2016 IL App (2d) 141048-U
No. 2-14-1048
Order filed December 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROY C. DENNIS, JR., Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 09-CF-231 Honorable John R. Truitt, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly instructed the jury, per the applicable statute, that "sexual penetration" meant either intrusion or contact, even though the indictment specified intrusion: the indictment's allegation of the specific manner of commission was surplusage, and thus the State remained free to prove either manner.

¶ 2 Defendant, Roy C. Dennis, Jr., appeals his conviction of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)). He contends that the trial court improperly expanded the charge by instructing the jury that it could find him guilty based on penetration by

contact when the indictment alleged penetration by intrusion in that he placed his penis in the vagina of the victim, A.B. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2009, respondent was indicted on two counts of predatory criminal sexual assault, which alleged in part that, in violation of section 12-14.1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-14.1(a)(1) (West 2008)), he committed acts of sexual penetration in that he placed his penis in the vagina of A.B. and placed his penis in the mouth of A.B. The count alleging that he placed his penis in A.B.'s mouth was dismissed before trial.

¶ 5 At trial, A.B. testified that, when she was in the fourth grade, defendant would come into her room more than once per month, pull down her pajama pants, and try to put his penis in her vagina. When asked for details, she testified that he would try to put his penis in her vagina and try to push himself up and down. She also said that he would try to put his penis inside the lips of her vagina and she would try to scoot away. She said that he never was able to get his penis all the way in, but when he tried, "white stuff" would come out on her vagina and he would wipe it off of her. An expert who physically examined A.B. testified that she had a small, healed tear in her hymen, called a cleft, that was consistent with sexual abuse. Defendant denied the allegations.

¶ 6 At the jury instruction conference, the State offered an instruction based on Illinois Pattern Jury Instructions, Criminal, No. 11.65E (4th ed. 2000) (IPI 11.65E), providing that:

> "The term 'sexual penetration' means any contact, however slight, between the sex organ or anus of one person and the sex organ of another person or intrusion, however slight, of any part of the body of one person into the sex organ of another person. Evidence of emission of semen is not required to prove sexual penetration."

¶ 7 The defense offered an instruction defining " 'sexual penetration' " as "any intrusion, however slight, of any part of the sex organ of one person into the sex organ of another person." Defense counsel argued that the indictment alleged only intrusion by defendant's penis into A.B.'s vagina and, therefore, the instruction should not include contact or penetration by anything other than defendant's penis. The trial court initially stated that it would give defendant's instruction. However, the next day, the court stated that it rethought its ruling and instead would give the following instruction over the objection of both the State and defendant:

> "The term 'sexual penetration' means any contact, however slight, between the sex organ of one person and the sex organ of another person or intrusion, however slight, of any part of the sex organ of one person into the sex organ of another. Evidence of emission of semen is not required to prove sexual penetration."

The court removed the reference to " 'the body of one person' " since the case was focused on penile penetration. As to referencing both contact and intrusion, the court stated that it researched the matter and the two were not mutually exclusive.

¶ 8 During closing, the State argued in part that the cleft in A.B.'s hymen was evidence that defendant attempted to push his penis into A.B.'s vagina, and it noted that defendant did not have to go all the way in for him to be guilty. The jury found defendant guilty. Defendant filed a motion for a new trial, alleging in part that the court erred by giving its version of IPI 11.65E over his objection. At the hearing on the motion, the court indicated that it had read the motion but counsel was welcome to argue it. Defense counsel stated that, without waiving any issues, he would address only certain issues and made no argument about the instruction. However, the State addressed it. The court observed that the defense did not argue all points in its motion and

that the court did not deem any of them waived. The court denied the motion and sentenced defendant to nine years and six months of incarceration. Defendant appeals.

¶ 9 II. ANALYSIS

¶ 10 Defendant contends that the trial court denied him a fair trial by instructing the jury that it could find him guilty based on penetration by contact when the indictment alleged penetration by intrusion. He argues that this expansion of the indictment allowed the State to improperly prove penetration by contact instead of penetration by the form alleged in the indictment.

¶ 11 The State initially argues that defendant forfeited his argument by failing to precisely frame the issue in his motion for a new trial and failing to argue it at the hearing. However, the State ignores that the trial court clearly understood the issue, as did the State, which argued it. Further, the court specifically stated that it did not deem any of the issues to be forfeited and addressed the issue. Accordingly, the matter has not been forfeited for appellate review.

¶ 12 As for defendant's arguments, although jury instructions are generally reviewed for an abuse of discretion, when, as here, the question is whether the applicable law was accurately conveyed, our standard of review is *de novo*. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). As for indictments, generally, once an indictment has been returned by the grand jury, it may not be broadened through amendment, except by the grand jury itself. *People v. Ross*, 395 Ill. App. 3d 660, 667 (2009). However, this rule applies to substantive amendments. Formal defects in an indictment may be amended at any time by the State or the defense, and amendments changing the manner in which the defendant committed the offense are formal, not substantive. *Id*. at 667, 670.

¶ 13 Under section 12-14.1(a)(1), a defendant commits predatory criminal sexual assault of a child if he is over 17 years of age and commits an act of sexual penetration with a victim under 13 years of age. 720 ILCS 5/12-14.1(a)(1) (West 2008). "Penetration" is defined as:

> "[A]ny contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration. Evidence of emission of semen is not required to prove sexual penetration." 720 ILCS 5/12-12(f) (West 2008).

¶ 14 Defendant cites a number of cases that are not on point for the proposition that section 12-14.1(a)(1) requires that the specific type of penetration must be alleged in the indictment and proven at trial. See, *e.g.*, *People v. Lara*, 2012 IL 112370; *People v. James*, 331 Ill. App. 3d 1064 (2002). However, defendant fails to address cases specifically holding that it is unnecessary for the indictment to distinguish between the types of penetration and that the State need prove only that a type of sexual penetration occurred. See, *e.g.*, *People v. Carter*, 244 Ill. App. 3d 792, 804 (1993).

¶ 15 Contrary to defendant's assertions, Illinois courts have rejected the argument that the specific conduct constituting penetration is an element of criminal sexual assault. See, *e.g.*, *Ross*, 395 Ill. App. 3d at 670; *Carter*, 244 Ill. App. 3d at 803-04; *People v. Foley*, 206 Ill. App. 3d 709, 718 (1990). Instead, "Illinois case law provides that the type of sexual penetration is not an element of the offense, and its inclusion in the indictment is merely surplusage." *Carter*, 244 Ill. App. 3d at 803-04. "If the statutory language used describes specific conduct, it is unnecessary for the indictment to specify the exact means by which the conduct was carried out. [Citation.]

The State need only prove that *a* type of sexual penetration occurred beyond a reasonable doubt." *Foley*, 206 Ill. App. 3d at 718. (Emphasis in original and internal quotation marks omitted.) Thus, when an indictment charges a defendant with sexual penetration, which is the specific conduct prohibited in the relevant statute, it is unnecessary for the indictment to specify the exact means by which the sexual penetration was carried out. [Citation] *Ross*, 395 Ill. App. 3d at 670. Based on these principles, the sexual acts themselves are not required to be detailed in the instructions. *Carter*, 244 Ill. App. 3d at 804.

¶ 16 Here, the indictment properly alleged sexual penetration, which is statutorily defined as either contact or intrusion. It did not need to specify the sexual act at all, and that it did specify intrusion was surplusage. The State was free to prove penetration by either contact or intrusion, and the jury was properly instructed as such. See *People v. Meras*, 284 Ill. App. 3d 157, 164 (1996). Further, defendant does not contend that he was misled in preparing his defense. Accordingly, there was no improper expansion or amendment of the indictment.

¶ 17 III. CONCLUSION

¶ 18 The court did not err when it instructed the jury on both the contact and intrusion forms of penetration. Accordingly, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 19 Affirmed.