2017 IL App (2d) 160136-U
No. 2-16-0136
Order filed March 9, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSE L. ALVAREZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 10-CF-2389 Honorable M. Karen Simpson, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Jorgenson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State failed to prove defendant guilty beyond a reasonable doubt of two counts of criminal sexual assault, as the evidence was that defendant placed his fingers "on," not into, the victim's vagina and thus did not commit an act of sexual penetration; we thus reduced those convictions to the lesser included offense of aggravated criminal sexual abuse and remanded for resentencing; (2) the State failed to prove defendant guilty beyond a reasonable doubt of one count of aggravated criminal sexual abuse, as the evidence was that the victim was under the age of 13, not between 13 and 17.

¶ 2 Defendant, Jose L. Alvarez, appeals his convictions of two counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2010)) and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2010)). He contends that there was insufficient evidence of

penetration to prove the charges of criminal sexual assault beyond a reasonable doubt and that the State failed to prove that the victim was at least 13 years of age to prove the charge of aggravated criminal sexual abuse. We affirm as modified in part, reverse in part, and remand for resentencing.

¶ 3 I. BACKGROUND

¶ 4 On November 9, 2010, defendant was charged by a 15-count indictment with crimes related to sexual conduct with his daughters, C.A. and M.A. Only three counts are at issue on appeal, all of which involve M.A. Of those three, counts IX and X charged defendant with criminal sexual assault, alleging that defendant committed an act of sexual penetration when he placed his fingers in the sex organ of M.A. when she was under 18 years of age. Count XV charged defendant with aggravated criminal sexual abuse, alleging that defendant committed an act of sexual penetration when he placed his fingers in the sex organ of M.A. when she was at least 13 years of age but under 17 years of age. In October 2011, a jury trial was held.

¶ 5 M.A. testified that, when she was 10, defendant rubbed his penis on her "butt," over her clothes. She said that, when she was 12, defendant touched her breast over her clothes. He then went upstairs, called to M.A. to come up, pulled her into a bedroom, touched her breast again, and touched her vagina over her clothes. M.A. pushed him away and ran downstairs. Defendant called her again and pulled her into the bedroom, where he touched her breasts, pulled down her pants, and touched her vagina over her underwear. He then touched the bare skin on her vagina and put his penis inside of her vagina. M.A. stated that he was moving his fingers " '[o]n' " her vagina and, when asked if she said " 'in' " her vagina, she said that she said " '[o]n.' " M.A. had difficulty escaping because defendant was holding her hands, but at some point she was able to push him off and run away. M.A. testified that, in another incident when she was 12, defendant

touched her breasts and vagina again over her clothes. Defendant put his penis in her vagina only the one time.

¶ 6 When M.A. was in high school, defendant was arrested, and M.A. was examined by Dr. Darryl Link, who testified as an expert in child sexual abuse detection. Link testified that he examined M.A. and that her mother was present when the case history was provided. The case history included the allegations of what had happened and M.A.'s medical history. When asked what history he was given regarding allegations of abuse, Link said that there was fondling and digital and penile penetrations reported over a period of about five years. He did not state who reported that information to him or distinguish it as anything other than a report of the allegations against defendant. When asked if he interviewed M.A., he replied, "I conducted a medical history." During discussions, without the jury present, about a hearsay objection to a statement made by M.A.'s mother, counsel for the State said that M.A. was asked how many times she had been abused and that she said she had been abused digitally the past five years. Defense counsel disagreed and said that M.A.'s mother said that. The State replied, "[w]ell maybe the child may have said it. I don't know." After additional disagreement about who made the statement, the hearsay objection was sustained. Link testified that he performed a physical examination of M.A.'s genital area and found nothing abnormal, but that this did not rule out sexual abuse.

¶ 7 After the State finished presenting its evidence, defendant moved for a directed verdict, arguing generally that the State failed to prove him guilty beyond a reasonable doubt. That motion was denied. Defendant testified and denied any sexual contact with C.A. and M.A. After the completion of the evidence, the State dismissed count VIII involving penile penetration of M.A.

¶ 8 The jury found defendant not guilty of all counts involving C.A. and found him not guilty of counts XII and XIII involving M.A. The jury found defendant guilty of the remaining counts involving M.A.

¶ 9 Defendant moved for a new trial, arguing in part that there was insufficient evidence to convict him.[1] That motion was denied, and he was sentenced to an aggregate term of 180 months' incarceration. His motion to reconsider the sentence was denied, and he appeals.

¶ 10 II. ANALYSIS

¶ 11 Defendant first contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt of counts IX and X of criminal sexual assault based on his alleged digital penetration of M.A. He argues that there was no evidence of penetration when M.A. testified that he touched her "on" her vagina. Defendant asks that this court reduce the convictions to the lesser included offense of aggravated criminal sexual abuse (720 ILCS 12-16(b) (West 2010)).

¶ 12 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). On a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime

[1] Defendant did not specifically argue in the motion for a directed verdict or the posttrial motion that there was a lack of proof of digital penetration or that all of the evidence showed that M.A. was under the age of 13. However, defendant did generally allege that he was not proven guilty beyond a reasonable doubt, that the State failed to prove all elements, and that the State failed to prove the ages of defendant and the victim. The State has not made any arguments concerning forfeiture.

beyond a reasonable doubt.' " (Emphasis in original.) *Id*. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard applies regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 13 Under section 12-13(a)(3), a defendant commits criminal sexual assault if he commits an act of sexual penetration with a victim under 18 years of age and the accused is a family member. 720 ILCS 5/12-13(a)(3) (West 2010). "Sexual 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 2010).

¶ 14 It is well settled that evidence of a defendant's act of placing a hand or finger "on" the victim's vaginal area is insufficient to prove penetration. See, *e.g.*, *People v. Maggette*, 195 Ill. 2d 336, 352 (2001); *People v. Lofton*, 303 Ill. App. 3d 501, 507-08 (1999); *People v. Garrett*, 281 Ill. App. 3d 535, 545 (1996).

¶ 15 For example, in *Maggette*, the victim testified that the defendant placed his hand underneath her panties and she felt his hand "in [her] vagina area." (Emphasis omitted.) *Maggette*, 195 Ill. 2d at 352. Our supreme court held that the victim's vague reference to her vaginal area was not sufficient to prove an " 'intrusion' " into the vagina and could not support a conviction of an offense requiring proof of sexual penetration as an essential element. *Id.* Similarly, in *Garrett*, the court reversed a conviction of criminal sexual assault based on an

allegation of anal penetration. The court found that the only evidence presented by the State was that the defendant placed his finger on the victim's anus and was inconclusive as to whether there was an intrusion into the victim's anus, even slightly. *Garrett*, 281 Ill. App. 3d at 545; see also *Lofton*, 303 Ill. App. 3d at 508 (act of placing a finger "on the vagina" of the victim is not an act of sexual penetration as defined in section 12-12(f) (emphasis omitted)); *People v. Bell*, 234 Ill. App. 3d 631, 637 (1992) (victim's testimony that the defendant "rubbed" her privates with his finger, coupled with a specific denial as to penetration, was insufficient to prove penetration).

¶ 16 Here, M.A. consistently testified that defendant moved his fingers "on" her vagina. She never stated that any part of his fingers intruded into her vagina, even slightly. Instead, when M.A. was specifically asked if she said that defendant moved his fingers " 'in' " her vagina, she replied with " '[o]n.' " The State contends that penetration can be inferred from Link's testimony, but the State mischaracterizes that testimony. The State asserts that Link spoke with M.A. and examined her based on her description of digital penetration. But the record merely shows that Link was told of the allegations of penetration and was provided a medical history. The record does not show who provided that information and indicates that it could have come from M.A.'s mother. The State also notes that, during the discussions concerning the hearsay objection, counsel indicated that a report stated that M.A. told Link that she had been digitally abused for five years. But that statement was not evidence, and it was clear that the parties did not agree whether it was M.A. or her mother who told that to Link. Nor were details provided as to whether the digital abuse included penetration. Thus, because M.A. consistently stated that defendant touched the outside of her vagina with his fingers and no evidence supported a finding that defendant's fingers intruded, however slightly, into her vagina, the evidence was insufficient to support a finding of "sexual penetration" as defined in section 12-12(f) (720 ILCS 5/12-12(f)

(West 2010)). Accordingly, defendant was not proved guilty beyond a reasonable doubt of the two counts of criminal sexual assault based on digital penetration.

¶ 17 Defendant asks that this court reduce those charges to the lesser included offense of aggravated criminal sexual abuse, which criminalizes an act of sexual conduct by a family member of a victim who is under 18 years of age (720 ILCS 5/12-16(b) (West 2010)). The State agrees that such a reduction would be appropriate. We accept the parties' agreement. See *People v. Kennebrew*, 2013 IL 113998, ¶ 25 ("Rule 615(b)(3) provides the appellate court with broad authority to reduce the degree of a defendant's conviction, even when the lesser offense is not charged and the State [and the defendant] did not request an instruction on the lesser offense at trial."); *Bell*, 234 Ill. App. 3d at 637 (reducing conviction of aggravated criminal sexual assault to lesser included offense of aggravated criminal sexual abuse and remanding for resentencing where penetration was not proven beyond a reasonable doubt). Accordingly, we reduce defendant's convictions on counts IX and X to aggravated criminal sexual abuse, and we remand for resentencing.

¶ 18 Defendant next argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt of count XV, alleging aggravated criminal sexual abuse based on the allegation that M.A. was at least 13 years of age but under 17 years of age, because the evidence was that all of the abuse occurred when M.A. was 12. The State concedes that there was no evidence that M.A. was at least 13 years of age. However, the State argues that the proof at trial was a permissible variance in the evidence that does not require reversal.

¶ 19 Defendant was charged under section 12-16(d), which provides that the accused commits aggravated criminal sexual abuse if he "commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was at

least 5 years older." 720 ILCS 5/12-16(d) (West 2010). Defendant was found guilty of other aggravated-criminal-sexual-abuse charges, under other subsections of section 12-16, alleging that defendant was a family member (count XI) and that M.A. was under 13 years of age (count XIV).

¶ 20 "The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). Thus, the prosecution must prove the essential elements of a charging instrument as alleged without variance. *People v. Austin*, 123 Ill. App. 3d 788, 794 (1984). "[A] variance or lack of proof of facts alleged is not fatal if the facts in question are not essential elements of the crime charged." *Id*. However, the age of the victim is an essential element of a charge of aggravated criminal sexual abuse that is based on the age of the victim. See *People v. Roberson*, 401 Ill. App. 3d 758, 772-73 (2010) (listing elements of the offense under section 12-16(d)); *People v. Johnson*, 347 Ill. App. 3d 570, 576 (2004) (discussing double enhancement in which the age of the victim cannot be taken into account at sentencing because it is an inherent element of the crime); *People v. Edwards*, 224 Ill. App. 3d 1017, 1033 (1992) (applying the same principle to criminal sexual assault based on the age of the victim).

¶ 21 Here, there was no proof at all that M.A. was at least 13 years of age. Instead, the evidence was that she was 12. The State does not dispute this, but argues that, since defendant could have been found guilty of other forms of aggravated criminal sexual abuse under other subsections of section 12-16, in particular under subsection (c) (720 ILCS 5/12-16(c) (West 2010)), applicable to victims under the age of 13, there was no fatal variance in the facts proven.

But this ignores that age is an essential element of the offense. It further ignores that count XV was separate from the other charges of aggravated criminal sexual abuse, which were based on other subsections. The State failed to prove count XV beyond a reasonable doubt, and we reverse that conviction.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967), we modify defendant's convictions on counts IX and X to the lesser included offense of aggravated criminal sexual abuse (720 ILCS 12-16(b) (West 2010)) and remand for resentencing on those offenses. We reverse the conviction on count XV of aggravated criminal sexual abuse under section 12-16(d).

¶ 24 Affirmed as modified in part and reversed in part; cause remanded.