2013 IL App (5th) 100016-U

NO. 5-10-0016

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Madison County. |
| | ) | |
| v. | ) | No. 08-CF-149 |
| | ) | |
| KENNETH TUDOR, | ) | Honorable |
| | ) | James Hackett, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Stewart concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant was denied a fair trial where the State presented more evidence of uncharged sexual conduct than it did of the alleged offenses in Madison County, where the State presented photographs of the alleged victims at age five rather than the ages when the alleged crimes took place and then used those photographs during closing argument, and where an examining nurse was allowed to testify as an expert without being so qualified.

¶ 2 Defendant, Kenneth Tudor, appeals his three convictions for predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)). Count I related to victim H.T., defendant's adopted daughter, and counts II and III related to victim R.T., defendant's biological daughter. On appeal, defendant contends as follows: (1) he was denied a fair trial where (a) the State conducted a trial on uncharged sexual conduct between him and H.T. and R.T., presenting more evidence of those alleged offenses which occurred outside of Madison County than of the alleged offenses charged in Madison County, (b) the State presented photographs of H.T. and R.T. as very young children, rather than at their ages when the

alleged charged crimes took place with the only purpose being to inflame the passions of the jury, and (c) a "sex abuse nurse" was allowed to testify as an expert without being so qualified; (2) defense counsel was ineffective where he failed to ask R.T. about comments she made to Rebecca Gmoser, in which R.T. admitted she fabricated the allegations against defendant and where he failed to object to Detective Charlie Becherer's violation of an order *in limine* that he only testify to statements R.T. and H.T. made about the alleged Madison County incidents; (3) the combined errors served to deprive defendant a fair trial; and (4) he was not proven guilty beyond a reasonable doubt of predatory criminal sexual assault of a child. We reverse and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 On March 27, 2008, defendant was charged with four counts of predatory criminal sexual assault of a child. Count I alleged that defendant committed an act of sexual penetration upon H.T. in that "defendant placed his penis in the vagina of H.T." Count II alleged that defendant committed an act of sexual penetration upon H.T. in that "defendant placed his penis in the mouth of H.T." Count III alleged that defendant committed an act of sexual penetration upon R.T. in that "defendant placed his penis in the vagina of R.T." Count IV alleged that defendant committed an act of sexual penetration upon R.T. in that "defendant placed his penis in the mouth of R.T." The counts alleged that defendant was over the age of 17 and the victims were both under the age of 13. An amended indictment was filed on August 20, 2009, which deleted the original count II. Defendant was tried on the three remaining counts.

¶ 5 Prior to trial, the trial court heard argument on the State's motion to introduce other-crimes evidence pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2006)). In addition to the charged acts against H.T. and R.T., the State wished to present evidence of other acts defendant allegedly perpetrated

against both H.T. and R.T., beginning when they were each five or six years old up until the time of the charged offenses. The State set forth that the family moved around quite a bit, that there were numerous residences, and that not all of the offenses by defendant against H.T. and R.T. took place in Madison County. The State asked that H.T. and R.T. be allowed to tell the jury from beginning to end in chronological fashion what took place. The trial court ruled that evidence of other offenses was admissible, but asked the State to provide more detail about what H.T. and R.T. would testify to specifically. The State later provided summaries. H.T.'s summary provided as follows:

> "[H.T.] - Anticipated Testimony pursuant to 725 ILCS 5/115-7.3.
>
> First memory of abuse was when they were living in Rochester, IL and she was around six. When her mom was at work, the defendant would tell [H.T.] to come sleep with him. He took off his clothes and he would take off her clothes and forced his penis into her vagina. He was on top of [H.T.] She stated it hurt her and should [*sic*] would cry and he would tell her, 'it's okay.' She would be sore afterward.
>
> After Rochester, they lived in Springfield, and in the defendant's bedroom, he penetrated her with a red, huge vibrator. [H.T.] described this as very uncomfortable.
>
> Another time, he pulled the mattress from his bedroom into the living room. He took off her clothes and his clothes and penetrated her vagina with his penis, after lubricating with his own spit. This type of abuse happened whenever her mom was working and away from home.
>
> After Springfield, they moved to Marengo. While living there, the defendant would call [H.T.] into his bedroom, tell her to get undressed and penetrate her with his penis after spitting on his hand and using the spit for lubrication. He would also have her perform oral sex on him and he would perform oral sex on her.
>
> While still living in Marengo, the family was at the railroad museum, which included

a train car. In the train car, the defendant took [H.T.] to the sleeping portion of the car, took of [*sic*] her clothes and his clothes and penetrated her vagina with his penis.

The family then moved to Alhambra, [H.T.] was in sixth grade. The defendant brought [H.T.] alone to their new house. He brought in pillows and blankets and laid them out on the floor. He took off her clothes and his clothes and penetrated her vagina with his penis. He had her be on top of him during intercourse. Once they moved into the Alhambra home, the abuse took place in the defendant's bedroom.

The family moved to Highland, Illinois when [H.T.] was around fourteen. The defendant took off her clothes and took pictures of her in several poses while in defendant's bedroom."

The State also provided a summary of R.T.'s expected testimony as follows:

"[R.T.] - Anticipated Testimony pursuant to 725 ILCS 5/115-7.3

Marengo, IL

1st memory of abuse was in Marengo in a train car. She thinks she was 5 or 6 years old at the time. She, [d]efendant and [H.T.] were present. Defendant took [H.T.] into the sleeping room and had her come in a short time later. When she walked in she saw [H.T.] naked on the bed. The [d]efendant was also naked. Defendant told her to watch as he abused [H.T.] [Defendant's] face was in [H.T.'s] private part/vagina and [H.T.'s] face was in his private part/penis. When finished with [H.T.] [defendant] did the same thing to her. He was licking and sucking her private part and put his penis inside her mouth. After defendant was finished with both the girls, he told them to get dressed and they all left the train car.

Alhambra, IL

Moved to a house in Alhambra when she was in 1st grade. She & [defendant] were

on the bed in [defendant] and [mother's] bedroom. He told her to take her clothes off and he did the same. [Defendant] pulled out a pink two-headed thing from his drawer and stuck it inside her vagina/private part, and pulled it out when she started bleeding.

Highland, IL

Moved to a house in Highland when she was in 2nd grade. When she was in 3rd or 4th grade, she and [defendant] were home alone after she came home from school. [H.T.] missed the bus that particular day. She and [defendant] were in the living room and the curtains were closed. [Defendant] had her take her clothes off. [Defendant] had his shirt on and pants down. He laid down on the couch and had her get on top of him, facing him. He put his penis in her vagina, using his own spit as lubrication. Heard someone coming in, so they both jumped up and were trying to put their clothes on. [H.T.] walked in while she was behind the fish tank trying to put her clothes on. [Defendant] was pulling up his pants.

This, meaning vaginal penetration, also happened other times without anyone walking in. This would happen in her room, her parents' room and the wooden work shed in the backyard in same fashion as described above.

[Defendant] would also have her give him blowjobs both inside the house and in the work shed. Stuff would come out of his private part and she would have to swallow it. She would then get a drink of anything but water.

Trenton, IL

Moved to Trenton in 5th grade and similar acts of abuse continued.

Aviston, IL

Moved to Aviston in 6th grade. Her last memory of abuse was in Nov/Dec 2007. She was doing dishes and [defendant] told her to come to his bedroom. He took his clothes off and had her take her clothes off. He laid on the bed and had her get on top

of him. He put his private part in her private part, again using his own spit as lubrication."

Defense counsel argued that the summaries were insufficient for the trial court to perform the required balancing test and what information had been provided showed a lack of similarity required to admit the evidence. Only Alhambra and Highland are in Madison County. Nevertheless, the trial court ruled the State met its burden and all the evidence was admissible.

¶ 6 The State also moved for admission of statements made by H.T. and R.T. to Kathy Hitpas, a Department of Children and Family Services (Department) investigator, Detective Becherer, and the victims' mother who was married to defendant. Hitpas testified that she spoke to R.T. in January 2008 and that R.T. was very "matter of fact" and not very upset during the interview. R.T. told Hitpas her first sexual contact with defendant was in a railroad museum when she was five or six years old. R.T. heard noises like "mom and dads make when they make babies" coming from the sleeping car. Defendant came out of the sleeping car nude and told her to go in. R.T. complied and saw her sister, H.T., also nude, on a bunk. H.T. and defendant engaged in some sexual acts and then defendant told H.T. to get out of bed and R.T. to get in. R.T. claimed defendant put his penis in her mouth. R.T. said once the family moved to Alhambra, defendant was no longer involved with H.T., but only with R.T. The conversation was not recorded. Hitpas testified the interview took place two days after R.T. spoke to employees at the Child Advocacy Center and denied in a videotaped statement that she had any contact with defendant.

¶ 7 Detective Becherer talked to R.T. after Hitpas and videotaped his interview. R.T. told him about the train car incident and said she saw defendant and H.T. naked in a bunk with H.T.'s crotch in defendant's face and defendant's crotch in H.T.'s face. Defendant told R.T. to watch and then to switch places with H.T., and R.T. complied. R.T. also told Becherer

about other incidents of alleged sexual contact in Alhambra, Highland, Trenton, and Aviston, all places where the family lived. R.T. claimed defendant would tell her to give him "blow jobs" and that defendant would have her get on top of him and he would put his penis in her vagina. R.T. also told him she had anal intercourse with defendant when they lived in Marengo. Usually the incidents occurred in defendant's bedroom, but one time it occurred in the living room in a recliner, and once it occurred in R.T.'s bedroom. The recliner incident occurred in Highland. Becherer believed R.T. told him only vaginal penetration occurred in Highland.

¶ 8 The trial court ruled that Hitpas and Becherer could only testify as to statements R.T. made to them about the Madison County incidents and the victims' mother could not testify about pictures of H.T. allegedly taken by defendant because it was not factually similar enough to incidents of penetration.

¶ 9 At the time of trial, H.T. was 18 and R.T. was 13. Detective Charlie Becherer was the first witnesses called by the State. He testified that on January 3, 2008, the Clinton County sheriff's department received an anonymous phone call from a female who said she worked with H.T. and she heard that some sexual things occurred between H.T. and defendant and she thought it needed to be investigated. Detective Becherer learned that H.T. was now living with her boyfriend, B.B. He went to B.B.'s house and talked to both B.B. and H.T. After he talked to H.T., he contacted the Madison County sheriff's department because he discovered that some of the alleged abuse occurred in Madison County. He also reported the alleged abuse to the Department hotline. He and Detective Bauer from Madison County went to H.T.'s family residence in Aviston where he learned that H.T.'s sister R.T., age 11, was residing, along with two other younger female siblings. No abuse is alleged against the younger siblings. A Department caseworker recommended that defendant move out of the home, and defendant complied. R.T. initially went to live with H.T., but later moved out.

¶ 10 H.T. testified that she is defendant's stepdaughter and she does not know her biological father, but she has since changed her name to H.M. Her mother met defendant when they lived in South Dakota and H.T. was six. Her mother and defendant married. They moved to Rochester, Illinois, when she was six. H.T. said that while in Rochester, some uncomfortable touching occurred in her parents' bedroom. Defendant asked H.T. to sleep with him, and he rubbed her and took her clothes off and she took defendant's clothes off. She said she was on her back and defendant got on top of her and had intercourse with her, and it hurt her vagina. The prosecutor specifically asked H.T. whether defendant touched her any other time while in Rochester that made her feel uncomfortable and she answered, "No." H.T. testified that the family moved around a lot while she was young and after Rochester, the family moved to Springfield when she was about eight.

¶ 11 She testified that while in Springfield, defendant also touched her in ways that made her feel uncomfortable. The first time was in the living room when defendant took the bed out of the master bedroom and put it in the living room while her mother was on vacation with a friend. She said she had intercourse with defendant on the bed and she was on top. She also recalled another incident in her parents' bedroom with a vibrator. She said defendant was experimenting with it. According to H.T., defendant took off her clothes and made her insert a red plastic vibrator in her vagina. She said it hurt. The prosecutor specifically asked H.T. how often this type of touching occurred in Springfield, and H.T. answered, "Any time my mom wasn't home."

¶ 12 H.T. testified that the family moved to Marengo when she was about 8 years old and lived there until she was 12 or 13. She testified that while in Marengo, defendant touched her in ways that made her feel uncomfortable and that these incidents usually occurred in her parents' bedroom. H.T. said defendant would "[p]erform intercourse" which she described as defendant's "penis touched my vagina." The prosecutor specifically asked H.T. how often

this would occur in Marengo and H.T. again replied, "Any time my mom wasn't home." H.T. said her mom would not be home because she would be at work. She also said defendant performed oral sex on her, meaning "[h]is mouth touched my vagina."

¶ 13 The prosecutor specifically asked whether there was a time while she was living in Marengo if her family would go to a railroad museum, and H.T. replied that there was and that defendant owned a train car that was located there. The prosecutor asked H.T. if there were any touches in the train car that made her feel uncomfortable and she replied: "It wasn't more of touching. It was just more of laying there." She said that both of them removed their clothes. She said that her sister R.T. was in the dining area of the train car while this occurred.

¶ 14 H.T. testified that the family moved to Alhambra when she was 13 and in sixth grade. She recalled that the first night they moved there, they took a load of their belongings to the house and picked out beds. She said defendant laid blankets on the floor in what was to become her parents' bedroom and then had intercourse with her. She recalled that she was on the top. She said that nothing else of a sexual nature occurred in Alhambra.

¶ 15 The family moved to Highland when H.T. was 14. H.T. testified that defendant did not do anything to her there that made her feel uncomfortable, but she was suspicious that defendant was doing something to R.T. H.T. explained that one day she missed her bus to school and walked home. When she got home she saw R.T. in the living room and R.T. was crying and buttoning her pants. She said defendant was in the bathroom.

¶ 16 She testified that while the family was living in Springfield, she told her mom as she was leaving the house to go on vacation with a friend that she did not want her to leave because she did not want defendant touching her. The next person she told about the sexual abuse was her boyfriend. She said she told him the night they moved out of her parents' house when her boyfriend asked her why she disliked defendant so much. She testified that

she did not tell anyone else about the abuse because she knew what it would do to the family and she saw how happy her mother was and she did not want to break that up for her mother. H.T. explained that she never told anyone about her suspicions after missing her bus and finding R.T. crying on the floor because she did not have proof that defendant did anything. She recalled seeing a doctor about "women's issues" and said she did not disclose anything to the doctor about being abused because "[i]t was never brought up." The prosecutor specifically asked H.T. whether the doctor asked her if she was being abused, and H.T. replied, "No."

¶ 17 On cross-examination, H.T. initially denied that her parents kicked her boyfriend out of the house. She later admitted that her boyfriend had been living with her at her family home since mid-November and that on approximately January 1, 2007, her parents got tired of the disrespect from her boyfriend and told her that her boyfriend was not welcome back. She agreed that her boyfriend was smoking in the house against her parents' wishes and had been caught urinating out of a second-story bedroom. She denied that defendant took her phone away, but later admitted that defendant told her that she and her boyfriend were going to be responsible for their own phone bills and he took away the truck she had been driving; however, H.T. denied that either of these things bothered her.

¶ 18 Defense counsel then impeached her with postings made on her MySpace account. H.T. admitted that she wrote as follows: "No, but New Year's Eve my dad kicked me out. Kicked me and my boyfriend out of the house, and took my phone, and my truck away from me, and I'm living with some roommates here in Trenton." After reading that, H.T. admitted that defendant kicked her out of the house and took her phone away.

¶ 19 Also on cross-examination, H.T. said she only had sex with defendant one time in Springfield. She said that what occurred in Marengo at the railroad museum was "[n]ot a sex act, no." She testified that they just laid there naked and there was no penetration or

fondling. Later H.T. admitted there was fondling, but said R.T. did not come into the area of the car where they were lying naked and R.T. did not witness anything. She said defendant did not invite R.T. to participate. H.T. did not witness R.T. and defendant involved in any sexual acts in the train car. She explained why she did not tell Detective Becherer about the train car incident: "I didn't see what was– what was the point of telling. There was nothing sexual in the act doing it." She said she brought it up later because R.T. made some statements about the train car and thereafter H.T. was asked about the incident. She said she never told Kathy Hitpas that it was defendant and R.T. on the bunk in the sleeper car. She testified that during the two-year period the family lived in Marengo she only had vaginal intercourse with defendant once and oral sex one time in her parents' bedroom. She recalled only one incident in Alhambra and said nothing sexual occurred in Highland. Ultimately, she said she had sex with defendant a total of four times. She denied ever telling a Department worker that defendant told her if she was not going to cooperate and have sex would she mind if he then did these things with R.T. She said if she ever thought something was really going on between defendant and R.T. she would have told somebody. She denied ever having discussions with R.T. about this case or threatening R.T.

¶ 20 After H.T. finished testifying the trial court gave a limiting instruction, specifically stating as follows:

> "[THE COURT:] We've heard testimony here from this witness about other instance–other incidents or other offenses, let me say, than specifically what is charged against [defendant] in this case here. Meaning you've heard of offenses or incidents that had to do with times outside of our jurisdiction prior to what happened in this jurisdiction.
>
> You follow me?
>
> JURORS: (Indicating).

THE COURT: Now those are admitted. Those are presented to you on a limited basis which means you can only consider that information for a restricted purpose which means that you can consider that information in deciding this case as to whether, first, the [d]efendant committed those acts or offenses.

Second, if you do believe that, then they are in your considerations for a limited purpose, and if you determine that those offenses occurred, then you give what weight to it that you think, but it's for the limited purpose of propensity to commit the offense charged.

Now, that's a lot of legal terminology there. Meaning if you are convinced beyond a reasonable doubt at the end of the case that an act happened in Chicago or Minneapolis–whatever the location is–prior to the time period and the jurisdiction of this charge, that is now what he is being accused of here today as far as what you vote guilty or not guilty on.

Does that make sense?

JURORS: (Indicating).

THE COURT: So, whether you are affirmatively convinced beyond a reasonable doubt that he did something in New York City, that's not the elements here that you are asked to decide, but you can use that information for a limited purpose. That the law allows you to consider that on the issue of the [d]efendant's propensity to commit the crime charged here at our time in this jurisdiction.

Does that make sense?

JURORS: (Indicating).

THE COURT: The information that you've heard, and there was a lot of it, about prior offenses or prior acts, does not necessarily allow to– you to conclude that, but what it does is gives you for a limited purpose evidence as to whether you believe

that demonstrates the [d]efendant's propensity to commit the acts charged.

Follow that?

JURORS: (Indicating)."

A short break was taken after which R.T. was the next witness to testify.

¶ 21 R.T. was 13 at the time of trial and in eighth grade. She testified she currently lives with foster parents because she was a victim of abuse in her own home. She testified the abuse began when she was four or five years old and the family lived in Union, which is near Marengo. She said the incident occurred in a train car at the railroad museum where defendant worked. Defendant came into a train car on his lunch break and asked H.T. to go into the bunk area with him, and H.T. complied. Defendant then came out of the bunk area and asked R.T. to go in, where she saw H.T. naked on a bed. Defendant was also naked. He asked R.T. to get undressed, too. After R.T. took off her clothes, defendant asked her to watch H.T. Defendant laid on the bed and H.T. got on top of defendant with her vagina at defendant's mouth and defendant's penis in H.T.'s mouth. He then asked R.T. to do the same thing, and she complied. Ultimately, defendant went back to work and H.T. and R.T. went back to playing Play Station.

¶ 22 R.T. testified the family moved to Alhambra when she was in first grade. She recalled being in her parents' bedroom with defendant on one occasion in which defendant had a "pink thing" and he put it in her vagina and when he pulled it out, her vagina was bleeding. Defendant made her get into the bathtub and wash with water so she would stop bleeding. R.T. did not remember any other incidents in Alhambra.

¶ 23 R.T. testified that after Alhambra the family moved to Highland and there was a time that defendant got a vasectomy. She was home alone with defendant. H.T. was not home from school yet, and her other two sisters were with her mother. Defendant was on the couch in the living room and he told her to take off her clothes. After R.T. took her clothes off,

defendant told her to get on top of him, and he put his penis in her vagina. R.T. said it hurt. R.T. then heard H.T. open the door, so R.T. got off of defendant and started putting her clothes back on and so did defendant. R.T. said H.T. got very upset. R.T. said it did not happen anymore in Highland, but it did happen "a couple of times I know of. I just don't remember much." She said other incidents in which defendant put his penis in her vagina occurred in Highland in her parents' bedroom, her bedroom, and a work shed in the backyard. She remembered giving defendant a "blow job" in the work shed while her little sister watched. She said that when she gave him a blow job sperm would come out of his penis and go in her mouth and that sometimes she swallowed it and sometimes she spit it out. If she swallowed it, she would get some lemon and water to wash away the taste. She said defendant sometimes told her not to tell her mother about these incidents. She said other things happened in Highland, but she could not exactly remember what happened.

¶ 24 After Highland, the family moved to Trenton where she said there were "quite a few" "uncomfortable touches" which she further described as, "Basically [defendant] putting his penis in my vagina, and we'd be in his room or in mine." She said all the incidents occurred inside the home in Trenton. She said the family lived in Trenton until November of her sixth-grade year and then the family moved to Aviston. She said there were a couple of times in Aviston where defendant put his penis in her vagina. She said sometimes defendant would put saliva on his penis before he would put his penis in her. She said she never told anyone because she was afraid defendant would go to jail and she loved him and she did not realize what defendant was doing was really wrong.

¶ 25 She remembers the police coming to her house when she was 11 and having to talk to a Department caseworker who took her to the Child Advocacy Center. While at the Center she denied that anything sexual occurred between her and defendant, but she did tell a police officer something occurred and she gave a videotaped statement. After giving the statement,

she wrote a letter to the Department in which she denied any sexual abuse, but since writing that letter, she decided what defendant did was "wrong and sick, and he shouldn't have done it." She said she wrote the letter to the Department out of loyalty to her father and the fact that she did not want him to go to jail.

¶ 26 On cross-examination, defense counsel tried to pin R.T. down about where the alleged events occurred. As to the sexual incidents that occurred in Alhambra, R.T. said it was the "pink thing" one time and "the other thing was a couple of times." She explained the "other things" as "like me being with him putting his penis up my butt." She said that occurred "[a] couple of times." She said he put his penis in her vagina "quite a few times" in Alhambra. R.T. admitted that she was very confused as to where things occurred and that, other than the "pink thing" incident, she does not specifically remember what occurred in Alhambra, and she could not specifically tell the jury defendant inserted his penis into her vagina in Alhambra, nor could she specifically remember oral sex occurring in Alhambra. As to Highland, she said defendant was on the couch when H.T. walked in, and she does not remember telling the detective defendant was on a reclining chair. She said she had sex with defendant quite a few times, but does not remember saying it was 15 times per month. She said she had anal sex with defendant only in Alhambra. In Trenton, she only had vaginal sex with defendant. She said she also had sex with defendant in Aviston.

¶ 27 R.T. said her mother asked her to write a letter denying the allegations, and she complied. R.T. admitted that probably only three fourths of what she testified to was correct, but she believes that over the course of at least a couple of years she had sex with defendant two out of every five days. She does recall telling someone who interviewed her that she made up all of the allegations because H.T. put a lot of pressure on her, and she did try to repeatedly contact the Department in March 2008 in order to tell them the allegations against defendant were untrue.

¶ 28 The next witness called by the State was Cara Christanell, a certified pediatric nurse practitioner at Cardinal Glennon Hospital. She testified she has been involved in approximately 350 to 400 cases of sexual abuse where she was the primary examiner. She examined R.T. on January 24, 2008, and the results were normal. R.T. did not exhibit any signs of permanent injury or scarring. She testified that a normal exam does not rule out abuse because "sexual abuse can occur without leaving any type of permanent physical injury." She explained that with only minor trauma the body can heal itself without leaving any type of permanent injury or scarring. Over objection, she was allowed to testify that in 90 to 95% of the cases in which sexual abuse is alleged, the results of the medical examination are normal.

¶ 29 On cross-examination, Christanell testified that she was unaware that there had been any genital-to-anal contact and no report of such had been made to her from R.T. or anyone who interviewed R.T. She acknowledged that R.T.'s anal examination was normal in that there was no scarring or no tearing.

¶ 30 H.T. and R.T.'s mother testified that H.T. was three when she met defendant. She recalled an incident between H.T. and defendant which made her suspicious. She testified that when H.T. was five or six, the family was living in Springfield and the mother walked in and found defendant sitting on a chair with his pants down and H.T. on the floor across from him with her pants down. Defendant said, "I didn't expect you back so soon." She confronted defendant about it, and defendant explained that he was giving H.T. a spanking. She admitted that she helped R.T. write a letter to the Department in which R.T. denied any incidents of sexual abuse. She said at that time she did not quite believe that any abuse had occurred and she wanted to get defendant out of jail. She took the letter to her lawyer and the lawyer told her it was okay to send the letter, so the mother put the letter in the mail. The mother identified People's Exhibit 4 as being a picture of H.T. taken when H.T. was in

kindergarten or first grade and People's Exhibit 5 as a picture of R.T. in kindergarten.

¶ 31 On cross-examination, she said that over the course of the past 12 years neither of her daughters ever voiced a complaint about defendant doing anything sexual to them. When the family lived in Springfield, H.T. did not want her mother to go on vacation, but she never indicated there was a problem with defendant. She admitted that defendant was a disciplinarian and was fairly hard on H.T. and R.T. and that he and H.T. "bumped heads" over H.T.'s live-in boyfriend right before the allegations came to light. She admitted that H.T.'s truck and phone had been taken away from her right before she made these allegations against defendant and that H.T. could have been resentful.

¶ 32 Detective Charlie Becherer was called again by the State over the objection of defense counsel. He testified that he conducted a videotaped interview of R.T. on January 15, 2008, during which R.T. said that while living in Alhambra almost all the sexual contact happened in her parents' bedroom and defendant would be on the bottom and she would be on the top and defendant's penis would be in her vagina. She also told him that she would give defendant a blow job in which defendant would put his penis in her mouth. During the course of the interview, Detective Becherer asked R.T. if she knew what an orgasm was, and R.T. said she did not. Detective Becherer explained what it was, and she then said defendant would have an orgasm in her mouth and afterwards defendant would get her a glass of water. Detective Becherer said R.T. reacted like several of the sexual abuse victims he interviewed over the course of his career.

¶ 33 The State rested, and the first witnesses called by defendant was Erin Fancher Gagen, a family practice physician who examined H.T. on June 26, 2007, in Trenton. Dr. Gagen testified that it is her common practice any time a teen or young woman comes to her seeking contraceptive advice to ask whether she has been sexually molested by an adult. She specifically asked H.T., who denied any history of molestation or inappropriate touching by

an adult. H.T. was accompanied by defendant to the doctor appointment, but Dr. Gagen asked him to step out of the room prior to asking H.T. whether there was any history of sexual abuse.

¶ 34 Rebecca Gmoser, a family friend, attended a custody hearing at the Clinton County courthouse in the early part of 2008. She testified that after the hearing, H.T. came out of the courtroom clapping her hands and saying, "yea, I win, I win." Gmoser saw social workers and an attorney congratulating H.T.

¶ 35 Detective Becherer was called by the defense. He testified that when he interviewed H.T. in early January 2008, she never told him about a sex toy being inserted into her vagina by defendant. He said his interview lasted only a couple of minutes and he was trying to ascertain whether a crime occurred in Clinton County. H.T. told him the abuse started when she was 7 and lasted until she was 14. She told him nothing happened in Clinton County, and she never gave him a number of how many times it occurred.

¶ 36 Detective Bauer testified that he interviewed H.T. on January 5, 2008, and H.T. never told him about a sex toy or oral sex. He specifically asked H.T. how many times she had sex with defendant and she said, "too many times to count." H.T. told him when the family lived in Alhambra she started sticking up for herself and would tell defendant she did not want to have sex and defendant would place his hands over her nose and mouth and try to suffocate her to get his point across. H.T. told him that if she suspected defendant was doing anything to R.T. she would have told someone.

¶ 37 Kathy Hitpas, a Department child protection investigator, testified that she spoke to R.T. on January 5, 2008, at the Child Advocacy Center, and R.T. denied that anything happened between her and defendant. Ms. Hitpas conducted additional interviews with R.T. on January 10 and January 11, 2008. During one of these interviews, R.T. told Hitpas that at some point she was having sex with defendant 15 times per month. R.T. told her the

sexual abuse started in Marengo and continued until 2007 in Aviston. R.T. also reported that H.T. tried to stop defendant from having sex with R.T. Kathy reported that during the middle of the investigation, she became ill and Angela Owens took over. During cross-examination, Ms. Hitpas reported that it is normal for children not to tell the whole truth right away during an investigation. Initially, R.T. said defendant penetrated her with his penis, but the next day, R.T. told her there was more to the story and then told her about the train car incident in Marengo.

¶ 38 Angela Owens testified that she took protective custody of defendant's children on March 7, 2008, and on that date R.T. told her she wanted to take back what she said about the abuse because it was not true and H.T. forced her to make the allegations because H.T. was mean and R.T. was scared of her. R.T. told Owens H.T. was evil and was lying about everything. Owens confirmed that H.T. sent a letter to the Department in which she recanted. On cross-examination, Owens confirmed that on March 10, 2008, R.T. told her that she did not lie about what defendant did to her and she recanted only because she was trying to help her mother, who was lying around crying, and R.T. felt badly for her mother. Owens said it is "very common" for a young victim to recant after making allegations of abuse because the family is torn apart and the child feels guilty and wants to fix it.

¶ 39 Defendant took the stand in his own defense. He testified that when the family moved to Alhambra, the entire family moved at the same time. He testified that he worked as a conductor and engineer for the railroad and he was always on call and would only get two hours' notice to report to work. He recreated his work schedule for the prior five years. In a typical month, he would have at least 4 days off, but if he had vacation he would have 11 days off work. He testified it was impossible for him to have assaulted R.T. 15 times per month because he was not even home that many days each month.

¶ 40 Defendant believed H.T. made the accusations against him out of vengeance for

disciplining her so much and dragged R.T. into the situation to bolster the allegations. Defendant testified that his relationship became more confrontational with H.T. the older she became. Defendant allowed H.T.'s boyfriend to move into the family home hoping that it would straighten her out, but that did not happen. The boyfriend failed to follow the ground rules defendant and his wife laid down. He smoked in the home, despite being told not to do so, and urinated out of a second-floor window. The boyfriend went to a New Year's Eve party, but H.T. was grounded for bad grades. Defendant and his wife decided it would be best if the boyfriend not return and informed H.T. of their decision. H.T. decided to move out with her boyfriend. Defendant took her phone and the truck she was driving away from her. Defendant speculated that H.T. thought she would be better able to manipulate her mother with defendant gone and might be able to move back into the Aviston house with her boyfriend and that is why she made the sexual abuse allegations against him. Defendant denied all the allegations of sexual abuse.

¶ 41 Defendant was convicted of all three counts of predatory criminal sexual assault and was sentenced to natural life in prison. Defendant filed a timely notice of appeal.

¶ 42 ANALYSIS

¶ 43 I. FAIR TRIAL

¶ 44 A. Uncharged Sexual Conduct

¶ 45 Defendant first contends he was denied a fair trial because the State conducted a trial on uncharged sexual conduct between defendant and H.T. and R.T., presenting more evidence of those alleged offenses than the offenses charged in Madison County and creating a risk that his convictions were based on the jury's belief that he is a bad person in need of punishment rather than actual proof. The State admits that more evidence of uncharged conduct was admitted than was evidence concerning the charged offenses, but insists the trial court correctly permitted the introduction of propensity evidence because it was relevant to

establish defendant's continual course of criminal misconduct against H.T. and R.T. since defendant had changed residences numerous times over the years to places outside of Madison County.

¶ 46 It is well-settled that other-crimes evidence is prejudicial to a defendant because the risk associated with the admission of such evidence is that it might prove "too much," leaving a jury inclined to convict the defendant simply because it believes that he or she is a bad person deserving of punishment. *People v. Donoho*, 204 Ill. 2d 159, 170, 788 N.E.2d 707, 714 (2003). However, section 115-7.3 of the Code provides an exception to the rule against other-crimes evidence and "enable[s] courts to admit evidence of other crimes to show [a] defendant's propensity to commit sex offenses." *Donoho*, 204 Ill. 2d at 176, 788 N.E.2d at 718. Section 115-7.3 specifically provides:

> "(a) This Section applies to criminal cases in which:
>
> (1) the defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal abuse, criminal sexual abuse, or criminal transmission of HIV;
>
> * * *
>
> (b) If the defendant is accused of an offense set forth in paragraph (1) or (2) of subsection (a) or the defendant is tried or retried for any of the offenses set forth in paragraph (3) of subsection (a), evidence of the defendant's commission of another offense or offenses set forth in paragraph (1), (2), or (3) of subsection (a), or evidence to rebut that proof or an inference from that proof, 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.
>
> (c) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(1) the proximity in time to the charged or predicate offense;

(2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances.

(d) In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown." 725 ILCS 5/115-7.3(a)(1), (b), (c)(1)–(3), (d) (West 2006).

In *Donoho*, our supreme court urged trial courts "to be cautious in considering the admissibility of other-crimes evidence to show propensity by engaging in a meaningful assessment of the probative value versus the prejudicial impact of the evidence." *Donoho*, 204 Ill. 2d at 186, 788 N.E.2d at 724. Thus, while section 115-7.3 creates an exception to the rule that other-crimes evidence of propensity is inadmissible, it is not without limitation. Such evidence will only be admitted where the trial court finds that its undue prejudicial effect does not substantially outweigh its probative value. *Donoho*, 204 Ill. 2d at 170, 788 N.E.2d at 714-15.

¶ 47 When weighing the prejudicial impact of admission, a court should consider whether the other-crimes evidence will become the focus of the trial, or whether it might otherwise be misleading or confusing to the jury. *People v. Boyd*, 366 Ill. App. 3d 84, 94, 851 N.E.2d 827, 837-38 (2006). Other-crimes evidence must not become a focal point of the trial, and the detail and repetition admitted must be narrow so as to avoid the danger of a trial within a trial. *Boyd*, 366 Ill. App. 3d at 94, 851 N.E.2d at 837-38. When the unfair prejudice is excessive, even a limiting instruction will not save admissibility of the evidence. *Boyd*, 366 Ill. App. 3d at 94, 851 N.E.2d at 838. A trial court's decision to admit other-crimes evidence

will not be reversed unless the court abused its discretion. *Donoho*, 204 Ill. 2d at 182, 788 N.E.2d at 721.

¶ 48 Defendant relies on *People v. Cardamone*, 381 Ill. App. 3d 462, 885 N.E.2d 1159 (2008), in support of his argument that here the prejudicial effect of other-crimes evidence outweighed its probative value. In *Cardamone*, the defendant, a gymnastics coach, was charged with sexually abusing his students, and the State introduced evidence of at least 158 instances of uncharged conduct against 15 alleged victims so that "the vast majority of the State's case consisted of other-crimes evidence." *Cardamone*, 381 Ill. App. 3d at 491, 885 N.E.2d at 1182. The court in *Cardamone* noted that the uncharged allegations concerned incidents that were proximate in time and similar to the charged incidents, but concluded that the sheer quantity of propensity evidence caused unfair prejudice to defendant. *Cardamone*, 381 Ill. App. 3d at 493-97, 885 N.E.2d at 1186.

¶ 49 In order to answer the question, "How much propensity evidence is allowed under section 115-7.3?" the *Cardamone* court looked to cases applying common-law other-crimes principles, citing one case in which evidence of "numerous" other crimes was held to have been "prosecutorial overkill" (*People v. Funches*, 59 Ill. App. 3d 71, 73, 375 N.E.2d 135, 137 (1978)) and another case in which testimony from two of the defendant's alleged previous victims was ruled inadmissible under common-law principles (*People v. Wilson*, 214 Ill. 2d 127, 824 N.E.2d 191 (2005)). From these cases, *Cardamone* held that "a large volume may make probative other-crimes evidence overly prejudicial," and there the large volume of evidence regarding uncharged conduct was "overwhelming and undoubtedly more prejudicial than probative." *Cardamone*, 381 Ill. App. 3d at 496-97, 885 N.E.2d at 1186. While the State insists that *Cardamone* is distinguishable due to the sheer volume of alleged victims allowed to testify about propensity evidence and the complexity in that case, we agree with defendant that *Cardamone* is not as different as the State suggests.

¶ 50 The instant case is more complex than the State suggests for two reasons: (1) it covered approximately a 12-year period, and (2) the victims contradicted not only themselves but also each other. H.T. testified that the abuse began when she was six and the family was living in Rochester, and R.T. claimed that she was abused up until at least November 2007. H.T. testified on direct examination that some type of abuse occurred from the time she was 6 until she was 14 every time her mother left the house; however, on cross-examination, H.T. testified that she only had sex with defendant a total of four times from the time she was 6 until she was 14. H.T. also testified that whatever happened in the train car in Marengo was not sexual, and she insisted that R.T. was not in the train car while she was lying naked with defendant.

¶ 51 On the other hand, R.T. insisted that her first incident of sexual abuse by defendant occurred in a train car in Marengo. She testified that she watched defendant and H.T. have oral sex, and then she participated in the same acts with defendant. The Marengo incident was without a doubt a trial within a trial. It became the focus of much of the trial and was highly misleading and confusing. See *Boyd*, 366 Ill. App. 3d at 94, 851 N.E.2d at 837-38.

¶ 52 The trial court was well aware of the potential for the prejudicial effect of the other-crimes evidence to outweigh its probative value. In an attempt to determine whether other-crimes evidence would be unduly prejudicial, the trial court ordered the State to submit summaries of H.T.'s and R.T.'s anticipated testimony prior to trial. The State complied, and we have set out those summaries in their entirety above. The trial court was correct to not allow the State to present testimony about sexually suggestive photographs defendant allegedly took of H.T. because (1) they were not close enough in time to the charged Madison County offenses, and (2) they lacked factual similarity to the charged offenses. The charged Madison County offenses were based upon sexual penetration, which included allegations of defendant placing his penis in the vagina of H.T. and the vagina and the mouth

of R.T. However, the trial court allowed the State to elicit testimony about all of the other allegations, including the insertion of sex toys or vibrators, and alleged other crimes outside of Madison County, that were set forth in the summaries.

¶ 53 H.T. claimed numerous incidents of touching, fondling, oral sex, and vaginal penetration. H.T. testified at length about incidents allegedly occurring years before the charged crime in Madison County and then contradicted herself on cross-examination, admitting that she only had sex with defendant on four occasions. R.T.'s testimony was even more confusing than H.T.'s testimony. Not only did she testify about alleged acts set forth in the summary provided by the State prior to trial, she added testimony about anal sex, which is not discussed anywhere in the summary. The fact that this was elicited on cross-examination does not change our belief that defendant was unduly prejudiced. R.T. admitted that only about 75% of what she testified to actually occurred. Her testimony lacked clarity in that she was confused as to not only what acts took place, but when they took place. During cross-examination when defense counsel was trying to pin down R.T.'s testimony, R.T. introduced an entirely new allegation about anal sex. The trial court was clearly concerned after both H.T.'s and R.T.'s testimony and gave limiting instructions, but even that was not enough to overcome the prejudice defendant suffered due to the breadth of other-crimes evidence to which they testified.

¶ 54 Thus, there were other facts and circumstances weighing against the admission of the other-crimes evidence, including defendant's ability to defend himself, the acts raised for the first time on appeal, and the inability of the limiting instructions to cure undue prejudice. Defendant entered into evidence records of his work hours over several years, but with so many allegations of uncharged conduct, all of which were vague as to dates and times, defendant was forced to attempt to account for his whereabouts all day and every day for 12 years. Also, at least one of the uncharged acts was raised for the first time at trial when R.T.

claimed defendant had anal sex with her. Finally, we do not believe the limiting instructions were sufficient to protect defendant against the undue prejudice he suffered as the result of the plethora of uncharged conduct allowed into evidence.

¶ 55 The State relies on *People v. Walston*, 386 Ill. App. 3d 598, 900 N.E.2d 267 (2008), in which the Second District of our Appellate Court concluded that "the actual limits on the trial court's decisions on the quantity of propensity evidence to be admitted under section 115-7.3 are relatively modest, especially when combined with the highly deferential abuse-of-discretion standard that governs review of such trial court decisions." *Walston* 386 Ill. App. 3d at 621, 900 N.E.2d at 289. *Walston* determined that because section 115-7.3 abrogates the common-law rule barring the admission of other-crimes evidence to show propensity in certain sex cases and expressly allows the parties to present competing evidence relating to alleged prior crimes, the traditional concerns regarding the dangers of "mini-trials" of such crimes are less pressing in section 115-7.3 cases. *Walston*, 386 Ill. App. 3d at 619-20, 900 N.E.2d at 288. However, *Walston* conceded that "high quantities of other-crimes evidence may still be inadmissible under section 115-7.3 for reasons other than its tendency to show propensity, because the gratuitous other-crimes evidence may also cause jury confusion." *Walston*, 386 Ill. App. 3d at 620, 900 N.E.2d at 288. This is exactly what occurred in the instant case.

¶ 56 Moreover, the Third District recently upheld a trial court's limitation on the use of other-crimes evidence in *People v. Smith*, 406 Ill. App. 3d 747, 941 N.E.2d 419 (2010). In *Smith*, the defendant was charged with aggravated criminal sexual abuse of his granddaughter for allegedly fondling her vagina. *Smith* was an interlocutory appeal in which the State argued that the trial court erred by refusing to allow the testimony of two of the defendant's sisters who claimed that the defendant sexually assaulted them in the 1960s and three of the defendant's daughters who claimed the defendant fondled them and digitally

penetrated them in the 1970s and 1980s when they were preteens and teenagers. The trial court did allow the testimony of another granddaughter who alleged the defendant rubbed her in her vaginal area outside her clothing approximately five years before the charged offense. *Smith* held that the trial court did not abuse its discretion in refusing to allow the other-crimes evidence of the sisters and daughters and disagreed with *Walston* as follows:

> "To be sure, several instances of misconduct might be needed to establish propensity in some cases, and it will often be difficult to determine how much is enough and how much is too much. However, trial courts must ensure that the jury is not tempted to convict the defendant based upon his past crimes rather than his commission of the charged offense. To achieve that result, the court must admit only so much evidence as is reasonably necessary to establish propensity. The fact that section 115-7.3 allows the parties to present competing evidence regarding other crimes does not alter this basic principle of fundamental fairness." *Smith*, 406 Ill. App. 3d at 756, 941 N.E.2d at 427.

We agree with *Smith* that fundamental fairness must be considered.

¶ 57 Unlike *Walston*, the record here reveals that the evidence of defendant's other crimes was more prejudicial than probative because it was too extensive and simply overwhelmed the evidence of the charged offenses. While the trial court tried to limit the prejudicial effect of the other-crimes evidence by seeking summaries of the victims' testimony and issuing limiting instructions, it is nevertheless quite probable the jury convicted defendant on the basis of other-crimes evidence rather than the commission of the three charged offenses in Madison County. Our review of the record shows that the probative value of the other-crimes evidence did not outweigh its prejudicial impact and defendant did not receive a fair trial.

¶ 58 B. Photographs

¶ 59 Defendant further argues he was denied a fair trial because the State presented photographs of H.T. and R.T. as very young children, rather than the ages when the charged conduct occurred, with the only purpose being to inflame the passions of the jury. The State responds that defendant waived the issue of improper presentation of the photos because defense counsel failed to object at the time the photographs were introduced and did not raise the issue in his posttrial motion. Alternatively, the State argues that the photographs were relevant and not used for anything more than to complement H.T.'s and R.T.'s testimony.

¶ 60 We first point out that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). Under the plain error doctrine, a court can review an issue that was not raised if: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of such error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of how close the evidence is. *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

¶ 61 Second, trial counsel's failure to raise an issue or preserve it for appeal can be ineffective assistance of counsel. In order to establish ineffectiveness of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, but for counsel's error, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). Judicial scrutiny of an attorney's performance must be deferential, and a reviewing court will not inquire into areas involving the exercise of discretion, judgment, trial tactics, or strategy. *People v. Pecoraro*,

144 Ill. 2d 1, 13, 578 N.E.2d 942, 947 (1991).

¶ 62 In the instant case, the State introduced, without objection, pictures of H.T. and R.T. when they were both approximately five years of age. The charged offenses did not occur when either H.T. or R.T. was five years of age. We agree with defendant that if the State truly wanted to demonstrate their appearance at a relevant time, it would have shown pictures of H.T. and R.T. at the ages they were when the alleged abuse occurred in Madison County. The pictures were clearly not relevant in the instant case. Worse than just introducing the pictures, the prosecutor began her closing argument by showing the jury the photographs and specifically stating as follows:

> "[Prosecutor:] Thank you, your Honor. Ladies and gentlemen of the jury, you are looking at two pictures, one of [R.T.] and one of [H.T.] These are pictures of these girls when they were about five or six years old.
>
> These girls deserved to have a father who loved them, who protected them, who gave them unconditional love, and a father who made them feel safe. In our society, that's what we value our fathers for, that's what we expect our fathers to do for our children. But instead [H.T.] and [R.T.] had a father who violated them over and over for years and years, a father who did not protect them. In fact, this man, their father, was the person that they needed protection from."

Once again, defense counsel failed to object. Defense counsel's failure to offer any objection to the photographs or the prosecutor's use of them during closing argument constituted ineffective assistance of counsel.

¶ 63 We point out that the State's case was not so overwhelming that defense counsel's failure to prevent the introduction of the photographs into evidence and arguments thereon could not have affected the verdict. The only evidence against defendant was the testimony and the statements made by H.T. and R.T. While the mother testified about a suspicious

incident when H.T. was six, she did not see any inappropriate contact between defendant and either H.T. or R.T., and she admitted neither H.T. nor R.T. ever voiced a complaint about defendant doing anything sexual to them until after she and defendant told H.T. her boyfriend could not live with them and took away her phone and truck. There was no physical evidence supporting H.T.'s and R.T.'s claims, and no independent witness testified that he or she saw any improper contact between defendant and H.T. and/or R.T. Defendant specifically denied ever abusing his daughters. We fail to see how defense counsel's failure to object to such emotionally charged and irrelevant evidence could have been a matter of strategy or tactics. Thus, we believe that defendant has established prejudice due to the admission of the photographs.

¶ 64 C. Improper Testimony

¶ 65 Defendant also contends he was denied a fair trial because a "sex abuse nurse" was allowed to testify as an expert without being so qualified. The State again replies that the argument was waived because defense counsel failed to raise a proper objection. We disagree that the argument was waived.

¶ 66 Defendant did object to Cara Christanell testifying about the percentage of sexual abuse cases in which physical results are normal, but the trial court overruled the objection and allowed the testimony, which we believe was in error, and, thus, reviewable. Assuming *arguendo* that defense counsel objected on the incorrect basis, we note that failure to object on the appropriate basis constitutes ineffective assistance of counsel, which is also reviewable. *People v. Eddmonds*, 101 Ill. 2d 44, 63, 461 N.E.2d 347, 356 (1984).

¶ 67 Here, the record reveals that Cara Christanell, a pediatric nurse practitioner, testified that she examined R.T. and found normal results in her anal-genital examination. There were no signs of tearing or scarring. She testified that a normal examination alone does not rule out sexual abuse because such abuse can occur without leaving any type of permanent

physical injury. Later, the following ensued:

"Q. [Prosecutor:] Okay. And then there's the portions on this sheet that talks about if the exam was normal. Explain to the Jury why that's on there, please?

A. It's a very important part of our discharge summary cause most people think that you're–we're definitely going to find evidence when the 90 to 95 percent of all the exams I do there's not medical evidence–

[Defense Counsel:] I'm going to object, move to strike, Your Honor. If she wants to testify about this case, that's fine. I don't have any evidence about what else she's testifying on here today. All I have is a report.

THE COURT: I'll probably sustain it, but let me–finish the question–the answer, if you would, ma'am. You said 90 to 95 percent what?

THE WITNESS: Of all medical exams of a child's sexual abuse are normal. We often don't find medical evidence.

THE COURT: All right.

THE WITNESS: Even though the child that–

THE COURT: Oh, that's okay, ma'am. Thank you. No, I think that's okay. Overruled."

We agree with defendant that this testimony went far beyond the permissible testimony of a medical provider and into the realm of expert testimony.

" 'An expert is an individual who, because of education, training or experience, possesses knowledge of a specialized nature beyond that of the average person and who may be expected to render an opinion within his expertise at trial. [Citation.] A treating physician is not necessarily an expert witness. [Citation.] Instead, the testimony of the physician may be offered only in regard to factual matters of which the doctor has personal knowledge.' " *Flanagan v. Redondo*, 231 Ill. App. 3d 956,

963-64, 595 N.E.2d 1077, 1082 (1991) (quoting *Atkins v. Thapedi*, 166 Ill. App. 3d 471, 475, 519 N.E.2d 1073, 1076 (1988)).

The burden of establishing an expert's qualifications and the scientific theories he or she relies upon rests with the proponent, and there must be a sound explanation as to the manner in which he or she arrived at it for it to be admissible. *People v. Thill*, 297 Ill. App. 3d 7, 11, 696 N.E.2d 1175, 1178 (1998).

¶ 68 The State argues that defendant was not prejudiced by Christanell's testimony because if the State attempted to qualify her as an expert then she would have so qualified; however, we agree with defendant that the State misses the ultimate point which is that Christanell offered absolutely no foundation for her opinion that 90 to 95% of sex abuse victims have no physical findings of abuse. Moreover, we do not agree with the State's assertion that error, if any, was harmless.

¶ 69 As previously discussed, the evidence against defendant was not overwhelming. The only evidence against defendant was the testimony of H.T. and R.T., who testified inconsistently. There were no physical findings of abuse. Allowing Christanell to testify without foundation that in 90 to 95% of all cases of sexual abuse, the victim presents with no physical findings of abuse was indeed prejudicial.

¶ 70 After careful consideration of the record before us, we agree with defendant that the admission of too much evidence of other crimes, the unnecessary and highly inflammatory use of photographs of the victims at age five rather than their ages when the charged offenses took place, and the improper testimony of Cara Christanell all served to deprive defendant of a fair trial. Accordingly, we believe defendant is entitled to a new trial. Because of our decision on the first issue, we need not address most of the additional arguments raised by defendant. However, because we are remanding for a new trial, we must consider the final argument raised by defendant that there was insufficient evidence to prove him guilty beyond

a reasonable doubt.

¶ 71 II. SUFFICIENCY OF THE EVIDENCE

¶ 72 Where a defendant challenges the sufficiency of the evidence, the relevant inquiry is whether after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262, 267 (2005). It is the function of the trier of fact to weigh and resolve conflicts in the evidence and draw reasonable inferences therefrom, and we will not overturn a defendant's conviction based upon insufficient evidence unless the proof is so improbable or unsatisfactory so that a reasonable doubt exists concerning the defendant's guilt. *Cardamone*, 381 Ill. App. 3d at 512, 885 N.E.2d at 1198.

¶ 73 This case boils down to a credibility determination between defendant and H.T. and R.T. While we pointed out serious flaws in the victims' testimony, we cannot say their testimony was insufficient to sustain defendant's convictions. H.T. testified that she had vaginal intercourse with defendant in Madison County, and R.T. testified that defendant penetrated her vagina with his mouth and his penis in Madison County. When viewed in the light most favorable to the State, there was sufficient evidence to sustain defendant's convictions, and so there is no double jeopardy impediment to a new trial.

¶ 74 CONCLUSION

¶ 75 For the foregoing reasons, the judgment of the circuit court of Madison County is hereby reversed and the cause remanded for a new trial.

¶ 76 Reversed and remanded.