due to the fact that on June 12th, 2018, while transporting a participant, [I.G.], home, it was alleged that [Smart] touched [I.G.] inappropriately." (R. 503)

Closing Arguments

The State argued that Smart exhibited a "pattern" of behavior, referencing the other act incidents that were deemed inadmissible before trial: "We saw two times before he was fired from Breakthrough and the one with [J.P.] [...] This is a pattern." (R. 534) The State urged the court to find Smart guilty because he acted "exactly in [his] character" by "engag[ing] in a pattern of abuse against boys" that "culminated" with this case. (R. 523, 533)

The Verdict

The judge emphasized that "the State's case rises and falls with the testimony of [J.P.]" because "he was the only one actually present when the alleged incidents occurred." (R. 535) The judge explained, "I did find many aspects of J.P.'s testimony credible, however, I do find the defense witness's [sic] credible too." (R. 535) Specifically, the judge found that Amanda Brown "did not [...] embellish her testimony at all," and further remarked that she "didn't find Frank's testimony incredible either." (R. 536) Ultimately, the judge found Smart guilty of aggravated criminal sexual abuse under count one (defendant's mouth to victim's penis) and count two (defendant's hand to victim's penis). (R. 536) The judge did not "find [J.P.] credible regarding Count 3" (victim's hand to defendant's penis) and acquitted Smart of that count. (R. 536)

Post-Trial

Smart was sentenced to 30 months of sex offender probation. (R. 568) Smart filed for a motion for new trial, arguing that the court erred in granting the State's motion to allow the other crimes evidence involving I.G. (CI. 89-93)

The judge denied the motion, finding that the other crimes evidence was properly admitted. (R. 558) Smart filed a timely notice of appeal. (C. 137)

Appeal

On appeal, Smart argued that the trial court erred in admitting evidence of the incident with I.G. because it failed to satisfy any exception

under Illinois Rule of Evidence 404(b), and allowed the State to improperly argue that Smart had a propensity to commit the charged offense. (Def. App. Ct. Br. 15)[1] Smart also argued in the alternative that his trial counsel was ineffective (1) failing to object to the State's elicitation of other crimes evidence that, pre-trial, the court had ruled was inadmissible, (2) stipulating to parts of that same evidence that the court found inadmissible, (3) failing to object to inadmissible hearsay regarding the complainant's alleged outcry in a case that did not permit outcry hearsay, and (4) repeatedly referring to the inadmissible outcry hearsay throughout trial. (Def. App. Ct. Br. 25)

In response, the State abandoned its written, pre-trial position that every exception to the rule against other crimes applied. It also abandoned its sole argument at the hearing on the motion: that the prior bad act showed a "common design." (R. 107); *Smart*, 2023 IL App (1st) 220427, ¶ 23. Instead, the State argued that the other act was admissible because "it showed that [Smart] engaged in a pattern" where he "use[d] his position as a 'mentor'" to "isolate" children, and "take advantage of them." (St. App. Ct. Br. 39) According to the State, intent was at issue because Smart admitted to being with the complainant at the time in question. (St. App. Ct. Br. 40) The State did not ask the appellate court to hold that, in Illinois, other crimes evidence is presumptively admissible in the prosecution of all specific intent offenses.

The appellate court held that Smart had been denied a fair trial by

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[1] Certified e-filed, stamped copies of the parties' appellate court briefs have been filed in this Court pursuant to Ill. S. Ct. Rules 318(c) and 612(b).

admission of other crimes evidence which the State "relied heavily upon" to prove its case: "When a defendant has denied the charge and does not claim accident or mistake, Illinois courts have concluded that other crimes evidence is 'simply unnecessary' for purposes of proving intent." *Smart*, 2023 IL App (1st) 220427, ¶ 24. The appellate court reversed Smart's conviction, finding that the other act was inadmissible to prove intent, and the error was not harmless. *Id.* at ¶¶ 34, 37. The court did not address the ineffective assistance of counsel arguments Smart raised. *Id.* at ¶ 38. This Court allowed leave to appeal. *People v. Smart*, 472 Ill. Dec. 701 (March 27, 2024).

ARGUMENT

Prior bad acts are admissible to show intent only where intent is genuinely at issue. Here, there was no dispute that the alleged contact between Cecil Smart and J.P. was for the purposes of sexual gratification; the only issue was whether Smart committed the offense. Thus, the erroneous admission of a prior act was not harmless, particularly where the State used it to argue that Smart had the propensity to commit the charged offense.

Smart was charged with three counts of aggravated criminal sexual abuse. Count 1 alleged that Smart "knowingly committed an act of sexual penetration upon J.P." by putting his mouth on J.P.'s penis, Count 2 alleged that Smart "touched J.P.'s penis with his hand for the purpose of sexual gratification," and Count 3 alleged that "J.P.'s hand touched Smart's penis for the purpose of sexual gratification." (CI. 6-8) Smart was convicted of Counts 1 and 2 and acquitted of Count 3.

Before trial, the State correctly conceded that propensity evidence was statutorily inadmissible in Smart's prosecution. (R. 103) But the State was

intent on admitting propensity evidence regardless. The State argued to the court that Smart's prior bad acts were similar to the charged offense, so the prior conduct should be admitted under an exception to the rule against propensity evidence: that is, Smart had a "common design" of abusing children and this was not an "isolated incident." (CI. 72; R. 106-07) The trial court agreed, admitting one of Smart's prior bad acts where Smart allegedly drove a student, I.G., home, and grabbed his buttocks. (CI. 63, 113) The State then used the prior bad act as propensity evidence, arguing that Smart was guilty because he engaged in a "pattern" of abuse that "culminated" in this case. (R. 523) This is exactly the propensity argument barred by Illinois Rule of Evidence 404(b).

In the appellate court, the State well-knew that the argument it made in the trial court was unsustainable. The "common design" exception against other crimes evidence only applies to an other act that was committed in furtherance of the crime charged. *See People v. Cerda*, 2021 IL App (1st) 171433, ¶ 107 ("Evidence of a common plan or design proves the existence of a larger criminal scheme of which the crime charged is only one element."). Put another way, claiming one person has a "common design" to behave in a particular way– based on their prior bad acts– is the definition of propensity.

So in the appellate court, the State changed paths and claimed that the other act was admitted to show Smart's "intent." (St. App. Ct. Br. 35) But the appellate court saw through that argument as well. Intent was not at issue in this prosecution because Smart consistently denied committing the

charged conduct so the presumption that other crimes evidence is inadmissible prevailed. *People v. Smart*, 2023 IL App (1st) 220427, ¶¶ 24, 33.

And now the State pivots yet again in this Court. Because intent was not genuinely at issue in *this* prosecution, the State asks for a rule that intent is at issue in *every* prosecution for a specific intent crime. Thus, according to the State, it is *always* permitted to introduce other crimes evidence so long as it is not more prejudicial than probative. (St. Br. 14)

The State's proposal would turn Illinois law on its head. The plain language of Rule 404 presumptively prohibits other crimes evidence, making no distinction between specific and general intent offenses. Under the State's proposal, though, the exception against other crimes evidence would instead constitute a presumption *in favor* of the admission of other crimes evidence, so long as the crime intends a specific result.

This case illustrates the absurdity of the State's position. The State's burden to prove specific intent pertained to only two counts, which alleged that Smart acted with the intent to touch J.P. for "sexual gratification." (CI. 7-8) But the allegation in this prosecution was that Smart "masturbated" J.P. and orally stimulated J.P.'s penis until J.P. ejaculated into Smart's mouth, and that Smart used J.P. to sexually pleasure his own penis. (R. 233-241) It could not possibly be genuinely in dispute as to whether stimulating a penis to ejaculation is sexually gratifying conduct. The court's denial of defense counsel's motion for a directed verdict underscores this point, where the court found that "the State ha[d] met its burden at this point" despite no evidence

of the admitted other act during the State's case-in-chief. The material issue at this trial had nothing to do with Smart's specific intent to achieve sexual gratification; it was whether Smart committed the offense at all.

But under the State's proposal, a jury would hear Smart's prior bad acts, and then be instructed that it cannot consider those prior bad acts to determine whether Smart is guilty, but instead, whether the prior bad act tended to show that stimulating a penis to ejaculation was done "for the purpose of sexual gratification." The State's proposal would render Rule 404(b) and its protection against propensity inferences meaningless. See *United States v. Jones*, 455 F.3d 800, 811 (7th Cir. 2006) (Easterbrook, J., concurring) ("Telling juries not to infer from the defendant's criminal record that someone who violated the law once is likely to do so again is like telling jurors to ignore the pink rhinoceros that just sauntered into the courtroom."). The appellate court, therefore, was correct in holding, in line with Illinois precedent, that "if a defendant denies the commission of the crime and does not offer any evidence or argument that his actions were or may have been accidental, incidental, or inadvertent, other act evidence may not be admitted to prove intent." *Smart*, 2023 IL App (1st) 220427, ¶ 33.

Admission of other-acts evidence is reviewed for abuse of discretion. *People v. Peterson*, 2017 IL 120331, ¶ 125. This court should affirm the appellate court below and reject the State's argument that intent is always at issue in specific intent cases because it undermines Rule 404(b)'s protections against propensity evidence and because intent is not a genuine issue in this

case.

A. This court should reject the State's proposal of near-automatic admission of other act evidence in every specific intent case because it violates Illinois Rule of Evidence 404(b).

The State does not urge this Court to follow the theory of admissibility it advocated for in the trial court, nor the more expansive theory of admissibility it proposed in the appellate court. Rather, the State asks this Court to adopt a new and far more sweeping proposal: that other act evidence is always admissible in specific intent cases, "even where the defendant did not specifically dispute [intent]." (St. Br. 13)

But this proposition flips Illinois Rule of Evidence 404(b) on its head, transforming this rule of exclusion into a permissive one which mechanically admits other acts even when intent is not truly at issue. The State's proposed rule also undermines longstanding precedent prohibiting propensity evidence. This Court should reject the State's arguments.

i. The State's proposal undermines Illinois Rule of Evidence 404(b)'s exclusionary principle

A defendant is entitled to have his guilt or innocence evaluated solely on the basis of the charged crime. *People v. Lampkin*, 98 Ill.2d 418, 430 (1983). Consistent with this principle, Illinois Rule of Evidence 404(b) prohibits the admission of "[e]vidence of other crimes, wrongs, or acts [...] to prove the character of a person in order to show action in conformity therewith." Rule 404(b) provides for exceptions, allowing for the admission of other acts for "other purposes, such as proof of motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident."

By its own terms, Rule 404(b) "is *exclusionary*." *People v. Mujkovic*, 2022 IL App (1st) 200717, ¶ 12 (emphasis in original). It "represents a policy choice to exclude evidence that may be logically relevant but presents too great a risk of inviting a factfinder to decide the case on an erroneous basis." *Id.* "The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michelson v. United States*, 335 U.S. 469, 476 (1948).

But the State's proposed rule, that other act evidence is presumptively admissible in specific intent cases, is anything but exclusionary. The logic underpinning the State's argument is this:

> (1) the prior bad act was intentional; (2) if the prior bad act event was intentional, it is more likely that the charged similar conduct is intentional; and (3) because the State must show intent as an element of the offense, the evidence is relevant to an element genuinely in issue.

State v. Lipka, 817 A.2d 27, 39 (Vt. 2002)

But, as explained by Vermont's high court, this logic is simply a propensity chain: "Since the State would not offer evidence of a prior bad act unless it appeared to be intentional, the practical result of the acceptance of the State's argument is that all prior bad act evidence is admissible if it shows conduct similar to that involved in the charged offense." *Id.* Illinois Rule of Evidence 404 must not be interpreted so as to permit the State to introduce the most prejudicial evidence available on the pseudo-ground that

intent is "always" at issue in specific intent cases.

As explained by Professor Imwinkelried, unchecked admission of other crimes evidence to prove intent raises the specter of propensity:

> The charged offense occurred at one time and place while the uncharged crime ordinarily occurs at a different time and place. To bridge the temporal and spatial gap between the two incidents, the prosecutor must assume the accused's propensity to entertain the same intent in similar situations. That assumption is the inescapable link between the charged and uncharged crimes. The trier of fact can reason from the starting point of the uncharged crime to a conclusion about the *mens rea* of the charged crime only through an intermediate assumption about the accused's character or propensity.

Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 583–84 (1990); see also Abraham P. Ordover, *Balancing the Presumption of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 Emory L.J. 135, 158 (1989)("[W]here the charge requires the prosecution prove a specific intent of the defendant to commit the specific crime charged, a prior unconnected similar act proves no more than a general intent.").

Attempts to undermine Rule 404(b)'s exclusionary principle have been criticized by state and federal courts alike. As Judge Easterbrook has observed,

> Rule 404(b) provides that evidence of prior bad acts (including convictions) is inadmissible to show character or propensity but may be admissible to show intent, motive, or some other subject material to the trial. In this prosecution, as in quite a number of others we have seen in recent years, the parties and district judge alike treated the rule's second sentence as if it were a rule of admissibility. It is not; it says that evidence "may" be admissible for a given purpose,

> not that it is automatically admissible. Allowing the jury to learn about the defendant's criminal history, with or without a *pro forma* limiting instruction, invites the impermissible [propensity] inference.

United States v. Jones, 455 F.3d 800, 810 (7th Cir. 2006) (Easterbrook, J., concurring).

Mindful of this danger, the appellate court in *People v. Clark* refused to adopt a bright line rule that "intent is automatically at issue" in specific-intent crimes because of the risk that such a rule would create an improper propensity inference. 2015 IL App (1st) 131678, ¶ 42. *Clark* illustrated this point by discussing *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004):

> [T]he Iowa Supreme Court held that, in a trial for possession of narcotics with intent to deliver, the State could not introduce evidence that the defendant had previously been convicted of dealing drugs because '[t]he State's inherent argument for admitting the evidence was based on the character theory that if [the defendant] entertained the intent to deliver during a similar prior incident, he probably harbored the same intent at the time of the charged offense.'

Clark, 2015 IL App (1st) 131678, ¶ 43.

Similarly, in *State v. Ives*, the Arizona Supreme Court declined to adopt a rule that "intent is automatically at issue" in specific intent cases where it would obliterate the general exclusionary rule against introduction of prior bad acts to show propensity. 927 P.2d 762, 769-70 (Ariz. 1996).

Illinois courts have consistently held, in line with Illinois Rule of Evidence 404(b), that "[e]vidence of crimes for which a defendant is not on trial is inadmissible if relevant merely to establish the defendant's disposition or propensity to commit crime." *People v. Manning,* 182 Ill.2d 193,

213 (1998). Rule 404(b) is an exclusionary rule because "'if applied mechanically' the permitted purposes listed in the rule 'would overwhelm the central principle' of the rule against propensity evidence." *United States v. Gomez*, 763 F.3d 845, 855 (7th Cir. 2014) (quoting *United States v. Beasley*, 809 F.2d 1273, 1279 (7th Cir. 1987)). Thus, this Court should reject the State's proposed mechanical application of the intent exception to other act evidence in all specific intent cases.

ii. The State's proposal undermines Illinois Rule of Evidence 404(b)'s materiality principle

Other-acts evidence, while typically inadmissible to prove propensity, "may nonetheless still be admissible to prove some other point *material* to the controversy" such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Mujkovic*, 2022 IL App (1st) 200717, ¶ 13 (emphasis added). The permissible other purpose "must be a material issue in the case" and other act evidence "must be relevant to establishing that purpose without relying on the propensity inference." *Id.*; see also 1 Kenneth S. Broun *et al.,* McCormick on Evidence § 190, at 809-10 (4th ed. 1992) ("[T]he connection between the evidence and the permissible purpose should be clear, and the issue on which the other crimes evidence is said to bear should be the subject of a *genuine* controversy.") (emphasis added). Contrary to the State's argument, Illinois courts have abided by this principle for over a century: "[W]here the intent with which an alleged offense has been committed is a material element of the charge *and becomes an issue on the trial*, proof of former similar offenses[...] may be

received [...] for the purpose of showing his knowledge and guilty intent." *People v. Lane*, 300 Ill. 422, 424 (1921) (emphasis added).

The State urges this Court to open the door to admission of other act evidence in *all* specific intent cases because "intent is always at issue" in such instances, regardless of the defense strategy. (St. Br. 15) The State argues that the appellate court "incorrectly reasoned, contrary to these principles, that intent was not 'at issue' — and other-acts evidence probative of intent thus not admissible — because [Smart] denied committing the charged acts." (St. Br. 13)

But the State's proposed admission of other act evidence in *all* specific intent crimes, regardless of the theory of defense, erases this materiality principle and invites a flood of prejudicial evidence into a case regardless of its relevance to any genuine issue.

This court has rejected this argument before and should do so again. In *People v. Wilson*, the defendant was convicted of criminal sexual abuse, a specific intent offense, based on allegations that he touched female students inappropriately. 214 Ill.2d 127, 134-135 (2005). Wilson testified that he liked to touch students, there was evidence presented that he was a "touchy feely type person," who often placed his hands on students, and complainant testimony indicated that defendant's sexual touching was subtle. *Id.* at 138. Defense counsel argued that defendant's actions were misinterpreted. *Id*.

Although this Court acknowledged the idea urged here by the State, that intent is always at issue in specific intent cases, *Wilson* declined to adopt

the exact categorical rule the State now proposes. *Id*. at 137. Rather, this Court looked to the evidence and arguments presented and determined that "testimony of the witnesses and the statements made by [Wilson's] counsel" demonstrated "defendant's intent was a genuine issue in the case." *Id.* at 137-38. Thus, other acts were properly admitted "in this kind of case" to show that the touching was intentional, not mistaken or accidental. *Id.* at 139.

In adopting this case-by-case approach, this Court distinguished the facts of *Wilson* from other cases where intent was not genuinely at issue and prior sexual misconduct was improperly admitted. For instance, in *People v. Bobo*, 278 Ill. App. 3d 130 (5th Dist. 1996), as noted by this Court, the defendant's actions were "much more overt, and there was no question as to whether the acts happened accidentally or with the requisite intent *if they happened at all*." *Wilson*, 214 Ill.2d at 138-39. (emphasis added). This distinction speaks to the guiding principle of Rule 404(b): where the central issue is whether the alleged conduct ever occurred, like it is here, intent is not truly at issue and other act evidence thus is not admissible. This Court should reject the State's radical proposal and maintain the fact-based, case-by-case approach set forth in *Wilson*. See also *People v. Lenley*, 345 Ill. App. 3d 399, 406 (5th Dist. 2003) ("The first step in deciding whether to admit [other-crimes] evidence is to define what is truly at issue during the trial. The reasons for the admission of evidence proving uncharged criminality need to be linked to contested issues.").

Other jurisdictions also reject the notion that prior bad acts are

automatically admissible to prove intent in all specific intent offenses. For example, the Arizona Supreme Court held that, where "the accused denies any involvement in the charged offense, the 'intent' exception of 404(b) is not a proper basis for injecting prior misconduct into a proceeding." *State v. Hughes*, 938 P.2d 457, 464 (Ariz. 1997). *Hughes* explained, "Unless there is some discernible issue as to defendant's intent (beyond the fact that the crime charged requires specific intent), the state may not introduce evidence of prior bad acts as part of some generalized need to prove intent in every case." *Id.*

Indiana's Supreme Court recognizes "that to allow other-bad-acts evidence to prove intent when a defendant merely denies involvement in a crime would often produce the 'forbidden inference'—a result at odds with Rule 404(b)'s overarching purpose." *Fairbanks v. State*, 119 N.E.3d 564, 569 (Ind. 2019). Thus, "Rule 404(b)'s intent exception is available only when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent." *Id.* In other words, "to use the Rule 404(b) intent exception, the State needed more than a mere denial of involvement in the offense; it needed to be confronted with a defendant's claim that whatever conduct he may have engaged in, he did not possess the necessary *mens rea* for the offense." *Id.* (internal citations omitted). See also *State v. Wells*, 221 P.3d 561, 570 (Kan. 2009) ("the crucial distinction" in admitting other crimes evidence on the issue of intent "is not whether the crime is a specific or general intent crime but whether the

defendant has claimed that his or her acts were innocent."); *State v. Sullivan*, 679 N.W.2d 19, 24-25 (Iowa 2004) (prior act admissible only if "it is relevant and material to a *legitimate* issue in the case.").

The State cites *People v. Heard,* in which the defendant, accused of murdering his former girlfriend, her new partner, and a roommate, asserted an alibi defense. 187 Ill. 2d 36, 50-51 (1999). The circuit court admitted evidence of the defendant's prior jealousy-fueled encounters with his victims to prove "motive and intent." *Id*. at 57-58. This Court affirmed, stating that the other act evidence was admissible on these bases, as it "revealed defendant's continuing hostility and animosity" toward the victims. *Id.* at 59. According to the State, "it follows from *Heard* that other-acts evidence probative of intent may be admitted to prove the specific-intent element of a crime," and because "intent is always 'at issue' in a specific-intent crime, the prosecution may, regardless of the defense strategy," introduce other acts evidence to prove intent, subject to the probative versus prejudicial balancing test. (St. Br. 15)

Heard stands for no such thing. First, the *Heard* defendant was charged with first degree murder, a general intent offense, and the decision says nothing about specific versus general intent. See *People v. Petrov*, 2023 IL App (1st) 160498, ¶ 73 ("Murder is a general intent crime."). More significantly, *Wilson,* in which this Court adopted a case-by-case approach to the admissibility of other crimes evidence, was decided after *Heard,* belying any notion that intent is at issue in every specific intent case. Finally, the

Heard defendant's prior acts and the charged offense were committed *against the same people*. As observed in *People v. Clark*, 2015 IL App (1st) 131678:

> *Heard* found the other-crimes evidence relevant as tangible evidence of the defendant's jealousy and hurt over the breakup, which provided him with a clear motive to kill the victims. It is true that the supreme court discussed the defendant's 'intent' in its discussion, but we do not read that language as referring to the question of 'intent' in the strict legal sense of whether the perpetrator, in firing the weapon, did or did not 'intend' to cause death or great bodily harm; we think it is clear that the court was referring more generally to his jealousy, his overall state of mind—his motive to do harm to his ex-girlfriend and her new boyfriend.
>
> *Id.* at ¶ 38

Although cases such as *People v. Cavazos*, 2022 IL App (2d) 120444-B (St. Br. 15), cite *Heard* for the notion that other-act evidence of intent is always admissible, regardless of the theory of defense, this runs counter to *Wilson* and represents an overly expansive reading of *Heard*. Further, *Cavazos* is factually distinguishable in that the other act evidence – shooting at a rival gang member after fatally shooting another rival gang member – was part of a continuing narrative that spoke to the defendant's accountability and intent *that night*. *Cavazos*, 2022 IL App (2d) 120444-B, ¶ 72 ("the subsequent crime, reflecting that Justin was responsible for shooting a rival gang member—indeed, a purported Latin Kings member—later that same evening, was relevant to the State's theory that, at the time of the charged shooting, Justin shared Joshua's intent.").

Courts recognize that "[w]hen facts concerning uncharged criminal conduct are all part of a continuing narrative which concerns the circumstances attending the entire transaction, they do not concern separate,

distinct, and unconnected crimes." *People v. Johnson*, 368 Ill. App. 3d 1146, 1155-56 (4th Dist. 2006). Accordingly, "other-crimes evidence is admissible if it is part of a continuing narrative of the event that gave rise to the offense." *People v. Schofield*, 2024 IL App (4th) 220961, ¶ 79; See also *People v. Carter*, 362 Ill. App. 3d 1180, 1190 (4th Dist. 2005) (other-crimes evidence admissible under the continuing narrative exception "when offered to explain an aspect of the crime charged or some of the conduct engaged in by the accused that would otherwise be implausible or perhaps even inexplicable.").

In *Heard* and *Cavazos*, other act evidence was properly admitted to prove motive and present a complete narrative of related events. These cases demonstrate that, consistent with Rule 404(b)'s materiality principle, other act evidence is only admissible to prove an issue that is material to the case.

People v. Foreman, 2019 IL App (3d) 160334, and *People v. Watkins*, 2015 IL App (3d) 120882 (St. Br. 16), hold that a prior conviction for intent to deliver cannabis is admissible as evidence of intent in a subsequent prosecution for possession of cocaine with intent to deliver. *Foreman* and *Watkins* are wrongly decided because intent was not truly at issue in either case: both defendants contested possession, not their intent to deliver. 2019 IL App (3d) 160334, ¶ 32; 2015 IL App (3d) 120882, ¶ 49. Because intent was not truly at issue, the admission of an other act in both cases served no purpose other than to demonstrate a propensity to sell drugs.

The State repeatedly emphasizes that it bears the burden to prove each element of the offense with evidence of its choice. (St. Br. 12-13, 14)

Accordingly, the State argues that admitting evidence of other acts only where intent is truly at issue would allow a crafty defendant to "prevent the prosecution from offering evidence on an element of the charged offense while at the same time contending that the prosecution failed to present sufficient evidence to prove that element beyond a reasonable doubt." (St. Br. 20) But this Court need look no further than this case to see that the State's fears are unfounded. After testimony from the State's witnesses, none of whom offered information regarding the other act admitted pre-trial, defense counsel moved for a directed verdict and it was denied. (R. 314) Indeed, a motion for directed verdict based on lack of proof of sexual gratification would have been frivolous, in light of the charged conduct. The other act evidence was then elicited by the State during the defense case and in a subsequent stipulation. Thus, the other act evidence in this case had no bearing on the prosecution's ability to meet its burden to prove its case-in-chief.

In any case, this problem is easily solved. *Wilson*, for example, emphasized that it was, in part, *defendant*'s testimony that raised the issue of intent. See 214 Ill.2d at 138 ("Defendant testified that he liked to touch students [and] [...] Defendant himself testified that one of the victims 'misinterpreted' his actions in touching her breasts.") Thus, if other act evidence is excluded during the State's case-in-chief because it appears to not be relevant, but intent emerges as an issue at some later point, "the prosecutor can wheel out the [prior bad act] during rebuttal; by then its relevance (or irrelevance) should be apparent." *United States v. Jones*, 455

F.3d 800, 811 (7th Cir. 2006) (Easterbrook, J., concurring). In other words, the State's expansive proposal does not ensure the admissibility of relevant evidence; rather Rule 404(b)'s materiality principle does.

The only issue in this case was whether Smart committed the acts at all: Smart "consistently denied that any physical contact, sexual or otherwise, occurred between him and J.P." and Smart "emphatically denied these allegations in his interview with police and testified to the same at trial." *Smart*, 2023 IL App (1st) 220427, ¶ 30. As observed by the appellate court, "[n]o evidence presented suggested that Smart had somehow inadvertently or accidentally touched J.P." in a way that would make other act evidence relevant to intent. *Id.* In this type of case, where there is no genuine issue of intent, admitting other act evidence to prove a non-issue is fundamentally at odds with Rule 404(b) and would simply allow the State to admit propensity evidence. The appellate court below correctly held that "if a defendant denies the commission of the crime and does not offer any evidence or argument that his actions were or may have been accidental, incidental, or inadvertent, other acts evidence may not be admitted to prove intent." *Smart*, 2023 IL App (1st) 220427, ¶ 33. This Court should therefore reject the State's expansive proposal and affirm the appellate court's decision below.

B. Intent was not a genuine issue in this case and the improper admission of other act evidence was not harmless.

Smart was charged with three counts of aggravated criminal sexual abuse: Count 1 alleged that Smart "knowingly committed an act of sexual

penetration upon J.P." by putting his mouth on J.P.'s penis. (CI. 6) At trial, J.P. testified that Smart orally stimulated J.P.'s penis until J.P. ejaculated into Smart's mouth. (R. 235-37). Count 2 alleged that Smart "touched J.P.'s penis with his hand for the purpose of the sexual gratification or arousal of Cecil Smart or J.P." (CI. 7) J.P. testified that Smart "stroked [his] penis up and down" for 10-15 minutes, continued to touch J.P.'s penis throughout the night, and that J.P. heard Smart masturbating next to him in bed. (R. 235-240). Count 3 alleged that "J.P.'s hand touched Smart's penis for the purpose of the sexual gratification or arousal of Cecil Smart or J.P." (CI. 8) Smart was convicted of Counts 1 and 2 and acquitted of Count 3. (R. 536)

It could not possibly be in dispute that stimulating a penis to ejaculation is sexually gratifying conduct. In fact, Count 1, predicated on sexual penetration, is a general intent crime which requires no proof of sexual motivation. (CI. 6); See *People v. Kidd*, 2022 IL 127904, ¶ 21 (an act of sexual penetration, if proven, will support a conviction even without evidence concerning the purpose of the act). The admissibility of other acts evidence in general intent crimes is not automatic, but is, rather, dependent on whether a defendant makes it an issue at trial. See *People v. Knight*, 309 Ill. App. 3d 224, 227 (2d Dist. 1999) (intent not at issue in domestic battery case where defendant did not argue that he injured victim by mistake or lacked the requisite intent to commit the crime but claimed he was not present). Smart denied touching J.P. at all and did not claim accident or mistake. (R. 448) The other act evidence bore on all charges, not just the ones requiring specific

intent. (R. 113, CI. 70-73) Thus, even accepting *arguendo* the State's general-versus-specific intent approach to admission of other act evidence, it was error to admit evidence of other acts vis a vis Count 1, because specific intent is not an element of this general intent offense.

But intent was not genuinely in dispute with regard to Count 2, either, even though the State was required to prove that Smart acted for the purpose of sexual gratification. J.P. testified that Smart stroked and touched J.P.'s penis with his hand throughout the course of the night and J.P. heard Smart masturbating next to him in bed, taking "thicker, deeper breaths." (R. 235-240) The State acknowledged the obvious sexual nature of these alleged acts, asking J.P. what Smart did after Smart "used his hand to masturbate [J.P.]" (R. 237) As this case amply demonstrates, intent is not necessarily at issue, even where a specific intent crime is concerned, as sexual motivation may be inferred from the nature of the acts. *See In re M.G.*, 2024 IL App (1st) 232106, ¶ 31 ("Circumstantial evidence of sexual gratification may include the removal of clothing, heavy breathing, placing the victim's hand on the accused's genitals, an erection, or other observable signs of arousal.") The judge's decision to deny defense counsel's motion for a directed verdict reinforces this point, where all evidence of sexual gratification in the State's case-in-chief stemmed from J.P.'s testimony. (R. 314) Further, the trial testimony and arguments of the parties unequivocally demonstrate that the issue in this case was whether Smart committed the acts at all, not what his state of mind was when he committed them.

Perhaps due to the obvious sexual nature of the alleged acts, Smart's intent to touch J.P. "for the purpose of sexual gratification" was mentioned only once at trial, and only in reference to Count 3, of which Smart was acquitted. (R. 523) The State's insistence before this Court that sexual gratification is always at issue is belied by its failure to argue this point with regard to Count 2. Similarly, in the appellate court, the State never argued that Smart's specific intent to touch J.P.'s penis "for the purpose of sexual gratification" was at issue. Rather, it focused entirely on whether Smart engaged in the alleged conduct and if the other act evidence was admissible to prove that he did. (St. App. Ct. Br. 39) Smart's specific intent became an issue only when the State decided to make it one before this Court.

The circumstances of J.P.'s allegations, if true, proved Smart's intent to touch J.P.'s penis for the purpose of sexual gratification. Because intent can be inferred from surrounding circumstances, admission of other act evidence here to prove specific intent was not only unnecessary, but completely gratuitous and unfairly prejudicial. See *Getz v. State*, 538 A.2d 726, 733 (Del. 1988) ("[W]here, as here, the State presents direct evidence, through the testimony of an alleged victim, that an attack occurred, no evidential purpose is served by proof that the defendant committed other intentional criminal acts of the same type."). The genuine issue in this case was whether Smart committed the acts at all; Thus, there was no basis for admitting the other act evidence. The appellate court below properly found that intent was not at issue in this case.

"The erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal." *People v. Lindgren*, 79 Ill. 2d 129, 140 (1980). And when "the determination of a defendant's guilt or innocence depends on the credibility of the defendant and the accuser, error is particularly likely to be prejudicial." *People v. Stanbridge*, 348 Ill. App. 3d 351, 358 (4th Dist. 2004); *People v. Bobo*, 278 Ill. App. 3d 130, 133 (5th Dist. 1996) (When "the outcome of a trial depends entirely on the credibility of an accuser and the defendant, no error should be permitted to intervene.").

The other crimes evidence, and the State's argument that it proved Smart's propensity to abuse young boys, was not harmless. The State quibbles with the appellate court's prejudice analysis, arguing that "a circuit court's evidentiary error requires reversal and a new trial only when the verdict likely would have been different had the error not occurred." (St. Br. 26) This Court has previously applied the "harmless beyond a reasonable doubt" standard to a non-constitutional error. See *People v. King*, 2020 IL 123926, ¶ 40 (new trial ordered based on State's "wholly improper use of expert testimony."). Regardless of the standard applied, however, the erroneous admission of the other act evidence here was not harmless because the remaining evidence did not overwhelmingly support Smart's conviction, as "there was no physical evidence, there were no eyewitnesses, and the [trial] court acknowledged that the State's case hinged on J.P.'s testimony because 'he was the only one actually present when the alleged incidents occurred.'" *Smart*, 2023 IL App (1st) 220427, ¶ 37.

The other act evidence was a significant part of the State's case. The prosecutor asked Smart about it and how it led to Smart's termination from Breakthrough. (R. 455-457) Smart testified that he drove I.G. home and no one else was in the car. (R. 457) When I.G. exited Smart's car, Smart slapped his buttocks, but said it was in a "non-sexual way" as I.G.'s coach. (R. 458, 490) According to Smart, he had "that kind of relationship" with the youth he worked with. (R. 484) When I.G. sent a group text saying "coach slapped my butt," a parent called Smart for an explanation. (R. 456) The next day, Smart went to the HR director for Breakthrough, Marcie Curry, to explain the situation. (R. 456) Smart was ultimately dismissed from Breakthrough due, in part, to this incident. (R. 458) The State's questioning over this topic with Smart became intense, and the court told both Smart and the prosecutor to "remain calm." (R. 457)

On cross-examination, the State also asked Smart's brother, Frank, if he knew that Smart got fired from Breakthrough "for driving a kid home and grabbing his butt." (R. 427) When Frank responded that he did not know that, the prosecutor pressed, "You never asked your brother why he was fired? (R. 427)

The parties then stipulated that Marcie Curry, human resources director for Breakthrough Ministries, would have testified that on June 22, 2018, Smart "was notified by mail that he was terminated from employment at Breakthrough Ministries due to the fact that on June 12th, 2018, while transporting a participant, [I.G.], home, it was alleged that [Smart] touched

[I.G.] inappropriately." (R. 503)

Further, "the State relied heavily upon the other act evidence" in order to argue that Smart "engaged in a pattern of abuse against boys, [that] culminated in him raping [J.P.]" *Smart,* 2023 IL App (1st) 220427*,* ¶ 37. The State attempts to rebut this claim, arguing that the other act evidence was mentioned only "a few times during the trial." (St. Br. 26) The State puts the count at five, which would, on its own be reversible error. (St. Br. 26) However, the State's citations do not include one additional reference to this other act during the State's closing (R. 521) and four explicit propensity arguments linking the other act evidence to Smart's "pattern" of behavior. See (R. 522, "Leveled upon children, young boys, there is a pattern here, Judge."); (R. 523, "The defendant has engaged in a pattern of abuse against boys, it culminated in him raping [J.P.]."); (R. 534, "[I]t's exactly in his character. It's character, its pattern of taking jobs that put him around children in places where he can be alone with children [...] so that he can be alone with them and then abuse them."); (R. 534, "We saw two times before he was fired from Breakthrough and the one with [J.P.] [...] That is a pattern."). The State's attempt to minimize the weight this other act evidence carried in the trial is rebutted by the record.

The State agrees "the court focused on the relative credibility of the witnesses, primarily the victim and defendant." (St. Br. 25) In arguing that the erroneous admission of the other act evidence was harmless, the State points to the fact that, when announcing the verdict, the court did not

explicitly mention the other act evidence. (St. Br. 25-26) This claim, however, ignores the direct impact that other act evidence has on a witness' credibility. *See, e.g., People v. Stanbridge*, 348 Ill. App. 3d 351, 358 (4th Dist. 2004) (where the "crux of this case is who should be believed about what happened in defendant's bedroom" erroneous admission of other act evidence "is particularly likely to be prejudicial."). As explained by the appellate court below, "Although the trial court did not reference the other acts evidence when announcing its verdict, we cannot presume that this evidence did not influence the trial court's credibility determinations and, ultimately, affect the outcome, because it expressly deemed this evidence admissible." *Smart,* 2023 IL App (1st) 220427*,* ¶ 37; see also *People v. Lawler*, 142 Ill.2d 548, 562 (1991) (where "guilt of the defendant hinged entirely on the credibility of the complainant and himself" improperly admitted evidence was not harmless).

Because the court improperly permitted the State to introduce other crimes evidence, even in this bench trial, "it cannot be presumed that the evidence did not enter into the court's consideration" in reaching a verdict. *People v. Naylor*, 229 Ill. 2d 584, 605 (2008) (judge considered improper evidence when he deemed the evidence admissible, but did not explicitly reference it as a reason for his finding); Cf. *People v. Cox*, 2021 IL App (1st) 181279-U[2], ¶¶ 59-60 (erroneous admission of other crimes evidence deemed harmless in a bench trial where the judge "explicitly stated that it did not

[2] A copy of the *Cox* order is attached, in accordance with Supreme Court Rule 23(e).

consider the other crimes evidence in reaching its judgment.")

Because J.P.'s contested testimony, parts of which the court found to be unreliable, was the sole evidence, any perceived similarities between the instant case and the other crimes evidence played an influential role in the judge's verdict, particularly where the State repeatedly depicted Smart as "engag[ing] in a pattern of abuse against boys," including J.P. (R. 523) Where the trial court erred admitting the other crimes evidence at Smart's trial, and the State relied on this evidence to depict Smart as a serial sexual predator, such error was not harmless in a case as close as this one. This Court should accordingly affirm the appellate court's decision below.

C. Should this Court determine that Smart's intent was a material issue, the other act evidence was more prejudicial than probative and thus inadmissible to prove that Smart acted "for the purpose of sexual gratification."

The other act admitted at trial involved an incident where Smart, contrary to company policy, drove a student ("I.G.") home and grabbed his buttocks as he exited Smart's car. (CI. 63) According to the State, the other act tended to prove that, "just as [Smart] had touched the other teenage boy for the purpose of sexual gratification or arousal, [Smart] had touched J.P. with the same specific intent." (St. Br. 24) In other words, because Smart had the intent before, he had the intent again. The State fails to explain how the other act evidence admitted at trial could speak to Smart's intent to touch J.P.'s penis "for the purpose of sexual gratification" other than through an impermissible propensity inference.

"Other-crimes evidence is unquestionably prejudicial to a defendant." *People v. Perez*, 2012 IL App (2d) 100865, ¶ 45. This is particularly true when other act evidence is offered to prove intent because this "permissible non-propensity purpose is [...] most likely to blend with improper propensity uses." *United States v. Gomez*, 763 F.3d 845, 858 (7th Cir. 2014). Thus, the negligible probative value of the other act evidence admitted here, in combination with the ample surrounding evidence of Smart's specific intent to touch J.P.'s penis "for the purpose of sexual gratification," cannot outweigh the unfair prejudice that stems from the improper propensity inference the State utilized at trial, as explained *supra*.

Courts have deemed arguments just like the State's a violation of the prohibition of other acts to prove character and/ or propensity. In *People v. Clark,* the court rejected the State's attempt to admit evidence of a prior bicycle theft in 2008 to prove defendant's specific intent to steal a bicycle in 2012 for this very reason:

> The only way it would be relevant—the only way to connect defendant's intent in the 2008 theft to his intent in the 2012 theft—is through a propensity inference: because defendant intended to steal a bike in 2008, it is more likely he intended to steal this one in 2012. That is the very inference the State is not allowed to present.

2015 IL App (1st) 131678, ¶ 42.

Clark thus held that "even if intent had been at issue at trial, evidence of the 2008 theft would not have been relevant to that issue. The trial court erred in admitting this evidence on this basis." *Id.* at ¶ 47.

"When one looks beyond the purposes for which the evidence is being

offered and considers what inferences the jury is being asked to draw from that evidence, and by what chain of logic, it will sometimes become clear ... that despite the label, the jury is essentially being asked to rely on the evidence as proof of the defendant's propensity to commit the charged offense." *Gomez*, 763 F.3d at 856. That is precisely how the State used the other act evidence during trial and is continuing to use it now before this Court. Thus, even under the State's proposed approach to admission of other act evidence in specific intent crimes, the other act evidence in question here was inadmissible because even if it is relevant, it is excluded "if its probative value is substantially outweighed

by the danger of unfair prejudice." Illinois Rule of Evidence 403**.** For this additional reason, this Court should affirm the appellate court's decision below.

Conclusion

This Court should reject, as it did in *Wilson*, the notion that intent is genuinely at issue in every prosecution for a specific intent offense. The State's proposed categorical rule, which would open the door to virtually all "other act" evidence, even where intent is a non-issue, would result in a flood of improper, unfairly prejudicial propensity evidence. That is precisely what happened here, where the State introduced other act evidence and relied upon it not as proof of "sexual gratification," but of Smart's propensity to abuse young boys. This Court should affirm the appellate court and hold that where the accused denies commission of the crime and does not claim that his

actions were or may have been accidental, incidental, or inadvertent, such that intent is not truly at issue, other acts evidence is not admissible to prove intent. Should this Court decline to do so, it should remand for consideration of Smart's remaining ineffective assistance of counsel claims.

CONCLUSION

For the foregoing reasons, Cecil Smart, Defendant-Appellee, respectfully requests that this Court affirm the appellate court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 39 pages.

/s/Kara Kurland
KARA KURLAND
Assistant Appellate Defender

APPENDIX TO THE BRIEF

2021 IL App (1st) 181279-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois, First District,
THIRD DIVISION.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Delrico COX, Defendant-Appellant.

No. 1-18-1279
|
March 31, **2021**

Appeal from the Circuit Court of Cook County. No. 15 CR 17032, Honorable Maura Slattery Boyle, Judge Presiding.

ORDER

JUSTICE McBRIDE delivered the judgment of the court.

***1** ¶ 1 *Held*: (1) No plain error occurred, nor was trial counsel ineffective, in the admission of the victim's prior consistent statements; and (2) the trial court erred in allowing the admission of other crimes evidence, but the error was harmless where the court indicated it did not consider the evidence in its guilty finding.

¶ 2 Following a bench trial, defendant Delrico Cox was convicted of indecent solicitation of a child and subsequently was sentenced to a term of five years in the Illinois Department of Corrections. On appeal, defendant argues that he was denied a fair trial because: (1) the State elicited improper prior consistent statements from the minor victim J.W., and (2) the introduction of other crimes evidence failed to comply with section 115-7.3 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-7.3 (West 2016)) and lacked probative value.

¶ 3 In October 2015, defendant was charged by indictment with the following four offenses. Count one alleged that defendant committed the offense of aggravated criminal sexual abuse when he touched his hand to J.W.'s sex organ for the purpose of sexual gratification and J.W. was under 18 years of age and defendant was a family member, *i.e.*, her stepfather, in violation of section 11-1.60(b) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/11-1.60(b) (West 2014)). Count two alleged the same conduct by defendant and that he was 17 years of age or older and J.W. was under 13 years of age in violation of section 1.60(c)(1) of the Criminal Code (720 ILCS 5/11-1.60(c)(1) (West 2014)). Count three alleged that defendant committed the offense of attempt aggravated criminal sexual abuse of a family member under 18 years of age when he, with the intent to commit the offense of aggravated criminal sexual abuse, knowingly attempted an act of sexual conduct upon J.W. when he asked J.W. if he "could rub multiple parts of her body, had J.W. rub lotion on his body, and indicated he wanted J.W. to sit on his penis" for the purpose of sexual arousal or gratification and J.W. was under 18 years of age and defendant was a family member, *i.e.*, her stepfather, in violation of section 8-4 of the Criminal Code (720 ILCS 5/8-4 (West 2014)). Count four alleged that defendant committed the offense of indecent solicitation of a child when he was 17 years of age or older and with the intent that the offense of aggravated criminal sexual abuse be committed, he knowingly solicited J.W., a child or one whom defendant believed to be a child, to perform an act of sexual conduct, with contact between J.W.'s buttock and defendant's penis, for the purpose of the sexual gratification or arousal of defendant or J.W. in violation of section 11-6(a) of the Criminal Code (720 ILCS 5/11-6(a) (West 2014)).

¶ 4 Prior to trial, the State filed a motion to allow evidence of other crimes. In the motion, the State sought to introduce evidence related to another uncharged allegation of aggravated criminal sexual abuse involving a minor, T.R. According to the State's motion, in December 2008, T.R. was 13 years old and the niece of defendant's girlfriend. Defendant was driving her to school from her grandmother's house. Defendant told her that he needed to charge his cell phone and turned into a motel. He checked into the motel and while there, he committed sex acts with T.R., including rubbing T.R. over her clothing, touching her buttocks and breasts, as well as removing his penis from his pants and placing T.R.'s hand on his penis and having her rub his penis until he ejaculated. The State asked to introduce the evidence to prove motive, intent, identity, knowledge, and absence of mistake as well as propensity under section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2016)). In his response, defendant asked for this evidence to be excluded on several grounds, including proximity in time and degree of similarity in the offenses.

Following arguments, the trial court allowed the admission of the evidence based on the similarity of the acts and found the evidence to be more probative than prejudicial.

***2** ¶ 5 Defendant waived his right to a jury trial and proceeded to a bench trial in March 2018. At the start of the proceedings, the State informed the trial court that T.R. was "not cooperating" and had not appeared in court. The prosecutor asked for leave to admit defendant's statement to Chicago police when he was arrested in that case. Over defendant's objection, the court allowed the State to present the testimony regarding the other crime incident. The State then called its first witness.

¶ 6 J.W. testified that she was born on March 15, 2000, and at the time of the trial she was 17. She primarily lived with her father while growing up. Her mother, Shauna Cox, was married to defendant. She identified defendant in court.

¶ 7 When J.W. was 8 or 9 years old, she lived with her grandmother near West 65th Street and South Marshfield Avenue in Chicago. Her mother was living in an apartment with defendant and a sibling. J.W. would occasionally visit their apartment. During one of those visits, her mother had a headache and went to lay down while defendant was going to take J.W. to her grandmother's house. When they went into the hallway, defendant touched J.W.'s vagina over her clothes. She explained that defendant "cupped" her vagina. Defendant did not say anything to her. J.W. felt "scared" and did not know what to do. Afterward, defendant then drove her to her grandmother's house. J.W. did not tell anyone about what happened because she was scared and she kept it to herself. J.W. did not spend as much time with her mother as before this incident, and she then spent more time with her grandmother.

¶ 8 When J.W. was in eighth grade, she stayed the night at a different apartment shared by her mother and defendant. J.W. spent the night on the couch. In the morning, her mother told J.W. that she could sleep in the mother's bed. J.W. went to sleep in the bed alone while her mother went to work at Walmart. She was later woken up by defendant in the bed. She felt someone rubbing her feet and saw defendant was "massaging" her feet. Defendant was lying opposite her on the bed with his head near her feet. J.W. felt "weirded out" and "scared." She then got out of the bed and went to another room to sleep. She later told her grandmother what happened on this occasion and about the prior occasion. J.W. asked her grandmother not to tell anyone because she was "scared." J.W. did not tell anyone else because she did not want to "share it with anybody" because it was a "sensitive subject." Her grandmother has since passed away.

¶ 9 Later in 2015, when J.W. was 15 years old, J.W.'s mother and defendant had a new baby. J.W. helped to care for the baby by babysitting, changing diapers, and giving the baby her bottle. Her mother was still working at Walmart and she worked often. J.W. stayed for one or two weeks at her mother's home, including sleeping and keeping clothes there. J.W. would babysit the baby while her mother was at work and defendant was "in and out." One day, J.W. took a shower and when she exited into the hallway in a towel, defendant was "staring" and asked if he could "oil [her] down." She said no and continued to one of her sibling's rooms to get dressed. She felt "a lot of emotions" and was "scared and confused" by defendant's conduct. J.W. testified that she did not know why she did not say anything at the time.

¶ 10 A couple weeks later, J.W. was sitting on the couch with defendant. She was looking at her phone when defendant asked for a kiss and asked her if she thought it was right. She told him no and that she did not think it was right. She again felt scared and confused.

***3** ¶ 11 Later in the summer, J.W. was in a downstairs bedroom with the baby. Defendant came into the room without a shirt on and asked her to rub lotion on his back. J.W. "just did it" because she did not want to say no. He then asked her to put lotion on his stomach, but she said no because she was "uncomfortable." Defendant then pointed towards his penis and asked her to get on top of him. J.W. said no and she felt "scared." She then left the room and went to the bathroom. When she came out of the bathroom, defendant and the baby were still in the bedroom. Defendant was still shirtless. He then asked to rub her feet or to put lotion on him. J.W. told him no. Defendant then offered her $5, but she continued to refuse because she did not want him to touch her feet. J.W. did not let defendant touch her feet. Eventually defendant left the room.

¶ 12 J.W. testified that she did not tell anyone right away because she did not want to be feel "exposed or embarrassed" to say what happened. She did not know why she did not tell anyone. Approximately two weeks later, she told her father and uncles what happened with defendant.

¶ 13 During a conversation with her dad and uncles, they asked her what was going on and she "eventually just said it." J.W. said all of her emotions came out and she "let it be

known." She "let it out" because she had "so many emotions" going through her head. J.W. admitted that the conversation began when she was asked about being in the park with a boy. Her father was not aware she had a boyfriend because he did not approve of her dating. Later her mother came to the house and J.W. told her what happened. They went to J.W.'s mother house and contacted the police. When the police arrived at the house, J.W. spoke with them about what happened and she later spoke with detectives.

¶ 14 Following her report of what occurred, J.W.'s mother was supportive and "act[ed] like she believed" J.W., but later J.W. "barely" had any contact with her mother. She denied that she heard a discussion at either school or church community events about "bad touches" or to be careful about people touching in bad sexual ways. She also denied talking with family about this topic.

¶ 15 Detective Moreen Hanrahan of the Chicago police department testified that in September 2015, she was assigned to the investigation of sexual abuse involving J.W. She took over the case from Detective James Evans, who had already spoken to J.W. She interviewed defendant after he turned himself in to the police and identified defendant in open court.

¶ 16 During the interview, defendant told her that he was J.W.'s stepfather. He had been in a relationship with her mother since 2008 and they married in 2012. He said J.W. started to come over to their house more often in 2011. In response to the allegations, defendant told her that he played a "rub lotion game with all of his kids." He has the children rub his feet and he would rub lotion on their feet. About a month prior, he had asked J.W. if she would rub lotion on his feet. He also asked her to rub lotion on his back, which she did.

¶ 17 Detective Granadon [1] , a Chicago police detective, was assigned in 2008 to an investigation involving the sexual abuse of T.R. in which defendant was named as the offender. T.R. referred to defendant as her uncle and he was her aunt's boyfriend. The detective identified defendant in court. Defendant gave a statement to the detective regarding T.R.'s allegations.

¶ 18 Defendant would take T.R. to school sometimes. T.R. was 13 years old at the time of the incident. On the day of the incident, he was driving T.R. to school, but she told him that she did not want to go to school. He then went shopping with her and drove to a motel to charge his phone. He registered at the motel and went into the room. About 10 to 15 minutes later, T.R. knocked on the door and he let her into the room. Defendant told the detective that T.R. turned on the television. Defendant then left the room to make a cell phone call and when he returned, T.R. had pornography playing on the television. Defendant denied doing anything to T.R.

***4** ¶ 19 After the State rested, defendant moved for a directed finding, which the trial court denied.

¶ 20 Shauna Cox testified for the defense. She stated that she is J.W.'s mother and has been married to defendant since 2012. She identified defendant in court. She has five children, including three with defendant. J.W. has never resided with Cox, but has lived with her father and her grandmother. J.W. would visit on occasion. Cox began living with defendant at the end of 2009.

¶ 21 According to Cox, J.W. would visit once every two weeks. Sometimes J.W. would call and ask to visit. Cox denied that J.W. would ever come over when she was not home. She would not let J.W. visit when Cox was at work. When her youngest child was born, J.W. came over to help, but it was when Cox was not working. Cox worked at Walmart and took a leave for about a month. She could not recall if she was ever called into Walmart for an emergency while J.W. was staying at her house. Cox denied that J.W. was ever alone with defendant and she stated that J.W. would not be in the house without Cox or J.W.'s siblings. Cox denied that J.W. ever complained that defendant had touched her inappropriately or asked her to sit on his penis.

¶ 22 Cox communicated regularly with J.W. In 2015, Cox learned that J.W. might have a boyfriend and she found out from people in the neighborhood that J.W. might have been spending time with the boy in the park. She then told J.W.'s father this information. As a result, J.W. got in trouble with her father and had her phone taken away. Cox had J.W.'s phone and saw that J.W. was still talking to the boy after she had been told that she was not allowed. Cox then told J.W.'s father who came over and "popped her" on the head and took her home.

¶ 23 Cox testified that her family would use lotion and that the children would put lotion on defendant's feet. This would occur in her bedroom because her room is "the hangout room." J.W. would observe others putting lotion on defendant's feet. Cox described defendant's feet as "really bad dry feet." According to Cox, there was an incident in which her two older children with defendant were putting lotion on defendant's feet. J.W. walked into the room and said she

would put lotion on defendant's feet for $5. Cox denied that defendant asked J.W. to put lotion on his feet or any other part of his body. Cox gave J.W. the $5 because J.W. did things around the house for extra money. She denied that rubbing lotion on defendant was described as a game.

¶ 24 Cox discussed people touching in bad places with her daughters, including J.W., on many occasions. Cox had these discussions because she had been raped when she was younger. She started having these conversations with J.W. when she around five or six years old. She would have these conversations when J.W. was getting in or out of the bathtub. She would ask J.W. if anyone every touched her "pocketbook," which was the family term for the vaginal area. J.W. never reported any inappropriate touches by anyone. Specifically, J.W. did not indicate that defendant had touched her inappropriately nor did she show any fear of defendant. Cox previously had a good relationship with her daughter J.W., but at the time of trial, she no longer had the same relationship. Cox stated that J.W. was planning to move in with her after J.W.'s grandmother died. Cox denied being told by J.W. of what happened in August 2015. Cox stated that she was present when J.W.'s family came to Cox's house to make a police report.

***5** ¶ 25 The defense rested after Cox's testimony. In rebuttal, the State recalled Detective Hanrahan. The detective testified that defendant described the rub lotion activity as a game that he played with his family and his wife. Defendant also told her that the incident in which he asked J.W. to rub lotion on his back occurred while Cox was at work. The State then rested in rebuttal.

¶ 26 Following closing arguments, the trial court took the case under advisement. Later in March 2018, the trial court entered its guilty finding on the record. The court found defendant not guilty of both counts of aggravated criminal sexual abuse as well as the attempted aggravated criminal sexual abuse count, but found defendant guilty of indecent solicitation of a child. In April 2018, defendant filed a motion for a new trial, which the trial court subsequently denied. The trial court sentenced defendant to five years in the Illinois Department of Corrections.

¶ 27 This appeal followed.

¶ 28 Defendant first argues that he was denied a fair trial because the trial court improperly allowed the introduction of J.W.'s prior consistent statements. According to defendant, J.W. was improperly permitted to testify that she told her father and uncles about the incident with defendant and that she later told police what had occurred. The State responds that while the testimony was "likely improper," any error was not prejudicial because the trial court did not rely on this testimony in its guilty finding.

¶ 29 Defendant admits that no objection was made to this testimony during trial, nor was this claim raised in his motion for a new trial. To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). However, defendant asks this court to review the issue under the plain error doctrine or, in the alternative, ineffective assistance of trial counsel.

¶ 30 Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). However, the plain error rule "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the supreme court has held that the plain error rule is a narrow and limited exception to the general rules of forfeiture. *Id.*

***6** ¶ 31 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that the improper admission of J.W.'s prior consistent statements qualify as a plain error under both prongs. However, "[t]he initial

analytical step under either prong of the plain error doctrine is determining whether there was a clear or obvious error at trial." *People v. Sebby*, 2017 IL 119445, ¶ 49.

¶ 32 As a general rule, proof of a prior consistent statement made by a witness is inadmissible hearsay and may not be used to bolster a witness's testimony. *People v. Denis*, 2018 IL App (1st) 151892, ¶ 79. The reasoning behind this rule is that " 'a jury is likely to attach disproportionate significance to them. People tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve.' " *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 60 (quoting *People v. Smith*, 139 Ill. App. 3d 21, 33 (1985)). The prejudicial nature of evidence of prior consistent statements is judged on a case-by-case basis. *People v. Caffey*, 205 Ill. 2d 52, 110 (2001). "These evidentiary rulings are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." *Id.* Further, "when a trial court is the trier of fact a reviewing court presumes that the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion." *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). This presumption may be rebutted if the record on appeal "affirmatively shows the contrary." *Id.* at 603-04.

¶ 33 Two exceptions exist to the admissibility of prior consistent statements: (1) when it is suggested that the witness had recently fabricated the testimony or had a motive to testify falsely, and the prior statement was made before the motive to fabricate arose; and (2) when the out-of-court statement is for identification. *People v. Tisdel*, 201 Ill. 2d 210, 217 (2002). Defendant asserts that neither exception is applicable in this case.

¶ 34 Here, defendant bases his argument on J.W.'s testimony that she told her father and uncles and later the police "what happened." After the 2015 incident with defendant involving the lotion, the prosecutor asked J.W. if it was correct that she did not tell anyone. J.W. responded that "after a while" she "ended up telling" her dad and her uncles. She estimated she told them two weeks later. The prosecutor asked J.W. to "tell us about the conversation that you had with your dad and your uncles." J.W. responded:

> "So they were, like, asking me what was going on with me. And I eventually just said it. Like, because they were asking me what's going on and all my emotions came out and I just -- I let it be known."

¶ 35 The prosecutor asked if it was correct that J.W. told her father what happened, and she answered, "Yes." The prosecutor then asked J.W. if she told her mother "what happened," she answered, "Yes." The prosecutor also questioned J.W. about contacting the police and making a police report. The prosecutor then asked, "And you told [the police] what happened," and J.W. responded, "Yes." The prosecutor also asked her if she later told detectives "what had happened," and J.W. answered, "Yes."

¶ 36 We agree with defendant that neither exception applies here. There was no testimony suggesting that J.W. had recently fabricated her testimony, nor was identification an issue. According to defendant, this testimony constituted inadmissible prior consistent statements and was improper. The State maintains that the testimony was not used to bolster J.W.'s credibility, but rather to establish a timeline of events. However, even if we assume this testimony was admitted in error, defendant has not shown how this testimony so affected his trial as to constitute plain error.

***7** ¶ 37 Although defendant has asserted plain error under both prongs, the supreme court has already foreclosed a claim of prior consistent statements as implicating a substantial right under the second prong. *People v. Keene*, 169 Ill. 2d 1, 18 (1995). Accordingly, defendant's challenge under the second prong lacks merit. Under the first prong, defendant has the burden to show that the evidence was so closely balanced that the error in admitting the prior consistent statements alone threatened to tip the scales of justice against him. See *Piatkowski*, 225 Ill. 2d at 565. Moreover, as previously stated, we presume the trial court in a bench trial only considered admissible evidence and disregarded any improper evidence. *Naylor*, 229 Ill. 2d at 603.

¶ 38 Several factors may minimize the prejudicial effect of a prior consistent statement, such that it will not constitute plain error. For example, when the evidence of a prior consistent statement is provided by the witness herself, her credibility is not truly enhanced, because she is merely corroborating herself. *People v. Henderson*, 142 Ill. 2d 258, 311 (1990), *not followed on other grounds by People v. Terry*, 183 Ill. 2d 298, 304-05 (1998). In addition, prejudice is minimized when the testimony is general instead of specific and no portion of

the actual statement is admitted into evidence. *Id.* at 312. Both factors are applicable here.

¶ 39 First, J.W. testified about what occurred with defendant and then merely confirmed that she told her father and uncles, her mother, and police officers. Second, the substance of what she told any of these individuals was never offered. The extent of this testimony was in response to general questions asking if J.W. told the respective party "what happened." At no time did J.W. detail what she told either of her parents or the police. Nor did any of those individuals testify at trial about what J.W. recounted to them.

¶ 40 Significantly, and contrary to defendant's contention, the trial court did not rely on J.W.'s testimony regarding her statements to either of her parents or the police in its findings. While the court noted J.W.'s initial outcry in its general recitation of the trial testimony, the court explicitly based its guilty finding on defendant's own statement to the police that corroborated J.W.'s testimony regarding his request to have her rub lotion on his feet. The trial court specifically found as follows.

> "The question is she testified in regards to something, you validated it, and you validated it even further by indicating this occurred when [Cox] wasn't home.
>
> ***
>
> What I find is, in regards to the allegation of aggravated criminal sexual abuse, the first three counts, [there] is a finding of not guilty, but in regards to the charge of indecent solicitation of a child, based on [J.W.'s] testimony and the corroborating evidence of the testimonies of the individuals, [there] is a finding of guilty on that charge."

¶ 41 The trial court further found the testimony of Cox, J.W.'s mother, "lacking some veracity" and observed that defendant's statement to the police directly contradicted Cox's testimony. At the hearing on defendant's posttrial motion, the court further found that Cox "did not successfully rebut [J.W.'s] testimony at all." The court again observed that J.W. stated this incident occurred while she was home alone with defendant despite Cox's testimony that she never left J.W. home alone, while defendant's statement indicated that "this incident occurred while his wife was at work."

¶ 42 As illustrated by the trial court's findings, this case did not rest entirely on J.W.'s credibility. Defendant ignores the fact that the court found him not guilty of the more serious offenses of aggravated criminal sexual abuse and attempted aggravated criminal sexual abuse because the State failed to prove those charges beyond a reasonable doubt. This court is only considering the conviction for indecent solicitation of a child, and we do not find that the evidence of this offense was closely balanced.

***8** ¶ 43 A person age 17 or over commits the offense of indecent solicitation of a child "if the person, with the intent that the offense of *** aggravated criminal sexual abuse be committed, knowingly solicits a child or one whom he or she believes to be a child to perform an act of sexual penetration or sexual conduct ***." 720 ILCS 5/11-6(a) (West 2014). In addition to J.W.'s testimony describing defendant's request for her to rub lotion on his feet for $5 and asking her to sit on his penis, defendant corroborated a significant portion of J.W.'s allegations to the police. According to Detective Hanrahan, defendant told her that he engaged in a "rub lotion game" and specifically, that he asked J.W. to rub lotion on his feet while Cox, his wife and J.W.'s mother, was not at home. These were the corroborating statements by defendant which the trial judge found supported and then resulted in the guilty finding on the single charge of indecent solicitation of a child. The burden is on defendant to show that the evidence was so closely balanced that the error in admitting J.W.'s prior consistent statements tipped the scales of justice against him, and he has failed to do so. Nothing in the trial court's findings suggests that J.W.'s brief testimony in which she affirmed that she told her father and uncles, and later two sets of police officers what happened with defendant impacted the guilty finding. Since defendant cannot show that J.W.'s testimony contributed to his conviction, he has failed to establish plain error.

¶ 44 Similarly, defendant's claim of ineffective assistance of trial counsel for failing to object to J.W.'s testimony regarding prior consistent statements fails. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of

reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. Strickland, 466 U.S. at 697. *Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008).

¶ 45 Defendant has failed to satisfy the *Strickland* test. Defense counsel's performance was not deficient where counsel's strategy was to use the timing of J.W.'s outcry to suggest that she was not credible. During cross examination, he asked J.W. about the conversation about the boy in the park that occurred just before she told her father and uncle about defendant's actions. Counsel also noted in his questions that J.W. did not tell her dad, her uncle, her grandma, or any cousins after the first incident with defendant. Later, counsel argued during his closing arguments that J.W. failed to report the incidents with defendant despite the opportunity and a supportive family, but she "volunteered it" after "she got caught with a boy." Counsel further argued that J.W. "retaliated by pushing it off against her mother's husband." This was a valid trial strategy to suggest the timing of J.W.'s outcry was suspect. Moreover, under the invited error rule, "a party cannot complain of error that it brought about or participated in." *People v. Hughes*, 2015 IL 117242, ¶ 33. Here, counsel used the timing of J.W.'s reporting as part of his trial strategy and this argument does not support a claim of deficient performance.

¶ 46 Further, under the prejudice prong, defendant has not shown that absent counsel's alleged error, the result of the proceeding would have been different. As discussed above, the trial court based its findings on defendant's statement to police that corroborated portions of J.W.'s testimony. There is nothing in the court's findings to suggest that absent J.W.'s testimony regarding her reporting what happened to other people, defendant would have been found not guilty of indecent solicitation of a child. Accordingly, defendant's claim of ineffective assistance fails.

***9** ¶ 47 Next, defendant contends that the trial court abused its discretion in allowing other crimes evidence to be admitted at trial. Specifically, defendant asserts that trial court erred in allowing Detective Granadon to testify over defendant's objection about defendant's statement in an uncharged sexual abuse case. The State maintains that the evidence was properly admitted, and the trial court did not abuse its discretion in finding that the probative value of this evidence outweighed the potential prejudice.

¶ 48 In its motion to admit other crimes evidence, the State sought to admit evidence related to the prior investigation involving T.R. under two methods. First, the State argued that the evidence was admissible under section 115-7.3 to show defendant's propensity. And second, the State asked to admit the evidence under the common law rule to prove motive, intent, identity, knowledge, and absence of mistake. The State contended that both the proximity in time and the similarity of the offenses supported its admission.

¶ 49 Generally, evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crimes. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). Other crimes evidence is admissible to show *modus operandi*, intent, identity, motive, or absence of mistake. *Id.* at 136. "Other-crimes evidence may also be permissibly used to show, by similar acts or incidents, that the act in question was not performed inadvertently, accidently, involuntarily, or without guilty knowledge." *Id.* at 136. "Where such other-crimes evidence is offered, it is admissible so long as it bears some threshold similarity to the crime charged." *Id.*

¶ 50 Additionally, section 115-7.3 of the Code provides an exception to the general rule and permits the introduction of certain evidence in cases where defendant is accused of certain enumerated offenses including aggravated criminal sexual abuse. 725 ILCS 5/115-7.3(a)(1) (West 2016). Under section 115-7.3(b), evidence of prior acts may be admissible and "may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(b) (West 2016). In determining whether the probative value of the evidence outweighs the undue prejudice that could result from the introduction of the evidence, the trial court may consider: (1) the proximity in time to the charged offense, (2) the degree of factual similarity between the charged offense, and (3) any other relevant facts and circumstances. 725

ILCS 5/115-7.3(c) (West 2016). "[T]he State does not need to prove defendant's involvement in other crimes beyond a reasonable doubt but instead such proof must be 'more than a mere suspicion.' " *People v. Johnson*, 2020 IL App (1st) 162332, ¶ 52 (quoting *People v. Thingvold*, 145 Ill. 2d 441, 456 (1991)). The trial court should engage in a "meaningful assessment of the probative value versus the prejudicial impact of the evidence" before admitting other crimes evidence to show propensity. *People v. Donoho*, 204 Ill. 2d 159, 186 (2003).

¶ 51 Since defendant was charged with aggravated criminal sexual abuse, section 115-7.3 was applicable, and evidence of prior acts were admissible if the court found the evidence to be more probative than prejudicial. Thus, the fact that the trial court ultimately found defendant not guilty of the applicable charges does not impact the admissibility of the evidence under this section. The admissibility of other crimes evidence rests within the sound discretion of the trial court, and we will not disturb the court's decision absent a clear abuse of discretion. *Wilson*, 214 Ill. 2d at 136. An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable or when no reasonable person would take the position adopted by the trial court. *Donoho*, 204 Ill. 2d at 182.

***10** ¶ 52 According to defendant, Detective Granadon's testimony about defendant's statement from the uncharged offense was improperly admitted for three reasons: (1) defendant's statement was not admissible under section 115-7.3(a) since defendant denied any wrongdoing to the police; (2) defendant's statement does not fall within the type of admissible evidence listed under section 115-7.3(e), and (3) the prejudicial effect outweighed the probative value based on the proximity in time and lack of similarity in allegations. While defendant did challenge the admission of other crimes evidence in the motion *in limine* and in his motion for a new trial, defendant failed to argue that his statement denying the allegations did not fall within section 115-7.3, nor did he argue that his statement was not the type of admissible evidence under section 115-7.3(e).

¶ 53 Before the trial court, defendant only raised the following arguments to exclude this evidence: proximity in time between the two incidents, the lack of similarity in the allegations, the evidence was not admissible under the grounds of intent, motive, *modus operandi*, common scheme, plan, identity, mistake or accident, and the detective's testimony was "subject to hearsay issues." Accordingly, defendant has raised the arguments challenging the evidence under sections 115-7.3(a) and (e) for the first time on appeal. The supreme court has held that a specific objection waives all other unspecified grounds. *People v. Cuadrado*, 214 Ill. 2d 79, 89 (2005) (citing *People v. O'Neal,* 104 Ill. 2d 399, 407 (1984)). A defendant's failure to object at trial robs the trial court of the opportunity to correct the error, and his failure to object in a posttrial motion deprives this court of the factual findings that the trial court might have made concerning the effect of the alleged error on the weight of the evidence against defendant as well as the potential impact of the error." *People v. Anaya*, 2017 IL App (1st) 150074, ¶ 50. Since defendant failed to offer a specific objection or argument on these grounds in the trial court, these arguments have been forfeited on appeal.

¶ 54 We turn to the preserved arguments presented to the trial court. Defendant contends that Detective Granadon's testimony regarding defendant's statement in the 2008 incident "lacked any meaningful probative value" because defendant denied any wrongdoing in the statement which prevented the trial court from considering its probative value.

¶ 55 In this case, the State filed a motion *in limine* prior to trial seeking to introduce evidence of defendant's prior acts related to an uncharged allegation of sexual abuse from 2008. At a hearing, defendant argued that the events were too remote in time since seven years had passed between that allegation and the charged offense and that the allegations in that case were too dissimilar to the allegations involving J.W. After considering the parties' arguments, the trial court granted the State's motion and allowed the introduction of this evidence. The court observed that "the statute does not, nor does caselaw indicate that there's any type of bright red line indicating it must occur within 5 years of said alleged offense, in order for it to be admitted." The court also considered the similarity of the allegations related to the proximity of the child to defendant existed due to a relationship between defendant and the relatives of these minors. The court concluded that "though the specific acts may be a little different," they were similar enough to find that they were more probative than prejudicial.

¶ 56 At trial, the alleged victim T.R. was not cooperative with the State, and thus, unavailable as a witness. The State then asked to present the other crimes evidence of defendant's statement through the testimony of Detective Granadon.

Defendant objected to this evidence. The State argued that defendant's statement was relevant under the reasons set forth in its motion *in limine*. The trial court held that the evidence was admissible "pursuant to statute as well as case law." The court noted that it would "weigh the circumstances under which the evidence is received regarding the witness in that other case, alleged victim, and taking all of that information will weigh all of it together."

***11** ¶ 57 Detective Granadon testified regarding the statement defendant provided to police during an investigation into the 2008 allegations. According to the detective, defendant denied any wrongdoing and explained his relationship to T.R. Defendant would take T.R. to school sometimes. T.R. was 13 years old at the time of the incident. On the day of the incident, he was driving T.R. to school, but she told him that she did not want to go to school. He then went shopping with her and drove to a motel to charge his cell phone. He registered at the motel and went into the room. About 10 to 15 minutes later, T.R. knocked on the door and he let her into the room. Defendant told the detective that T.R. turned on the television. Defendant then left the room to make a cell phone call and when he returned, T.R. had pornography playing on the television.

¶ 58 We find that while the trial court properly granted the State's motion to admit other crimes evidence based on T.R.'s testimony, the admission of Detective Granadon's testimony as other crimes evidence was error. When T.R. failed to appear at trial, the State sought to admit defendant's statement through Detective Granadon's testimony. The admission of the detective's testimony was error because it lacked relevance and was counter to the *corpus delicti* rule because the statement alone was insufficient to establish that a crime had been committed. The *corpus delicti* of an offense cannot be proven by a defendant's admission, confession, or out-of-court statement alone. *People v. Lara*, 2012 IL 112370, ¶ 17. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). Without T.R.'s testimony, defendant's statement never established that a crime was committed regarding the prior allegations of sexual abuse. Further, we find the prejudicial effect of admitting defendant's statement outweighed its probative value. There was no probative value for the other crimes evidence when T.R. failed to appear in court. We acknowledge that the trial court was not called upon to consider this evidence under this basis, but we nevertheless conclude that the admission was in error.

¶ 59 However, we further find that this error was harmless because the trial judge explicitly stated on the record that she did not consider the other crimes evidence in rendering her judgment. We find the decision in *People v. Fletcher*, 328 Ill. App. 3d 1062 (2002), to support our conclusion. There, the defendant was found guilty of aggravated criminal sexual assault case and during the bench trial, the trial court allowed evidence, over the defendant's objection, that the defendant had been administered a polygraph. The court allowed the evidence for a limited purpose because defendant was claiming his statement(s) about the offense were involuntary and that the defendant had changed his story. *Id.* at 1066-67. On appeal, the defendant asserted that the admission of the polygraph evidence was reversible error. *Id.* at 1073-74. However, the reviewing court pointed out that it is presumed that the trial court considers only competent evidence, as well as evidence introduced for a limited purpose for that purpose only, and this presumption is not overcome unless the record shows otherwise. *Id.* at 1075. In affirming the conviction, the *Fletcher* court observed that the trial court stated that he would not consider the polygraph evidence in reaching a judgment. *Id.* The reviewing court also found that because the record showed the court did not consider the polygraph evidence, any error in the improper introduction of evidence would be harmless error. *Id.*

¶ 60 Here, in denying defendant's motion for a new trial, the trial court explicitly stated that it did not consider the other crimes evidence in reaching its judgment.

> ***12** "The court did not rely on the proof of other crimes in rendering a verdict. The court took that as part of the evidence but also the testimony that the court heard from the victim as well as the detective. And [defendant's] wife, her testimony played a significant role in the rendering as well as the words of the defendant himself, plays a significant role in this court's ultimate determination of guilt."

Thus, we conclude that while the admission of Detective Granadon's testimony was error, the error was harmless because the court did not consider this evidence in rendering its judgment. Accordingly, the record fails to support any claim of prejudice and defendant's argument fails.

¶ 61 We also reject defendant's assertion that Detective Granadon's testimony constituted inadmissible testimonial

hearsay and a violation of the confrontation clause of the sixth amendment. Hearsay is defined as testimony of an out-of-court statement offered to establish the truth of the matter asserted. *People v. Armstead*, 322 Ill. App. 3d 1, 11 (2001). The confrontation clause of the sixth amendment requires that, "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amends. VI, XIV; see also Ill. Const. 1970, art. I, § 8.

¶ 62 The record shows that Detective Granadon did not testify about his interview with T.R. At the start of the detective's testimony, the prosecutor asked if in 2008 he was involved "in an investigation of sexual abuse involving a 13-year-old girl named" T.R., and Detective Granadon answered, "Yes." He then testified that T.R. had identified defendant as the offender. The rest of his testimony related to the statement defendant provided during that investigation. No specific testimony about T.R.'s allegations was introduced. No hearsay testimony was admitted nor was there a violation of the confrontation clause where T.R.'s statement was not admitted at trial.

¶ 63 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 64 Affirmed.

Presiding Justice Howse and Justice Burke concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2021 IL App (1st) 181279-U, 2021 WL 1227900

Footnotes

1 Detective Granadon did not give his first name during his testimony.

No. 130127

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- CECIL SMART, Defendant-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-22-0427. There on appeal from the Circuit Court of Cook County, Illinois , No. 19 CR 14458. Honorable Carol M. Howard, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 8, 2024, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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