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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-451
)	
ELICEIO J. MONTEJO,)	Honorable
)	John T. Phillips,
Defendant-Appellant.)	Judge, Presiding.

ORDER

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

¶ 1 *Held:* The trial court did not abuse its discretion in denying appellant's request to instruct the jury on the lesser-included offense of aggravated criminal sexual abuse. However, defendant was denied the effective assistance of counsel. Therefore, we reversed and remanded for a new trial.

¶ 2 Defendant, Eliceio J. Montejo, appeals his conviction of two counts of predatory criminal sexual assault of a child. Defendant contends that (1) the trial court abused its discretion in denying his request to instruct the jury on aggravated criminal sexual abuse as a lesser-included offense and (2) he was denied the effective assistance of trial counsel. For the reasons that follow, we determine

that defendant's trial counsel rendered ineffective assistance. We, therefore, reverse and remand for a new trial.

¶ 3 On February 18, 2009, defendant was charged by indictment with two counts of predatory criminal sexual assault of a child, in that defendant, who was over the age of 17, placed his penis in the anus of T.M., a child under the age of 13 in violation of section 12-14.1(a)(1) of the Code of Criminal Procedure (the Code) and that defendant committed the same offense when he placed his finger in T.M.'s anus. See 720 ILCS 5-12-14.1(a)(1) (West 2008). The indictment further included three counts of aggravated criminal sexual abuse in that defendant rubbed his penis on T.M.'s penis, touched T.M.'s buttocks, and kissed T.M.'s mouth, all for the purpose of his own sexual gratification in violation of section 12-16(c)(1)(1) of the Code, two counts of criminal sexual assault, and one count of unlawful restraint. See 720 ILCS 5/12-16(c)(1)(1) (West 2008). All offenses allegedly occurred between December 21, 2008, and December 26, 2008. Before trial, the State nolle prossed all charges but the two counts of predatory criminal sexual assault of a child.

¶ 4 Prior to trial, the trial court ruled that evidence regarding T.M.'s pretrial statements to his parents and to a child abuse investigator describing defendant's alleged sexual conduct was admissible pursuant to section 115-10 of the Code. See 725 ILCS 5/115-10 (West 2008). The trial court also ruled over defense counsel's objection that a statement made by defendant to a police officer in 1995 describing sexual conduct he committed against a six-year-old boy was admissible, pursuant to section 115-7.3 of the Code, as proof that defendant's actions were done knowingly and that defendant was prone to commit sex offenses. See 725 ILCS 5/115-7.3 (West 2008).

¶ 5 On April 11, 2011, defendant's trial commenced. Testimony at the jury trial established that, in December of 2008, Jaime and Theodoro M. and their three children, nine-year-old T.M., seven-year-old N.M., and three-year-old, A.M., resided in Rutherford College, North Carolina. In

December of 2008, defendant, who was Theodoro's older brother, drove from his home in North Chicago to North Carolina for a visit. Defendant's and Theodoro's nephews, 14-year-old Bryan and 11-year-old Ramon, accompanied defendant on the visit. Bryan and Ramon had been living with defendant for approximately one month. Following the visit, which lasted a few days, Jaime and Theodoro agreed to let T. M. and N.M. go to North Chicago with defendant and their cousins for the Christmas holiday. Defendant and his nephews left for North Chicago a few days before Christmas. On December 26, 2008, T.M. and N.M. returned to their home in North Carolina.

¶ 6 Following T.M.'s return, Jaime and Theodoro noticed changes in T.M.'s behavior. According to his parents, T.M. spent less time playing with his siblings and more time alone in his bedroom. He also had problems sleeping, complained of stomach discomfort, and vomited repeatedly. On January 1, 2009, Jaime asked T.M. if anything had happened during his trip to Chicago. T.M. responded, "Mommy, Uncle tried to do private parts with me." Jaime instructed T.M. to speak with his father and T.M. did so immediately.

¶ 7 Theodoro testified that T.M. told him, "Uncle did private parts with me." Upon hearing his son's remarks, Theodoro testified that he phoned defendant. On January 2, 2008, Theodoro called the Burke County, North Carolina Sheriff's Department. Theodoro testified that a detective came to their home and interviewed T.M. Theodoro then took T.M. to a local hospital where he was examined for signs of sexual abuse.

¶ 8 The parties stipulated that the physician who examined T.M., Dr. Steven Kikel, found T.M.'s genitalia normal and his rectal sphincter intact. No bruises or lesions were found on T.M.'s body. Sexual Assault Nurse Examiner Sharon Dimitrijevic testified that a failure to detect physical injury to a child's anus does not necessarily mean that the child was not anally assaulted.

¶ 9 Mark Pleasant, an employee of the Child Advocacy Center testified that, on January 16, 2009, Jaime and Theodoro brought T.M. to Lake County, Illinois, where he interviewed T.M. Pleasant identified People's Exhibits Nos. 1-6 as DVDs containing portions of his recorded conversations with T. M. The jurors were shown the DVDs.

¶ 10 People's Exhibit No. 1 contained a short segment where T.M. claimed that he was "raped" by his uncle. People's Exhibit No. 2 contained T.M.'s account of how, one night, while he and defendant were sharing a bed, defendant tied T.M. to the bed's side rails and then penetrated his anus, using both his penis and his finger. In the recording, T.M. stated that his brother, N.M. was sleeping at the bottom of the same bed at the time. In the recording, T.M. demonstrated how he was tied. People's Exhibit No. 3 contained T.M.'s assertion that, after being untied, he was placed on his stomach and retied and, defendant put his penis and his finger inside T.M.'s "bottom." People's Exhibits Nos. 4 and 5 contained T.M.'s account of the events following his return from defendant's home, including how he came to report the incidents to his mother. People's Exhibit No. 6 included more discussion regarding the specifics of how defendant tied T.M. to the bed before abusing him, and a discussion regarding how defendant threatened to harm T.M. if he told anyone about the incident. Pleasant identified People's Exhibits Nos. 7 and 8 as anatomical drawings of a boy and a man where T.M. is seen using crayons to circle the body parts involved.

¶ 11 T.M. testified. He identified People's exhibits Nos. 26-31 as photographs of defendant's bedroom. The photographs depicted a room with a single, one-person hospital bed, complete with side rails. T.M. testified that he, his brother, and defendant slept in the hospital bed during their visit. T.M. testified that his cousins, Bryan and Ramon, slept in another bedroom in the apartment. T.M. testified that, during the visit, he never slept in his cousins' room.

¶ 12 T.M. described the night of the incident. T.M. testified that, one evening, he and defendant were lying next to one another on the hospital bed watching a movie; N.M. was asleep on the foot of the same bed. Bryan and Ramon were asleep in the other room. T.M. testified that after defendant told him “don’t tell your dad,” defendant removed his pants and T.M.’s pajama bottoms, applied lotion to his penis, and placed his penis halfway into T.M.’s “butt.” Defendant then applied lotion to his finger and inserted it into T.M.’s “butt.” T.M. testified that defendant used his cell phone to photograph T.M.’s penis as well as his own.

¶ 13 During cross-examination, T.M. admitted that, on the morning following the incident, he was lying on the bed in his cousins’ room alone. Defendant entered the room, kissed T.M. and fondled him through his clothes. The State asked T.M. if he recalled telling Pleasant that defendant tied him to the hospital bed before he inserted his penis in T.M.’s “butt.” T.M. stated that his claim that defendant tied him up was false. He testified that he told the lie because he was “scared and embarrassed that [defendant] took me.”

¶ 14 North Chicago police investigator Cesar Flores testified that, on January 30, 2009, he was the evidence technician during a search of defendant’s apartment. Flores acknowledged that the search did not produce any ropes, bondage tools, photographs of sexual conduct, or pornographic material.

¶ 15 Dean Kharasch, an investigator trained to collect evidence from devices such as cellular phones, testified that defendant’s cellular phone contained 85 deleted photographs, but admitted that he was unable to ascertain what the deleted photographs depicted. He testified that none of the remaining 565 photographs contained images of sexual conduct.

¶ 16 Libertyville police officer Dennis Meserve testified that, on July 7, 1995, he interviewed defendant regarding an incident that allegedly occurred on July 4, 1995. At that time, defendant told

Meserve that a neighbor, whose bathroom was being painted, accepted his offer to bathe her children in his apartment. Defendant told Meserve that, while cleaning the neighbor's six-year-old's backside, one of his fingers may have accidentally entered the child's anus. Meserve conducted a second interview regarding the incident with defendant, which he recorded. During defendant's second interview, he admitted that he intentionally used his soapy finger to penetrate the boy's anus twice. The trial court instructed the jury to consider Meserve's testimony as evidence on the issue of whether defendant acted knowingly and of his propensity to commit such offenses.

¶ 17 After the State rested, defense counsel announced his intention to show the jury a portion of T.M.'s recorded statement that had been redacted by the State. The recorded statement showed T.M. telling Pleasant that he saw an internet web site called sexoffender.com, which showed that defendant had engaged in acts similar to the charged offenses with other young boys and two adults. Defendant's counsel told the trial court that he would cite T.M.'s admission that he saw the web site as support for a defense theory that T.M. fabricated his present complaints regarding defendant based on information he gleaned from the website. Defense counsel explained that he was using the evidence only because Meserve had been allowed to testify about the 1995 incident and opined that the segment revealed no more criminal conduct than Meserve had already revealed. Specifically, defense counsel stated, "I will tell you, that absent the 7.3 ruling, I would never, obviously, tender this evidence. [The redacted portion of T.M.'s recorded statement] was not an admission [that] the defendant was guilty of anything other than the conduct the State had revealed pursuant to § 115-7.3." The trial court admonished defense counsel that it had taken pains to prevent the jury from learning that defendant had a prior sex offense conviction, and noted that defense counsel's presentation of the evidence would open the door for proof of the conviction by the State. Defense counsel continued, "I think from my- I think anybody looking in my shoes right now, with my trial

strategy can see the logic of [my] position [is] reasonable.” The trial court agreed to allow defense counsel to pursue his strategy.

¶ 18 Defense counsel recalled Pleasant and played for the jury a recording of T.M. stating that, after telling both of his parents about the abuse and going to a hospital to be examined for signs of sexual trauma, he and his parents looked at a website called sexoffender.com. T.M. read on the website that defendant “did it before” to three 7-year-old children as well as to two adults, one of whom defendant physically harmed in the process of the sexual attack.

¶ 19 T.M.’s cousin, Bryan, testified that defendant’s bed made irritating squeaking sounds whenever anyone on the bed moved. He testified that he heard no sounds on the night of the incident. T.M.’s cousin Ramon testified that defendant’s bed squeaked whenever there was movement on it. He testified that the squeaking sound would awaken him. He also heard no squeaking on the night of the incident.

¶ 20 After the defense rested, the trial court held a jury instructions conference. Defense counsel tendered instructions for a lesser-included offense of aggravated criminal sexual abuse. The trial court refused the instructions, concluding that the State’s decision to dismiss the aggravated criminal sexual abuse counts before trial rendered the instructions inappropriate. Regarding defense counsel’s failure to object when the State elicited testimony from T.M. describing conduct that took place the morning after the incident, counts the State nolle prossed before trial, the State told the trial court judge:

“Counsel made a strategic decision, and I can totally understand it why he didn’t object to the second incident coming in. In some ways, it’s uncharged.”

Defense counsel responded, “I don’t have a right to object to that.”

The jury found defendant guilty on both counts of predatory criminal sexual assault. On September 15, 2011, defendant received consecutive prison terms of 21 and 18 years. Defendant timely appealed.

¶ 21 As an initial matter, we first address the open motion filed by defendant for leave to cite an additional authority. Defendant's requests to cite *People v. Kennebrew*, 2013 IL 113998 (March 21, 2013) because he asserts that "the decision is relevant to argument I in the briefs filed in this case". We grant defendant's motion.

¶ 22 Defendant's first contention on appeal is that the trial court abused its discretion when it denied his request to instruct the jury on aggravated criminal sexual abuse as a lesser included offense. Although defendant was originally charged with two counts of predatory criminal sexual assault and three counts of aggravated criminal sexual abuse, the State nolle prossed the aggravated criminal sexual abuse charges before trial. Defendant was tried and convicted only of the predatory criminal sexual assault charges. These charges required proof of sexual penetration. Defendant argues that the only evidence that he penetrated T.M. came from T.M.'s testimony, and T.M.'s credibility was questionable because he embellished his pretrial complaint and falsely claimed that defendant tied him up before assaulting him. According to defendant, a rational juror could have found T.M.'s claim that defendant penetrated him rather than merely touching him was another embellishment and convicted defendant of the lesser offense. The State responds that the lesser-included offense of aggravated criminal sexual abuse is not applicable in the present matter because the testimony was not conflicting and the only testimony offered regarded acts of penetration.

¶ 23 We determine that the trial court did not abuse its discretion. A defendant may be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument and the evidence adduced at trial rationally supports a conviction on the lesser-included

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offense and acquittal on the greater offense. *People v. Kolton*, 219 Ill. 2d 353, 359-60 (2006). In appropriate cases, a defendant is entitled to have the jury instructed on a lesser included offense. *People v. Meor*, 233 Ill. 2d 465, 469 (2009). In Illinois, a lesser included offense is defined as an offense that is established by proof of the same or less than all of the facts or a less culpable mental state, or both, than that which is required to establish the commission of the offense charged. *Id.* at 469-70 (citing 720 ILCS 5/2-9(a) (West 2008)). Courts determine whether an uncharged offense is a lesser-included offense of a charged offense by using the two-tiered charging-instrument approach. *Kolton*, 219 Ill. 2d at 360-61. The first tier requires a court to determine on a case-by-case basis whether the charging instrument described the purported lesser offense in that the greater offense, as charged, contains the broad foundation of the purported lesser offense. *Id.* If this test is satisfied, the court moves on to determine whether the evidence adduced at trial would permit a rational jury to convict on the lesser offense but acquit the defendant of the greater offense. *People v. Thomas*, 374 Ill. App. 3d 319, 323 (2007).

¶ 24 The two-tiers of a lesser-included analysis require the application of a bifurcated standard of review. Under the first tier, whether a charged offense encompasses a lesser-included offense presents a question of law, which is reviewed *de novo*. *Kolton*, 219 Ill. 2d at 361 (citing *People v. Landwer*, 166 Ill. 2d 475, 486 (1995)). The second tier inquiry of whether there is sufficient evidence to support a conviction on the lesser-included offense involves a discretionary question for the trial court which we will only reverse when there has been an abuse of discretion. *People v. Cardonmone*, 381 Ill. App. 3d 462, 507-08 (2008).

The statutory definition of predatory criminal sexual assault of a child as was relevant to defendant's indictment provides:

“defendant, who was 17 years of age or older, committed an act of sexual penetration with the victim, who was under 13 years of age when the act was committed, in that said defendant knowingly placed his finger in the anus of the victim.” 720 ILCS 5/12-14(a)(1) (West 2008).

Furthermore, the indictment alleged that

“defendant, who was 17 years of age or older, committed an act of sexual penetration with the victim, who was under 13 years of age when the act was committed, in that said defendant knowingly placed his penis in the anus of the victim.” 720 ILCS 5/12-14.1(a)(1) (West 2008).

¶ 25 The statutory definition of aggravated criminal sexual abuse of a child provides that a defendant commits aggravated criminal sexual abuse if the defendant was 17 years of age or older and committed an act of sexual conduct with a victim who was under the age of 13 when the act was committed. 720 ILCS 5/12-16(c)(1) (West 2008). The difference between the two acts is whether the defendant penetrated the victim. See *Kolton*, 219 Ill. 2d at 368-69.

¶ 26 Defendant relies on *Kolton* for his claim that a trial court faced with a similar fact pattern concluded that aggravated criminal sexual abuse was a lesser-included offense of predatory criminal sexual assault. *Kolton*, 219 Ill. 2d at 368-69. The State responds that *Kolton* is distinguishable. In *Kolton*, the defendant was charged with one count of predatory criminal sexual assault. The indictment provided that defendant knowingly placed his finger in the victim’s vagina. Following a bench trial, the trial court concluded that the State failed to prove the element of sexual penetration and found defendant guilty of the lesser-included offense of aggravated criminal sexual abuse. *Id.* at 356. On appeal, defendant argued that his conviction must be overturned because aggravated

criminal sexual abuse was not a lesser-included offense of predatory criminal sexual assault. *Id.* at 357-362.

¶ 27 Our supreme court disagreed and affirmed defendant's conviction on the lesser-included offense. *Id.* at 368-72. The supreme court examined the statutory definitions of "sexual conduct" and "sexual penetration" and stated:

“ ‘Sexual conduct’ means any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused.

“ ‘Sexual penetration’ means any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio, or anal penetration.’ ” *Id.* at 368-69 (citing 720 ILCS 5/12-12(e) (West 2000); 720 ILCS 5/12-12(f) (West 2000)).

¶ 28 As the State asserts, *Kolton* is distinguishable from the current matter. *Kolton* involved contact of a female victim's genitalia with a defendant's finger. Penetration of the victim's vagina with the defendant's finger would have constituted penetration, and thus, predatory criminal sexual assault. However, mere contact of the defendant's finger with the victim's vaginal region would have constituted sexual conduct, and thus, aggravated criminal sexual abuse.

¶ 29 In the current matter, the indictment, as amended, alleged that defendant placed his penis and finger into T.M.'s anus. Therefore, although in *Kolton*, the defendant's charged conduct of predatory

criminal sexual assault contained a broad foundation of the offense of aggravated criminal sexual abuse, this is not true in the present matter. Here, the first tier of the lesser-included analysis is not satisfied.

¶ 30 Moreover, even if we were to determine that the first tier of the lesser-included analysis was satisfied in the present matter; the second tier of the analysis is not satisfied. The amount of evidence necessary to obtain an instruction on a lesser-included offense has been described as “any,” “some,” slight, or “very slight.” *People v. Blan*, 392 Ill. App. 3d 453, 457 (2009), quoting *People v. Novak*, 163 Ill. 2d 93, 108-09 (1994). This evidentiary requirement is satisfied “by the presentation of conflicting testimony on the element that distinguished the greater offense from the lesser offense.” *People v. Garcia*, 188 Ill. 2d 265, 284 (1999). Where the testimony is not conflicting, the requirement may be satisfied if the conclusion as to the lesser-included offense may be fairly inferred from the evidence presented. *Id.*

¶ 31 Here, T.M. testified that defendant placed his penis in T.M.’s anus. No other evidence suggested that the defendant merely touched T.M.. Even if the jury believed that T.M.’s account was embellished and that defendant’s penis did not enter, but only touched defendant’s anus, that conduct, by statutory definition, still constituted penetration and thus, predatory criminal sexual assault. Furthermore, no evidence was presented that defendant’s conduct did not include penetration. Had the jurors determined that T.M. lacked credibility, their option would have been to acquit defendant. A rational juror would not assume that even if the testifying victim lied regarding penetration, defendant must have, nonetheless, touched the victim in a sexual manner where none of the evidence adduced suggested this scenario. Thus, the second tier of the lesser-included inquiry is not satisfied. As to this issue, we determine that the trial court did not abuse its discretion.

¶ 32 Defendant's second contention is that he was denied the effective assistance of trial counsel. Specifically, defendant argues that his trial counsel was ineffective because he failed to challenge the admissibility of evidence regarding uncharged sex crimes with the victim and then deliberately exposed the jury to evidence of additional prior sex crimes against children. The State responds that the defense attorney's actions constituted reasonable trial strategy and did not prejudice defendant. We determine that defense counsel was ineffective.

¶ 33 Whether a defense attorney has provided effective assistance is a mixed question of fact and law. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). Although a reviewing court must defer to the trial court's findings of fact, it is free to make an independent determination of the ultimate legal issue. *People v. Crane*, 195 Ill. 2d 42, 51 (2001). Here, the facts surrounding counsel's representation of defendant are reviewable from the record. Thus, whether counsel's acts constituted ineffective assistance of counsel is a question of law and is subject to *de novo* review. *People v. Daniels*, 187 Ill.2d 301, 307 (1999).

¶ 34 To show ineffective assistance of counsel, a defendant must demonstrate that his or her attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 687. It is defendant's burden to demonstrate prejudice resulting from the admission of evidence of a prior conviction. *People v. Perez*, 98 Ill. App. 3d 64, 69 (1981). The primary duties of a defense attorney are to advocate for the defendant's cause and to use his or her skill and knowledge so as to render the trial a reliable adversarial testing process. *People v. Jackson*, 318 Ill. App. 3d 321, 326 (2000) (citing *Strickland*, 466 U.S. at 688). To establish that counsel's representation was deficient, the defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *People v. Simms*,

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192 Ill. 2d 348, 361 (2000). This presumption is overcome where no reasonably effective criminal defense attorney confronting the circumstances of the defendant's trial would engage in similar conduct. *People v. Fletcher*, 335 Ill. App. 3d 447, 453 (2002).

¶ 35 In the present matter, the trial court determined that, pursuant to section 115-7.3 of the Code, the State could present evidence that, in 1995, defendant intentionally inserted his finger into the anus of a six-year-old boy. See 725 ILCS 5/115-7.3 (West 2008). On appeal, defendant does not contend that this was error. Defendant instead takes issue with two decisions made by his defense counsel. First, defendant takes issue with his counsel's handling of T.M.'s testimony regarding a second incident of uncharged sexual acts committed against T.M. by defendant. Although the State nolle prossed the aggravated criminal sexual abuse charges relating to the second incident, defense counsel did not tender a *motion in limine* to prevent testimony regarding the uncharged conduct after learning that the State would not pursue aggravated criminal sexual abuse charges. Moreover, when, during cross-examination, the State questioned T.M. about the second incident, defense counsel did not object and the jury was allowed to hear details of the uncharged conduct. A recorded interview of T.M. discussing the second incident was also played for the jury, without any objection from defense counsel.

¶ 36 The State asserts that this was defense counsel's sound trial strategy. The record, however, does not support the State's assertion. The record reflects that during the jury instruction conference, the prosecutor, discussing defense's counsel's failure to object to testimony regarding the uncharged acts stated:

“Counsel made a strategic decision, and I can totally understand it why he didn't object to the second incident coming in. In some ways, it's uncharged.”

Defense counsel's response was: “I don't have a right to object to that.”

¶ 37 In the present matter, it appears that defense counsel's failure to object was not aimed at consciously strengthening defendant's case, but was instead the result of defense counsel's inability to recognize that the evidence was being presented in violation of the procedures required pursuant to section 115-7.3. Here, defense attorney's response indicates that his failure to challenge the admissibility of the evidence was attributable to ignorance, rather than strategy.

¶ 38 Pursuant to section 115-7.3(a)(1) and (b) of the Code, in cases where the defendant is charged with certain serious sex offenses, including predatory criminal sexual assault, evidence that he committed other uncharged sex offenses may be considered by the fact-finder "for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3(a)(1) and (b) (West 2008). Generally, proof that the defendant committed other, uncharged crimes is admissible if it is relevant to prove his intent, modus operandi, identity, motive, or absence of mistake. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Evidence that an accused sex offender has committed other sex offenses can also be presented to prove his propensity to commit sex crimes. *Id.* at 176.

¶ 39 Even if evidence of other sex crimes qualifies for admission pursuant to section 115-7.3, it should be admitted only if its probative value is not outweighed by its prejudicial effect. *Cardamone*, 381 Ill. App. 3d at 489 (citing *Donoho*, 204 Ill. 2d at 180-81). The problem with such evidence is that it can prove "too much," possibly encouraging jurors to issue a guilty verdict based upon their conclusion that the defendant is a bad person deserving of punishment. *Donoho*, 204 Ill. 2d at 170. Because of this, the admission of other crimes evidence should be limited. *Cardamone*, 381 Ill. App. 3d at 489.

¶ 40 In the current matter, the trial court had no opportunity to weigh the probative value of the evidence against its prejudicial effect because defense counsel did not object to the State's line of questioning. The record indicates that the trial court was cognizant of the potential for overkill, and

deliberately chose to limit evidence of other crimes to the testimony of Officer Meserve regarding a single incident which took place in 1995. Specifically, the record reflects that, in response to a statement by defense counsel, the trial court reminded defense counsel that it had taken pains to prevent the jury from learning that defendant had a prior sex offense conviction and indicated that it had purposefully limited the evidence of other sex crimes to evidence of a single confession, while excluding evidence of a prior conviction and redacting portions of Pleasant's recorded interview with T.M. where other sex offenses were mentioned. Here, the record reflects that the decision of defense counsel not to object to evidence of the uncharged conduct was not trial strategy.

¶ 41 The second portion of the trial proceedings that defendant contends shows he received ineffective assistance was defense counsel's decision to deliberately expose the jury to evidence of additional prior sex crimes against children. Specifically, after the State rested, defense counsel announced his intention to show the jury a portion of T.M.'s recorded statement that had been redacted, during which T.M. told Pleasant that he had seen an internet website called sexoffender.com, which showed that defendant had engaged in acts similar to the charged offenses with other young boys. In the recording, T.M. states that the website listed defendant as having raped three other young boys and two adults, seriously wounding one of his adult victims. The record does not reveal whether the victim's statements accurately reflect the contents of the site. Defense counsel told the trial court that he would cite T.M.'s admission that he saw the website as support for a defense theory that T.M. fabricated his present complaints regarding defendant based on information he discovered while viewing the website. Defense counsel opined that the segment revealed no more criminal conduct than Meserve had already revealed. The trial court admonished defense counsel that it had taken pains to prevent the jury from learning that defendant had a prior

sex offense conviction. Defense counsel continued, “I think from my - I think anybody looking in my shoes right now, with my trial strategy can see the logic of [my] position [is] reasonable.”

¶ 42 With respect to the first *Strickland* prong, defendant argues that his counsel’s strategy was not reasonable. See *Fletcher*, 335 Ill. App. 3d at 453 (presumption that counsel’s actions are sound trial strategy is overcome where no reasonably effective criminal defense attorney confronting the circumstances of the defendant’s trial would engage in similar conduct). The State again argues that defense counsel’s conduct was sound trial strategy which did not prejudice defendant.

¶ 43 We agree with defendant. Although defense counsel claimed that presentation of the evidence would bolster the defense theory that T.M. fabricated his complaints regarding defendant based on information he gleaned from the website, a quick review the facts in the case makes clear that T.M. did not see the website until after he had reported the incident to both of his parents and a child sex abuse expert, and had been through a hospital examination. Thus, showing the jury this portion of T.M.’s recorded interview could not have helped prove defense counsel’s theory. Instead, the evidence served only to expose the jury to information that defendant “raped three seven-year-olds as well as a 29-year-old and a 38-year-old,” and that defendant had physically harmed one of the adult victims. The record reflects that the trial court had concerns with defendant’s strategy and admonished defense counsel that he was jeopardizing “the pains [it had] taken to prevent the jury from learning that defendant had a prior sex offense conviction.” Defense counsel persisted, however, and the trial court allowed the evidence. The sole result of the presentation of this evidence was that the jury was informed, regardless of whether the information was true, that up to five other individuals had been sexually harmed by defendant. Thus, although defense counsel’s conduct was trial strategy, the strategy was not reasonable; no reasonably effective criminal defense

attorney confronting the circumstances of the defendant's trial would engage in similar conduct. *Fletcher*, 335 Ill. App. 3d at 453.

¶ 44 Case law supports defendant's assertion that defense counsel's strategy was not reasonable. See *People v. Phillips*, 227 Ill. App. 3d 581 (1992) (testimony elicited by defense counsel of a police officer offering hearsay statements that the defendant participated in other crimes was determined to be "devastating" to defendant's case, constituted ineffective assistance of counsel and a new trial was ordered); *People v. Moore*, 2012 IL App (1st) 100857 ¶¶53-57 (counsel who failed to object to other crimes evidence on interrogation videos shown to the jury found ineffective); *Fletcher*, 335 Ill. App. 3d 447 (defense counsel who had defendant summarize his criminal history deemed ineffective, appellate court affirmed, stating, "no reasonable defense lawyer would ask his client to tell the jury about an extensive history of criminality *** in order to convince the jury that defendant is innocent of a like crime because he denies his guilt instead of pleading guilty). In the present matter, we cannot say that defense counsel's decision to offer the evidence at issue was a product of reasonable trial strategy.

¶ 45 Regarding whether counsel's decisions prejudiced defendant in that had defense counsel not taken the actions he did, there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different; we note that the evidence against defendant regarding the charged offenses was not overwhelming. The proof that defendant engaged in sexual activities with T.M. was supplied only by T.M. himself. No other witnesses testified as to having observed the abuse. Defendant made no inculpatory statement. The parties stipulated that a medical examination of T.M. detected no physical signs of sexual abuse. T.M.'s cousins testified that defendant's single-person hospital bed made loud squeaking noises whenever defendant moved; yet they heard nothing on the night of the incident. T.M. testified that his younger brother was asleep on the same bed, but

did not awaken during the incident, even when defendant's painful contact caused T.M. to vomit. Furthermore, a reasonable juror could have determined that T.M.'s testimony lacked credibility, in that T.M. admitted during the trial that he originally lied, telling Pleasant that defendant tied him to the bed and demonstrating on a DVD specifically how defendant did so. The jury was shown a recording of T.M. offering the fabrication.

¶ 46 Here, the combined effect of counsel's errors caused the jury to believe that defendant may have sexually assaulted up to seven people, five of them children. Pursuant to *People v. Hooker*, 253 Ill. App. 3d 1075, 1086 (1993), this court recognized that "under *Strickland*, ineffective assistance of counsel is most likely to result from the cumulative impact of several serious errors, rather than isolated or incidental mistakes within a trial." The effect of counsel's errors here prejudiced the jury, serving to dramatically increase the evidence of other crimes presented in a case where such evidence provided critical support for a sole complaining witness. In the present matter, defense counsel chose to present evidence of other crimes that may have not been accurate. This damaged defendant's case and deprived him of his constitutional right to effective assistance of counsel. *Phillips*, 227 Ill. App. 3d at 586-590. Thus, we reverse defendant's convictions and remand the cause for a new trial based upon defendant's second contention.

¶ 47 For the forgoing reasons, we reverse the judgment of the Circuit Court of Lake County and remand the cause for a new trial.

¶ 48 Reversed and remanded.