2017 IL App (1st) 152078-U

SIXTH DIVISION
Order filed: November 22, 2017

No. 1-15-2078

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 13 CR 54
	)	
GOLDINE WILLIAMS,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the trial court is affirmed, where: (1) the State presented sufficient evidence to prove the defendant guilty of aggravated battery of a child beyond a reasonable doubt; (2) the trial court did not abuse its discretion by permitting the State to elicit testimony regarding prior bad acts committed by the defendant; (3) the defendant's due process right to access evidence was not violated where she abandoned her request to interview the victims; and (4) the defendant was not denied effective assistance of counsel.

¶ 2 Following a jury trial, the defendant, Goldine Williams, was convicted of two counts of aggravated battery of a child (720 ILCS 5/12-3.05(b)(2) (West 2012)), and sentenced to concurrent terms of five years' imprisonment. On appeal, she argues that: (1) the evidence was

insufficient to convict her beyond a reasonable doubt; (2) the trial court erred by admitting evidence of other crimes; (3) her due process right to access evidence was violated where defense counsel was denied the opportunity to interview the victims; and (4) defense counsel was ineffective for failing to preserve her second and third claims of error for appellate review. For the reasons that follow, we affirm.

¶ 3 In December 2012, the defendant was charged with, *inter alia*, four counts of aggravated battery of a child. 720 ILCS 5/12-3.05(b)(1), (b)(2) (West 2012). The charges alleged that, beginning August 1, 2011, and continuing through October 18, 2012, the defendant knowingly caused bodily harm or permanent disability to J.W. and D.W. by striking them on or about their bodies while they were under the age of 13 years.

¶ 4 Prior to trial, defense counsel informed the trial court that he wanted to interview J.W. and D.W., but was not able to contact them because they were in the custody of the Department of Children and Family Services (DCFS). In response, the trial court instructed the State to "facilitate the request" by contacting DCFS, locate J.W.'s and D.W.'s caseworker or guardian, and determine whether the children wanted to "talk to [defense counsel]." The court continued the matter and stated that if the children wish to speak with defense counsel, "then we will set it up."

¶ 5 At a status hearing held on November 25, 2013, an assistant Attorney General appeared on behalf of the Guardianship Administrator for the State of Illinois and informed the trial court that he was "willing to cooperate" with defense counsel's request to interview J.W. and D.W. He noted, however, that both children had been diagnosed with post-traumatic stress disorder (PTSD) and "need to be in a therapeutic setting before they can discuss anything with anyone." The assistant Attorney General also expressed uncertainty as to whether J.W. and D.W. would be

available to testify at trial. The court reiterated that "the defendant has the right to interview witnesses if they wish to be interviewed" and that the "threshold question" is whether J.W. and D.W. would even be available as witnesses at trial. After several continuances, the parties appeared at a status hearing on March 13, 2014, and advised the court that the assistant Attorney General issued a report stating that J.W. and D.W. are not available as witnesses because testifying at trial "would be detrimental to their health."

¶ 6 Thereafter, the State filed a motion indicating that it intended to introduce statements made by J.W. through the testimony of two witnesses: (1) Jennifer O'Connor (J.W.'s first-grade teacher), and (2) Inodu Spiff (the school nurse). The State also requested a hearing to determine whether J.W.'s hearsay statements were non-testimonial and sufficiently reliable to be admitted under section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2014)). Following a hearing, the trial court granted the State's section 115-10 motion, finding that the statements J.W. made to O'Connor and Spiff were non-testimonial in nature and that the circumstances of those statements provided sufficient safeguards of reliability. Following the court's ruling, defense counsel did not raise the issue of interviewing J.W. or D.W. and the matter proceeded to a jury trial.

¶ 7 At trial, Tosheba Drake testified that she lived in an apartment building with her sister, Pamela Clemons, and that, in 2011, the defendant moved into the apartment across the hall from them. Drake clarified that the defendant's two adult daughters and two grandchildren, J.W. (age five) and D.W. (age three), also lived with the defendant. Drake stated that she met the defendant shortly after the defendant moved in and they became "close." She also became "close" with J.W., who attended the same elementary school as her daughter and whom she gave rides to and from school. During her testimony, Drake recalled several instances in which she

observed the defendant physically abuse J.W. In the fall of 2011, for example, Drake and Clemons were at the defendant's apartment when the defendant told J.W. to put his hands on his chest and then punched him "real hard" three or four times, making him cry. On other occasions, Drake observed the defendant "whip" J.W. three to four times just below his buttocks with a wooden slat; strike him five or six times on his legs with a plastic sword; "whack" him several times with a spatula across his arms; and "whack" him with a belt on his arms and legs. Drake also stated that J.W. and D.W. would come to her apartment asking for food and water and she would feed them despite the defendant's specific instructions to the contrary. She also recalled that, in September or October 2012, she was helping J.W. straighten his clothes and get ready for school when she noticed red marks or "welts" on his legs and scratches on his arms. Drake had a conversation with J.W. about the marks on his arms and legs and, following that conversation, she reported her observations to J.W.'s teacher and school principal.

¶ 8 Clemons testified and corroborated Drake's testimony that they lived across the hall from the defendant and that, from July 2011 through October 2012, she witnessed the defendant become "angry" with J.W. When asked to elaborate, Clemons stated that she heard the defendant say things like, "J.W. get your ass over here, get [your] ass over here now. I'm fittin' to whoop your ass, get over here. *** I'm about to beat your ass." Clemons also testified that she observed the defendant "discipline" J.W. by punching him four or five times in the chest with enough force to make him cry and fall down. She also saw the defendant strike J.W. with a plastic cake spreader, a wooden plank from a banister, and a belt. Clemons also recalled a time when she was in the defendant's bedroom and the defendant made J.W. and D.W. bend over on one foot with their arms stretched out for 20 to 60 minutes. Clemons also explained that J.W. would come to their apartment before school with messy hair, a disheveled shirt, stained pants,

and untied shoes. On one occasion, as Clemons was helping J.W. get ready for school, she noticed scratches on his neck, shoulders, and back.

¶ 9 The State also presented the testimony of O'Connor, J.W.'s first grade teacher. When asked about J.W., O'Connor recalled that he would hoard boxes of cereal and fruit in his desk and, after asking him about the food in his desk, she learned that it was for his younger sister who was not old enough to be in school. O'Connor also recalled a time when she asked the students in her class about their favorite food to eat for dinner and J.W. said, "I don't get dinner," and "if I'm hungry, [the defendant] tells me to eat the cat food."

¶ 10 O'Connor further testified that, on October 18, 2012, she noticed J.W. "walking strangely" and asked him if he was okay. When J.W. replied that he "got it bad by [the defendant]" on the bottom of his feet, O'Connor looked at J.W.'s feet and observed "long welt-like marks" and an "open wound" above his heel. She brought J.W. to the school's nurse where they examined J.W.'s foot, arms and cheek, which revealed old and new scratches and marks. After seeing these injuries, O'Connor called DCFS. O'Connor further testified that J.W. came to school the following day agitated and upset, and informed her that he "got it real bad" on the back of his thigh after having touched a plant. O'Connor observed a mark on the back of J.W.'s thigh. O'Connor testified that J.W. was upset and crying, he confirmed that the defendant had hit him, and he stated that he "did not want to go home" and "didn't want to get beat any more." O'Connor stated that she again called DCFS, who sent someone to the school later that same day. When asked if she discussed J.W.'s plight with anyone outside of school, O'Connor stated that she talked to J.W.'s neighbor, Drake, who seemed worried and expressed concern for his living situation.

¶ 11 Spiff testified that, on October 18, 2012, she was working as a school nurse at Fermi Elementary School when J.W. was brought into her office with complaints of foot pain. She examined J.W.'s foot and observed a blister-like sore on his heel. She also performed a head-to-toe assessment and discovered old and new marks, including bruising on his inner elbows and arms, old scars in his trunk area and arms, scratches to his cheek, and bruising on his neck area. When Spiff asked J.W. about his injuries, he stated that the defendant "threw a toy at his heel" and "grabbed him." Following her examination of J.W., Spiff called a hotline to report "the abuse."

¶ 12 After being examined by the parties and accepted by the trial court as the State's expert witness in the field of emergency medicine, Dr. David Howes testified that he examined both J.W. and D.W. on October 19, 2012. Regarding J.W., Dr. Howes testified that he observed a fresh bruise on his buttock and thigh area; an abrasion on his right ear; five healed scars that were curvilinear as well as straight in the area of his right jaw; two recent scars that were healing on his left forehead; fresh bruises on both of his inner arms at the elbow; five scars arranged throughout his chest and abdomen; and six scars along both of his shoulder blades. Dr. Howes testified that the hospital's social worker obtained a history from J.W., in which he reported having been hit by the defendant with a Halloween toy (a plastic knife) as well as a "stick." Regarding D.W., Dr. Howes testified that his physical examination revealed five scars on both of her shoulder blades, two of which were curved; a fresh bruise over her left collar bone; scars in her abdominal area; a fresh bruise on both of her shins; a bruise on her right thigh; and an older bruise and four small scars on her left thigh. Dr. Howes explained that the curved scars on J.W. and D.W. have "a special significance *** because it's done with specifically a belt or *** a loop of an electrical cord ***." Dr. Howes diagnosed J.W. and D.W. with "nonaccidental

trauma, traumatic injury to a child," and opined that their injuries are "indicative of the children having been abused."

¶ 13 Dr. John Gobby, a supervising clinical psychologist at La Rabida's Children's Hospital, testified as an expert in the field of clinical psychology. He stated that he is a therapist for children who have "experienced trauma and who demonstrate sexualized behaviors" and that J.W. and D.W. were referred for treatment "because of a trauma history for physical abuse, exposure to domestic violence and sexualized behaviors they were demonstrating." During treatment, Dr. Gobby had J.W. work on a book about his life as a therapy tool to construct a "trauma narrative" or "story of what happened to him." Through that tool, Dr. Gobby learned that J.W. was sad while he lived with the defendant and that:

> "while [J.W.] was living with [the defendant], she whooped him, hit him with a stick, a ruler and extension cord. That she would slap him in the face, that she would scratch him on his face, legs and back. And that he had marks on his body and that [the defendant] would bite him on the fingers. That she threw a candle at his head. That she would feed the adults in the house regular food, and [the defendant] would fee[d] him and his sister cat food. And he told me that *** [the defendant] would drown him in the toilet, in the bathtub and punch him the teeth."

J.W. told Dr. Gobby that the candle caused a "big, big, big, bump" on his head and that marks on his body were caused by the defendant. Overall, J.W. characterized the defendant's treatment of him as "mean."

¶ 14 Dr. Gobby testified that J.W. and D.W. were diagnosed with PTSD. He explained that PTSD is a mental illness that develops in the aftermath of traumatic events and he described the "different aspects" and symptoms of the illness. Dr. Gobby opined that the cause of J.W.'s and

D.W.'s PTSD diagnosis was the defendant's treatment of them and that it was not in their best interest to testify at trial. He explained that in trauma treatment, especially at the stage of treatment these children were in, it is destructive to expose them to the source of their trauma. He recounted that, when asked to do a drawing about what happened with her grandmother, D.W. "hid under a deck [*sic*]" and had to have her foster parent come to comfort her. Similarly, when J.W. learned that the defendant was no longer in jail, he reverted to bed wetting and had a recurrence of sexualized behaviors at school. Dr. Gobby testified that J.W. made clear that "he does not wish to see [the defendant] again."

¶ 15 On cross-examination, Dr. Gobby conceded that children do not always tell the truth. He also acknowledged that J.W. and D.W. were removed from the custody of their biological mother in 2008 after D.W. suffered a "linear right frontal skull fracture" and two fractures of the left tibia and fibula. Dr. Gobby was also aware that J.W. and D.W. "had welts and other signs of previous injury" when they were taken away from their mother. Dr. Gobby clarified, however, that J.W. and D.W. had new injuries, which were attributable to the defendant.

¶ 16 Following Dr. Gobby's testimony, the State entered into evidence, *inter alia*, the defendant's birth certificate showing her birthdate to be September 21, 1965, and then rested its case-in-chief.

¶ 17 The defendant did not present any evidence and elected not to testify. During closing argument, the defense argued that the State failed to prove the defendant guilty of the charged offenses beyond a reasonable doubt. Defense counsel attacked the credibility of the State's witnesses and argued that children do not always tell the truth. The defense further claimed that the scars and marks on J.W. and D.W. could have been the result of the physical abuse they suffered in 2008, while living with their mother.

¶ 18 Following closing arguments, the jury deliberated and found the defendant guilty of two counts of aggravated battery of a child (causing bodily harm to J.W. and D.W.), and not guilty of aggravated battery of a child (causing permanent disfigurement to J.W. and D.W.). The defendant filed a posttrial motion challenging, *inter alia*, the sufficiency of the evidence, which the trial court denied. The defendant was subsequently sentenced to concurrent terms of five years' imprisonment and this appeal followed.

¶ 19 On appeal, the defendant first contends that the State failed to prove beyond a reasonable doubt that she committed an aggravated battery against D.W. (She does not challenge her conviction of aggravated battery of a child against J.W.)

¶ 20 When considering a challenge to the sufficiency of the evidence in a criminal case, our function is not to retry the defendant. *People v. Washington*, 2012 IL 107993, ¶ 33. Rather, our inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Id*. This means that we must draw all reasonable inferences from the record in favor of the prosecution. *Id*. We will not reverse a conviction unless " 'the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *Id.* (quoting *People v. Ross*, 229 Ill. 2d 255, 276 (2008)).

¶ 21 In order to prove the defendant guilty of aggravated battery of a child, the State was required to prove that the defendant was at least 18 years of age when, in committing a battery, she knowingly, by any means, "causes bodily harm or disability or disfigurement to any child under the age of 13 years." 720 ILCS 5/12-3.05(b)(2) (West 2012). A battery, in turn, is committed when a person "knowingly without legal justification by any means (1) causes bodily

harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3 (West 2012).

¶ 22 In this case, the defendant does not dispute the age-related elements of the offense or the jury's finding that D.W.'s injuries qualify as "bodily harm." Rather, she argues that the State presented no evidence establishing that she struck or hit D.W. She maintains that the State's evidence, at best, establishes that she forced D.W. to stand in a "stress position," which she contends is insufficient to convict.

¶ 23 Viewing the evidence in the light most favorable to the State, as we must, we find the evidence sufficient to prove the defendant guilty of aggravated battery of D.W. beyond a reasonable doubt. The State's evidence established that the defendant was D.W.'s and J.W.'s primary caretaker and that, beginning August 2011 and continuing through October 18, 2012, the defendant physically abused both children. The defendant's neighbors, Drake and Clemons, provided detailed testimony as to how they observed the defendant punch J.W. in the chest, strike him with a wooden banister, and "whack" him with a toy sword, spatula, and belt. The State also presented the testimony of J.W.'s first grade teacher, school nurse, and clinical psychologist who all testified that J.W. attributed his injuries to the defendant. More importantly, the testimony of Dr. Howes established that, as of October 19, 2012, both J.W. and D.W. had fresh bruises, curvilinear scars on their shoulder blades, and scars on their abdomen and legs. Thus, while it is true, as the defendant contends, that none of the State's witnesses testified that they observed the defendant strike or hit D.W., a reasonable trier of fact could fairly conclude that D.W.'s injuries, which were recent and nearly identical to those sustained by J.W., were also caused by the defendant. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60 (the trier of fact is not required to disregard inferences that flow normally from the evidence, nor to seek all

possible explanations consistent with innocence and elevate them to reasonable doubt); see also *People v. Psichalinos*, 229 Ill. App. 3d 1058 (1992) (physician's testimony circumstantially supported inference that the defendant caused fracture of child's nose where the physician testified that the fracture appeared to be recent). Because we find that the State's evidence was sufficient to establish that the defendant caused bodily harm to D.W., we need not address the question of whether forcing D.W. to stand in a stress position is also sufficient, by itself, to sustain a conviction for aggravated battery of a child.

¶ 24 In a related argument, the defendant's contends that D.W.'s injuries were caused by her biological mother. The injuries caused by D.W.'s mother, however, occurred in 2008 and resulted in a frontal skull fracture and two fractures of the left tibia and fibula. At trial, the State presented overwhelming evidence that D.W. had scars and fresh bruising on her shoulder blades, abdomen, and both legs. The nature and location of D.W.'s recent injuries were separate and distinct from the injuries she sustained in 2008. We further note that defense counsel presented this argument to the jury during closing argument and the jury apparently rejected it as unpersuasive.

¶ 25 In further support of her claim that the evidence was insufficient, the defendant asserts that J.W.'s hearsay statements that the defendant beat him were not reliable and "could reflect the fantasies of a six-year-old child." This argument amounts to nothing more than an invitation for this court to reweigh the evidence and substitute our judgment for that of the trier of fact, something we cannot do. *People v. Bradford*, 2016 IL 118674, ¶ 12 (it is the responsibility of the trier of fact to weigh the evidence, resolve conflicts therein, and draw reasonable inferences from the testimony and evidence presented). We cannot say that the jury was unreasonable in finding J.W.'s hearsay statements regarding the cause of his injuries to be more credible than

defense counsel's explanation that it was a lie or "fantasy."

¶ 26 In sum, viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found that the State proved the defendant guilty of aggravated battery of D.W. beyond a reasonable doubt.

¶ 27 We next address the defendant's argument that the trial court erred when it allowed the State to present evidence of "uncharged crimes and other bad acts" because it "served no other purpose than to establish [her] bad character and her propensity to act in conformity therewith." The defendant admits that she did not raise this issue at trial and did not include it in her posttrial motion. She asks this court to review her forfeited claim under the plain-error doctrine.

¶ 28 The plain-error doctrine is a narrow and limited exception to the general rule of forfeiture. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). Under the plain-error doctrine, the defendant has the burden to show that a clear or obvious error occurred, and either (1) the evidence is so closely balanced that the error, standing alone, threatened to tip the scales against the defendant regardless of the seriousness of the error, or (2) the error was so serious that it affected the trial's fairness and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Before considering whether the plain-error exception applies, we must first determine whether any error occurred. *People v. Glasper*, 234 Ill. 2d 173, 203-04 (2009).

¶ 29 Evidence of other crimes, wrongs, or bad acts is not admissible to prove a criminal defendant's criminal propensity. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Evidence of other crimes, however, is admissible for any other purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Specifically, other-crimes evidence may be admitted to show that the

defendant did not act inadvertently, accidentally, involuntarily, or without knowledge of guilt. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). However, even when such evidence is offered for a permissible purpose and not solely for propensity, such evidence will not be admitted if its prejudicial impact substantially outweighs its probative value. *People v. Pikes*, 2013 IL 115171, ¶ 11. A trial court's decision to admit other-crimes evidence is reviewed for an abuse of discretion. *People v. Peterson*, 2017 IL 120331, ¶ 125.

¶ 30 Here, the defendant first challenges the admissibility of evidence that J.W. and D.W. were being treated for "sexualized behavior." She argues that she was charged with striking and causing bodily harm to J.W. and D.W.; not with sexually abusing them. She asserts, therefore, that the State's evidence regarding "sexualized behavior" is inadmissible as evidence of prior bad acts. We disagree.

¶ 31 At trial, Dr. Gobby testified, *inter alia*, that: (1) he is therapist for children who have "experienced trauma and who demonstrate sexualized behavior"; (2) J.W. and D.W. were referred for treatment "because of a trauma history ***, exposure to domestic violence and sexualized behaviors they were demonstrating"; and (3) J.W. had a recurrence of sexualized behaviors at school and bed wetting when he learned that the defendant was no longer in jail. Contrary to the defendant's assertion on appeal, Dr. Gobby's testimony is not evidence of a prior bad act or other crime committed by the defendant. See *Pikes*, 2013 IL 115171, ¶ 20 (the other-crimes doctrine only applies where the defendant is alleged to have a committed a prior offense); *People v. Morales*, 2012 IL App (1st) 101911, ¶ 23 (the proponent of other-crimes evidence must show that a crime took place and that the defendant committed it or participated in its commission). Rather, Dr. Gobby was merely testifying about the psychological symptoms that J.W. suffered as a result of being *physically abused*. While we recognize that Dr. Gobby's

testimony regarding J.W.'s sexualized behavior may suggest that he was sexually abused (an uncharged offense), it does not, standing alone, require it to be analyzed under other-crimes principles. Rather, we conclude that the evidence of J.W.'s sexualized behavior should be analyzed under ordinary principles of relevance. See *Pikes*, 2013 IL 115171, ¶ 20 (judging the challenged evidence under ordinary principles of relevance where the other-crimes doctrine did not apply).

¶ 32 Evidence is generally admissible if it is relevant. Ill. R. Evid. 402 (eff. Jan. 1, 2011). "Relevant evidence" is defined as 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). Even relevant evidence, however, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ill. R. Evid. 403 (eff. Jan. 1, 2011). Evidence has been defined as being unduly or unfairly prejudicial when it has "an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror." *People v. Edgeston*, 157 Ill. 2d 201, 237 (1993).

¶ 33 In support of her argument that the probative value of Dr. Gobby's testimony was substantially outweighed by its prejudicial effect, the defendant argues that she was charged with striking and causing bodily harm to J.W. and D.W, and that she was never "accused of neglect or sexual abuse." We are not persuaded. Dr. Gobby's testimony was introduced to establish, *inter alia*, the nature and extent of the psychological injuries inflicted upon J.W. and D.W. that resulted from the physical abuse. Dr. Gobby testified that both children were diagnosed with PTSD and he described the various symptoms that J.W. and D.W. exhibited, including "sexualized behavior." This evidence was therefore relevant to the question of whether J.W. and

D.W. suffered "great bodily harm or permanent disability or disfigurement." 720 ILCS 5/12-3.05(b)(1) (West 2012). Dr. Gobby's testimony regarding J.W.'s and D.W.'s "sexualized behavior" was brief and he did not elaborate or dwell on it. We conclude, therefore, that Dr. Gobby's testimony that J.W. and D.W. were being treated for exhibiting "sexualized behavior" is not so inflammatory or prejudicial that it outweighs its probative value.

¶ 34 The defendant also contends that the trial court erred in allowing the State to present evidence that she fed J.W. and D.W. cat food and drowned J.W. in the toilet. She claims that this evidence of prior bad acts "served no other purpose than to establish [her] bad character and her propensity to act in conformity therewith." Again, we disagree.

¶ 35 Our supreme court has recognized that, in cases involving child abuse, the State frequently introduces evidence of prior abuse to show a defendant's intent or absence of mistake. In *People v. Burgess*, 176 Ill. 2d 289, 308 (1997), for instance, the supreme court concluded that the trial court did not abuse its discretion in admitting evidence of prior acts of abuse committed by the defendant against the three-year-old victim. Although the defendant in *Burgess* argued that the witnesses did not actually see the abuse take place, one witness observed the defendant take the victim into a room with a dog leash, heard striking noises and the victim's cries, and saw welts on the victim after the incident. *Id.* at 307. Other witnesses did, in fact, observe the defendant spanking the victim, pushing the victim into a corner and kicking the victim. *Id.* at 307-08. Another witness, who lived with the defendant for two months, testified that the defendant would take the victim into another room four or five times a day for spankings and the witness would hear the victim crying. *Id.* at 308. Our supreme court determined that the State "appropriately sought to present evidence of prior bad acts of abuse committed by the defendant against the victim, to show the presence of intent and the absence of accident." *Id.* at 308.

Similarly, in *People v. Lucas*, 132 Ill. 2d 399, 426-27 (1989), witnesses testified that the defendant was a poor father, who drank excessively, failed to comfort his seven-month-old son when he was crying, and complained that his wife paid too much attention to the baby. The supreme court held that this evidence was admissible to show motive and absence of accident where the defendant killed his son by hitting his head against the side of his crib. *Id.*

¶ 36 In the case *sub judice*, we cannot say that the trial court abused its discretion in allowing the State to introduce evidence of the defendant's prior acts of abuse. The defense theory at trial was that the State's witnesses were not credible and that J.W.'s and D.W.'s biological mother caused their injuries. To counter the defense theory, the State appropriately sought to present evidence of prior acts of abuse committed by the defendant against J.W. and D.W., to show the presence of intent and absence of accident. Feeding J.W. and D.W. cat food and "drowning" J.W. in the toilet shared, at the very least, general areas of similarity. The acts were committed by the defendant, aimed at J.W. and D.W., involved acts of abuse, took place in the defendant's apartment, and occurred during the same time period as the other acts of physical abuse. Evidence that the defendant was involved in prior incidents in which the victims suffered similar injuries is admissible to show the presence of intent or knowledge and the absence of accident. See *id*. at 429 (where evidence of the defendant's previous bad acts is offered to prove intent or absence of an innocent mental state, general similarity between the acts will suffice). The State's evidence established that the defendant's conduct was not inadvertent or accidental, but rather that she possessed the requisite mental state for aggravated battery of a child.

¶ 37 Nevertheless, the defendant argues that the State failed to show that she committed the bad acts. She asserts that the "unconfronted" hearsay statements of J.W. are not enough to establish that she fed the children cat food or drowned J.W. in the toilet. We are not persuaded

by this argument.

¶ 38 Before the State may introduce evidence of prior bad acts, it must first show that the defendant committed those acts. *People v. Thingvold*, 145 Ill. 2d 441, 455 (1991). Although the State need not prove beyond a reasonable doubt that the defendant committed the other acts, it must present more than a mere suspicion. *Id*. at 456.

¶ 39 Here, there was sufficient circumstantial evidence to show that the defendant engaged in these acts. Drake and Clemons both testified that J.W. and D.W. would come to their apartment asking for food and water and, despite the defendant's instructions to the contrary, they fed them anyway. O'Connor similarly testified that she noticed J.W. hoarding food in his desk, which he claimed was for his sister. J.W. also told O'Connor and Dr. Gobby that he does not eat dinner with the adults and, when he is hungry, he is told to eat the cat food. The record also reveals that J.W. reported a consistent history of abuse to O'Connor, Spiff, Dr. Gobby, and Dr. Howes. Thus, although this may not be proof beyond a reasonable doubt that the defendant fed J.W. and D.W. cat food and "drowned" J.W. in the toilet, it rises above mere suspicion.

¶ 40 Next, the defendant argues that the probative value of the prior bad acts was substantially outweighed by its prejudicial effect. She cites *People v. Nunley*, 271 Ill. App. 3d 427 (1995), in support of her argument that the probative value of the evidence of her prior bad acts is substantially outweighed by its possible prejudice.

¶ 41 In *Nunley*, the defendant was on trial for shooting a victim to death during a robbery, which occurred on March 6, 1988. During the trial, the State elicited testimony from four witnesses that, on July 11, 1989, the defendant tried to " 'cut [his mother's] head off' " because he thought she was possessed by Satan and that he stabbed the family dog when it tried to intervene "because it was also possessed by Satan." *Id*. at 429-31. The State argued that the

stabbing testimony was necessary to explain why the defendant spontaneously confessed to a robbery and murder committed 16 months earlier. *Id*. at 432. On appeal, this court reversed and remanded the matter for a new trial, holding that although some evidence concerning the aggravated battery of the defendant's mother was admissible to establish the voluntariness of the defendant's confession to murder, the State offered excessive detail in a repetitive manner, subjecting the defendant to a mini-trial over the attack on his mother and the killing of her dog. *Id*.

¶ 42 We find *Nunley* to be distinguishable and of no aid to the defendant's position. The two attacks that occurred in *Nunley* were completely unrelated to each other. Moreover, the defendant provides no example of such a "mini-trial" in this case. Indeed, the testimony regarding cat food, being "drowned" in the toilet, and sexualized behavior was targeted and brief. It accounted for a mere 3 pages of the trial record, whereas the testimony of witnesses relating to the events of physical abuse accounted for approximately 150 pages of the trial record. The defendant's assertion that the admission of other-crimes evidence became the focus of the trial, instead of whether the defendant was responsible for the aggravated battery of J.W. and D.W., is not supported by the record. See *People v. Null*, 2013 IL App (2d) 110189, ¶¶ 44-45 (distinguishing *Nunley* where the other-crimes evidence was "targeted and brief" and did not amount to a "mini-trial" on the other offenses).

¶ 43 As discussed above, the defendant's prior bad acts toward J.W. and D.W., committed during the relevant time period, were relevant to show the defendant's intent and inclination to harm J.W. and D.W. See *People v. Chapman*, 2012 IL 111896, ¶ 33 (the defendant's prior domestic battery conviction was relevant to show his intent and inclination to harm the victim during the course of the instant crime). As such, the evidence supported the State's theory that

the defendant had a proclivity to harm J.W. and D.W. The proffered other-crimes evidence in this case is not unfairly prejudicial as it does not tend to allow a jury to decide the defendant's guilt based on emotion, hatred, contempt, horror or any ground other than the proof offered relating to the aggravated battery of J.W. and D.W. As such, the trial court did not abuse its discretion in determining that the defendant's prior acts of abuse were more probative than unduly prejudicial and it did not err in admitting the evidence. Accordingly, the defendant has failed to establish that any error occurred and the plain-error doctrine does not provide a basis for excusing her procedural default. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 44 The defendant alternatively argues that, if we hold that review is improper under the plain-error doctrine, we nevertheless should find that defense counsel was ineffective for failing to object at trial and include the issue in a posttrial motion.

¶ 45 To prove ineffective assistance of counsel, the defendant bears the burden of showing that 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 result of the proceeding would have been different." *People v. Patterson*, 192 Ill. 2d 93, 107 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). To demonstrate sufficient prejudice under the second prong of the *Strickland* standard, the defendant must show that there is a reasonable probability that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 46 Here, the defendant's ineffective-assistance-of-counsel claim is based upon her trial counsel's failure to object to the other-crimes evidence at trial and include it in a posttrial motion. However, as we just elaborated in detail above, the State's evidence of prior bad acts was introduced for a permissible purpose and its probative value was not substantially

outweighed by its prejudicial effect. The defendant's failure to show that an error occurred defeats her ineffective-assistance-of-counsel claim. See *People v. Rutledge*, 409 Ill. App. 3d 22, 25 (2011); See *People v. Peeples*, 205 Ill. 2d 480, 532 (2002) (where underlying issue has no merit, a defendant suffers no prejudice due to trial counsel's failure to preserve it for appeal).

¶ 47 The defendant next contends that her due process rights were violated because she did not have "access [to] evidence against her." More specifically, she maintains that her trial attorney was denied the opportunity to interview J.W. and D.W. prior to trial. She acknowledges that this issue is forfeited for review, but she asks this court to review her claim under the plain-error doctrine. Our first step in deciding whether the plain-error doctrine applies is to determine whether an error occurred. *People v. Glasper*, 234 Ill. 2d 173, 203-04 (2009).

¶ 48 The due-process clause of the fourteenth amendment (U.S. Const., amend. XIV) and the confrontation clauses of the federal and Illinois constitutions (U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8) guarantee criminal defendants "a meaningful opportunity to present a complete defense." (Internal quotation marks omitted.) *People v. Santos*, 211 Ill. 2d 395, 412 (2004). It is well settled in this State that criminal defendants are entitled to a list of the prosecution's witnesses and she may contact the witnesses in preparation of her case. *People v. Steele*, 124 Ill. App. 3d 761, 768 (1984). Further, under Illinois Supreme Court Rule 415(a) (eff. Oct. 1, 1971), the State is prohibited from advising persons having relevant information to refrain from discussing the case with defense counsel or from otherwise depriving the defense of a fair opportunity for an interview. However, our supreme court has held that Rule 415(a) "does not abrogate the general proposition that a prosecution witness need not grant an interview to defense counsel unless he chooses to do so." *People v. Peter*, 55 Ill. 2d 443, 451 (1973). Thus, in order to comply with Rule 415(a), a witness cannot be advised not to talk to opposing counsel.

However, the witness "can be informed that it is his decision as to whether he wants to speak to opposing counsel and that he is under no legal obligation to either discuss the case or to refrain from discussing it with opposing counsel or his agents." *People v. Sassu*, 151 Ill. App. 3d 199, 203 (1986).

¶ 49 In this case, there is nothing in the record demonstrating that the State advised J.W. and D.W. not to talk to defense counsel. To the contrary, the record reveals that the trial court accommodated defense counsel's request to interview J.W. and D.W. by instructing the State to contact DCFS and determine whether the children wished to be interviewed. The record shows that the State complied with the court's instructions and "facilitated" the defendant's request for an interview by subpoenaing an assistant Attorney General who served as J.W. and D.W.'s guardian. The assistant Attorney General appeared in court and stated that he was "willing to cooperate," but that the children would "need to be in a therapeutic setting before they discuss anything with anyone." Although the assistant Attorney General subsequently issued a report stating that J.W. and D.W. would not be available as witnesses, the record shows that defense counsel never asked for a continuance or leave of court to interview J.W. and D.W. See *People v. Nunn*, 130 Ill. App. 2d 86, 88 (1970) (the defendant was not denied a fair trial where the record disclosed that no attempt was made by defense counsel to interview the witness, either before trial or by requesting leave of court to accomplish that task). By failing to follow through on his request to interview J.W. and D.W., defense counsel essentially abandoned his request. Given the defendant's inability to show that the trial court or the State told J.W. or D.W. to not speak with defense counsel or otherwise prevented defense counsel from interviewing J.W. and D.W., the defendant has failed to establish a violation of her constitutional rights.

¶ 50 Alternatively, the defendant also asserts that her defense counsel's performance was

deficient because he failed to interview J.W. and D.W. This claim is baseless. This court has repeatedly explained that the failure to perform a futile act does not constitute ineffective assistance. See *People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000). Because witnesses for the State "need not grant an interview" to the defense (*Peter*, 55 Ill. 2d at 451), we do not believe that defense counsel performed deficiently by failing to request an interview with J.W. and D.W., which J.W. and D.W. had no obligation to grant. The defendant's argument to the contrary is entirely speculative, as it rests upon the twin assumptions that, had defense counsel followed through with his request for an interview, J.W. and D.W. would have (1) agreed to be interviewed and (2) provided a statement corroborating the defendant's version of the facts. Therefore, the defendant cannot establish that her attorney's failure to request an interview with J.W. and D.W. fell below an objective standard of reasonableness, and her ineffective assistance of counsel claim fails. See *People v. Jones*, 2017 IL App (1st) 143766, ¶ 44.

¶ 51 For the reasons stated herein, we affirm the defendant's convictions for aggravated battery of a child.

¶ 52 Affirmed.