2018 IL App (5th) 150125-U

NO. 5-15-0125

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 13-CF-368
	)	
MARK R. REDFERN,	)	Honorable
	)	Mark W. Stedelin,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction of the offense of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) is affirmed where the circuit court did not abuse its discretion in allowing the testimony, pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2012)), of another biological daughter of the defendant that he sexually abused her and in allowing hearsay evidence of the victim's statements to her mother and an investigator via testimony and video recording pursuant to section 115-10(d) of the Code (725 ILCS 5/115-10(d) (West 2012)). The prosecutor's references, on cross-examination and closing argument, to the defendant's refusal to memorialize his statements to an investigator after the defendant testified that the investigator lied about the defendant's statements of confession, did not constitute plain error.

¶ 2 The defendant, Mark R. Redfern, appeals his February 23, 2015, conviction, in the circuit court of Marion County, of the offense of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)), based on a jury's finding that he committed an act of sexual penetration on the victim, B.R., who was three years old at the time of the offense. On appeal the defendant argues that he is entitled to a new trial based on the following claims of error: (1) the admission of other crimes evidence in the form of the testimony of A.R. that the defendant had sexually abused her; (2) the admission of the hearsay testimony of B.R.'s mother and a detective as to statements B.R. made to them about the offense as well as the videotape of B.R.'s forensic interview; and (3) the State's repeated criticism during the trial of the defendant's failure to memorialize his statements to the police in writing. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 On October 31, 2013, the defendant was charged by information, in the circuit court of Marion County, with, *inter alia*, the offense of predatory criminal sexual assault of a child. The information alleged that, "during the time frame of 2012 through early 2013," the "defendant, a person over the age of 17 years[,] committed an act of sexual penetration, being the contact of his finger with the anus of B.R., a child under the age of 13 years when the act was committed." 720 ILCS 5/11-1.40(a)(1) (West 2012). On April 10, 2014, the State filed a motion to admit hearsay evidence pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2012)), in which it notified the circuit court that it intended to call, *inter alia*, B.R.'s mother and Special Agent Holly Finney of the Illinois State Police, to testify as to statements that

B.R., then three years old and the defendant's biological daughter, made to them about the alleged offense. In addition, the State, via this motion, sought to introduce into evidence a videotaped interview of B.R. by Agent Finney. According to the motion, the State intended to call B.R. to testify at trial. Also on April 10, 2014, the State filed a motion to admit, pursuant to section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2012)), testimony of A.R., another biological daughter of the defendant by a different mother, that the defendant sexually abused her when she was between the ages of seven and nine.

¶ 5 A hearing on the State's motions took place on October 30, 2014. First, addressing its motion to present the testimony of A.R. pursuant to section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2012)), the State proffered that the alleged victim in the instant case, B.R., is the biological daughter of the defendant, and that A.R. is also the defendant's biological daughter, but by a different mother. The State first explained to the circuit court what it believed would be the evidence regarding the facts and circumstances of the defendant's alleged sexual contact with B.R., and will be further detailed below. Thereafter, the State set forth the testimony it would seek to introduce from A.R., as follows:

> "The [P]eople believe, if allowed to testify, A.R. would testify that during the time period of 2005 to 2007, when A.R. was seven through nine years old, that during visits that she had with the defendant at her paternal grandmother's residence on weekends[,] that the defendant sexually abused her on those occasions. This was an ongoing thing. The [P]eople believe that A.R. would testify that various sexual

acts occurred on those occasions, that there were times where he would—the defendant would penetrate A.R.'s vagina with his finger. This happened multiple times. She would testify that he had placed his penis in her vagina on more than one occasion and would give details, fairly graphic, regarding those occasions such as the first time he had done so, it had hurt badly and she started to bleed from her vagina afterwards. A.R., it is believed, would also testify that during this time frame the defendant had rubbed her butt with his penis and then turned her over and rubbed her vagina with his penis, that he had also during that time licked the outside of her vagina and butt."

¶ 6 After argument from both sides regarding the factors set forth in section 115-7.3(c) of the Code (725 ILCS 5/115-7.3(c) (West 2012)), the State proceeded to an evidentiary hearing on its motion to admit hearsay evidence pursuant to section 115-10(b)(1) of the Code (725 ILCS 5/115-10(b)(1) (West 2012)). Therein, Shannon Gasser testified that she is B.R.'s mother. B.R. was born in October 2009 and the defendant is her biological father. Ms. Gasser and the defendant's relationship ended in early 2012 but the defendant lived with them through December 2012. According to the testimony of Ms. Gasser, between December 2012 and February 2013 the defendant and B.R. did not see each other at all, although Ms. Gasser told the defendant B.R. "brings you up all the time. She goes through mood changes. She realizes and recognizes that you're gone from her life. You need to play a part."

¶ 7 Ms. Gasser testified that on February 18, 2013, when B.R. was three years old, she was getting ready to put B.R. to bed. Ms. Gasser testified to the following exchange between herself and B.R. as she was kissing B.R. goodnight:

> "I was kissing [B.R.] goodnight. And she said, ['] my daddy sticked his finger in my butt and it hurt real bad.['] And I was like ['] chicken did what with a boot?['] That's exactly what I said to her, because out of the blue, that's what she said to me. And she repeated it. ['] My daddy sticked his finger in my butt and it hurt, and I went like this [bucking up] because it hurt real bad['] and she was squeezing her butt cheeks together. And I was just like staring at her, like what do you say to that? And I was like—I don't know exactly what I said to her. It was something along the lines of I'm sorry that happened, you won't see him anymore, you know I'm going to make sure that doesn't happen to you."

¶ 8 Ms. Gasser testified that she left the room and "just fell to pieces." The next morning, she took B.R. to the doctor, who conducted an examination of B.R. and concluded that "everything was normal." The doctor told Ms. Gasser to call the Department of Children and Family Services (DCFS), but she "just let it go." Ms. Gasser testified she did not call DCFS because it had been so long since B.R. had seen the defendant, and B.R. was potty training at the time and often "had poop crusted to her butt," which required one "to really have to scrape to clean her butt." In addition, she talked to the defendant, who denied "doing anything." Ms. Gasser testified that, for these reasons, she did not believe that the defendant committed an act of sexual abuse against B.R. at that time.

¶ 9 Ms. Gasser continued her testimony by explaining that subsequent to February 2013, the defendant began getting involved in B.R.'s life on a more routine basis. The defendant would see B.R. about every two to three weeks, on the weekends. Sometimes they would go to the home of the defendant's mother's boyfriend in Centralia, who B.R. referred to as "Papa Brian." According to Ms. Gasser, on the weekend of July 19, 2013, through July 21, 2013, B.R. went there with the defendant for a visit from Friday until Sunday. Ms. Gasser gave B.R. a bath on the evening of July 21. Ms. Gasser testified that as she washed B.R.'s body near her belly button, B.R. screamed at her, yelling "stop, don't touch me there, that hurts me." According to Ms. Gasser, when she asked B.R. what hurt, B.R. said, "it hurts right here," and pointed to her vagina. Ms. Gasser testified that she asked B.R. if "it hurt to pee," and the following exchange between her and B.R. took place:

> "And she said no, it hurts real bad because daddy rubbed me really hard there. I said—I said was he wiping your butt? And she said no. I said, was he giving you a bath? And she said no, we were just in bed, you know, and she had [a] sad face. *** I asked her to show me what daddy did and she started masturbating *** rubbing her vagina repeatedly like you would see in a porno film. So I took her out of the tub, dried her off, took her to the couch. After the incident in February *** I had bought a book, Good Touch, Bad Touch. *** And that stupid book sat on [B.R.]'s dresser forever until after that bath. *** So I, you know, got her dressed, I sat down and read the story with her. And throughout the whole book, she just kept insisting, you know. I would ask her, are you sure it's a bad touch? She said,

yes, it was a bad touch. It was not a good touch. He touched me here, and she would point at *** the genital area. And I'm like has mommy ever hurt you that way? She said no. I said well, has Bubby ever hurt you that way? Nope. Nope, just daddy. I didn't know what to say to that."

¶ 10 Ms. Gasser testified that subsequent to the evening of July 21, 2013, there were many occasions where B.R. spontaneously made statements regarding the defendant's touching her, explaining, "We would be out to dinner, we would be out to Wal-Mart. We would be, you name it, daycare even. She would just say, [']my daddy stuck his finger in my butt and it hurt real bad[']." Ms. Gasser further testified that B.R. also began "self simulating" the abuse by lying in the floor rubbing herself, which she had never done before. According to Ms. Gasser's testimony, about five to six months into counseling, B.R. began to speak less about what happened:

"She would just say that Mark's in jail. She stopped calling him daddy. She has decided that Wes, my husband, was her new daddy. At first she would call him my bad daddy because he hurts me. And she would say, but my new daddy doesn't hurt me. I said, well, you know, I'm glad that you have him in your life then, you know. And I would always tell her I'm proud of her for telling me the truth. I would tell her that I'm sorry for what happened to you when she did bring it up, but I didn't bring it up to her. If she wasn't thinking about it, I didn't want her to think about it."

¶ 11 On cross-examination, Ms. Gasser reiterated that when B.R. first brought up the defendant's touching her in February, she initially believed her but after speaking with

the defendant, and having B.R. examined, she "figured it was something to do with maybe him wiping her butt too hard when he was cleaning her up." Thus, she did not report the incident to the police or DCFS at that time. Ms. Gasser also reiterated that the doctor's examination of B.R. was normal. Ms. Gasser insisted that B.R. had never been exposed to pornography, and she had no pornographic movies in her home. Ms. Gasser and the defendant broke up in spring 2012 after a big fight when the defendant was drunk. Ms. Gasser testified that, after their breakup, she and the defendant were friendly. Ms. Gasser insisted that there was never a conversation between her and the defendant about him seeking custody of B.R., and there was absolutely never any occasion in which she called the defendant and told him if he tried to get custody that she was just going to make one phone call and he would end up in jail.

¶ 12 Following the testimony of Ms. Gasser, the State presented the testimony of Agent Finney, who testified she has been employed by the Illinois State Police since 2004, receiving a 40-hour specialized training in the forensic interviewing of children. On August 1, 2013, she conducted an interview with B.R. at the Illinois State Police District Headquarters in Effingham, which was video recorded. Agent Finney testified the video recording is an exact recording of what occurred during the interview, and the video was played at the hearing. This court has reviewed the video recording in its entirety. In the interview, B.R. spells her first name, states her entire name, and states her age. She states she lives at her mother's house, and her father lives at a different house. When asked whose house she stays at more, B.R. indicates she stays at her father's house more. In

response to a question regarding whether she has any pets, she refers to "traffics" and indicates she has a dog, a horse, and a unicorn.

¶ 13 From the video interview, it is apparent that at the time of the interview, B.R. had difficulty distinguishing the truth from a lie. First, she indicated "it's raining in here" was the truth. She then stated she went to her daddy's house that day, which Agent Finney agreed in her subsequent testimony was untrue. Nevertheless, she was able to answer Agent Finney regarding both parents bathing her, and was able to identify parts of the body on drawings of both a boy and a girl. However, she called the buttocks, vagina, and penis, "butt." In response to questions regarding whether it was "ok" to touch someone's shoulder or hand, B.R. responded in the affirmative. When asked what part of the body it is not ok to touch, she responded, "butt."

¶ 14 In response to Agent Finney's open-ended question as to whether anyone had touched her where it is not ok to touch, B.R. responded in the affirmative and stated her dad pushed her "back butt" really hard. She could not explain when this occurred, but in response to questions that presented options to her, she indicated it occurred in "Papa Brian's bedroom," it happened just once, and they were lying in bed next to each other and under the covers when it happened. She also stated he touched her under her clothes and he was wearing no shirt but did have on his underwear. She stated he touched her with his finger and it hurt, he said nothing when he did it, and after he did it, he got up and got dressed. Toward the end of the interview, Agent Finney asked B.R. if she would tell her if anyone else touched her like this, and B.R.'s response was "no." When Agent Finney asked her why not, she answered "because they didn't."

¶ 15 The record reflects the court reporter was out of the room during the playing of the video for the hearing, and subsequent to the completion of the video, there were additional questions which were asked of Agent Finney by the State but are not on the record. In addition, defense counsel's beginning cross-examination of Agent Finney was not on the record. On the record, Agent Finney testified the entirety of her interview with B.R. was depicted in the videotape and confirmed B.R. identified both the vagina and the buttocks as the "butt." Following Agent Finney's testimony, the State indicated to the circuit court B.R. would be available to testify at trial, and presented a motion for her to testify via closed-circuit television. The circuit court granted the motion, and this ruling is not at issue in this appeal. The circuit court took the remaining two motions, which are at issue in this appeal, under advisement.

¶ 16 At a pretrial conference on November 6, 2014, the circuit ruled from the bench on the State's motion to present the testimony of A.R., pursuant to section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2012)), as well its motion to present hearsay evidence of B.R.'s statements to Ms. Gasser and Agent Finney via their testimony and the video recording pursuant to section 115-10(d) of the Code (725 ILCS 5/115-10(d) (West 2012)). As to the latter, the circuit court found the testimony of B.R.'s mother and Agent Finney as to B.R.'s statements to them, as well as those depicted on the recorded video, reliable because of the spontaneity of B.R., the appropriate nature of the terminology she used, and the absence of any reason to fabricate. In addition, the circuit court found Agent Finney's interview of B.R. was not suggestive, B.R. answered open-ended questions, and B.R.'s responses were consistent with her age and ability to recall events.

Accordingly, the circuit court granted the State's motion to present the testimony of Ms. Gasser and Agent Finney as to B.R.'s statements to them, as well as the video recording of the interview, pursuant to section 115-10(d) of the Code. 725 ILCS 5/115-10(d) (West 2012).

¶ 17 Turning to the motion to present the testimony of A.R., the circuit court found that the defendant is charged with the applicable crimes, B.R. is under the age of 13 and will testify, and there is sufficient similarity between the acts of the defendant as would be testified to by A.R. and the acts of the defendant as alleged in the instant case. Specifically, the circuit court found there to be similarities in the age and sex of the alleged victims, the location of the alleged acts, the fact both alleged victims are biological daughters of the defendant, and both victims allege acts by the defendant involving contact with the vaginal and anal area of the alleged victims. Accordingly, the circuit court found A.R.'s testimony would be relevant and probative for the purposes of propensity, intent, and opportunity, and the probative value is not outweighed by its potential prejudice. Therefore, the circuit court granted the State's motion to present A.R.'s testimony, pursuant to section 115-7.3 of the Code. 725 ILCS 5/115-7.3 (West 2012).

¶ 18 A jury trial commenced on February 23, 2015, in which, following a jury selection process, the following relevant evidence was adduced. B.R. testified via closed-circuit television. She testified she was five years old at the time of the trial and went to school in Effingham. She testified she lived in a house with her mom, dad, sister, and brother. She identified all of them by name and testified her dad's name is Wes but, before him,

she had a dad whose name was Mark. B.R. testified she learned about "Good Touch/Bad Touch," and a good touch would be a touch on the shoulder while a bad touch would be a touch where she goes potty from. When asked whether anyone has ever given her a "bad touch," B.R. responded, "My other dad." B.R. testified she does not really remember when this happened, and did not want to talk about it. After a series of questions prompting B.R. to think about "her body parts where her underwear covers," and a leading question asking whether her "other daddy" gave her a "bad touch" in an area that her underwear covers, B.R. responded, "yeah." When asked whether he gave her a bad touch where she goes pee from or poop from, B.R. responded, "Front and back." Thereafter, for the duration of a few questions, B.R. was reluctant to answer questions, stating answers such as, "I don't want to talk about it," "I'm still thinking," and she did not remember telling her "Mommy" or anybody about the "bad touch." In response to leading questions, B.R. testified she was scared, there was a room full of people she did not know very well, and it was hard for her to talk.

¶ 19 In response to the question, "did your other daddy, your daddy Mark, did he ever put anything in your butt?" B.R. responded, "Just his finger." B.R. indicated this is what she did not want to talk about and she does not remember where she was or whose house she was at, as it was a long time ago. On cross-examination, B.R. agreed that when she used to go visit her "daddy Mark," she was much younger and was not yet potty trained. She agreed sometimes he would have to help her change her diaper, wipe her butt, and put medicine on her butt. When asked if she talked to her mommy about what she was supposed to say, B.R. answered, "I think." When asked if her mom told her "daddy

Mark" was a bad guy or a bad person, she answered, "bad person." On redirect, B.R. testified that her mommy told her to be brave and that was all.

¶ 20 Ms. Gasser testified consistently with her testimony at the evidentiary hearing on the State's motion to admit hearsay evidence pursuant to section 115-10(b)(1) of the Code. 725 ILCS 5/115-10(b)(1) (West 2012). In addition, Ms. Gasser testified that after B.R.'s statements to her on July 21, 2013, B.R. began having nightmares and calling out in her sleep. She testified she put B.R. in counseling starting in September 2013. B.R. has participated in weekly counseling ever since. Ms. Gasser testified B.R. has improved in counseling, no longer self-stimulates, and no longer has nightmares. She no longer brings up what happened, and Ms. Gasser no longer brings it up either. Ms. Gasser testified that in July 2013 she was involved in a serious relationship with her current husband, Wes. She is not sure if the defendant was in a new relationship, but she would not have cared if he was. Ms. Gasser testified the defendant never told her he wanted custody of B.R. Other than the allegations B.R. made to her, she never really had any concerns about the defendant as a parent.

¶ 21 On cross-examination, Ms. Gasser denied ever making a statement a couple of weeks before the alleged incidents that if the defendant "raised a stink" about visitation that "all it would take is one phone call." Ms. Gasser admitted waiting nine days to report the July 2013 allegations to the authorities. She denied ever telling B.R. "what she was supposed to say," other than advising her to tell the truth. The changes in behavior she saw in B.R. did not manifest until after July 2013.

¶ 22 On redirect, Ms. Gasser laid a foundation for People's Exhibits 1A through 1E, which were text messages between herself and the defendant, beginning on July 21, 2013, at 8:13 p.m. These text messages indicate that Ms. Gasser made contact with the defendant at that time, relaying B.R.'s statements to her during her bath, and indicating that she would send her for no further visits. The following text messages consist of a series of messages back and forth wherein the defendant denied that he touched B.R. inappropriately and suggested B.R. was confused due to a potty training incident where he had to clean B.R.'s butt. Ms. Gasser's return message stated B.R. was not confused, had said it happened in bed, and knew the difference between good and bad touch.

¶ 23 Agent Finney next testified on behalf of the State, first laying the foundation for the admission for the video recording of her August 1, 2013, interview of B.R., the details of which are outlined in conjunction with the State's motion to admit this evidence pursuant to section 115-10(d) of the Code. 725 ILCS 5/115-10(d) (West 2012). The video was then admitted into evidence and played for the jury. Thereafter, Agent Finney testified as to the foundation of two body charts depicting a boy and a girl, which she used during the interview to identify body parts with B.R. These were admitted into evidence. Agent Finney again testified B.R. referred to the vagina, penis, and buttocks on both charts as "butt."

¶ 24 Agent Finney testified that on August 9, 2013, she conducted an interview of the defendant, and testified as follows with regard to the details of that interview. Agent Finney met with the defendant at the Altamont Police Department because he worked in Altamont and did not have a ride over to Effingham. This was not a facility that Agent

Finney used often to conduct investigative business. The defendant voluntarily came to the police department to speak with her. Agent Finney brought a small audio tape recorder with her to Altamont to conduct the interview, but the recorder was rendered inoperable when the battery holder snapped off and there was no way to hold the battery. She knew that the Altamont Police Department has a recording system, but she did not know how to operate it and so did not use it to record the interview. As a result, the interview was not audio or video recorded.

¶ 25 Agent Finney testified the defendant knew the reason for the interview prior to coming to the police department. She testified the defendant told her prior to the interview that he had received text messages from Ms. Gasser accusing him of sexually abusing B.R. According to Agent Finney's testimony, during the interview, the defendant denied he ever touched B.R. in an inappropriate sexual manner. However, during the course of the interview, his statement changed. According to Agent Finney, the defendant made the following admissions during the interview. The defendant admitted to taking B.R. to the residence of "Papa Brian" in Centralia on the weekend of July 19, 2013, and admitted that during that weekend, he was on the bed with B.R. in "Papa Brian's" bedroom. The defendant then admitted he rubbed B.R. on the back and buttocks, then between the legs, but over her clothing, and became sexually aroused as a result. The defendant stated he stopped after two to three minutes because he knew it was wrong. Agent Finney testified that when she asked the defendant whether he touched B.R. on the vagina or vaginal area, he initially said no, but then said maybe a finger touched the vagina.

¶ 26 Agent Finney continued to testify that, throughout the course of the interview, the defendant admitted to having had sexual thoughts about B.R., but stated he never acted upon those thoughts. He claimed to struggle with alcoholism and to be a "sexaholic." According to Agent Finney, the defendant also admitted he had looked up child pornography in the past on the internet. Agent Finney testified, without objection, that at the very end of the interview, she asked the defendant, since the interview was not recorded in any way, if he wished to make a written statement, but the defendant declined.

¶ 27 On cross-examination, Agent Finney testified that another officer was present during the interview, and although at the time she did not know, he did have an audio recorder with him. There were no officers from Altamont nearby who could have helped her with the recording equipment. As a result, there is just her word that the defendant made the above-described admissions. However, she did take minimal notes.[1] Defense counsel then asked Agent Finney a series of questions that insinuated her prior testimony regarding the defendants' admissions was not true.

¶ 28 When asked why she did not have Ms. Gasser's computer forensically examined for evidence of child pornography, Agent Finney testified she talked to Ms. Gasser about that, but Ms. Gasser stated she no longer had the computer because she gave it to an ex-

[1]Because the defense did not receive a copy of Agent Finney's notes, or the notes of the other officer who was present, the defense moved for a mistrial due to a discovery violation. After sidebar argument by both sides, the circuit court denied the motion for mistrial, finding that all statements contained in the notes were reflected in a narrative summary prepared by Agent Finney and produced to the defense. The State was instructed to admonish Agent Finney to make no further reference to these notes. The defendant has not raised any issue with respect to these events on appeal.

boyfriend. Agent Finney contacted the ex-boyfriend, who still had the computer in his possession, but said it had been wiped clean several times using software. Agent Finney then consulted with her agency's technology department, which indicated that there was "little to no chance" that any files would be recovered under these circumstances. Agent Finney did not pursue the issue further.

¶ 29 On further cross-examination, Agent Finney testified she did not offer to write out a statement for the defendant for him to review and sign. Agent Finney testified that despite the admissions by the defendant to which she testified, she did not arrest the defendant that day. On redirect examination, Agent Finney testified that prior to August 9, 2013, she had never met the defendant, did not have any grudge against him, and had no reason to lie about him. Agent Finney testified she did not arrest the defendant the day of his interview because prior to the interview she told him that no matter what he told her during the interview he was not going to be arrested that day. She compiled her reports and sent them to the State's Attorney's office for them to review, and the case proceeded from there. At the conclusion of Agent Finney's testimony, the trial recessed for the evening.

¶ 30 The following day, the trial recommenced, and A.R. was the first to testify. A.R. testified she was 16 years old at the time of trial and a junior in high school. She testified the defendant is her father and she also has an 11-year-old brother who is the defendant's son. A.R. testified as follows with regard to her relationship with the defendant. The defendant was married to her mother, and they later divorced. After they divorced, A.R. and her brother would have visitation with the defendant approximately every other

weekend at the defendant's mother's house in Centralia. During the time that A.R. was seven to nine years old, the defendant began touching her sexually. A.R. testified the defendant rubbed her vagina with his hands, and sometimes with his penis.

¶ 31 When asked about specific events that occurred, A.R. testified the defendant pinned her down sometimes on the futon in the living room of the house and would not let her get up. He then rubbed her vagina with his hand and she asked him to stop, but he would not. He would continue to rub her and sometimes would penetrate her with his penis. A.R. testified that sometimes when she was in the shower the defendant would come in and ask if he could help her wash her hair, she would say yes, and he would get in the shower with her, naked, and rub her vagina with his hands. She testified the defendant would sometimes pin her against the shower wall and hold her there, and she would cry and ask him to stop, but he told her to stop crying and that he was not going to stop. According to A.R.'s testimony, he would continue to touch her and eventually penetrate her with his penis. When asked more specific questions regarding the defendant penetrating her with his penis, A.R. testified she never noticed any bleeding, and she does not remember him "going all of the way in," but he went "some of the way in," and it hurt.[2]

¶ 32 A.R. testified to another occasion in which she went on a bicycle ride with the defendant, who had her brother, around age five at the time, in a car seat hooked to the back of the defendant's bicycle. A.R. testified the defendant stopped them in the middle

[2]We note that this testimony differs somewhat from the State's proffer at the time of the pretrial hearing, wherein the State indicated that A.R. would testify that she bled from her vagina after the defendant penetrated her.

of a cornfield, pushed her down, and told her to take off her pants. A.R. testified that she told the defendant no and he stuck his hand down her pants, rubbed her vagina, and she started crying. A.R. testified the defendant told her to stop crying and she just looked away. She did not know if her little brother could see what was going on. A.R. testified these events took place "probably every weekend" they were together.

¶ 33 A.R. testified that around the age of nine, she told her mom's best friend what the defendant had been doing to her. However, she has never discussed these details with her mother. On cross-examination, A.R. testified that when they stayed at the defendant's mother's house with the defendant, they all slept in the living room. She testified it did not bother her when her mother and the defendant separated and that her mother was not angry with the defendant. During the time this was all happening, she never told her mother, grandma, or uncle. A.R. testified on redirect that when these events occurred in the defendant's mother's house, her uncle was always gone and the defendant's mother stayed in her bedroom watching television. At the conclusion of A.R.'s testimony, the State rested.[3]

¶ 34 Tamara Cox was the first to testify on behalf of the defendant. She testified she is the defendant's mother. She testified that when A.R. was seven to nine years old, her younger son, her younger son's girlfriend, the defendant, and Ms. Cox's boyfriend Brian all resided with her in her two-bedroom trailer. She used one of the bedrooms and her younger son and his girlfriend used the other. The defendant slept in the living room, and

[3]We again note a difference between the State's proffer at the pretrial hearing and A.R.'s ultimate testimony at trial. Contrary to the State's proffer, A.R. never testified that the defendant licked the outside of her vagina and butt.

when A.R. and her brother visited, they also slept in the living room. A.R.'s younger brother slept on the futon with the defendant and A.R. slept on a foldout bed. Ms. Cox testified she suffered a back injury in 1982 that affects her ability to sleep. She frequently left the bedroom at all hours of the night and early morning during the timeframe of A.R.'s allegations. She could see right into the living room. She never observed anything inappropriate between the defendant and A.R. and A.R. never mentioned anything to her.

¶ 35 Ms. Cox was then directed to consider the timeframe of the allegations at issue with regard to B.R. She testified that in late 2012 through 2013, she often stayed at her boyfriend Brian's home in Centralia. It was a modular home with three bedrooms. When B.R. and the defendant stayed with them, they usually slept in Brian's bedroom and Brian and Ms. Cox would sleep in the living room on the couch. There was a bathroom off of the bedroom the defendant and B.R. stayed in and she often walked through the bedroom to use that bathroom or go out the back door to smoke. The door to the bedroom was always open. Ms. Cox testified she specifically remembered the weekend of July 19 through July 21, 2013, as it was the last time that B.R. stayed at Brian's house with the defendant. She recalled that B.R. stayed there only one night that weekend, which was Saturday night.

¶ 36 Ms. Cox testified that on Saturday night of the weekend specifically in question, they were sitting and watching movies. B.R. fell asleep around 10:30 p.m. and the defendant carried her to Brian's room and then came back to the living room to watch television. Ms. Cox testified it was around 3 a.m. when the defendant went and got into bed with B.R. Ms. Cox testified she "was up the whole night" with her back. She testified

she went in and out of Brian's bedroom several times, to use the bathroom and to go out the adjacent back door and smoke, after the defendant went to lie down with B.R. The defendant had a pair of basketball shorts on and B.R. was dressed in her pajamas. She covered B.R. up a few times when she found her uncovered. She never heard any noises coming from Brian's room and never saw anything inappropriate. Ms. Cox testified the defendant had his back to B.R. The next morning, B.R. got up around 8 a.m. acting fine, happy and playing. B.R. and the defendant were interacting fine. When it was time for B.R. to leave to go back to her mother's, B.R. started crying, not wanting to go home, but wanting to stay with the defendant.

¶ 37 On cross-examination, Ms. Cox testified there were two unused bedrooms in Brian's house. She testified she did not go to sleep at all that night, or the previous night, and so had gone 48 hours without sleep. The night before that she slept four hours, off and on. There were periods of time when she was not in the bedroom observing the defendant and B.R. She is on narcotic pain medication for her back condition, and on the weekend of July 19 through July 21, 2013, she was taking morphine and oxycodone. On redirect, she testified these medications did not affect her ability to observe what was going on around her, nor to recollect. Although there were two other bedrooms in Brian's house, there was only one other bed. She never heard B.R. express her wishes about sleeping arrangements or fear of sleeping alone.

¶ 38 The defendant was the final witness to testify at the trial. He testified that he is B.R.'s father. He testified he never touched B.R.'s anus with his finger for any purpose other than to wipe her, clean her, or apply medicine. The defendant further testified that

he is A.R.'s father and did not do any of the things that A.R. testified to at the trial. The defendant stated that he and A.R.'s mother fought all through their marriage and after their divorce there were issues over custody, visitation, and child support. As to his relationship with Ms. Gasser, the defendant testified that a week or two before the July 19th weekend, they had an argument over visitation. The defendant testified he mentioned taking steps to get more visits with B.R. and Ms. Gasser stated if he tried to take her to court she would make one phone call and he would never see B.R. again.

¶ 39 Moving to his interview with Agent Finney, the defendant testified he went to the interview voluntarily because he wanted to "straighten out" the allegations that were being made against him. The defendant testified that, during the interview, he did tell Agent Finney that he rubbed B.R.'s back and rubbed across her butt to her legs and feet to give her a massage. However, he maintained that he never told Agent Finney that this incident escalated, that he rubbed between B.R.'s legs, or that he became aroused during this time. He testified he never made the statement that he touched B.R.'s vagina, that he realized that he should not have touched her, or that he had sexual thoughts about B.R. He also testified he did not tell Agent Finney that he was a sex addict. He testified he said he was an alcoholic and that Ms. Gasser had thought he was a sex addict. According to the defendant, during the course of the interview, Agent Finney asked him if he ever viewed child pornography, and he told her he had come across it on "Live Wire" and when he saw what it was he deleted it immediately and quit using "Live Wire."

¶ 40 Defense counsel then asked the defendant to describe for the jury "the nature of the interview" as far as the kinds of questions he was being asked, to which the defendant responded that he felt that the officers were trying to twist his words, explaining:

> "Well there [were] two officers and [Agent] Finney was one officer, she was asking most of the questions. She had asked me if I was aroused or had erections or any of that while I was in bed and I told her no. Then the other officer would say, well, did you have your hand between her legs. And after I described I rubbed her back they said did you take your finger and put it in between her legs like this and I said no. And they were going back and forth between the two of them and I got aggravated. I told them, you know what, I see what—she's stating that I told her that I was aroused oh, yes, yes you did. I'm arguing back and forth with them. I got up, I said I'm done with this interview, you are switching my words, you are saying that I said something I didn't say, so I said I'm not going any further."

¶ 41 Defense counsel then asked the defendant further questions about the sleeping arrangements when he would have visitation with A.R. and his son at his mother, Ms. Cox's residence, as well as when he had B.R. at Brian's house on the July 19, 2013, weekend. In both situations, the defendant testified he was aware of all the people in the house, his mother never slept, and anyone could wake up at any time. Finally, the defendant testified that on the weekend of July 19, 2013, B.R. was still being potty trained, and he had to change either her diaper or underpants from time to time, wipe her, and put medication on her.

¶ 42 On cross-examination, the defendant testified that when B.R. was potty training, he sometimes had to wipe her hard when "the poop would be dry," and sometimes she would cry and say he was hurting her. However, his finger "never went into her anus" when he did that. With regard to his interview with Agent Finney, the defendant testified that when Agent Finney contacted him, he knew "what was going on" because of Ms. Gasser's text to him on the evening of July 21, 2013, and he wanted to "clear it up." Contrary to Ms. Cox's testimony, the defendant testified B.R. spent two nights at "Papa Brian's" house with the defendant that weekend, and he could not recall if it was Friday or Saturday that he gave B.R. the massage. When the defendant was asked, "Well, was it the night that you went to bed at three a.m.?" the defendant answered, "It might have been, I don't know." The defendant was then asked, "So you would go to bed at three a.m. and give your three-year-old daughter a massage on her legs and feet?" to which he responded, "no." The prosecutor then asked, "so it wasn't?" to which the defendant responded, "Apparently not then, no." The prosecutor then started to ask, "So when you said it could have been…," the defendant interrupted, explaining, "I'm just saying I don't know what night it was exactly that I rubbed her shoulders and her back. Friday or Saturday, I'm not sure which night it was. I would have been." The prosecutor clarified, "Her shoulders, her back, her legs and her feet, right?" and the defendant answered, "Correct." The following colloquy then occurred regarding the defendant's interview with Agent Finney:

> "STATE: And you testified to your attorney that everything [Agent] Finney said you said you didn't say, right?

DEFENDANT: Correct.

STATE: Do you know how to read and write?

DEFENDANT: Yes, I do.

STATE: You testified you got upset because your words were being twisted, right?

DEFENDANT: Uh-huh.

STATE: Why didn't you insist on a piece of paper so you could write down your words the way you wanted them and get this cleared up in your words?

DEFENDANT: I didn't think about it at the time. I was upset, I was pissed off. I wasn't thinking about a piece of paper and pen. I just seen that they were trying—that they were attacking me and I was defending myself and I was done with the interview.

STATE: You didn't think about it when they asked you if you'd give a written statement?

DEFENDANT: They didn't ask me to give a written statement.

STATE: Oh, so that didn't happen, either?

DEFENDANT: No.

STATE: When you were being accused for the second time in your life of sexually abusing your daughter and you felt like your words were being twisted, it never occurred to you to write down your own words?

DEFENSE COUNSEL: Objection, asked and answered.

STATE: Slightly rephrased.

COURT: I will sustain the objection.

STATE: So you didn't give a written statement?

DEFENDANT: No."

¶ 43 Following this colloquy, the State turned to cross-examination of the defendant regarding his testimony that a week or two before the weekend of July 19, 2013, he and Ms. Gasser had an argument regarding the defendant's visitation with B.R. and Ms. Gasser threatened to make a call to ensure that he never saw B.R. again. According to the defendant, Ms. Gasser told the defendant she was withholding visitation from the defendant when the defendant asked Ms. Gasser to pack a bathing suit for B.R. and Ms. Gasser wanted to know where they were going. The defendant testified he told Ms. Gasser it was none of her business but he was taking B.R. to a friend's house to go swimming. Ms. Gasser then indicated the defendant would not be getting B.R. if the defendant did not tell her where they were going. The defendant testified that because this was not the first time that Ms. Gasser kept B.R. from him on his weekends, he told her if she was going to "keep doing this," he was just going to take her to court to get a custody agreement. The defendant again testified that in response, Ms. Gasser told him she would make one phone call and he would never see B.R. again. The defendant admitted that up until then, Ms. Gasser had voluntarily been setting up visitation between the defendant and B.R., and when B.R. was younger, she "badgered" him to be part of B.R.'s life. Following the defendant's testimony, the defense rested and the State proceeded with its closing argument.

¶ 44 During closing argument, the State made the following remarks about Agent Finney's interview of the defendant that are relevant to the issues on appeal:

> "You know, in his opening statement defense counsel highlighted two things. Told you flat out the defendant never said any of that to [Agent] Finney, period. *** [Agent] Finney has been with the State Police for over a decade. She had never met this defendant before August 9, 2013, she didn't know him, and she didn't have a grudge against him. Other than investigating this incident, she doesn't have a dog in this fight. You are going to hear, well, she didn't record this, it's unprofessional. She was accused pretty extravagantly, well, you never, intended to record this, did you? Which she denied, her recorder broke. When she got let in to the Altamont Police Department, which she went to as a convenience to the defendant, the guy who let her in disappeared and she wasn't comfortable, didn't know how to operate their recording equipment. And she didn't think to ask the officer with her if he had a recording device. The most she could do after talking to the defendant was to ask him if he would give a written statement which he declined to do so. She can't force him to. And, at that point, all she can do is type up a report regarding what he told her and turn it over which is what she did."

¶ 45 Further into its closing argument, the State made the following comments:

> "And [the defendant] told us he never touched [B.R.] and he tells us he never told [Agent] Finney any of that. That, in fact, every answer that she says he gave was the opposite. That when she asked did you become sexually aroused and he said yes, he said no. That he only told her he gave [B.R.] a massage on her shoulders,

back, legs and feet. That his hand might have brushed against her butt on the way down to her legs, but he never made any admissions that he had rubbed her buttocks and in between her legs for two to three minutes over her clothing. That he never said that he had prior sexual thoughts about [B.R.] And yet his purpose for going there, he knew why he was going there, because [Ms. Gasser] gave him a heads-up when she text[ed] him on July 21st. It wasn't like this was an interview by ambush, he knew full well what the allegations were and he wanted to clear this up. And yet he tells us that they twisted his words, they weren't listening, and his response wasn't to say, you know what, enough of this, give me a piece of paper, I'm going to write out this in my own words because I want to clear this up. He didn't do that. He just left. If you want to talk about inconsistent actions, that might be the definition of it."

¶ 46 The defendant did not object to any of the foregoing remarks made by the State during its closing argument. During jury instructions, the circuit court informed the jury, *inter alia*, that the believability of a witness may be challenged by evidence that on some former occasion, he acted in a manner that was not consistent with his testimony in this case. The circuit court further instructed the jury that evidence of prior inconsistent acts may be considered only for the limited purpose of deciding the weight given to the testimony the jury heard from the witness in the courtroom. After a period of deliberation, the jury returned a verdict of guilty of predatory criminal sexual assault of a child.

¶ 47 On April 2, 2015, the defendant filed an amended posttrial motion which included, *inter alia*, the first two issues he raises on appeal. However, he did not raise the third issue he raises on appeal in his posttrial motion. At a hearing on April 7, 2015, the circuit court denied the defendant's posttrial motion and after a sentencing hearing, sentenced the defendant to 25 years in prison with 3 years to natural life of mandatory supervised release. On April 8, 2015, the defendant filed a notice of appeal.

¶ 48 ANALYSIS

¶ 49 1. *Admissibility of "Other Crimes" Testimony of A.R.*

¶ 50 The defendant first argues that the circuit court erred in allowing the State to present "other crimes" evidence in the form of A.R.'s testimony that the defendant sexually abused her. We review the circuit court's decision to admit "other crimes" evidence for an abuse of discretion. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003) (citing *People v. Heard*, 187 Ill. 2d 36, 58 (1999)). We will find an abuse of discretion if the circuit court's evaluation is "arbitrary, fanciful or unreasonable" or where no reasonable person would take the view adopted by the circuit court. *Id.*

¶ 51 Section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2012)) provides that if a defendant is accused of, *inter alia*, predatory criminal sexual assault of a child, evidence of the defendant's commission of the therein enumerated sexual crimes may be admissible, if that evidence is otherwise admissible under the rules of evidence, and may be considered for its bearing on any matter to which it is relevant. Our supreme court has found this provision to be constitutional (*Donoho*, 204 Ill. 2d at 182) and has interpreted

this section to allow for admission of evidence meeting the criteria of the section to prove propensity of the defendant to commit the crime charged. *Id.* at 177.

¶ 52 In a criminal case in which the prosecution intends to offer evidence under section 115-7.3 of the Code, the circuit court must, as part of its analysis, weigh the probative value of the evidence against undue prejudice to the defendant. *Id.* at 171. In making such a determination, the circuit court may consider the evidence in relation to the charged offense for the following: (1) proximity in time; (2) degree of factual similarity; and (3) other relevant facts and circumstances. *Id.* at 183. Here, the defendant argues the circuit court's determination, based on these factors, that A.R.'s testimony was admissible, constituted an abuse of discretion. We disagree.

¶ 53 With regard to proximity in time, there was five to seven years between the prior crimes to which A.R. testified and the trial. We agree with the State that this is a lapse of time far smaller than the proximity between offenses in cases where the introduction of such evidence has been upheld. See *id.* at 184 (12 to 15 years lapse in time); see also *People v. Davis*, 260 Ill. App. 3d 176, 192 (1994) (20 years lapse in time). Indeed, the lapse of time in this case is less than the 10-year limit on the use of other crimes evidence for the purposes of impeachment. See *People v. Montgomery*, 47 Ill. 2d 510, 519 (1971). In any event, there is no bright line rule about when prior convictions are *per se* too old to be admitted under section 115-7.3 of the Code, but rather, it is a factor to consider when evaluating the probative value of the evidence. *Donoho*, 204 Ill. 2d at 183-84.

¶ 54 Moving to the factual similarity factor, the defendant argues the circuit court abused its discretion in allowing A.R.'s testimony because, while the defendant's alleged

abuse of B.R. in the instant case occurred when she was three years old, A.R. testified she was seven to nine years old at the time when the defendant sexually abused her. In addition, the defendant argues that while he is accused in the case at bar of rubbing and "pushing" on B.R.'s butt and/or vagina with his fingers, A.R. was permitted to testify not only that the defendant rubbed her vagina with his fingers, but also that he rubbed her vagina and anus with his penis and penetrated her vagina with his penis on numerous occasions. In support of his argument, the defendant points to cases where, he argues, "courts have required greater similarity between the offenses than is present here." See *Donoho*, 204 Ill. 2d at 163-66 (both offenses involved a boy and a girl, ages 7 to 11, and the defendant digitally penetrated the two girls' vaginas with his finger and forced the boy and girl to touch his penis); *People v. Boand*, 362 Ill. App. 3d 106 (2005) (prior acts, like the charged offense, involved the defendant drugging women with whom he had been in a dating relationship and having intercourse with them after they became unconscious); *People v. Boyd*, 366 Ill. App. 3d 84, 86-90 (2006) (prior and charged offenses almost identical where defendant offered the women a ride, stated he had to urinate and started shaking his leg, drove into alley, drew a gun, took valuables and money, turned the women onto their stomachs, and penetrated their rectums with his penis). In contrast, the defendant likens A.R.'s testimony in the instant case to that in *People v. Smith*, 406 Ill. App. 3d 747, 753 (2010), which he characterized as noting "allegations of touching complainant's vagina w[ere] factually dissimilar from allegations of penetration."

¶ 55 We note that, in the cases to which the defendant cited, whereby the predicate offense(s) and the charged offense(s) were virtually identical, it was of course proper to admit such evidence, as even under our common law rules of evidence, the identical nature of the offenses would make such "other crimes" evidence admissible as proof of *modus operandi*. See *People v. Illgen*, 145 Ill. 2d 353, 372-73 (1991) ("Where evidence of prior bad acts is offered to prove *modus operandi* *** there must be a high degree of identity between the facts of the crime charged and the other offense in which the defendant was involved."). If this was the standard for factual similarity to prove propensity under section 115-7.3 of the Code, there would be no need for this section at all. As the *Donoho* court pointed out, in order for other crimes evidence to be admissible under section 115-7.3 of the Code, the offenses need not be identical, but rather, must bear "general areas of similarity." 204 Ill. 2d at 184. For the reasons that follow, we do not find that the circuit court abused its discretion in finding such general areas of similarity in the case at bar.

¶ 56 We agree with the State that the degree of similarity between the charged offenses in the instant case and the offenses described in A.R.'s testimony are considerable. Both A.R. and B.R. are biological children of the defendant, and the defendant's alleged acts against each of them occurred at a time when the defendant's relationship with their mother had ended. While the ages of A.R. and B.R. are not identical, we agree with the State's characterization of each child as "very young" at the time of the relevant offenses. The offenses against each child occurred during periods of visitation and a time when the defendant took the children to be with his mother. Finally, the offenses against each child

involved the defendant rubbing his hands on the vaginal area. While we recognize that A.R. was permitted to testify that on various occasions the defendant began with rubbing his hand on her vaginal area and subsequently made penile contact, we cannot say that this factor alone would prevent a reasonable circuit court judge from finding the degree of factual similarity necessary to admit A.R.'s testimony under section 115-7.3 of the Code.

¶ 57 Regarding other facts and circumstances bearing on the reliability of A.R.'s testimony, the defendant argues that, at the time of the circuit court's ruling, the offenses to which A.R. testified involved "uncharged conduct," cut against the admission of A.R.'s testimony. We find this factor is properly afforded little weight in the circuit court's overall analysis. The reason for this can be seen in this case, wherein this court takes judicial notice of court and Illinois Department of Corrections records that show the defendant was ultimately charged and convicted based on the conduct to which A.R. testified. For all of these reasons, we decline to disturb the circuit court's admission of A.R.'s testimony.

¶ 58 2. *Hearsay Testimony of Ms. Gasser and Agent Finney*

¶ 59 The second issue on appeal is whether the circuit court erred in admitting the hearsay testimony of Ms. Gasser, as well as the testimony of Agent Finney and the video recording of Agent Finney's interview of B.R. The admission of hearsay testimony in this context is governed by section 115-10 of the Code (725 ILCS 5/115-10 (West 2012)), which provides, in relevant part, as follows:

"(a) In a prosecution for a physical *** act perpetrated upon or against a child under the age of 13, *** including but not limited to prosecutions for violations of [predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012))], the following evidence shall be admitted as an exception to the hearsay rule: ***

***

(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 *** 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 ***; and

(3) In a case involving an offense perpetrated against a child under the age of 13, the out of court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offence, whichever occurs later, but the statement may be admitted regardless of the age of the victim at the time of the proceeding."

¶ 60 According to the language of the statute, for evidence of a victim's out-of-court statements concerning the alleged abuse to be admissible, the circuit court must find "that the time, content, and circumstances of the [victim's] statement provide sufficient safeguards of reliability." 725 ILCS 5/115-10(b) (West 2012). When determining the reliability of a child's hearsay statement, relevant but nonexclusive factors for consideration include: "(1) the spontaneity and consistent repetition of the statement; (2) the mental state of the child in giving the statement; (3) the use of terminology not expected in a child of comparable age; and (4) the lack of a motive to fabricate." *People v. Bowen*, 183 Ill. 2d 103, 118 (1998). As the proponent of the out-of-court statement, the State bears the burden of establishing its reliability and that it was not the result of manipulation or prompting by an adult. *People v. Lara*, 2011 IL App (4th) 080983-B, ¶ 36.

¶ 61 On review, we will not reverse the circuit court's decision to admit evidence under section 115-10 of the Code unless the record clearly demonstrates that the court abused its discretion. *People v. Williams*, 193 Ill. 2d 306, 343 (2000). "Determinations of the credibility of witnesses, the weight to be given their testimony, and reasonable inferences to be drawn from the evidence lie in the province of the trier of fact." *Lara*, 2011 IL App (4th) 080983-B, ¶ 41. "An abuse of discretion occurs when the [circuit] court's determination is arbitrary, fanciful, or unreasonable or when no reasonable person would agree with the stance adopted by the [circuit] court." *People v. Applewhite*, 2016 IL App (4th) 140558, ¶ 57.

¶ 62 Further, "[u]nder our deferential standard of review, we evaluate the [circuit] court's finding that hearsay statements are sufficiently reliable for admission under section 115-10 of the *** Code by considering the totality of the circumstances surrounding the making of the statements at issue." *People v. Stull*, 2014 IL App (4th) 120704, ¶ 85. "In so doing, we do not focus on the evidence presented at trial, but instead, only on the evidence presented at the pretrial hearing concerning the reliability of the victim's hearsay statements." *Id.* With these standards in mind, we address the defendant's arguments regarding the hearsay testimony of Ms. Gasser and Agent Finney, as well as the video recording of B.R.'s statements during her forensic interview.

¶ 63 In arguing it was reversible error to admit the testimony and video recording regarding B.R.'s hearsay statements, the defendant first argues that the timing of B.R.'s statements did not "provide a sufficient safeguard of reliability." According to the testimony presented by the State in the pretrial hearing, B.R. made the first statement to Ms. Gasser in February 2013 and the second on July 21, 2013. Agent Finney's interview of B.R. took place on August 1, 2013. The defendant argues that because he was ultimately acquitted of the charge alleging abuse against B.R. in July of 2013, and convicted of abuse alleged to have occurred sometime in 2012 or early 2013, "potentially more than one year had passed" between the alleged abuse and B.R.'s statements to Ms. Gasser and Agent Finney. The defendant, citing *In re E.H.*, 377 Ill. App. 3d 406, 408-16 (2007), argues that this lapse in time, in conjunction with B.R.'s young age of three, renders B.R.'s statements unreliable.

¶ 64 Having considered the defendant's argument as to the timing of B.R.'s statements to Ms. Gasser and Agent Finney in light of *In re E.H.*, we find a determinative distinguishing factor making that case inapplicable. In that case, the victims, who were two and five at the time, made the statements a year after the alleged abuse, and the circuit court had before it that information when it made its ruling. 377 Ill. App. 3d at 414. In contrast, we decline to find an abuse of discretion based on information that the circuit court did not have available to it at the time of the pretrial hearing. See *Stull*, 2014 IL App (4th) 120704, ¶ 85. Based on the charges before the circuit court, B.R.'s statements to Ms. Gasser were made within days or months of each corresponding allegation of alleged sexual abuse. In addition, Agent Finney interviewed B.R. within a few days of the alleged abuse occurring in late July. We find no abuse of discretion on the basis of the timing of B.R.'s statements to Ms. Gasser and Agent Finney.

¶ 65 The defendant next argues that B.R.'s statements to Ms. Gasser and Agent Finney were unreliable because they "were not necessarily spontaneous," but rather were in response to leading questions by Ms. Gasser and Agent Finney respectively. After a thorough review of the record and a viewing of the video recording of the forensic interview, we disagree. According to Ms. Gasser's testimony at the pretrial hearing, B.R. was not prompted at all when B.R. made the initial statement to Ms. Gasser that the defendant had stuck his finger in her "butt" and that it hurt badly. The fact that Ms. Gasser testified she did not believe this initial statement does not defeat the spontaneity of the statement. Additionally, according to Ms. Gasser's testimony in the pretrial hearing, B.R.'s statement to her in July 2013 began with B.R.'s spontaneous reaction to

Ms. Gasser's movement toward her vaginal area while giving B.R. a bath, and her statement and demonstration regarding the defendant's rubbing her in her vaginal area. While B.R.'s additional statements to Ms. Gasser were made after Ms. Gasser read her a book about good and bad touch and asked her additional questions, this parental reaction to B.R.'s initial statements does not defeat their reliability.

¶ 66 With regard to B.R.'s statements to Agent Finney, the circuit court, the jury, and this court all had the benefit of viewing the video recording of Agent Finney's forensic interview of B.R. Our Supreme Court has recognized that the video recording of statements of victims under section 115-10 may well enhance their reliability. *People v. Bowen*, 183 Ill. 2d 103, 112 (1998) (citing *Idaho v. Wright*, 497 U.S. 805, 818-19 (1990)). "Unlike typical hearsay, videotaping enables the trier of fact to observe firsthand the nature and suggestiveness of the questions posed to the child; the substance and subtleties of the child's responses; and the child's demeanor in giving those responses." *Id.* Further, we agree with the State that there was evidence that B.R.'s age made it appropriate to ask her questions during the interview that gave B.R. options in providing an answer. In any event, B.R. made several spontaneous declarations during the course of the interview which increased the reliability of the statements, including her statements that the defendant had "pushed really hard," while gesturing to her butt region and physical demonstration of her index finger as describing the defendant's mode of pushing. For all of these reasons, we cannot find that no reasonable person would have taken the position that the circuit court took in allowing this evidence to be put before the jury.

¶ 67 The final argument the defendant makes regarding the circuit court's decision to admit B.R.'s hearsay statements via the testimony of Ms. Gasser and Agent Finney, as well as the video recording of the forensic interview, is that there were inconsistencies in these statements by three-year-old B.R. The main inconsistency that the defendant points to is the fact that Ms. Gasser testified to two statements made by B.R. several months apart, and describing two separate instances of conduct, while Agent Finney's interview of B.R. resulted in her statement that this only happened once. Considering B.R.'s age and the fact that the jury had the benefit of observing the forensic interview, we do not feel this inconsistency rendered the circuit court's decision to admit the statements an abuse of discretion.

¶ 68 3. *Prosecutorial References to Defendant's Failure to Memorialize Statements*

¶ 69 The final issue the defendant raises on appeal is whether he was deprived of a fair trial because the State repeatedly criticized, in front of the jury, his failure to memorialize his statements to Agent Finney in a written statement. According to the defendant, the prosecutor's questions to him on cross-examination as to why he refused to make a written statement, as well as the prosecutor's reference to this fact in closing argument, constituted an encroachment on his right to remain silent and signaled to the jury the defendant was required to prove his innocence. Because this issue was not properly preserved for review by contemporaneous objection and a posttrial motion, we must consider the argument under the plain error doctrine. See *People v. Bunning*, 298 Ill. App. 3d 725, 727 (1998). Under the plain error doctrine, this court can review the forfeited issue if the defendant can show that (1) a clear and obvious error occurred and

the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear and obvious error occurred and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the justice system, irrespective of the strength of the evidence. *People v. Taylor*, 2011 IL 110067, ¶ 30. However, on the record before us, we agree with the State that no error occurred in the prosecution's cross-examination of the defendant and corresponding closing argument.

¶ 70 In the defendant's direct examination, the defendant claimed a substantial portion of what Agent Finney testified to was a product of her "twisting" the defendant's words. The defendant further testified that during the interview itself, the defendant directly accused Agent Finney of this, and as a result the defendant became angry and walked out of the interview. In order to challenge the defendant's testimony on cross-examination, the prosecutor inquired of the defendant as to why he refused to memorialize his statement when asked. We agree with the State that this line of questioning was not a violation of the defendant's right to remain silent because once the defendant made a post-*Miranda* statement, the introduction of evidence that the defendant subsequently refused to memorialize that statement does not amount to a fifth amendment violation. *People v. Banks*, 2016 IL App (1st) 131009, ¶ 132.

¶ 71 Neither do we find clear and obvious error in the context of this case, where the prosecutor asked the defendant why he refused to memorialize his statement after he took the stand and testified that Agent Finney's version of events was fabricated. We agree with the State that it is entitled to impeach the defendant's credibility in this regard. See

People v. Burris, 49 Ill. 2d 98, 104 (1971). Further, the case upon which the defendant relies, *People v. Bunning*, 298 Ill. App. 3d 725, 731 (1998), where an investigating detective testified on direct examination that during the course of an interrogation the defendant terminated the interrogation by asking for counsel, is wholly inapposite. The defendant cites to no case that stands for the proposition that in a situation where the defendant testifies the police were lying about his statement, it deprives the defendant of a fair trial to cross-examine him, for purposes of impeachment, on his failure to memorialize his statement. Nor are we aware of any such case.

¶ 72 The State's cross-examination of the defendant regarding his failure to memorialize his statement after he directly testified that Agent Finney was fabricating his statements and was "twisting his words" during the interview, causing him to walk out, was a proper subject for impeachment by an inconsistent act. During jury instructions, the circuit court informed the jury, *inter alia*, that the believability of a witness may be challenged by evidence that on some former occasion, he acted in a manner that was not consistent with his testimony in this case. The circuit court further instructed the jury that evidence of prior inconsistent acts may be considered only for the limited purpose of deciding the weight given to the testimony the jury heard from the witness in the courtroom. For these reasons, we find that this line of cross-examination, and corresponding statements in closing argument, was not plain error. See *People v. Nicholas*, 218 Ill. 2d 104, 111 (2005) (a prosecutor has wide latitude during closing argument and may comment on the evidence and any fair and reasonable inferences therefrom).

¶ 73 CONCLUSION

¶ 74 For the foregoing reasons, the defendant's conviction is affirmed.

¶ 75 Affirmed.