2018 IL App (4th) 170027-U

NO. 4-17-0027

FILED
October 24, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RUSTY E. WILLING, Defendant-Appellant.	)	Appeal from the Circuit Court of Adams County No. 16CF490 Honorable Scott J. Butler, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Harris and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed defendant's conviction and remanded for a new trial because the trial court improperly permitted hearsay testimony concerning prior allegations of sexual misconduct against defendant.

¶ 2 In November 2016, a jury convicted defendant, Rusty E. Willing, of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40 (West 2016)). In January 2017, the trial court sentenced defendant to 30 years in prison.

¶ 3 Defendant appeals, arguing the trial court erred by (1) denying his motions for a directed verdict and judgment notwithstanding the verdict because the State failed to present sufficient evidence, (2) admitting the minor victim's recorded interview into evidence pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2016)), (3) denying defendant's motion for a mistrial when a State's witness mentioned defendant had been in prison, and (4) admitting hearsay testimony that defendant "had been in

trouble previously for molesting another little girl." We agree with defendant's third and fourth arguments but conclude there was sufficient evidence to support a conviction. Therefore, we reverse defendant's conviction and remand for a new trial.

¶ 4 I. BACKGROUND

¶ 5 A. The Charges

¶ 6 In August 2016, the State charged defendant with predatory criminal sexual assault of a child. 720 ILCS 5/11-1.40 (West 2016). The State alleged that on or about May 15, 2015, defendant engaged in sexual conduct with B.K.L., a minor under 13 years of age, for the purpose of sexual gratification.

¶ 7 B. The State's Motion *in Limine* Pursuant to Section 115-10

¶ 8 In September 2016, the State filed a motion *in limine* seeking to admit two hearsay statements of B.K.L. pursuant to section 115-10 of the Code. 725 ILCS 5/115-10 (West 2016). The first was a statement B.K.L. made to her mother, Stephanie C., in July 2016. The second was a video recording of B.K.L.'s interview at the Adam's County Child Advocacy Center conducted by Brooke Baldwin.

¶ 9 The trial court conducted a hearing spanning two days in September and October 2016 on the State's September 2016 motion *in limine.* At the hearing, the State presented the following evidence.

¶ 10 1. *Stephanie C.*

¶ 11 Stephanie C. testified she was B.K.L.'s mother and defendant's ex-girlfriend. Stephanie had dated defendant off-and-on for two and a half years, breaking up most recently in June 2016. Between February and May 2015, Stephanie and B.K.L. (who was then eight years old) lived with defendant at his home. Defendant and Stephanie occupied the first floor

bedroom, while B.K.L. lived in an upstairs bedroom.

¶ 12 Stephanie testified that on July 12, 2016, she asked B.K.L. if "anybody ever touched you down there in any way?" B.K.L. responded that one night she had woken up and "he" was standing above her with his hand down her pants and he said he was looking for the TV remote. Stephanie asked who B.K.L. was talking about, to which B.K.L. replied, "[Defendant]." Stephanie could not bring herself to ask any more questions and instead decided to take B.K.L. to the police station the following morning.

¶ 13 On July 13, 2016, Stephanie went to the police station and gave her statement to the police. On July 15, 2016, Stephanie took B.K.L. to the Child Advocacy Center so she could be interviewed. Stephanie testified she did not speak with B.K.L. about the incident between July 12 and July 15. Stephanie stated she believed the incident occurred in May 2015, the night before defendant "kicked [Stephanie and B.K.L.] out."

¶ 14 On cross-examination, Stephanie stated she told the police the incident occurred in June 2015, which is when they were kicked out. Stephanie explained that defendant would break up with her about a week before her father would get out of prison, stating this occurred in both 2015 and 2016. Specifically, Stephanie stated her father was released from prison around May 2015 (the first time she broke up with defendant), subsequently went back to prison, and was released again in May or June 2016 (the second time she broke up with defendant). Due to this perceived pattern, Stephanie asked her father, Ricky M., if he knew anything about defendant that she should know. Stephanie testified that Ricky told her "[t]wo things that when [defendant]—occurred when [defendant] was a juvenile." (We note the record demonstrates that the court was previously informed that defendant had a juvenile conviction for sexual abuse.) Two days after learning this information, Stephanie asked B.K.L. if anything had ever happened

to her. Stephanie testified this was the only reason she asked B.K.L. if anyone had touched her inappropriately, and she did not tell B.K.L. that defendant had done something similar previously.

¶ 15 Defense counsel then sought to impeach Stephanie with social media posts and text messages she sent to defendant following their June 2016 breakup. Stephanie claimed she did not take the breakup "very hard" but admitted she had posted on her Facebook page that defendant was "an opportunistic piece of shit" and his new girlfriend was "nothing but a whore, and that's obviously what he wants." Stephanie further admitted she had texted defendant, "[W]ow, you truly did leave me for another girl," and "you don't fuck with people's heart[s]. I'd never have done to you what [you've] done to me in a million years." Defense counsel continued to confront Stephanie with her posts and texts, demonstrating a motive for bias against defendant. (Other social media and text message statements she made included "I hate you" and references to karma "getting" defendant.) Eventually, Stephanie became upset and argumentative during her cross-examination.

¶ 16 2. *Brooke Baldwin*

¶ 17 Brooke Baldwin was the director of forensic interviewing at Advocacy Network for Children. On July 15, 2016, Baldwin interviewed B.K.L. at the Child Advocacy Center in Quincy. The State then played Baldwin's interview of B.K.L. In the interview, B.K.L. explains that defendant "tried to touch [her] right down [t]here, while [she] was sleeping." B.K.L. stated the incident only occurred one time and "[defendant] didn't succeed." B.K.L. told Baldwin that defendant's hand was down her pants and her underwear and that he claimed he was looking for the remote. B.K.L. said she had her own room with a TV but the TV was off and it did not have a remote. B.K.L. explained the incident occurred about a month before they moved out, during

the school year when she was in the third grade.

¶ 18 Baldwin asked B.K.L. if she ever told anyone. B.K.L. responded that she told her mom because her mom asked if someone ever did something bad to B.K.L. B.K.L. stated she told her mother defendant tried to put his hand down her pants, to which her mother asked, "Did he succeed?" B.K.L. answered her mother, "No." B.K.L. explained to Baldwin that her mother did not believe her at first but did believe her once she had learned something about defendant. B.K.L. did not know what this something was.

¶ 19 Baldwin asked B.K.L. what defendant's hand was doing and B.K.L. responded his hand was spread out. B.K.L. told Baldwin she calls her vagina a "monkey" and circled the corresponding area on an anatomically correct drawing. The following exchange then occurred.

"BALDWIN: And this part you circled, that's what his hand was touching when you woke up?

B.K.L.: Yes.

BALDWIN: Okay, was it touching the outside of your monkey or the inside of it or something else?

B.K.L.: It was touching the outside, but when I woke up the finger was like this. (Demonstrating)

BALDWIN: His [index] finger was bent [down] like that? Okay, and like where was his finger when it was bent like that?

B.K.L.: It was still on the outside.

BALDWIN: Okay, did he ever put his fingers inside of your monkey?

B.K.L.: No.

BALDWIN: Did he ever touch you anywhere else on your body?

B.K.L.: No.

In the remainder of the interview, B.K.L. confirmed nothing else ever happened between her and defendant. She also stated she was unaware of anything happening to defendant's daughters or anyone else.

¶ 20 On cross-examination, Baldwin admitted the best method for interviewing children is to ask open-ended questions and allow the children to explain things in their own words. She agreed leading questions should be avoided because they are less reliable and suggest an answer. Baldwin also conceded B.K.L.'s use of the term "succeed" was odd for a child her age and believed this terminology came from B.K.L's mother.

¶ 21 After hearing argument from the parties, the trial court granted the State's motion *in limine*. The court concluded the State had demonstrated that B.K.L's statement to her mother and the recorded interview were reliable and therefore admissible pursuant to section 115-10. The court rejected defendant's argument that B.K.L.'s interview statements were the product of coaching.

¶ 22 C. The Motions *in Limine* Relating to Prior Convictions

¶ 23 In September 2016, defendant filed a motion *in limine* seeking to exclude evidence related to a 2010 aggravated battery conviction. Defendant argued the conviction was remote in time and dissimilar in substance, thus making its probative value substantially outweighed by its prejudicial effect.

¶ 24 In October 2016, the State filed a motion *in limine* pursuant to section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2016)), seeking to admit as substantive evidence the uncharged conduct behind the 2011 aggravated battery conviction, as well as a 1994 juvenile conviction for sexual abuse. The State argued the uncharged conduct relating to the 2011

conviction was admissible as propensity evidence because defendant was charged with touching the breasts of a 16 year old. The 1994 juvenile conviction related to defendant's committing an act of sexual penetration against a minor relative.

¶ 25 The trial court granted the State's motion in part. The court concluded no basis existed to admit the juvenile conviction but determined the uncharged conduct in the 2011 aggravated battery case was admissible pursuant to section 115-7.3. Nonetheless, the court limited the evidence the State could present by barring testimony that was dissimilar to the charged offense. Because the court granted the State's motion *in limine*, it denied defendant's motion to bar the 2011 conviction.

¶ 26 D. The Motion *in Limine* Regarding Prior Misconduct

¶ 27 In November 2016, defendant filed a motion *in limine* to prevent the State from introducing evidence that Stephanie had heard from her father that defendant had sexually abused a minor when defendant was a juvenile. Later that month, the trial court conducted a hearing on defendant's motion, at which he argued the statements were hearsay and could only be offered for a prejudicial purpose. Defendant contended the court had barred the presentation of any evidence relating to the 1994 conviction and any attempt to discuss the substance of the conversation between Stephanie and her father would be an end run around the court's prior ruling. Defendant asserted the State could still present its case without this testimony and no limiting instruction could cure the undue prejudice the testimony would have if offered at trial.

¶ 28 The State argued the testimony was necessary to rebut defendant's allegation that Stephanie told her daughter to accuse defendant. Because throughout the pretrial proceedings defendant consistently argued and solicited testimony to demonstrate Stephanie's bias and motive to generate the allegation of sexual abuse, the State claimed it was "critical to be able to

present to the jury an accurate history or an accurate accounting of why on this particular occasion Stephanie C[.] decided to ask [B.K.L.] questions about whether anyone had ever touched her there." The State agreed a limiting instruction should be given but asserted the testimony was necessary to explain Stephanie's actions and present "an accurate picture to the jury."

¶ 29 The trial court agreed with the State and denied defendant's motion *in limine*. The court explained it understood the prejudicial nature of the testimony but believed a limiting instruction would be sufficient. The court recognized "the value of that testimony would be to show how the defendant acted in conformity with that" but, "based on the anticipated defense or theory of the case," the testimony would be probative to determine the truthfulness of Stephanie's actions and prevent the jury from being "led astray."

¶ 30 E. The Trial

¶ 31 In November 2016, defendant's jury trial was conducted.

¶ 32 1. *Defendant's Motion for a Mistrial*

¶ 33 The State called Stephanie as its first witness. The record shows that a scant four minutes into her testimony, Stephanie indicated she started dating defendant "right after he got out of prison." Defendant objected, the trial court immediately sustained the objection, and defendant requested to be heard in chambers.

¶ 34 In chambers, defendant moved for a mistrial, arguing the testimony was highly prejudicial and "tainted" the jury "within the first two minutes of testimony." The State responded that it was shocked by the testimony because it was following the same format it used at the pretrial hearing. Nonetheless, the State contended a limiting instruction would be sufficient to correct the error.

¶ 35 The trial court denied the motion for a mistrial, stating, "One thing that occurs to me is that if the defendant does testify, then certainly his prior felony conviction would be made known to the jury, which would take much, if not all[,] of the sting out of this. And I understand he may not testify." The court proposed a limiting instruction and asked defendant if he would prefer the court inform the jury why defendant was in prison or simply instruct them to disregard the statement. Defendant, subject to his objection, asked the court to instruct the jury to totally disregard the statement.

¶ 36 The court instructed the jury as follows:

> "I want to tell you folks on the jury that [Stephanie] just testified that she started a relationship with the defendant, I believe she said words to the effect, when he got out of prison. When she said that, I didn't know, and don't care to know, whether the defendant was in prison or not. It's irrelevant to this case. It has nothing to do with the facts in this case. I would ask that you disregard that statement. It shouldn't be used by you in any form whatsoever. Just forget you heard it. Put it out of your mind. I'm capable of doing that, and I'm asking that you do that also, okay?"

¶ 37 2. *Stephanie's Testimony*

¶ 38 Stephanie testified in large part consistently with her prior testimony at the hearing on the State's motion for the admissibility of B.K.L.'s statements under section 115-10 of the Code. Regarding her conversation with her father, Stephanie testified Ricky told her "[defendant] had been in trouble previously for molesting another little girl." (We note that this is the first time this statement was testified to; however, it covered generally the same conduct that was the subject of defendant's November 2016 motion *in limine*.) Stephanie stated she

believed the incident with B.K.L. occurred the day before they were kicked out because she remembered she woke up around 3 a.m. and saw defendant coming down the stairs. The State asked if there was anything that happened the next day to give her a specific reason to remember that occasion. Stephanie answered, "He went to court." The State again asked Stephanie if the next day was significant, and Stephanie indicated it was the day they got kicked out.

¶ 39 Defendant's cross-examination of Stephanie pointed out inconsistencies between Stephanie's trial testimony and her prior testimony at the section 115-10 hearing. When confronted with her prior testimony, Stephanie asserted that the transcript was incorrect and denied ever making the inconsistent statements. Defendant and the State later stipulated that the prior transcript was accurate.

¶ 40 3. *B.K.L.'s Testimony*

¶ 41 On direct examination, B.K.L. (who was then nine years old) testified that defendant had tried to touch her vagina. B.K.L. stated she was asleep when defendant tried to reach under her pants; defendant told her he was looking for the remote, but her TV did not have a remote. When she woke up, defendant's hand was "[r]ight above the center of [her vagina]."

¶ 42 On cross-examination, B.K.L. denied that her mom asked her if defendant touched her, stating Stephanie asked "if anyone touche[d] me." B.K.L. stated she talked to her mom about it two times that she remembered, and both times she told her mom the TV in her room was on when the incident occurred. B.K.L. also stated her mom did not believe her at first but when B.K.L. told her again, Stephanie did believe her because "she [had] found out some things." B.K.L. testified defendant did not get his hand down her pants and did not touch her vagina.

¶ 43 On redirect, B.K.L. stated that she remembered being interviewed by Baldwin and

that she told Baldwin the truth. B.K.L. agreed she talked to her mother twice "fairly close together," and after Stephanie "found out some things," she believed B.K.L.

¶ 44 4. *Baldwin's Testimony*

¶ 45 Baldwin testified consistently with her pretrial testimony. During her direct examination, the State played the recording of B.K.L.'s interview. On cross-examination, defendant highlighted the danger of leading questions and B.K.L.'s unusual use of the term "succeed."

¶ 46 5. *Defendant's Motion for a Directed Verdict*

¶ 47 The State then rested, and defendant moved for a directed verdict. Defendant argued the State had failed to prove all the elements of its case beyond a reasonable doubt in particular because B.K.L. testified in court that defendant did not touch her. The State responded that B.K.L. stated defendant touched her in the recorded interview and, because it was admitted as substantive evidence, that statement was sufficient. The court denied defendant's motion.

¶ 48 6. *Defendant's Case in Chief*

¶ 49 Defendant first called S.L., defendant's niece. S.L. testified she was 13 years old and then lived in Quincy with her father. In 2015, S.L.'s father, Anthony L., lived with defendant in an upstairs bedroom. In May 2015, S.L. lived mostly with her mother but spent weekends and many evenings after school with her father in defendant's house. S.L. described the layout of the house and stated that B.K.L. did not have a TV in her room; it was in defendant's daughters' room.

¶ 50 Anthony L. testified he was defendant's younger brother and S.L.'s father. Anthony lived with defendant in 2015, starting in late February. Anthony stated he moved in with defendant a month or two before Stephanie and B.K.L. and they moved out a month or two

before Anthony got custody of S.L. in July or August 2015. Anthony confirmed the layout of the house and that one would have to walk past his bedroom to reach B.K.L.'s room.

¶ 51 7. *Defendant's Testimony*

¶ 52 Defendant testified he had two daughters, ages seven and eight, who lived with him every other weekend and for a few weeks in the summer. Defendant stated their mother lived in Decatur, where he had spent 14 years before moving to Quincy. He moved into the residence in question in an effort to be allowed more time with his children.

¶ 53 Defendant began seeing Stephanie not long after moving into the house, around late December 2014. In February 2015, defendant's brother moved in, followed shortly thereafter by Stephanie and B.K.L. Defendant and Stephanie occupied the main floor bedroom, while Anthony, B.K.L., and defendant's daughters stayed in the three upstairs bedrooms.

¶ 54 Defendant testified that he put a TV in B.K.L.'s room in March or April 2015 but removed it a few weeks later after she had scratched a heart on the screen. Defendant did not babysit B.K.L.; other people watched her while Stephanie worked. Defendant denied touching B.K.L., being in her room, or trying to spend time alone with her.

¶ 55 Defendant testified that in May 2015, he was not getting along with Stephanie. He indicated to her it was not working out and she should think about making other arrangements. Defendant maintained he did not kick her out but instead told her to take the time she needed to find a new place and move her things. However, towards the end of 2015, defendant and Stephanie became romantic again and eventually started dating. In the spring of 2016, defendant moved to a new house, and Stephanie indicated she wanted to move in with him. Defendant did not want Stephanie to move in, and in May 2016, he ended their relationship.

¶ 56 Shortly after breaking up with Stephanie, defendant began dating another woman, and Stephanie became very upset. The two had repeated arguments, and Stephanie sent him text messages indicating she hated him, karma was going to get him, and her displeasure that defendant was seeing someone else.

¶ 57 On cross-examination, defendant denied coming down the stairs at 3 a.m. and talking to Stephanie. Defendant admitted he would have no reason to be upstairs at night unless his children were home. Defendant stated he was on good terms with B.K.L. when she and Stephanie moved out.

¶ 58 8. *The State's Rebuttal and Jury Verdict*

¶ 59 On rebuttal, the State offered certified copies of defendant's 2011 felony conviction for aggravated battery and defendant's 2012 felony conviction for unlawful possession of a converted vehicle. The trial court informed the jury of these convictions without mentioning the sentences imposed on defendant or whether he ever received a prison sentence. At the close of evidence, defendant renewed his motion for a directed verdict, which the trial court denied.

¶ 60 The jury found defendant guilty of predatory criminal sexual assault of a child, and the trial court later sentenced him to 30 years in prison.

¶ 61 This appeal followed.

¶ 62 II. ANALYSIS

¶ 63 Defendant appeals, arguing the trial court erred by (1) denying his motions for a directed verdict and judgment notwithstanding the verdict because the State failed to present sufficient evidence, (2) admitting the minor victim's recorded interview into evidence pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West

2016)), (3) denying defendant's motion for a mistrial when a State's witness mentioned defendant had been in prison, and (4) admitting hearsay testimony that defendant "had been in trouble previously for molesting another little girl." We agree with defendant's third and fourth arguments but conclude there was sufficient evidence to support a conviction. Therefore, we reverse defendant's conviction and remand for a new trial.

¶ 64 A. Motions for Directed Verdict and Challenges to the Sufficiency of Evidence

¶ 65 Defendant argues the trial court should have granted his motion for directed verdict both at the close of the State's case in chief and at the close of all evidence. Defendant further argues the court erred by denying his motion for judgment notwithstanding the verdict and the State failed to present sufficient evidence. However, all of these challenges raise the exact same issue: whether the State presented sufficient evidence to sustain a conviction. Because the analysis is identical, we address these issues together.

¶ 66 1. *The Applicable Law*

¶ 67 When a defendant raises a sufficiency of the evidence argument, "defendant implicitly challenges the trial court's denial of his motion for a directed verdict at the close of the State's case and, by extension, the court's denial of his posttrial motion for judgment *n.o.v.*" *People v. Shakirov*, 2017 IL App (4th) 140578, ¶ 80, 74 N.E.3d 1157. "A directed verdict or a judgment *n.o.v.* is appropriate when a trial court concludes, after viewing all of the evidence in a light most favorable to the State, that no reasonable juror could find that the State had met its burden of proving defendant guilty beyond a reasonable doubt." *Id.* ¶ 81. The same standard applies to challenges to the sufficiency of the evidence. *People v. Fickes*, 2017 IL App (5th) 140300, ¶ 17, 79 N.E.3d 334. Appellate courts review these challenges *de novo*. *People v. Connolly*, 322 Ill. App. 3d 905, 918, 751 N.E.2d 1219, 1229 (2001).

¶ 68 To prove predatory sexual assault of a child, the State must prove, beyond a reasonable doubt, (1) defendant was over the age of 17, (2) defendant committed an act of contact, however slight, between the sex organ of one person and a body part of another, (3) defendant did so "for the purpose of sexual gratification or arousal of the victim or the accused," and (4) the victim was under the age of 13. 720 ILCS 5/11-1.40 (West 2016).

¶ 69 2. *This Case*

¶ 70 Defendant concedes that he was over the age of 17 and B.K.L. was under the age of 13 at the time of the charged conduct. Further, if there is enough evidence to conclude defendant touched B.K.L.'s vagina, then the jury could infer the intent of sexual gratification. See *People v. Burton*, 399 Ill. App. 3d 809, 814. 927 N.E.2d 240, 244 (2010) (intent to arouse may be inferred solely from the nature of the act). Therefore, the conclusive issue is whether the State presented sufficient evidence that defendant made contact, however slight, with B.K.L.'s vagina.

¶ 71 Defendant argues that B.K.L. testified at trial that he did not touch her, and defendant himself testified to the same. The only contrary evidence came from (1) Stephanie's testimony about what B.K.L. told Stephanie and (2) B.K.L.'s recorded interview. Defendant claims Stephanie's credibility was so challenged that her testimony counted for nothing. Defendant further contends that B.K.L.'s recorded interview is of no value because B.K.L. never stated defendant touched her and only answered affirmatively when Baldwin inappropriately asked a leading question. According to defendant, the State, at most demonstrated he tried to touch B.K.L. but did not succeed.

¶ 72 The State responds that the testimony of B.K.L. during the interview is sufficient on its own to prove defendant touched B.K.L.'s vagina. The State also contends the jury could

infer that defendant touched B.K.L. through her testimony that his hand was inside her underpants because it would have been impossible for him to not have had at least slight contact with her vagina.

¶ 73 We conclude a reasonable juror could have found defendant touched B.K.L.'s vagina. In reaching this conclusion, we are mindful that a reviewing court does not substitute its judgment for the trier of fact on issues of the weight of the evidence presented or the credibility of witnesses. *Fickes*, 2017 IL App (5th) 140300, ¶ 17. Additionally, a reviewing court must draw every reasonable inference in favor of the State. *Id.*

¶ 74 B.K.L. agreed with Baldwin in the recorded interview that defendant touched her vagina and consistently stated to Stephanie, Baldwin, and the jury that defendant's hands were inside her underwear. Based on the foregoing information, a reasonable jury could conclude defendant touched B.K.L.'s vagina. We will not substitute our judgment for that of the jury. The State presented sufficient evidence for a jury to find defendant guilty beyond a reasonable doubt.

¶ 75 B. The Admission of B.K.L.'s Interview Pursuant to Section 115-10

¶ 76 Defendant next argues the trial court erred by admitting the recorded interview of B.K.L. pursuant to section 115-10 because it was unreliable. We disagree.

¶ 77 Section 115–10 of the Code provides, in pertinent part, as follows:

> "(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13, *** the following evidence shall be admitted as an exception to the hearsay rule:
>
> * * *

(1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and

(2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.

(b) Such testimony shall only be admitted if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child ***:

(A) testifies at the proceeding[.]" 725 ILCS 5/115-10 (West 2016).

¶ 78 "There are no precise tests for evaluating trustworthiness or reliability, but rather particularized guarantees of trustworthiness must be drawn from the totality of the circumstances surrounding the victim's statements." *People v. Rottau*, 2017 IL App (5th) 150046, ¶ 55, 83 N.E.3d 400 (citing *People v. West*, 158 Ill. 2d 155, 164, 632 N.E.2d 1004, 1009 (1994)). When determining the reliability of statements offered under section 115-10, a trial court should consider (1) the spontaneity and consistent repetition of the statement, (2) the child's mental state, (3) the use of terminology not expected in a child of similar age, and (4) lack of motive to fabricate. *Id.*; *People v. Johnson*, 2016 IL App (4th) 150004, ¶ 38, 55 N.E.3d 32. A reviewing court will reverse a trial court's reliability determination only if there is an abuse of discretion. *Id.* ¶ 38. A trial court abuses its discretion when its ruling is "arbitrary, fanciful, or unreasonable,

or when no reasonable person would take the same view." (Internal quotation marks omitted.) *Id.*

¶ 79 As an initial matter, defendant takes issue with the trial judge, who was a different judge than the one who ruled on the motions *in limine*, arguing that the trial judge had "the opportunity and responsibility to consider defense counsel's objections at trial" and erred by overruling the objections without additional argument. Defendant's arguments are not well taken.

¶ 80 The record demonstrates defense counsel renewed his prior objections for the record. Far from prohibiting argument, the trial court gave defendant the opportunity to argue further, and he declined. As a result, defendant has forfeited any suggestion that the trial judge acted improperly in ruling on these objections without additional argument. See *People v. Morgan*, 385 Ill. App. 3d 771, 773, 896 N.E.2d 417, 419 (2008) (arguments not made in the trial court are forfeited on appeal).

¶ 81 Considering the merits of defendant's claims, we conclude the trial court did not abuse its discretion by admitting B.K.L.'s statements pursuant to section 115-10. B.K.L.'s version of events was consistent with what she told her mother and with what she testified to at trial. Nothing in the record suggests there was anything abnormal about B.K.L's mental state or that she had an incentive to fabricate the story. While Stephanie may have had many problems with defendant, B.K.L. reported she thought he was a good man. During B.K.L.'s interview, she had no trouble saying "no" to Baldwin when she disagreed with the interviewer's statement.

¶ 82 Defendant makes much of the fact that B.K.L. used the term "succeed" during the interview. However, Baldwin noted that, according to B.K.L., the word came from Stephanie when she asked B.K.L. if defendant succeeded in touching her. This term was introduced only

after B.K.L. had stated defendant had his hand in her underwear; therefore, it would not be unreasonable for the trial court to discount defendant's theory of fabrication based on that single word. Accordingly, the trial court did not abuse its discretion by deeming the recorded interview reliable and admissible pursuant to section 115-10.

¶ 83 C. The Denial of Defendant's Motion for a Mistrial

¶ 84 Defendant next argues that the trial court erred by not declaring a mistrial after Stephanie (mere minutes into the trial) testified the defendant had been in prison. We agree.

¶ 85 "A mistrial should be granted where an error of such gravity has occurred that the defendant has been denied fundamental fairness such that continuation of the proceedings would defeat the ends of justice." *People v. Nelson*, 235 Ill. 2d 386, 435, 922 N.E.2d 1056, 1083 (2009). The "standard of review for motions for mistrial is whether the trial court abused its discretion; a court's decision will not be disturbed unless defendant was prejudiced by the testimony." *People v. McDonald*, 322 Ill. App. 3d 244, 250, 749 N.E.2d 1066, 1071 (2001).

¶ 86 In *People v. Bishop*, 218 Ill. 2d 232, 250-51, 843 N.E.2d 365, 376 (2006), the defendant appealed the denial of his motion for mistrial after the minor sexual assault victim testified defendant had been in jail. The supreme court rejected the defendant's claim, explaining the mere fact that he had been incarcerated previously would not lead the jury to speculate that he had been convicted of similar crimes. *Id.* at 253. Instead, the court concluded, "The mere fact, without more, that defendant had previously been in jail says nothing about the type of offense involved. There would be no particular reason for the jury to think that defendant had a history of committing sexual offenses." *Id.*

¶ 87 In this case, Stephanie's statement that defendant had been in prison was of such a character and magnitude that it prejudiced defendant and denied him the right to a fair trial.

Being in prison is very different from being in jail. An astute juror would recognize that many felonies are probationable offenses and therefore, if defendant had been in *prison* either he was a repeat offender or he had committed a serious crime. In other words, prior felony convictions do not necessarily mean a prison sentence.

¶ 88 Further, unlike *Bishop*, Stephanie gave jurors a reason to think defendant was in prison for a similar offense. Stephanie testified, "[Defendant] had been in trouble previously for molesting another little girl." The obvious inference is that defendant was in prison for molesting a little girl.

¶ 89 A limiting instruction was not adequate to overcome the prejudice defendant suffered as a result of this improper testimony. The trial court indicated one of the reasons it thought a limiting instruction would be sufficient was that if defendant testified, the jury would hear the information anyway. However, as the court later informed defendant, he had the sole right to decide whether he was going to testify. By not declaring a mistrial, the court essentially interfered with defendant's right to choose, suggesting to him that because the jury had already learned of his prison record, he should just go ahead and testify.

¶ 90 Further, the trial court was incorrect in its assumption that the jury would hear the defendant was *in prison* for the felony convictions that would be introduced to impeach him if he were to testify. Although the jury did learn that defendant was convicted of two prior felonies, the court did not inform the jury of the *sentence* imposed upon him for those felonies, nor should it have. Therefore, the trial court's rationale for denying defendant's motion for a mistrial was unreasonable, and the court abused its discretion when it denied defendant's motion for a mistrial on this basis.

¶ 91 We note that this error occurred only a few minutes into the testimony from the

first witness at defendant's jury trial. The trial court had very little to lose by declaring a mistrial and starting over.

¶ 92 An alternative approach to the trial court's definitively ruling on the motion for a mistrial when the matter first arose would have been for the court to take the motion under advisement. This approach would have allowed the court to watch the case unfold and determine how much prejudice defendant in fact suffered. Had the court taken the motion under advisement, defendant could later have decided as a matter of trial strategy whether he should testify. Instead, the court stated the prejudice of Stephanie's statement would be greatly diminished if defendant testified. The trial court erred by creating an improper factor to induce defendant to testify.

¶ 93 D. Hearsay Statements Concerning Previous Allegations Against Defendant

¶ 94 Defendant argues the trial court erred by allowing the State to introduce the substance of the conversation Stephanie had with her father that defendant "had been in trouble previously for molesting a little girl." Defendant asserts this case is nearly identical to *People v. Boling*, 2014 IL App (4th) 120634, 8 N.E.3d 65, and we should reach the same result. We agree.

¶ 95 In *Boling*, this court held that the hearsay statements at issue that revealed past accusations of misconduct against the defendant were inadmissible to explain the course of the investigation in that case. *Id.* ¶¶ 110-11. In *Boling*, we set forth the rules applicable to hearsay statements offered to explain a course of conduct or investigation, including parents and relatives asking children about sexual abuse, as follows:

> "A police officer may testify as to the steps taken in an investigation of a crime 'where such testimony is *necessary and important* to fully explain the State's case to the trier of fact.' [Citation.] 'Out-of-court statements that explain

> a course of conduct should be admitted only to the extent necessary to provide that explanation and *should not be admitted if they reveal unnecessary and prejudicial information.'* [Citation.] Testimony about the steps of an investigation may not include the *substance* of a conversation with a nontestifying witness. [Citations.]" (First two emphases added; third emphasis in original.) *Id.* ¶ 107.

¶ 96 The State argues that the statement was necessary to give the jury an accurate picture of why Stephanie asked B.K.L. if anyone had ever touched her inappropriately. In particular, the State claims this statement was required to counter defendant's theory of the case that Stephanie fabricated the story and coached B.K.L. to lie. We are not persuaded.

¶ 97 In *Boling*, the State claimed it needed to introduce the substance of a conversation between the victims' mothers and the defendant's cousin concerning past accusations against the defendant in order to explain why the victims' mothers would have a conversation with the victims about "good touches and bad touches." *Id.* ¶¶ 105, 109. We rejected this argument, explaining that the State could have easily accomplished its purpose by having the victims' mothers testify that they decided to have the conversation with their daughters "based upon a conversation with a third party." *Id.* ¶ 111.

¶ 98 Our explanation in *Boling* is equally applicable in this case. To contradict the allegation of fabrication, the State needed only to introduce the fact that Stephanie decided to speak with B.K.L. as a result of a conversation she had with her father. Indeed, an average person would understand that a parent does not need any particular justification to ask his or her child if she had been touched inappropriately.

¶ 99 The details of Stephanie's conversation with her father were not necessary or

relevant to the issue of Stephanie's credibility. Her statement was highly prejudicial and its prejudicial effect substantially outweighed its probative value. There was simply no reason for the State to introduce such an inflammatory statement. The trial court abused its discretion by allowing the State to elicit this improper testimony.

¶ 100 We are aware that evidentiary rulings are within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v. Clark*, 2018 IL App (2d) 150608, ¶ 23, 96 N.E.3d 528. However, for the reasons stated, we conclude the court here abused its discretion.

¶ 101 The State attempts to distinguish *Boling* by claiming it only applies when the State makes a "transparent attempt to reveal for the jury the substance of" the conversation concerning prior misconduct. Essentially, the State asks us to adopt a standard whereby trial courts would judge the State's intention when it seeks to admit prejudicial evidence. We decline the State's invitation. The focus of the inquiry is on the need for the testimony to explain the State's case, weighed against the prejudice such testimony might cause. If the prejudice substantially outweighs its probative value, as in this case, the testimony should be excluded.

¶ 102 E. Harmless Error

¶ 103 In the alternative, the State urges this court to affirm the conviction, arguing that any error by the trial court in admitting Stephanie's prejudicial statement was harmless. We disagree.

¶ 104 "The improper admission of evidence is harmless where there is no reasonable probability that, if the evidence had been excluded, the outcome would have been different." *People v. Brown*, 2014 IL App (2d) 121167, ¶ 28, 11 N.E.3d 882.

" 'When deciding whether error is harmless, a reviewing court may (1)

focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence.' " *People v. Brothers*, 2015 IL App (4th) 130644, ¶ 98, 39 N.E.3d 1101 (quoting *In re Rolandis G.*, 232 Ill. 2d 13, 43, 902 N.E.2d 600, 617 (2008)).

¶ 105 The error here was not harmless. The State's case is not a particularly strong one. In the background section, we detailed the numerous problems with Stephanie's credibility. Additionally, B.K.L. testified in open court that defendant did *not* touch her, and defendant testified likewise. Given Stephanie's statement that defendant had been in prison and previously "molested a little girl," we find it hard to believe that a jury could truly consider the prior bad acts evidence solely for a purpose other than propensity, especially in a case involving sexual abuse of a minor. We conclude the erroneous admission of this evidence was not harmless and likely contributed to defendant's conviction.

¶ 106 F. New Trial

¶ 107 Finally, defendant argues his conviction should be reversed outright. However, we concluded earlier that there was sufficient evidence from which a jury could find defendant guilty beyond a reasonable doubt. Accordingly, we likewise conclude that there is sufficient evidence to retry defendant on remand consistent with the double jeopardy clause. See *People v. McKown*, 236 Ill. 2d 278, 311, 924 N.E.2d 941, 959 (2010) ("If the evidence presented at the first trial, including the improperly admitted evidence, would have been sufficient for any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt,

retrial is the proper remedy.”).

¶ 108 III. CONCLUSION

¶ 109 For the reasons stated, we reverse the defendant’s conviction and remand for a new trial consistent with this opinion.

¶ 110 Reversed and remanded.