2016 IL App (1st) 133126-U

FIFTH DIVISION
Order filed June 24, 2016
Modified upon the denial of rehearing September 23, 2016

No. 1-13-3126

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 C6 60400
	)	
RICKY MITCHELL,	)	
	)	Honorable
Defendant-Appellant.	)	Luciano Panici,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where (1) the evidence was sufficient to find defendant guilty of predatory criminal sexual assault, (2) his charging instrument sufficiently apprised defendant of the charges against him, and (3) the trial court's error in allowing the victim's mother to testify as to the victim's outcry statement was harmless.

¶ 2 Following a bench trial in the circuit court of Cook County, defendant, Ricky Mitchell,

was ultimately convicted of two counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse. He was sentenced to 35 years' imprisonment for each predatory sexual assault count, to be served consecutively. He was also sentenced to 7 years' imprisonment for the aggravated criminal sexual abuse count, to be served concurrently. Defendant now appeals his convictions, arguing: (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt of predatory criminal sexual assault; (2) his charging instrument was insufficient; and (3) the trial court erred in allowing Alexis to testify regarding J.T.'s outcry statement. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On March 27, 2009, defendant was charged by information with two counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2008)) and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(I) (West 2008)) based on allegations that on February 16, 2009, defendant, who was over the age of 17, committed acts of sexual penetration upon J.T., an eight-year-old minor. Count 1 alleged, defendant "committed an act of sexual penetration upon [J.T.], to wit: contact between [defendant]'s hand and [J.T.]'s anus." Count 2 alleged, defendant "committed an act of sexual penetration upon [J.T.], to wit: an intrusion in that [defendant] inserted his penis into [J.T.]'s anus." Count 3 alleged, defendant "committed an act of sexual conduct upon [J.T.], to wit: [defendant] touched [J.T.]'s body with his penis causing seminal fluids to be transferred to [J.T.]'s body, for the purpose of sexual gratification or arousal of [defendant]."

¶ 5 J.T., who was 12 years old at the time of the trial, testified as follows. When the incident occurred, he was eight years old. On February 16, 2009, defendant picked J.T. up from J.T.'s house and drove him to defendant's apartment. Upon entering the apartment, defendant told J.T.

to take off his pants because it was hot inside the apartment and then go into defendant's bedroom. J.T. went into the bedroom and took off his pants. Shortly thereafter, defendant came into the bedroom and instructed J.T. to take off his underwear. Defendant then took off his own pants. Defendant was not wearing underwear. J.T. testified that as he lay on defendant's bed he "felt [defendant's] penis on my butt." Defendant then put petroleum jelly on his finger and inserted it into J.T.'s anus. Defendant then "put his penis in [J.T.'s] butt." J.T. was unaware of how long defendant penetrated him; but, at some point, there was a knock at the door. Defendant quickly put his clothes on and told J.T. to do the same. J.T. watched from the bedroom door as defendant went to the front door, cracked it open a little bit, and looked in either direction down the hall. No one was there.

¶ 6 Defendant returned to the bedroom and told J.T. to take his clothes off again. J.T. testified he did not want to take his clothes off, but he complied with defendant's demand because he felt threatened. Defendant took off his own clothes. J.T. lay on the bed in the same position. Again, defendant inserted his finger, which was coated in petroleum jelly, into J.T.'s anus and then anally penetrated him. After some time, defendant stopped and J.T. "saw suds [or "white stuff"] coming out of his penis." Defendant told J.T. to get dressed, but J.T. could not find his underwear. Defendant became anxious and told J.T. to "hurry up and find the underwear." Eventually, defendant found J.T.'s underwear and J.T. continued getting dressed.

¶ 7 Defendant drove J.T. home. While parked in front of J.T.'s house, defendant told J.T., " 'You remember what I told you? Like don't tell your mom or else I'll be in trouble.' " J.T. did not want defendant, who he called "Uncle Rick," to be in trouble, so he did not tell his mother what happened when he returned home.

¶ 8 The following day, when J.T. came home from school his mother asked him what was

"going on." J.T. started crying and he disclosed to her what had occurred. His mother took him to the police station where J.T. spoke with police. Thereafter, they went to the hospital where he was examined.

¶ 9 On cross-examination, J.T. testified that prior to the incident defendant used to come over to his house to "check up on me" and talk. When his mother was not home, defendant would call him. Defendant instructed J.T. to refer to him as "Uncle Rick." When asked by counsel whether he was lying, J.T. denied lying about this incident. J.T. further testified that on February 16, 2009, he watched the movie "Click" at defendant's house. Defendant's apartment was "very" hot. J.T. did not observe where defendant obtained the petroleum jelly because he was watching the movie. J.T. did not see defendant touch his "butt" with something, but only felt it. When he left defendant's house he could still feel the "grease" inside him. J.T. observed defendant's penis when defendant went to the bathroom, got a towel, and wiped the "suds" off of his penis.

¶ 10 Alexis F. (Alexis) testified that her son, J.T., is developmentally delayed and that his father was not a regular presence in his life. Alexis further testified she had been friends with defendant since before J.T. was born and that J.T. referred to defendant as "Uncle Rick." According to Alexis, she socialized with defendant three or four times a month.

¶ 11 On February 16, 2009, at approximately 3 p.m., defendant came to her home to take J.T. to play video games with some of the other children. Defendant dropped off J.T. at 9 p.m. Shortly after J.T. was dropped off, Alexis noticed a "musty odor about him." Alexis asked J.T. what he had been doing and "Why do you smell like that?" J.T. avoided her.

¶ 12 The following day, upon coming home from school, Alexis again asked J.T. why he smelled "like that." J.T. immediately started crying and informed Alexis that "Uncle Rickey had put his penis in his butt." Alexis and J.T. went to the police department and Alexis was advised

to take J.T. to the hospital. On February 18, 2009, Alexis took J.T. to the hospital where he was examined by a nurse and a doctor.

¶ 13 On cross-examination, Alexis testified that it was defendant who, on February 16, 2009, requested that he pick up J.T. Alexis also testified that when J.T. came home, she questioned J.T. about his odor "to the point where he was annoyed with me." Alexis then asked J.T. to take a bath. J.T. replied that he was tired and requested to take a bath in the morning. Alexis agreed. The following morning, however, J.T. woke up late and was unable to take a bath before school.

¶ 14 Sergeant Kevin Kolash (Kolash) of the Calumet City police department testified as follows. In the evening hours of February 18, 2009, he received an assignment to execute a search warrant at defendant's residence. In executing the search warrant, Kolash discovered an opened jar of petroleum jelly in defendant's bathroom. On cross-examination, Kolash testified that a white washcloth and the bed linens were also recovered from defendant's residence. Kolash, however, did not know whether or not these items were sent to the crime lab for testing.

¶ 15 Sergeant Casey Erickson (Erickson) of the Calumet City police department testified as follows. In February of 2009, he was assigned to the Criminal Investigations Division as a detective. Erickson testified that on February 19, 2009, he and his partner, Officer Pieczul, were assigned to investigate the matter. They advised defendant of his *Miranda* rights and defendant signed a form indicating he had received and understood those rights.[1] Defendant then made a statement to the detectives.

¶ 16 Defendant told the detectives he was a family friend of J.T. and that on February 16, 2009, he had picked J.T. up at his residence to take him to a party where there were other children. When they arrived at the party, it was already over, so defendant took J.T. to his apartment to watch a movie. Defendant and J.T. went into the bedroom where the television was

[1] Officer Pieczul's first name is not included in the record.

located and began watching a movie. Defendant then decided to make some hot dogs for them. J.T. remained in the bedroom watching the movie, "Click" while defendant made the hot dogs. When defendant returned to the room, J.T. was only wearing his underwear. They consumed the hot dogs and then defendant went to the bathroom. While he was in the bathroom, J.T. walked in on him and viewed defendant's exposed penis. Defendant then walked J.T. back into the bedroom and sat with him on the bed. Defendant was wearing jeans, which were unbuttoned, white briefs, and a pair of boxer shorts. Defendant had informed the officers he was not wearing a shirt because it was hot in the apartment and his jeans were unbuttoned because he had just used the bathroom.

¶ 17 According to defendant, at some point later they began to wrestle in a playful manner. While they were wrestling, defendant's penis came out of his briefs, boxers, and jeans and rubbed up against J.T.'s back. Defendant told the detectives that he ejaculated on J.T.'s buttocks. According to Sergeant Erickson, defendant panicked because "something like that has never happened before" and immediately wiped off J.T.'s buttocks with a towel and then used the towel to clean his penis. He asked J.T. if he was okay, and J.T. said yes. Defendant then told the detectives that he said to J.T. that " 'Boy's aren't supposed to do this with other boys' " and not to tell his mother about what had occurred. They both got dressed and defendant took J.T. home.

¶ 18 Erickson then asked defendant whether he had an erection while he was wrestling with J.T. In response, defendant "just put his head down, and he didn't answer." Defendant also stated he used Vaseline, a brand of petroleum jelly, on his penis to prevent his pubic hair from sticking to his underwear. By the end of the interview, defendant was visibly upset and began crying when he was telling the detectives that he never meant to hurt J.T.

¶ 19 On February 20, 2009, Erickson interviewed defendant again along with Commander Murphy (Murphy).[2] After being informed of his *Miranda* rights, defendant spoke with Erickson and Murphy about the incident. According to Erickson, defendant relayed the same story, but changed one detail; that when he walked out of the bathroom after J.T. had seen his exposed penis, that he was not wearing pants, only two pairs of underwear.

¶ 20 On cross-examination, Erickson testified that everything defendant told him was based on his own recollection as their conversation was not audio or video recorded. Erickson, however, further testified that video recording was not required in certain cases. He also did not have defendant write his statement as the standard procedure was to have an assistant State's Attorney assist with defendant's written statement, but that defendant did not provide a statement to the assistant State's attorney. In addition, Erickson testified that shortly after conducting these interviews with defendant he generated a report.

¶ 21 Katherine Sullivan, a forensic scientist employed by the Illinois State Police, testified as an expert DNA forensic analyst. Sullivan testified that she performed Y-STR testing, a specialized type of DNA testing that looks only at male or Y chromosome, on buccal swabs provided by both defendant and J.T. She then constructed a Y-STR profile for each individual which she then used to compare to the swab taken of J.T.'s buttocks.

¶ 22 Upon acknowledging fellow forensic scientist Karlee Kane's (Kane) results (which were later stipulated to by the parties), that semen was indicated but no sperm was observed on the buttock swab collected from J.T., Sullivan explained that semen is composed of two parts. One part is cellular, and generally consists of sperm cells, but could also contain skin cells. The second part is the liquid portion, which contains proteins and other components necessary for the life of the sperm cell.

[2] Murphy's first name is not included in the record.

¶ 23 Sullivan prepared the biological material from the buttocks swab and extracted three different components or "fractions": (1) a non-sperm fraction, which typically contains skin cells; (2) a sperm fraction; and (3) a mixed fraction, which could contain both skin cells and sperm cells. She then compared the DNA extracted from the swab to defendant's Y-STR profile. The non-sperm fraction indicated a mixture of DNA from two different males. The major contributor to that fraction "match[ed]" J.T.'s Y-STR profile. As to the minor contributor, one out of 11 alleles (also referred to as "sites" or "locations"), was consistent with defendant's Y-STR profile.

¶ 24 Regarding the mixed fraction, Sullivan testified that a fraction is referred to as "mixed" because "we don't know for sure if that D.N.A. came from a skin cell or sperm cell. It could be from both, and so it's mixed – all the D.N.A. from all the different types of cells in the original sample is mixed together and recovered at the same time." Sullivan testified that the mixed fraction contained DNA from a single male and that "the Y-STR profile in that sample is a match to the Y-STR profile of Rickey Mitchell." According to Sullivan, "I got D.N.A. types for all of the locations I tested and all of the types that I obtained were consistent with those found in Mr. Mitchell's standard."

¶ 25 On cross-examination, Sullivan testified regarding the sperm fraction that there "was too limited amount of D.N.A. in that item and I wasn't able to profile it." Due to the extremely limited amount of DNA in that fraction, Sullivan testified that it indicates that "it's more likely not the presence of sperm." Sullivan further testified that there was no semen indicated on any other item tested in the sexual assault kit, including two pairs of underwear and an anal swab.

¶ 26 As to the mixed fraction, Sullivan testified that the haplotype found in the mixed fraction was expected to occur in approximately 1 in 1400 unrelated black males, 1 in 970 unrelated

Hispanic males, and 1 in 1700 unrelated white males. According to Sullivan, this result did not specifically identify defendant: "The types are consistent with his types, but because of the relatedness of Y-STR's, there could be other individuals out there that would also match that sample."

¶ 27 Sullivan testified regarding the non-sperm fraction that there was one location that was consistent with defendant's standard. According to Sullivan, "That one D.N.A. type in that one area is expected to occur in approximately 1 in 8 unrelated black males, 1 in 38 unrelated Hispanic males, or 1 in 41 unrelated white males."

¶ 28 On redirect, Sullivan clarified that, in the database she utilizes, where there are no occurrences of a particular haplotype in a mixed fraction, the statistical weight is converted to 1 in approximately 1400, 1 in 970, or 1 in 1700.

¶ 29 The parties then agreed to a series of stipulations, the first being that defendant was born on June 1, 1962. The parties also stipulated to the testimony of the following individuals: (1) Mitch Grow (Grow), a detective employed by the Calumet City police department; (2) Murphy, a lieutenant employed by the Calumet City police department; (3) Nancy Healy (Healy), a registered nurse; and (4) Kane, a forensic scientist employed by the Illinois State Police.[3]

¶ 30 Grow would testify that on February 20, 2009, he was assigned to collect a buccal swab standard from defendant. Grow met with defendant on that date and followed the proper protocol when collecting the buccal swab standard.

¶ 31 Murphy would testify that on February 18, 2009, he picked up a sexual assault kit that was taken from J.T. and that the kit was in the proper chain of custody at all times.

¶ 32 Healy would testify she performed a sexual assault kit on J.T. As part of the sexual assault kit, Healy swabbed J.T.'s penis, anus, and buttocks. Healy would further testify that

[3] Murphy's first name is not included in the record.

J.T.'s physical examination demonstrated no evidence of injury.

¶ 33 Kane would testify that she was assigned to examine the sexual assault kit taken of J.T. Kane examined the buttocks swab for the presence of semen using methods generally accepted in the scientific community. The stipulation indicated that it would be Kane's opinion, within a reasonable degree of scientific certainty, that "semen was indicated but no sperm was observed on the buttock swab collected from J.T." Kane would further testify that no semen was identified on the penile swab, the oral swab, the anal swab, or the underwear swab collected from J.T.

¶ 34 The State rested. Defendant moved for a directed finding, which the trial court denied. Defendant then presented his case-in-chief.

¶ 35 Emerson Branch (Branch), defendant's cousin, testified that he has known defendant for over 25 years and defendant is a "[v]ery respectable and upstanding person." On February 16, 2009, defendant was visiting Branch at his residence. Between 2 and 2:30 p.m., defendant and Branch's brother, Dorian, left Branch's residence to go to a restaurant. Branch testified that he expected defendant to return to his residence with J.T. Defendant did not return to Branch's residence as planned. Later, Branch checked his cell phone and discovered that defendant had called him during the day and had left him messages.

¶ 36 Branch further testified that he knew J.T. and Alexis because they were defendant's friends. According to Branch, defendant and Alexis' friendship was "off and on." However, in February of 2009, defendant and Alexis were friends, but their relationship was "strained." Branch also testified that he observed defendant interact with J.T. on two prior occasions. Once was when J.T. was a "child" and then another time was when Alexis brought J.T. over to his house to play with his children.

¶ 37 In addition, Branch testified that the weekend prior to the incident Dorian, and Dorian's two children, ages 9 and 12, were overnight guests at defendant's residence. Branch also testified that defendant had cared for Branch's five children consistent with his reputation.

¶ 38 Defendant testified to the following. He met Alexis 20 years ago when they were coworkers and their friendship since has been "on and off" over the years. According to defendant, Alexis would ask him for favors and become "irate" if he would not comply with her requests. Just prior to the incident Alexis inquired if he would finance a house on her behalf, but he declined.

¶ 39 Regarding the events of February 16, 2009, defendant testified that Dorian and his two children stayed at his apartment over the holiday weekend. That morning, everyone got up at 10 a.m. and went to Branch's residence. At 2:30 p.m. defendant left the Branch residence with Dorian and his children and went to a restaurant. Defendant then met his "friend" Anita at his apartment around 3:15 p.m. At 4:30 p.m. defendant noticed that he had four missed telephone calls from Alexis. After Anita left his apartment at 5:30 p.m., defendant returned Alexis' telephone call. According to defendant, Alexis requested that defendant come over to her residence to pick up J.T. Upon arriving at Alexis' residence at 6 p.m., defendant indicated he would be taking J.T. to Branch's residence to play with the other children. On the way to Branch's residence, defendant called to see if Branch was home. When Branch did not answer his phone, defendant called Alexis, but she did not answer her phone either. Defendant then took J.T. to his apartment.

¶ 40 Upon arriving at his apartment, defendant put a movie on for J.T. and started straightening up his house. He did not instruct J.T. to take off his pants, but did direct him to the bedroom to watch the movie because the television in the front room was not working.

According to defendant, the television in the living room was an analog television set and the broadcasting standards had recently changed so that the analog television could not receive a signal. Defendant further testified that the temperature in the apartment was "over 85" degrees despite the fact it was February.

¶ 41 While he was cleaning up his apartment, defendant would check on J.T. At one point defendant noticed that J.T. was jumping on the bed while wearing only a t-shirt and underwear. Defendant then said to J.T., " 'Hey we getting ready to go in a minute. Why did you do that?' " At approximately 7:30 p.m. defendant drove J.T. back to Alexis' residence.

¶ 42 Defendant denied: ordering J.T. to take his pants and underwear off; inserting his fingers with Vaseline on them into J.T.'s anus; inserting his penis into J.T.'s anus; and ejaculating while J.T. was in the apartment. Defendant also testified that he kept the Vaseline in the bathroom to apply on his face and body to prevent dryness in these areas. Regarding his first interview with Erickson and Pieczul, defendant admitted he told the officers that J.T. walked in on him while he was using the bathroom, but denied telling the officers he had any sexual contact with J.T.

¶ 43 On cross-examination, regarding the events of February 16, 2009, defendant testified when he arrived at Branch's residence the children were no longer playing, so he took J.T. back to his apartment. Defendant put the movie "Click" on for J.T. and went to the kitchen to wash the dishes. J.T. was fully clothed when defendant left him alone in the bedroom. When defendant came back to the bedroom, J.T. was only wearing his t-shirt and underwear. Defendant did not suggest J.T. put his clothes back on nor did he open a window to make the apartment cooler. At some point, defendant went to the bathroom and left the door open out of habit. Defendant had his back to the door when J.T. came into the bathroom. After using the bathroom, defendant zipped up his jeans and went to the bedroom where he observed J.T. sitting

at the foot of the bed. Defendant then finished washing the dishes and went back to the bedroom. J.T., at that time, tried to wrestle with defendant, but defendant threw him off saying he did not have time to play.

¶ 44 Defendant further testified that on February 16, 2009, he was wearing a t-shirt, jeans, long underwear, briefs and boxers because it was cold outside. Defendant denied ever using Vaseline on his penis or applying any on J.T. Defendant further denied hearing a knock at his front door when J.T. was in his apartment. Defendant, however, acknowledged that he was the only adult male who had contact with J.T. from the time he picked J.T. up to the time he dropped him off at home.

¶ 45 Defendant also denied making any self-incriminating statements to Erickson and testified that during the interview Erickson provided him with "different scenarios" regarding how sexual contact with J.T. could have occurred. In addition, defendant testified he only socialized with J.T. five times prior to his arrest and that he did not instruct J.T. to call him "Uncle Rick."

¶ 46 On redirect, defendant testified that he relayed to the investigators the same version of what occurred on February 16, 2009, as he testified to at trial.

¶ 47 The State called Erickson to testify in rebuttal. Erickson testified consistently with his prior testimony regarding defendant's recitation of the events of February 16, 2009.

¶ 48 After hearing closing arguments, the trial court found defendant guilty on all three counts. Defendant presented two posttrial motions; a motion to reconsider and a motion for a new trial. The trial court denied both motions. The trial court then conducted a sentencing hearing and after hearing evidence in aggravation and mitigation, sentenced defendant to 35 years' imprisonment for each of the predatory sexual assault counts, to be served consecutively, and seven years' imprisonment for the aggravated criminal sexual abuse count, to be served

concurrently. Defendant then filed a motion to reconsider the sentence, which the trial court denied. This appeal followed.

¶ 49 ANALYSIS

¶ 50 On appeal, defendant raises three contentions: (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt of predatory criminal sexual assault; (2) count one of the charging instrument was insufficient; and (3) the trial court erred in allowing Alexis to testify regarding J.T.'s outcry statement. We address each argument in turn.

¶ 51 Sufficiency of the Evidence

¶ 52 Defendant argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt of predatory criminal sexual assault.[4] Specifically, he argues that: (1) J.T.'s account of the sexual assault is inconsistent with the lack of physical injury; (2) the DNA evidence did not establish a sexual encounter and was misconstrued by the trial court; and (3) his statement to the detectives fails to provide corroboration of the acts of sexual penetration. The State maintains that the evidence overwhelmingly established his guilt.

¶ 53 When reviewing the sufficiency of the evidence in a criminal case, we must determine 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541 (1999). A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to each witness' testimony. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009); *People v. Boykin*, 2013 IL App (1st) 112696, ¶ 6. Rather, we "carefully examine the evidence while bearing in mind that the trier of fact is in the best position to judge the credibility of witnesses, and due consideration must be given to the

[4] Defendant does not challenge his conviction for aggravated criminal sexual abuse.

fact that the fact finder saw and heard the witnesses." *People v. Herman*, 407 Ill. App. 3d 688, 704 (2011); see *People v. Sykes*, 341 Ill. App. 3d 950, 982 (2003). Therefore, we will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 9.

¶ 54 Defendant was found guilty of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)). A person commits the offense of predatory criminal sexual assault of a child if the accused was 17 years of age or older and commits an act of "sexual penetration" with a victim who was under 13 years of age when the act was committed. *Id.*; *People v. Hillier*, 392 Ill. App. 3d 66, 69 (2009), *affirmed on other grounds*, 237 Ill. 2d 539 (2010). "Sexual penetration" is further defined as "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person." 720 ILCS 5/12-12(f) (West 2008). In addition, evidence of the emission of semen is not required to prove sexual penetration. *Id.*

¶ 55 Defendant argues the evidence is insufficient as there was no physical evidence presented at trial that J.T. suffered any injury. Defendant maintains that where, as here, the allegations are that a 46-year-old man repeatedly anally penetrated an eight-year-old boy, there would have been some evidence of the physical invasion. Defendant points to the fact the State stipulated to Healy's testimony that J.T.'s medical examination demonstrated no evidence of injury and, thus, argues the State agreed there was no physical injury to J.T. We are not persuaded by defendant's argument.

¶ 56 A lack of injury does not disprove sexual abuse. *People v. Davis*, 260 Ill. App. 3d 176, 189 (1994) (citing *People v. Glass*, 239 Ill. App. 3d 916, 928 (1992) (testimony of the victim of a

sex offense need not be substantially corroborated by medical evidence in order for a defendant to be found guilty beyond a reasonable doubt)). Courts have held that "evidence of trauma is unnecessary because the statute considers penetration to have occurred as a result of '*any contact, however slight*, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person.' " (Emphasis in original.) *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 89 (quoting 720 ILCS 5/12-12(f) (West 2006)); see, *e.g.*, *People v. Diaz*, 201 Ill. App. 3d 830, 834 (1990) ("Although medical testimony is of value in cases of sexual abuse, even where there is no such testimony, the testimony of the victim alone will support a conviction unless that testimony is unbelievable as a matter of law."); *People v. Morgan*, 149 Ill. App. 3d 733, 738 (1986) ("It is not necessary that corroborating medical evidence be admitted to prove that penetration did occur."). Accordingly, the trial court could properly have found defendant guilty beyond a reasonable doubt despite the lack of physical evidence. See *Garcia*, 2012 IL App (1st) 103590, ¶ 89.

¶ 57 Defendant next contends the DNA evidence did not implicate him in the commission of any offense. Defendant asserts the DNA evidence failed to establish: (1) the existence of sexual material to corroborate J.T.'s account; and (2) the identity of the contributor of the material tested. Defendant further argues that the trial court was under the misapprehension that defendant's sperm was found on J.T.

¶ 58 We find defendant's arguments are belied by the evidence presented at trial. First, Kane stated that if called she would testify that the buttocks sample indicated the presence of semen. During her direct testimony Sullivan testified that semen is composed of two parts. One part is cellular, and generally consists of sperm cells. The second part is the liquid portion, which contains proteins and other components necessary for the life of the sperm cell. Accordingly,

based on Kane's and Sullivan's testimony, while the swab taken from J.T.'s buttocks did not contain sperm cells, it did indicate semen, which is a sexual material. Second, the type of DNA analysis performed in this case was Y-STR testing. Y-STR testing involves identifying sets of closely linked genetic markers, known as haplotypes, present on the male or Y chromosome (see *People v. Zapata*, 2014 IL App (2d) 120825, ¶ 15 (quoting *State v. Bander*, 208 P.3d 1242, 1246 (2009)); it does not involve a complete DNA profiling as is, for example, typically used in cases establishing paternity (see *In re N.C.*, 2014 IL 116532, ¶ 16; *J.S.A. v. M.H.*, 224 Ill. 2d 182, 187 (2007)). Thus, Y-STR profiling does not serve to identify a particular individual, but instead serves to identify an individual with a particular paternal lineage, *i.e.* father, son, grandfather. See *Zapata*, 2014 IL App (2d) 120825, ¶ 11 (quoting *People v. Barker*, 403 Ill. App. 3d 515, 527-28 (2010)). Accordingly, Y-STR testing enables a DNA analyst to determine whether a known male whose DNA has been profiled can be excluded as the source of Y chromosomes in the specimen. *Id.* ¶ 15.

¶ 59 As testified to by Sullivan, in this case, because Y-STR testing was performed on the buttocks swab, the contributor's identity would not be definitively established. In testing the buttocks swab, however, Sullivan testified she found a Y-STR profile matching defendant's Y-STR profile at all 11 locations in the mixed fraction and at one location in the non-sperm fraction. According to Sullivan, the mixed fraction is referred to as "mixed" because "we don't know for sure if that D.N.A. came from a skin cell or sperm cell. It could be from both ***." Thus, contrary to defendant's assertions, Sullivan's testimony did implicate defendant as the contributor of the DNA. While defendant argues that his DNA could have been found on J.T.'s buttocks because J.T. was lying on sheets that contained defendant's skin cells, defendant fails to acknowledge that, when tested, the buttocks swab was found to indicate the presence of semen.

Moreover, defendant also fails to acknowledge his own testimony that J.T. was not naked while on the bed, but was wearing a t-shirt and underwear, which covered his buttocks. We find that Sullivan's testimony in conjunction with defendant's testimony that he was the only male with J.T. on the evening of February 16, 2009, sufficiently corroborates J.T.'s version of the events. See *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶¶ 6, 42-43 (finding the State proved the defendant guilty beyond a reasonable doubt of predatory criminal sexual assault where forensic testing indicated the presence of semen on the victim and the victim testified regarding the sexual assault).

¶ 60 Within his sufficiency-of-the-evidence argument defendant further contends the trial court's misapprehension of the DNA evidence deprived him of due process. According to defendant, his conviction relied substantially on the DNA evidence, which the trial court misconstrued as containing defendant's sperm.

¶ 61 A trial court's failure to recall and consider testimony crucial to a defendant's defense may result in a denial of the defendant's due process rights. *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992). In a bench trial, the trial court is presumed to have considered only competent evidence in reaching its verdict, unless that presumption is rebutted by affirmative evidence in the record. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91. Where the record affirmatively indicates that the trial court did not remember or consider the crux of the defense when entering judgment, the defendant did not receive a fair trial. *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1976).

¶ 62 Here, we cannot find that the record affirmatively demonstrates that the trial court incorrectly recalled Sullivan's testimony. We acknowledge that in two places in the record, the trial court misstated Sullivan's testimony. Specifically, when the trial court referred to "three

profiles" being developed and when it stated that the extraction "confirmed that *** sperm was collected from the sample." A reading of the record reveals that the trial judge demonstrated an understanding of the expert testimony and mistakenly referred to "profiles" instead of fractions and "sperm" instead of semen. Moreover, the record sets forth that the trial court's finding that defendant was guilty beyond a reasonable doubt was not solely based on the DNA evidence. In denying defendant's motion to reconsider, the trial judge stated, "I came to the conclusion that the State had in fact proved the defendant guilty beyond a reasonable doubt based on the victim's testimony." The trial court further stated that J.T.'s testimony was corroborated by the Y-STR testing, "which indicated that this was attributable to the defendant's profile." Furthermore, while the DNA evidence did not conclusively demonstrate defendant assaulted J.T., that evidence did indicate there was a statistical probability that it could have been defendant. The DNA evidence, in conjunction with the other evidence presented at trial, namely J.T.'s credible testimony and the fact J.T. had not been in contact with any other adult male, further supported the allegations that defendant sexually assaulted J.T. See *People v. Smith*, 2012 IL App (1st) 102354, ¶ 63 (finding the evidence of the defendant's guilt of attempted first degree murder of a police officer was overwhelming where, in conjunction with the testimony of individuals at trial, the evidence established that the defendant could not be excluded from contributing to the DNA found on the handgun that was used in committing the offense); *People v. Harris*, 314 Ill. App. 3d 409, 419 (2000) (rejecting a sufficiency of the evidence challenge and holding that, while the DNA evidence did not inculpate the defendant, it also did not exculpate him, and the victims identified the defendant in lineups and in open court). "In other words, and contrary to defendant's claim, DNA does not trump all other evidence." *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 31. In light of the entire record, the trial court's judgment on this point was merely a

misstatement and not a "failure to recall and consider testimony crucial to a defendant's defense" when entering judgment. *Simon*, 2011 IL App (1st) 091197, ¶ 91.

¶ 63 Defendant next asserts that his statement to the detectives does not provide the proof required to sustain the convictions, particularly where the alleged statement did not contain "any mention of digital contact with J.T.'s anus, or the use of Vaseline, or of penile penetration of J.T.'s anus." Defendant further argues that his conviction cannot be based entirely on an alleged confession.

¶ 64 Even excluding defendant's statement to the detectives, there is enough evidence for a trial judge to rationally have found defendant guilty beyond a reasonable doubt. Here, the evidence, viewed in the light most favorable to the State, established that on February 16, 2009, defendant was over the age of 17 and J.T. was under the age of 13. J.T. testified that defendant inserted a finger coated with petroleum jelly into his anus and thereafter defendant inserted his penis into J.T.'s anus. J.T. testified defendant performed this specific act twice. J.T.'s testimony was unimpeached on cross-examination. The evidence further established that a jar of petroleum jelly was recovered from defendant's apartment and that semen was discovered on a swab taken from J.T.'s buttocks, which is consistent with J.T.'s testimony. Sullivan testified her DNA testing of the buttocks swab indicated the presence of a Y-STR profile identical to defendant's at all locations in the mixed fraction and identical to defendant at one location in the non-sperm fraction. Accordingly, we affirm the trial court. See *Betance-Lopez*, 2015 IL App (2d) 130521, ¶¶ 42-43.

¶ 65 Insufficiency of the Information

¶ 66 Defendant next contends that count one of the information alleging he committed predatory criminal sexual assault was insufficient where it was based on digital contact between

defendant's hand and the victim's anus. Relying on *People v. Maggette*, 195 Ill. 2d 336 (2001), defendant argues he was charged with a crime for which he could not have been lawfully convicted, as "penetration by digital contact" is a "nonexistent offense." Defendant acknowledges he did not raise this issue before the trial court, but requests we review his claim under the plain-error doctrine.

¶ 67 The State, however, correctly notes that when, as here, a charging instrument is challenged for the first time on appeal, it will be found sufficient if it apprised the defendant of the precise offense charged with enough specificity to allow preparation of his defense and to allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct. *People v. Pujoue*, 61 Ill. 2d 335, 339 (1975). The court of review thus considers whether the alleged defect in the information prejudiced the defendant in the preparation of his defense. *People v. Hughes*, 229 Ill. App. 3d 469, 472 (1992). This standard is more liberal than the one applied when a defendant challenges a charging instrument before trial; if an information or indictment is attacked before trial, it must strictly comply with the pleading requirements of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/100-1 *et seq.* (West 2012)). *People v. DiLorenzo*, 169 Ill. 2d 318, 321-22 (1996). In making this determination, our review is *de novo*. *People v. Swartwout*, 311 Ill. App. 3d 250, 256 (2000).

¶ 68 Defendant was charged by information with predatory criminal sexual assault. The information was in writing, specifically named the alleged committed offense, and provided citation to the relevant statutory provision, the date of the offense, the county of its occurrence, and defendant's name. See *People v. Collins*, 214 Ill. 2d 206, 219-20 (2005). Further, the information, in the words of the statute, stated defendant committed the offense of predatory criminal sexual assault in that:

> "He, being seventeen years of age or over committed an act of *sexual penetration* upon [J.T.], to wit: *contact* between [defendant]'s hand and [J.T.]'s anus, and [J.T.] was under thirteen years of age when the act was committed, in violation of chapter 720 act 5 section 12-14.1(A)(1)." (Emphases added.)

¶ 69 Interestingly, defendant does not argue that there was a fatal variance between the evidence presented at trial and the information nor does he argue that he was prejudiced by the alleged defect in the information. See *Maggette*, 195 Ill. 2d at 351. Defendant instead argues that the indictment was fatally defective in that it alleged penetration by digital *contact* which, according to defendant, is not a violation of the predatory criminal sexual assault statute. Defendant concedes, however, that digital *intrusion* is a violation of the predatory sexual assault statute.

¶ 70 While we agree with defendant that the information would have been more accurate had it alleged an *intrusion* between defendant's hand and J.T.'s anus, count one nonetheless adequately informed defendant of the kind of sexual penetration he was alleged to have initiated. The record demonstrates defendant was adequately informed of the count at issue where J.T. testified defendant inserted a finger coated with petroleum jelly into J.T.'s anus and defense counsel then cross-examined J.T., eliciting testimony that upon leaving defendant's house J.T. could still feel the petroleum jelly inside him. The record further supports this conclusion where defendant testified that he denied performing not only the conduct described in the information, but also any other related or similar conduct.

¶ 71 In support of his claim, defendant erroneously relies on *Maggette.* In *Maggette,* the defendant was charged with criminal sexual assault based on conduct where he placed the victim's hand on his penis and where he rubbed the victim's vagina through her clothing. *Id.* at

347. The issue before our supreme court was whether a hand or finger constituted an "object" under the definition of sexual penetration. In construing the statutory definition of sexual penetration, our supreme court interpreted the definition to encompass two broad categories of conduct. *Id.* at 346-47. The first category included any contact between the sex organ or anus of one person and an object, sex organ, mouth, or anus of another person (the contact clause). *Id.* at 347. The second category included any intrusion of any part of the body of one person or of any animal or object into the sex organ or anus of another person (the intrusion clause). *Id.* The supreme court held the word "object" in the contact clause was limited to inanimate objects, and hands or fingers were not objects. *Id.* at 349-50. Thus, *Maggette* limited the definition of sexual penetration *with a hand or finger* to situations where actual intrusion occurred, not mere contact. As previously discussed, defendant's information alleged penetration between defendant's hand and J.T.'s anus. Thus, defendant's reliance on *Maggette* is misplaced as this allegation falls squarely within the "intrusion clause" of the definition of sexual penetration. In conclusion, we find count one of the information sufficiently alleged defendant committed predatory criminal sexual assault based on the intrusion clause of the definition of sexual penetration.

¶ 72 The Excited Utterance Exception to the Hearsay Rule

¶ 73 Defendant argues the trial court erred in admitting, during Alexis' testimony, J.T.'s prior consistent statement that defendant "put his penis in his butt" without first complying with the statutory requirements of section 115-10 of the Code (725 ILCS 5/115-10 (West 2012)). The State responds that the trial court was not required to admit J.T.'s prior consistent statement under section 115-10 and that the statement was properly admitted under the excited utterance exception to the hearsay rule.

¶ 74 In a prosecution for a physical or sexual act committed against a child under the age of 13—including a prosecution for predatory criminal sexual assault of a child, as in this case—section 115-10 of the Code allows the following evidence to be admitted as an exception to the hearsay rule: (1) "testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another," and (2) "testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim." 725 ILCS 5/115-10(a) (West 2012).

¶ 75 Section 115-10 allows the introduction of the above hearsay statements only if (1) "[t]he 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"; (2) the child either (a) "testifies at the proceeding", or (b) "is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement"; and (3) "the out of court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offense, whichever occurs later." 725 ILCS 5/115-10(b) (West 2012).

¶ 76 The trial court is not required to conduct a section 115-10 hearing each time a victim under the age of 13 testifies. As stated by our supreme court:

> "We believe that admission of statements under the excited utterance exception and those statements admitted under the version of section 115-10 in effect at the time of defendant's trial further different purposes. Statements admitted under the excited utterance exception to the hearsay rule are admitted because the contents of the out-of-court statements tend to be reliable. (See *People v. Damen*, 28 Ill. 2d 464, 471 (1963)) On the other hand, out-of-court statements admitted under [section 115-10] serve to

> demonstrate the reliability of the child's in-court testimony. (See, *e.g.*, *People v. Server*, 148 Ill. App. 3d 888, 900 (1986)). Because the two rules serve different functions, we conclude that the legislature did not intend to preclude admission of a statement under the excited utterance exception to the hearsay rule when it enacted the version of section 115-10 applicable here." *People v. Nevitt*, 135 Ill. 2d 423, 443 (1990).

In light of *Nevitt*, we conclude the trial court did not err when it did not conduct a hearing pursuant to section 115-10. See *id.*

¶ 77 Defendant also argues that even if the excited utterance doctrine is available here, J.T.'s statement to his mother was inadmissible hearsay evidence that does not qualify as an excited utterance. Defendant argues that the time period between the alleged incident and the victim's statement to his mother demonstrates the statement was not spontaneous.

¶ 78 A hearsay statement is admissible as an "excited utterance" if there is: (1) an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) an absence of time to fabricate; and (3) a relationship between the statement and the circumstances of the occurrence. *People v. Pitts*, 299 Ill. App. 3d 469, 477 (1998). Each case rests on its own facts and is judged by the totality of the circumstances surrounding the event. *Id.* A trial court has broad discretion in ruling on evidentiary issues and will not be reversed on appeal absent an abuse of that discretion. *People v. Walston*, 386 Ill. App. 3d 598, 626 (2008).

¶ 79 While the events of February 16, 2009, amounted to the type of startling event required under the first prong of the test for the excited-utterance exception, we conclude that J.T.'s statement to his mother fails the second prong of the test. In order to pass the second prong, the statement must have been made without any time for the declarant to reflect on the contents of the statement. See *id.* at 626-27. In this case, J.T. made the statement to his mother well after

the events it purported to describe, which allowed J.T. ample time to reflect on the event prior to making his statement to Alexis. See *id.* at 627.

¶ 80 However, not all errors in the introduction of evidence require the reversal of a conviction; where other substantial competent evidence of a defendant's guilt is properly before the trier of fact, an error may be found to be harmless beyond a reasonable doubt. *People v. Durham*, 312 Ill. App. 3d 413, 417 (2000). Our supreme court has recognized three approaches to determine whether an error such as this is harmless beyond a reasonable doubt: (1) whether the error contributed to the defendant's conviction; (2) whether the other evidence in the case overwhelmingly supported the defendant's conviction; and (3) whether the excluded evidence would have been duplicative or cumulative. *People v. Lerma*, 2016 IL 118496, ¶ 33.

¶ 81 Although the trial court erred in allowing Alexis to testify regarding J.T.'s hearsay statement, our review of the evidence in this case leads us to conclude that the court's erroneous admission of J.T.'s statement to Alexis was, indeed, harmless beyond a reasonable doubt. In this bench trial, J.T. testified that defendant "put his penis in my butt," the same statement he had made to his mother. See *People v. Vinson*, 49 Ill. App. 3d 602, 607 (1977) (finding the admission of a hearsay statement was harmless error where it was merely cumulative). In addition, defense counsel had an opportunity to and in fact did cross-examine J.T. regarding this statement. Moreover, the trial court also based its determination of defendant's guilt on the DNA evidence, which, as explained previously, linked defendant's Y-STR profile to the semen found on J.T.'s buttocks. Thus, even disregarding Alexis' testimony regarding J.T.'s hearsay statement, the trial court had before it ample evidence to rationally find beyond a reasonable doubt that defendant was guilty of the crimes charged. See *People v. Witte*, 115 Ill. App. 3d 20, 28 (1983) (even if the victim's hearsay statement was too remote in time, the testimony was

merely cumulative and, thus, harmless error); *People v. Robinson*, 73 Ill. 2d 192, 199-200 (1978) (declaration made 3½ hours later was not spontaneous, but admission was not reversible error).

¶ 82 CONCLUSION

¶ 83 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 84 Affirmed.