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2012 IL App (3d) 100754-U

Order filed February 22, 2012

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IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-10-0754
	)	Circuit No. 06-CF-1215
MICHAEL TUCKER,	)	Honorable
Defendant-Appellant.	)	Amy Bertani-Tomczak, Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justices Lytton and McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* On appeal from the defendant's conviction for aggravated criminal sexual abuse, the appellate court held that: (1) the circuit court properly excluded testimony regarding a prior accusation of molestation made by the minor victim; (2) the court properly denied the defendant's motion to dismiss on double jeopardy grounds; (3) no fatal variance existed between the indictment and the evidence presented at trial with regard to the date of the offense; and (4) the State proved the defendant guilty beyond a reasonable doubt.

¶ 2 After a stipulated bench trial, the defendant, Michael Tucker, was convicted of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2004)), and was sentenced to a

term of probation. On appeal, the defendant argues that: (1) the circuit court erred when it granted the State's motion *in limine* to prohibit testimony regarding a prior allegation of molestation made by the minor victim; (2) the circuit court erred when it denied his motion to dismiss the case on double jeopardy grounds; (3) a fatal variance existed between the indictment and the evidence presented at trial with regard to the date on which the offense allegedly occurred; and (4) the State failed to prove him guilty beyond a reasonable doubt. We affirm.

¶ 3

### FACTS

¶ 4 On May 24, 2006, a grand jury returned an indictment charging the defendant with one count of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2004)) and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2004)). Count I alleged that the defendant placed his finger inside the vagina of the minor victim. Count II alleged that defendant fondled and kissed the minor victim's breasts. Count III alleged that the defendant made the minor victim touch the defendant's penis. All of these incidents were alleged to have occurred between February 1 and June 30, 2005.

¶ 5 Prior to trial, the State filed a motion *in limine* to admit "evidence of specific conduct" under the other-crimes evidence statute (725 ILCS 5/115-7.3 (West 2004)). The evidence consisted of an incident in which the defendant allegedly showed a book about sexual fulfillment to the minor victim and her minor friend. The circuit court granted the State's motion.

¶ 6 Testimony elicited at the bench trial indicated that the minor victim, who was the defendant's stepdaughter, was 14 years old when the alleged offenses took place some time during the first six months of 2005. She testified that on one occasion, she had just gotten out of the shower and was in a bathrobe in her room. The defendant came in the room and they began

talking about sensitivity in her nipples. The defendant rubbed and kissed her nipples. Then, he told her to lay down on the bed and spread her legs. She complied, and he placed his fingers in her vagina. In addition, he pulled his pants down and placed her hand on his penis. She did not tell her mother immediately about the incident because she did not want to upset her mother, who seemed happy in her marriage to the defendant, unlike in her prior marriage.

¶ 7 The minor victim also testified that when she was seven years old, she accused her biological father of molesting her. The accusation was based on her interpretation of the word "molest," which she believed included her biological father noticing that she was developing breasts. However, she recanted her accusation shortly thereafter once she was told what the word "molest" means.

¶ 8 The minor victim also testified that when she was a freshman in high school, she and a friend were in her bedroom and were each drinking an alcoholic beverage the defendant had bought for them. The defendant entered the room and asked the two girls "how far we had gone with boys and if we had ever given a blow job before." He also explained oral sex to them and showed them a book that he retrieved from his stepson's bedroom. The book was titled, "*The Complete Guide To Sexual Fulfillment*." The minor victim's friend also testified and largely corroborated this testimony.

¶ 9 The minor victim's mother testified that she was told about the inappropriate contact while on a drive to Target with the minor victim. At that time, she and the defendant had been talking to the minor victim about her recent poor academic performance and potential consequences if that performance did not improve.

¶ 10 At the close of the bench trial, the circuit court found the defendant guilty on all three

counts. However, the court later granted the defendant's motion for a new trial, as the court reversed itself on the admissibility of the testimony related to the incident in which the defendant allegedly showed the book to the minor victim and her friend.

¶ 11 Prior to the second trial, the State filed motions *in limine* to admit evidence regarding the book incident and to bar evidence regarding the prior accusation of molestation. The circuit court denied the former motion and granted to latter motion. The court also denied the defendant's motion to dismiss the case on double jeopardy grounds, in which the defendant alleged that the evidence remaining after the court's decisions on the motions *in limine* was insufficient to convict.

¶ 12 The case proceeded to a stipulated bench trial on count II only, which was the allegation of aggravated criminal sexual abuse in that the defendant fondled and kissed the minor victim's breasts. The parties stipulated for the circuit court to use the transcript from the first trial but to ignore the testimony related to the book incident and the prior accusation of molestation. The court found the defendant guilty. After the court denied the defendant's motion for a new trial and the defendant was sentenced to a term of probation, the defendant appealed.

¶ 13 ANALYSIS

¶ 14 The defendant's first argument on appeal is that the circuit court erred when it granted the State's motion *in limine* to prohibit testimony regarding the prior accusation of molestation made by the minor victim.

¶ 15 Initially, we will address the State's argument that the defendant has waived this argument by proceeding to a stipulated bench trial. The State's claim that the defendant "invited any error" is without merit. A defendant who pleads guilty waives all nonjurisdictional defenses or defects.

*People v. Horton*, 143 Ill. 2d 11, 22 (1991). A stipulated bench trial is tantamount to a guilty plea if the defendant: (1) stipulates to the sufficiency of the evidence to convict; or (2) fails to present or preserve a defense. *People v. Thompson*, 404 Ill. App. 3d 265, 270 (2010). Here, the defendant clearly preserved a defense regarding the prior allegation of molestation made by the minor victim. The defendant challenged the State's motion *in limine* and alleged in his posttrial motion that the circuit court erred by granting the State's motion. Moreover, the State's waiver argument runs contrary to an important purpose behind the stipulated bench trial procedure:

"[p]roceeding to a stipulated bench trial allows a defendant to avoid the forfeiture or waiver rule as to an issue that the defendant seeks to preserve for appeal, while still letting the defendant take advantage of the benefits and conveniences of a guilty-plea proceeding." *Thompson*, 404 Ill. App. 3d at 270. Accordingly, we will address the merits of the defendant's argument.

¶ 16 Motions *in limine* invoke the circuit court's inherent power to admit or exclude evidence. *People v. Williams*, 188 Ill. 2d 365, 369 (1999). We review a circuit court's decision on a motion *in limine* for an abuse of discretion. *Williams*, 188 Ill. 2d at 369.

¶ 17 Generally, "the proper procedure for impeaching a witness' reputation for truthfulness is through the use of reputation evidence and not through opinion evidence or evidence of specific past instances of untruthfulness." *People v. Cookson*, 215 Ill. 2d 194, 213 (2005).<sup>1</sup> However, in *Cookson*, our supreme court acknowledged that an individual accused of sexual assault may be

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<sup>1</sup> We acknowledge that the law on proving a witness's character, including the law as stated in *Cookson*, has changed with the advent of the Illinois Rules of Evidence on January 1, 2011. See Ill. R. Evid. 405, 608. However, because this case was tried prior to that date, the common law controls the disposition of this appeal.

allowed to present evidence that the alleged victim has previously fabricated allegations of sexual assault. *Cookson*, 215 Ill. 2d at 214. The *Cookson* court indicated that a defendant may present evidence that the alleged victim has previously fabricated allegations of sexual assault to impeach the alleged victim's credibility if the evidence establishes he or she had an improper interest, bias, or motive to lie as to the defendant. See *Cookson*, 215 Ill. 2d at 215-18.

¶ 18 Our review of the record reveals that the evidence at issue was inadmissible. First, contrary to the defendant's claim, the prior allegation made by the minor victim is not properly characterized as a fabrication. As she explained on the stand, she misunderstood the meaning of "molestation." Once her misunderstanding was cleared up, she recanted her allegation that her biological father had molested her. Thus, the evidence does not show any untruthfulness of the part of the minor victim. Second, there was no link between the biological father and the defendant such that the evidence could be said to establish an improper interest, bias, or motive to lie. See *Cookson*, 215 Ill. 2d at 216. Under these circumstances, we hold that the circuit court properly excluded this evidence. See *Cookson*, 215 Ill. 2d at 218 ("in the absence of a demonstration of A.C.'s improper interest, bias against defendant, or motive to fabricate abuse claims against him, evidence related to A.C.'s sexual abuse accusation against Aston was properly excluded by the trial court").

¶ 19 The defendant's second argument on appeal is that the circuit court erred when it denied the defendant's motion to dismiss the case on double jeopardy grounds.

¶ 20 "Generally, abuse of discretion is the appropriate standard for reviewing a trial court's ultimate ruling on a motion to dismiss charges on double-jeopardy grounds." *People v. Brener*, 357 Ill. App. 3d 868, 870 (2005). "If the evidence presented at the first trial, including the

improperly admitted evidence, would have been sufficient for any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt, retrial is the proper remedy."

*People v. McKown*, 236 Ill. 2d 278, 312 (2010).

¶ 21 Our review of the record in this case reveals that the evidence presented at the first trial was indeed sufficient for any rational trier of fact to find the defendant guilty beyond a reasonable doubt. The minor victim testified that on one occasion during the first six months of 2005, the defendant came into her room and began talking to her about sensitivity in her nipples. He rubbed and kissed her nipples, then told her to lay on the bed and spread her legs. When she complied, he placed his fingers in her vagina. He also made the minor victim place her hand on his penis. Witness credibility was for the trier of fact to decide. *People v. Atherton*, 406 Ill. App. 3d 598, 608 (2010). Under these circumstances, we hold that the circuit court properly denied the defendant's motion to dismiss the case on double jeopardy grounds.

¶ 22 The defendant's third argument on appeal is that a fatal variance existed between the indictment and the evidence presented at trial with regard to the date on which the offense allegedly occurred.

¶ 23 A variance is fatal if the evidence at trial differs materially from the charging instrument and misleads the defendant in formulating a defense or exposes the defendant to double jeopardy. *People v. Arndt*, 351 Ill. App. 3d 505, 518 (2004). We review a challenge to the sufficiency of the indictment under the *de novo* standard. *People v. Guerrero*, 356 Ill. App. 3d 22, 26 (2005).

¶ 24 In child sex offense cases, the date on which the alleged act occurred is not essential. *Guerrero*, 356 Ill. App. 3d at 27; *People v. Falcon*, 292 Ill. App. 3d 538, 545 (1997); *People v. Long*, 55 Ill. App. 3d 764, 772 (1977). In this case, the indictment alleged that the offense took

place between February 1 and June 30, 2005. At the first trial, the minor victim testified that the incident occurred during the first six months of 2005. Under these circumstances, we hold that there was no material difference between the indictment and the evidence presented at trial with regard to the date the offense allegedly occurred. See *Guerrero*, 356 Ill. App. 3d at 29; *Long*, 55 Ill. App. 3d at 772.

¶ 25 The defendant's fourth argument on appeal is that the State failed to prove him guilty beyond a reasonable doubt.

¶ 26 When the defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not this court's function to retry a defendant who challenges the sufficiency of the evidence. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 27 As charged in this case, "[a] person commits aggravated criminal sexual abuse if that person commits an act of \*\*\* sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is at least 5 years older than the victim." 720 ILCS 5/12-16(d) (West 2004).

¶ 28 Our review of the record reveals that the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt of aggravated criminal sexual abuse. The minor victim testified at the first trial that the defendant came into her room and began talking to her about sensitivity in her nipples. He began rubbing her nipples and proceeded to kiss them. The minor victim stated this incident occurred during the first six months of 2005. Questions regarding witness credibility are properly resolved by the circuit court (see, e.g., *Atherton*, 406 Ill. App. 3d at 608),

and we have found nothing in the record to suggest that the court's ruling was erroneous.

Viewing the evidence in the light most favorable to the State, we hold that a rational trier of fact could indeed have found the essential elements of the crime proven beyond a reasonable doubt.

¶ 29

#### CONCLUSION

¶ 30 The judgment of the circuit court of Will County is affirmed.

¶ 31 Affirmed.